Northern Illinois University Law Review

Volume 8 | Issue 1 Article 1

11-1-1987

"An Exuberance of Prerogative" - The Application of Ill. Rev. Stat. Ch. 110, Para. 2-611 and/or the Contempt Sanction to Attorney Disciplinary Proceedings in Illinois

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"An Exuberance of Prerogative"[1]?—The Application of ILL. REV. STAT. ch. 110, para. 2-611 and/or the Contempt Sanction to Attorney Disciplinary Proceedings in Illinois

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I. INTRODUCTION

On January 15, 1987, John Smith, who had formerly been admitted to practice law but who had been disbarred several years earlier, filed a petition for reinstatement to the Illinois bar with the Illinois Supreme Court.[2] The petition was assigned a Supreme Court

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1. J. FOX, THE HISTORY OF CONTEMPT OF COURT 73 (1927), *quoting* W. HUDSON, TREATISE OF THE COURT OF STAR CHAMBER 127-28 (*Collectanea Juridica* ii, I).

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The authors would like to express their thanks to Ms. Cheryl Marquardt, whose tireless efforts were of invaluable assistance in the research involved in the preparation of this article.

2. Petitions for reinstatement as an attorney licensed to practice in Illinois are governed by ILL. REV. STAT. ch. 110A, para. 767 (1985), which provides, in pertinent part, as follows:

docket number, and the Attorney Registration and Disciplinary Commission commenced a routine inquiry into the merits of Mr. Smith's request for reinstatement.[3] On May 31, 1987, after the inquiry had

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> An attorney who has been disbarred, disbarred on consent or suspended until further order of the court may file his verified petition with the clerk of the court seeking to be reinstated to the roll of attorneys admitted to practice law in this State. No petition shall be filed within a period of five years after the date of an order of disbarment, three years after the date of an order allowing disbarment on consent, two years after the date of an order denying a petition for reinstatement, or one year after an order allowing the petition for reinstatement to be withdrawn. No petition for reinstatement shall be filed by an attorney suspended for a specified period and until further order of the court, until the specified period of time has elapsed. The petition shall include the information specified by Commission rule.

ILL. REV. STAT. ch. 110A, para. 767(a) (1985) [hereinafter the Illinois Supreme Court Rules contained in ILL. REV. STAT. ch. 110A will be referred to as Supreme Court Rules].

3. Supreme Court Rule 767(b) provides that "[a]n attorney who has been disbarred, disbarred on consent or suspended until further order of the court may present to the Administrator [of the Attorney Registration and Disciplinary Commission] a copy of the petition he proposes to file with the clerk within 120 days prior to the date on which the petition may be filed." *See supra* note 1. After the petition has been filed with the Supreme Court, it is "referred to a hearing panel." Supreme Court Rule 767(f). "When a disciplinary case reaches the Supreme Court it is given a 'Miscellaneous Record' number (MR number) by the Clerk of the court. If exceptions are filed by the attorney or . . . by the Administrator, the case moves from the miscellaneous record docket onto the general docket and is tracked just like a regular case." J. BASSITT, ATTORNEY CONDUCT 2-17 (IICLE, 1985).

Supreme Court Rule 751 established the Attorney Registration and Disciplinary Commission [hereinafter, "ARDC"], and Supreme Court Rule 753(c) created a Hearing Board within the ARDC. The Board conducts hearings on disciplinary complaints and on petitions for reinstatement. Supreme Court Rule 753(c)(3); *see also* Rules of the Attorney Registration and Disciplinary Commission, Rule 413 ("Within 14 days after receipt of a copy of the petition, the Chair of the Hearing Board shall assign the case to a hearing panel and set the date for the hearing.") After hearing evidence on matters which have been referred to it, the Hearing Board "make[s] findings of fact and conclusions of fact and law, together with a recommendation" which is sent to a Review Board. Supreme Court Rule 753(c)(3), 753(d)(1). The "[p]roceedings before the [Hearing] Board [are] conducted according to the practice in civil cases as modified by rules promulgated by the [ARDC] pursuant to [Supreme Court] Rule 751(a)." Supreme Court Rule 753(c)(5).

Supreme Court Rule 751(a) provides that "[t]he registration of, and disciplinary proceedings affecting, members of the Illinois bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission." Supreme Court Rule 751(e)(1) provides that "[t]he Commission shall . . . make rules for

been in progress for several months, Mr. Smith filed a motion for leave to withdraw his petition for reinstatement.

Approximately two weeks after the filing of this motion, the Administrator of the Attorney Registration and Disciplinary Commission filed a motion with the Supreme Court in which he sought to have sanctions imposed against Mr. Smith and the attorneys who had represented him in the drafting and filing of the petition; the request for sanctions was predicated upon the recently revised Illinois Code of Civil Procedure §2-611,[4] which permits the imposition of sanctions for the act of filing a frivolous pleading.[5] The Administrator's motion also sought the issuance of a rule to show cause why Mr. Smith and his attorneys should not be held in contempt of court for filing a false and fraudulent pleading.

The ficticious scenario presented above is based upon an actual proceeding which was before the Illinois Supreme Court in 1987.[6] As

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disciplinary proceedings [that are] not inconsistent with the rules of [the Illinois Supreme Court]."

Acting pursuant to the authority conferred by the above provisions, the ARDC has promulgated rules governing practice before the Hearing Board and the procedures involved in determining the merits of a petition for reinstatement submitted pursuant to Supreme Court Rule 767. *See* Rules of the Attorney Registration and Disciplinary Commission [hereinafter, "ARDC Rules"] Rules 201-291 (Hearing Board), Rules 401-414 (Petitions for Reinstatement). ARDC Rule 401 prescribes the form of a petition for reinstatement, while ARDC Rule 402 lists twenty-five specific categories of information which must be disclosed in the petition. ARDC Rule 414 provides that "[t]he Administrator shall conduct an investigation into any matter raised by the petition and may file written objections to the petition."

For a discussion of the procedural aspects of attorney registration and discipline in Illinois, *see* J. BASSITT, ATTORNEY CONDUCT 2-4 to 2-17 (IICLE 1985); Murphy, *A Short History of Disciplinary Procedures in Illinois*, 60 ILL. BAR J. 528 (March, 1972); Saikley, *The Disciplinary Procedure of the Illinois State Bar Association Under Rule 59 of the Supreme Court*, 52 ILL. BAR J. 912 (July, 1964).

4. For a discussion of the provision, *see infra* Section II.

5. The factual predicate is not explicated in the above scenario for the reason that the fraudulence or factual impeccability of the Smith petition is truly irrelevant to the legal issues which are under consideration in this article. Section III, *infra*, does postulate that the Smith petition might have been factually imperfect in certain respects, but this postulate is articulated only as a device to assist in the analysis of the contempt sanction which is presented in that section. It is also important to note that, in moving for sanctions, the Administrator also responded to Mr. Smith's motion to withdraw the petition for reinstatement by stating that he had no objection to the motion and, in point of fact, recommended that it be granted.

6. *See In re* W. Jason Mitan, Supreme Court M.R. 4172, slip op. (Dec. 30, 1987).

may be apparent from the scenario,[7] certain novel issues arose from this proceeding that are likely to have important consequences for practice in Illinois attorney disciplinary matters and, perhaps, for practice in other areas as well. The issues which are likely to be of the most profound significance are (a) the application of Ill. Rev. Stat. ch. 110, para. 2-611 (hereinafter Rule 2-611) to Illinois attorney disciplinary proceedings; and (b) the use of the contempt power as an alternative and/or adjunct to the sanctioning authority conferred by Rule 2-611.

This article explores both of these issues in the context from which they arose, analyzing the permissibility of the relief sought in the Administrator's motion and the significance of the Administrator's action in requesting such relief. The article is presented in the following sections: Section II discusses the recently-amended provisions of Rule 2-611 and the statute's applicability to Illinois disciplinary proceedings; Section III examines the use of the court's contempt power as an alternative and/or additional sanction to be directed against unsatisfactory pleadings which are filed in such proceedings; and Section IV offers a brief conclusion which summarizes the analysis presented in each of the two preceding sections.

II. ILL. REV. STAT. CH. 110, PARA. 2-611

Until November of 1986, Rule 2-611 merely allowed the court to assess "reasonable expenses" and attorneys' fees against a party who was found to have filed an "untrue pleading" in a civil proceeding.[8] Public Act 84-1431 substantially revised Rule 2-611 by incorporating

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7. Although the scenario was suggested by the pleadings which were filed in an actual Supreme Court proceeding, the authors have elected to predicate this article upon a hypothetical scenario for the reason that a fictional example provides more flexibility in articulating a factual analysis that is most capable of illustrating the propositions which are at issue. The fact that the factual predicate for the article was suggested by an actual case should not be taken as indicating that any of the facts adduced in the scenario analyzed herein reflect the circumstances at issue in that proceeding and, indeed, the authors hereby disclaim any intrinsic factual similarities between their scenario and *In re* W. Jason Mitan, *supra*. What the authors have done is to extract certain of the legal issues involved in that proceeding and to construct a scenario which permits their exploration in an optimal analytical context.

8. The measure provided, in pertinent part, that "[a]llegations and denials [in pleadings], made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal." ILL. REV. STAT. ch. 110, para. 2-611 (1981) (prior to revision).

the language of Federal Rules of Civil Procedure 11, almost verbatim, into the Illinois provision.[9] As amended, Rule 2-611 governs the "Signing of Pleadings, Motions and Other Papers" and provides, in pertinent part, as follows:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. *The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this Section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party of parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.*[10]

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9. *See, e.g.*, Public Act 84-1431, *reprinted in* WEST'S ILLINOIS LEGISLATIVE SERVICE: 1986 LAWS - 84TH GENERAL ASSEMBLY, REGULAR SESSION (P.A. 84-1406 to 84-1431) at 281-82.

10. ILL. REV. STAT. ch. 110, para. 2-611 (1981) (emphasis added). The revised Rule 2-611 also includes provisions concerning the imposition of sanctions upon an insurance company on whose behalf an improper "pleading, motion or other paper" is filed, and retains the final two paragraphs of its predecessor, which concern the applicability of the provision to "the State of Illinois or any agency thereof" and the procedure "[w]here the litigation involves review of a determination of an administrative agency." *See* ILL. REV. STAT. ch. 110, para. 2-611 (1981) (as revised). As noted above, the revised provision is essentially a reiteration of the provisions of Fed. R. Civ. P. 11, with the omission of one sentence which deals with the abolition of a rule of equity practice which provided that "the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances". *See* FED. R. CIV. P. 11.

The Administrator's motion sought the imposition of sanctions against Mr. Smith and his attorneys based upon what the Administrator characterized as the filing of a "false, fraudulent and frivolous" petition for reinstatement. The Administrator asserted that sanctions were appropriate: (a) against Smith because he "knowingly, intentionally and willfully" caused to be filed a petition which, in the Administrator's words, was "riddled with fraud and falsehood"; and (b) against Smith's attorneys because they had violated the dictates of Rule 2-611 by signing and causing to be filed a petition for reinstatement which was "riddled with fraud and falsehood" when "reasonable inquiry" on their part would have revealed the factual imperfections inherent therein.

In responding to the Administrator's motion, both Smith and his former attorneys argued that Rule 2-611 did not apply to attorney disciplinary and/or reinstatement proceedings.[11] They based their ar-

11. In addition to the argument adduced above, Smith and the attorneys also argued that the Administrator's motion could not be granted for yet another reason: Pointing out that Smith had moved to withdraw the offending petition and that the Administrator had acquiesced therein, the defending parties argued that the matter was in a posture equivalent to that which prevails when the plaintiff in a civil lawsuit has moved to dismiss his complaint and/or when a prosecutor has filed a motion for the voluntary dismissal of an indictment. *See, e.g.*, ILL. REV. STAT. ch. 110, para. 2-1009; Chicago Title and Trust Co. v. Cook County, 279 Ill. App. 462, 466 (1935); Ill. Rev. Code Ch. 14 § 5; Creek v. Clark, 91 Ill. App. 3d 429, 414 N.E.2d 816, 821, 46 Ill. Dec. 763, 768 (1980); People v. Verstat, 112 Ill. App. 3d 90, 444 N.E.2d 1374, 1385, 67 Ill. Dec. 691, 702 (1983). Citing the Seventh Circuit, they asserted that "once there is no more dispute, there is no case." Alliance to End Repression v. City of Chicago, 820 F.2d 873 (7th Cir. 1987).

The revised Rule 2-611 explicitly provides that "[a]ll proceedings under this Section shall be within, and part of the civil action in which the pleading . . . has been filed." *See* ILL. REV. STAT. ch. 110, para. 2-611. Therefore, Smith and his erstwhile representatives argued, the Administrator's motion for sanctions under Rule 2-611 was "within and a part of" a proceeding in which there had been a *de facto*, stipulated dismissal. The *de facto* dismissal, they asserted, effectively terminated the underlying proceeding and all matters attendant thereupon, including the motion for sanctions. They concluded by suggesting that principles of judicial economy militated against proceeding to consider the merits of that motion in the absence of an actual "case or controversy." *See, e.g.*, Babbitt v. Farm Workers, 442 U.S. 289, 297 (1979); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Silver Mfg. Co. v. General Box Co., 76 Ill. 2d 413, 417-18, 392 N.E.2d 1343 (1979), *quoting* Stovall v. Denno, 388 U.S. 293, 301 (1967); People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1343, 1345 (1979). As further support for their position, the Smith respondents pointed out that at least one reported decision, *In re* Jerome Jacob Ruther, Supreme Court M.R. 1431 (1981), involved an attorney who was permitted to withdraw his petition for reinstatement while it was pending before the Supreme Court, which was after the ARDC Hearing Board had recommended that the petition be denied.

gument upon two propositions: (1) Rule 2-611 could not apply because attorney admission and disciplinary proceedings are "original proceedings" before the Illinois Supreme Court which are not subject to the provisions of the Illinois Code of Civil Procedure unless and to the extent that the Court has explicitly ordered that they so apply; and (2) attorney admission and disciplinary proceedings are *sui generis* proceedings, being neither civil nor criminal in nature, and, as such, cannot be encompassed by the provisions of the Illinois Code of Civil Procedure. Both propositions are considered below.

A. ORIGINAL PROCEEDINGS

Rule 2-611 is a provision of the Illinois Code of Civil Procedure.[12] Ill. Rev. Stat. ch. 110, para. 1-108 (hereinafter Rule 1-108) prescribes the applicability of the provisions of the Code of Civil Procedure.[13] The purpose of Rule 1-108(b) is to encompass idiosyncratic proceedings such as chancery practice, dissolution actions, mechanic's lien suits and election contests within the Illinois Code of Civil Procedure.[14]

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12. The provision appears in Article II of the Code of Civil Procedure of Illinois. *See* P.A. 82-280 (effective July 1, 1982). ILL. REV. STAT. ch. 110, para. 1-101(a) provides that "[t]his Act shall be known and may be cited as the 'Code of Civil Procedure.'" ILL. REV. STAT. ch. 110, para. 1-101(b) provides that "Article II [of the Act] shall be known as the 'Civil Practice Law' and may be referred to by that designation."

13. ILL. REV. STAT. ch. 110, para. 1-108(b). Rule 1-108(b) provides that:

> (a) The provisions of Article II of this Act apply to all proceedings covered by Articles III through XIX of this Act except as otherwise provided in each of the Articles III through XIX, respectively.
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> (b) In proceedings in which the procedure is regulated by statutes other than those contained in this Act, such other statutes control to the extent to which they regulate procedure but Article II of this Act applies to matters of procedure not regulated by such other statutes.
>
> (c) As to all matters not regulated by statute or rule of court, the practice at common law prevails.

Id.

14. *See* ILL. REV. STAT. ch. 110, para. 1-108, "Historical and Practice Notes"; Malkov Lumber Co. v. Serafine Builders, Inc., 1 Ill. App. 3d 543, 273 N.E.2d 654 (1971). In *Malkov*, the court held that the Mechanic's Lien Act did not provide a rule for a procedural problem. The court resolved the problem by looking to the rules of practice and procedure of the Civil Practice Act. *Id.* at 550-51, 273 N.E.2d at 659. *See also*, Harbeck v. Lyon, 329 Ill. App. 642, 70 N.E.2d 208 (1946), where the court held that where special statutes are silent, provisions of the Civil Practice Act are applicable.

In *Annexation of Territory in County of Kankakee*, 30 Ill. App. 2d 391, 174 N.E.2d 710 (1961), the court held that where, in matters of procedure not covered by [the Revised Cities and Villages Act], the Civil Practice Act would apply.

This provision is simply intended to ensure that residual procedural issues which are not explicitly addressed in the statutes governing such proceedings can be resolved by reference to the Illinois Code of Civil Procedure.[15]

It is Rule 1-108(a) which governs the general application of the Illinois Code of Civil Procedure. Under Rule 1-108(a), the Code applies to "all proceedings covered by Articles III through XIX of the [Civil Practice] Act except as otherwise provided in each of the Articles III through XIX, respectively."[16] Since attorney admission and disciplinary matters are not included within Articles III through XIX,[17] Smith and his attorneys concluded that Rule 2-611 could not apply to the act of filing Smith's petition for reinstatement with the Illinois Supreme Court.

In addition to parsing the language of the Illinois Code of Civil Procedure, Smith and his former attorneys derived this conclusion by yet another means, i.e., an analysis of the nature of a proceeding for reinstatement. This analysis began with the proposition that proceedings for reinstatement are established and governed by the provisions of Illinois Supreme Court Rule 767.[18]

Illinois Supreme Court Rule 767, in turn, is predicated upon the Court's inherent power to admit and discipline attorneys and to govern the practice of law in this state.[19] Because they are predicated upon

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15. *See supra* note 13.

16. ILL. REV. STAT. ch. 110, para. 1-108(a).

17. *See id.* The articles and their subject-matter are as follows: Article III - "Administrative Review"; Article IV - "Attachment"; Article V - "Costs"; Article VI - "Ejectment"; Article VII - "Eminent Domain"; Article VIII - "Evidence"; Article IX - "Forcible Entry and Detainer"; Article X - "Habeas Corpus"; Article XI - "Injunction"; Article XII - "Judgments-Enforcement"; Article XIII - "Limitations"; Article XIV - "Mandamus"; Article XV - "Mortgage Foreclosure"; Article XVI - "Ne Exeat"; Article XVII - "Partition"; Article XVIII - "Quo Warranto"; Article XIX - "Replevin."

18. *See supra* notes 2-3.

19. *See, e.g., In re* Day, 181 Ill. 73, 54 N.E. 646 (1899). In *Day*, which involved "an application to [the Supreme Court] for admission to the bar of this State by virtue of diplomas from law schools issued to the applicants", the court held that "the admission of attorneys [is] a judicial proceeding and the exercise of an appropriate judicial function." *Id.* at 91-93, 54 N.E. at 651-52.

> That power belongs to the court by virtue of its being a court of justice and one of the departments of State into which, under the constitution, the power falls. Without such power, by which the courts can protect themselves against ignorance and want of skill, they cannot properly administer justice.

Id. at 94, 54 N.E. at 652. *See also In re* Nesselson, 76 Ill. 2d 135, 137-38, 390 N.E.2d 857, 858 (1979) (Supreme Court has the exclusive authority to regulate the practice

this inherent power, attorney disciplinary proceedings are "original proceedings" before the Illinois Supreme Court;[20] since reinstatement proceedings are also predicated upon this inherent power, they, too, represent "original proceedings" before the Court.[21]

Since reinstatement proceedings are "original proceedings" before the Illinois Supreme Court, they are necessarily governed by the procedures applicable to such a proceeding. Therefore, because the Illinois Code of Civil Procedure does not apply to such a proceeding,[22] it must be governed either by "rule of court . . . [or] the practice at common law."[23] Three rules governing "Original Actions in the Supreme Court" appear in the Supreme Court Rules.[24]

The first of these, Illinois Supreme Court Rule 381, governs "[p]roceedings in the Supreme Court in original actions in cases relating to revenue, *mandamus*, prohibition, or *habeas corpus* and as may be necessary to the complete determination of any case on

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of law in Illinois); Remole Soil Serv., Inc. v. Benson, 68 Ill. App. 2d 234, 215 N.E.2d 678 (1966). In *Benson*, the court stated that "the license to practice law is a privilege granted only by the Supreme Court and can only be delimited, restricted or taken away by that Court or statutory enactments" 68 Ill. App. 2d at 236-37, 215 N.E. 2d at 680.

20. *See, e.g., In re* Mitan, 75 Ill. 2d 118, 387 N.E.2d 278 *cert. denied*, 444 U.S. 916 (1979); *In re* Reynolds, 32 Ill. 2d 331, 205 N.E.2d 429 (1965).

21. For the proposition that an attorney reinstatement proceeding is a new and independent proceeding, based upon the general jurisdiction of the judiciary to control membership of the bar, see Cantor v. Grievance Committees, 189 Tenn. 536, 226 S.W.2d 283, 286 (1949); *In re* Keenan, 310 Mass. 166, 37 N.E.2d 516 (1941). *See also* 7A C.J.S. *Attorney & Client* § 126 (1980). *See generally In re* Stephenson, 243 Ala. 342, 10 So. 2d 1 (1942); *In re* Fleming, 36 N.M. 93, 8 P.2d 1063 (1932); Danford v. Superior Court, 49 Cal. App. 303, 193 P. 272 (1920); *In re* Cate, 94 Cal. App. 222, 270 P. 968 (1928), *reh'g denied*, 271 P. 356, *supp. op.*, 95 Cal. App. 589, 273 P. 131, *superseded*, 207 Cal. 443, 279 P. 131 (1929). The fact that attorney reinstatement proceedings are proceedings of the same type as attorney disciplinary proceedings is inferentially supported by the fact that both are assigned "a 'Miscellaneous Record' number (MR number) by the Clerk of the Court." BASSITT, *supra* note 3, at 2-17; *see also supra* note 3.

22. *See supra* notes 13-16 and accompanying text.

23. ILL. REV. STAT. ch. 110, para. 1-108(c). The citation to this provision is, of course, merely illustrative and is not intended to suggest that the Illinois Code of Civil Procedure governs attorney admission and disciplinary proceedings, even in this limited, residual respect. *See infra* notes 37-39 and accompanying text, for the proposition that legislative control of such proceedings would violate fundamental principles of the "separation of powers."

24. *See* Illinois Supreme Court Rules, Article III (Civil Appeals Rules), Part G, Rules 381-383. Supreme Court Rule 1, which prescribes the applicability of the Supreme Court Rules, simply provides that "[t]he rules on appeals shall govern all appeals."

review."[25] The second, Illinois Supreme Court Rule 382, governs "[p]roceedings in the Supreme Court when the court has original and exclusive jurisdiction under article IV, section 3, and article V, section 6(d), of the [Illinois] Constitution."[26] The third and final rule is Illinois Supreme Court Rule 383, which governs "motion[s] requesting the exercise of the Supreme Court's supervisory authority."[27]

Reinstatement proceedings are not, therefore, within the express compass of the rules which have been promulgated to govern "original proceedings" before the Supreme Court. Reinstatement proceedings are, however, proceedings "in the Supreme Court when the court has original and exclusive jurisdiction".[28] Therefore, in the absence of specific provision to the contrary, such proceedings are governed by the procedure prescribed by Illinois Supreme Court Rule 382 or by analogy thereto.[29]

Under Illinois Supreme Court Rule 382(a), an original proceeding is instituted by filing a motion for leave to file a complaint, with the complaint and a brief in support thereof attached to the motion.[30] "Thereafter, the case shall proceed in the manner ordered by the court. Whenever appropriate, and subject to order of the court, the

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25. Supreme Court Rule 381(a). The Supreme Court may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review.

26. Supreme Court Rule 382. The Illinois Constitution of 1970, article IV, § 3 governs legislative redistricting, while Article V, § 6(d) governs "the ability of the Governor to serve or to resume office."

27. *See generally* Supreme Court Rule 383.

28. Supreme Court Rule 382(a). For the proposition that attorney *disciplinary* proceedings are original proceedings in the Supreme Court, see *In re* Reynolds, 32 Ill.2d 331, 205 N.E.2d 429 (1965). For the proposition that the Supreme Court has exclusive jurisdiction over "who may and may not be permitted to practice law in this state", see Chicago Bar Ass'n v. Quinlan and Tyson, Inc., 53 Ill. App. 2d 388, 393, 203 N.E.2d 131, 134 (1st Dist. 1964); *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899). *See also supra* notes 20-21 and accompanying text.

29. This assumption is based upon two propositions in addition to those which have been adduced above: (1) the procedure prescribed by Supreme Court Rule 382 is the most "generic" of the procedures established by the three Supreme Court rules governing "original proceedings" and is, therefore, the most appropriate source of analogy for a proceeding which is not explicitly encompassed within the provisions of those rules; and (2) rather than ignoring the Supreme Court Rules and looking to common law practice to define the procedures for hearing and adjudicating the merits of reinstatement petitions, the preferred practice would seem to be to honor the Supreme Court's existing pronouncements as to its own procedures by developing an analogy which permits their extension to reinstatement proceedings.

30. The rule also provides that "[t]he complaint may be supported by affidavits or other pertinent documents." Supreme Court Rule 382(a).

rules governing cases in the circuit court shall serve as a guide to the procedure to be followed."[31]

The application of this principle to original proceedings other than those arising under Article IV, §3 and/or under Article V, §6(d) is supported by the practice of the United States Supreme Court. Rule 9.1 of the Rules of the Supreme Court of the United States governs "actions within the Court's original jurisdiction under Article III of the Constitution of the United States", and provides, in pertinent part, as follows: "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court."[32]

As one treatise has noted, "[i]t would be natural that the Court which promulgated the Civil Rules for the district courts would make use of their principles for the trial of actions within the Court's original jurisdiction. Yet in light of the Court's differentiating characteristics as the supreme, trial/appellate court of this Nation, the Court could go no further than to make the Civil Rules generally applicable."[33] Given the "differentiating characteristics" of the Illinois Supreme Court as "the supreme, trial/appellate court of this [State]", similar constraints apply to that court's application of the Illinois Code of Civil Procedure.[34]

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31. Supreme Court Rule 382(b).

32. U.S. SUP. CT. R. 9.1, 28 U.S.C. Rule 9.1 (1984).

33. 13 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE para. 809.21[1] (2d ed. 1985). *See also id.* at para. 809.31 (noting specific departures from practice under the Federal Rules of Civil Procedure).

34. *See supra* note 33 and accompanying text. The discussion which follows is predicated upon the assumption that the Illinois Supreme Court Rule 382(b) reference to "the rules governing cases in the circuit court" should be construed as referring (a) to the Illinois Code of Civil Procedure, or (b) to the Illinois Code of Civil Procedure plus the Supreme Court's own "Rules on Civil Proceedings in the Trial Court" rather than as referring only to the Court's "Rules on Civil Proceedings in the Trial Court". (For the provisions of the Supreme Court's "Rules on Civil Proceedings in the Trial Court", see Supreme Court Rules 101-298.) The discussion is predicated upon this assumption because only if the phrase is construed as referring either to alternative (a) or (b) can there be any argument that Rule 2-611 could apply to original actions such as proceedings for reinstatement as an attorney. That is, if the above-quoted reference is construed as referring only to the Supreme Court's own "Rules on Civil Proceedings in the Trial Court", then there can be *no* argument in favor of the application of Rule 2-611 to original actions in which the procedure must be defined by analogy to Supreme Court Rule 382. Since this construction absolutely refutes the position which the ARDC has taken in the Smith hypothetical,

And, indeed, although the rules are very similar in their provisions, there is one crucial distinction which leads one to conclude that the Illinois rule is more restrictive in this respect than is its federal counterpart. Whereas the United States Supreme Court rule provides that the Federal Rules of Civil Procedure "may be taken as a guide" to procedure in original actions "where their application is appropriate", the Illinois Supreme Court rule adds an additional caveat: Under Supreme Court Rule 382, the Illinois Code of Civil Procedure serves as a guide to procedure in original actions only (a) "[w]henever appropriate", *and* (b) "subject to order of the court."[35]

Since Illinois Supreme Court Rule 382 is "based in part upon . . . Rule 9 of the United States Supreme Court Rules",[36] one must assume that the addition of (b), above, was intended as an express limitation upon the general applicability of the Illinois Code of Civil Procedure to original actions in the Illinois Supreme Court. This construction of the phrase is supported by a crucial distinction between the Illinois Code of Civil Procedure and the Federal Rules of Civil Procedure: While the Federal Rules of Civil Procedure were promulgated and adopted by the Supreme Court of the United States,[37] the Illinois Code of Civil Procedure was promulgated and adopted by the Illinois legislature.[38]

Since the power to prescribe rules of judicial procedure is intimately bound up with the doctrine of "separation of powers",[39] it is

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it has been reserved for this note; the primary analysis which appears in the text is concerned with refuting the only assumption that can support the ARDC's position.

35. Supreme Court Rule 382(b).

36. Supreme Court Rule 382, "Committee Comments" (Smith-Hurd July 1, 1971).

37. *See, e.g.*, Orders Re Rules of Procedure, 302 U.S. 783 (1937) ("It is ordered that Rules of Procedure for the District Courts of the United States be adopted pursuant to Section 2 of the Act of June 19, 1934, Chapter 651 (48 Stat. 1064)"); *see also* 28 U.S.C. § 2072 (1982) (originally enacted as Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064).

38. *See, e.g.*, ILL. REV. STAT. ch. 110, para. 1-101 (1985); *see also* Public Act 82-280 (effective July 1, 1982).

39.

> The [Illinois] Constitution of 1970 vests the judicial power in the supreme court, an appellate court and circuit courts, and it declares that no branch of government 'shall exercise powers properly belonging to another.'

Bonaguro, *The Supreme Court's Exclusive Rulemaking Authority*, 67 ILL. BAR J. 408 (March, 1979), *quoting* ILL. CONST. of 1970, art. VI, § 1 and article II, § 1. The Illinois Supreme Court has relied upon the separation of power doctrine in striking down legislative enactments which it perceived as "infring[ing] upon the powers of the judiciary." *See, e.g.*, People v. Jackson, 69 Ill. 2d 252, 255-61, 371 N.E.2d 602,

only reasonable to assume that Rule 382, and practice based upon analogy thereto, must reflect the Illinois Supreme Court's ability to retain control over proceedings which are encompassed by its "original and exclusive jurisdiction."[40] Any assumption to the contrary would effectively eliminate the "separation of powers" contained in the Constitution of the State of Illinois in that it would permit the legislature to usurp a traditional, inherent prerogative of the Illinois Supreme Court and lower state courts.[41]

The inevitable conclusion is, therefore, that the procedure in original actions which do not fall within the express compass of Supreme Court Rules 381-383 is as follows: After the proceeding has been initiated by the filing of a petition for reinstatement or other appropriate pleading, it will proceed "in the manner ordered by the

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604-06 (1977); People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 65-66, 237 N.E.2d 495, 497 (1968); Agran v. Checker Taxi Co., 412 Ill. 145, 148-50, 105 N.E.2d 713, 715 (1952). The "concurrent power relationship between the legislature and the judiciary" with respect to the authority to promulgate rules of judicial procedure is a subject which is beyond this scope of this article. *See, e.g,* Note, *People ex rel. Stamos v. Jones: A Restraint on Legislative Revision of the Illinois Supreme Court Rules,* 6 J. MARSHALL J. OF PRAC. & PROC. 382 (1973); Fins, *Impropriety of Illinois Legislature's Infringement upon the Constitutional Rule-Making Authority of the Supreme Court,* 66 ILL. BAR J. 384 (March, 1978); Note, *Exclusive Judicial Power to Regulate Appellate Practice and Procedure—People v. Cox,* 30 DE PAUL L. REV. 969 (1981). With respect to the point at issue herein, it appears that the proper resolution of this "concurrent power relationship" is according to the following principle:

> [W]here there has been . . . a conflict between [a] legislative enactment and a Supreme Court Rule in [an] area[] where the legislative power is not constitutionally established or where the Court believes that it has an inherent judicial power, the Supreme Court has held that the rule takes precedence over the statute.

REC. OF PROC., SIXTH ILL. CONST. CONV., vol. VI at 825 (1969-70). Since *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899), established that the admission of attorneys is a matter encompassed by the Court's "inherent judicial power", and since reinstatement proceedings are proceedings for the admission of attorneys, it necessarily follows that the Supreme Court's rule-making authority takes precedence over any legislative enactments with respect to the procedure which is to be followed in such proceedings. And, since the Supreme Court's rule-making authority takes precedence in this area, it necessarily follows that Rule 2-611 cannot apply to such proceedings absent an explicit exercise of the Court's rule-making authority to that effect.

40. *See id.*

41. *See, e.g.*, People v. Kelly, 347 Ill. 221, 235, 179 N.E.2d 898, 903-04 (1931) ("the legislature . . . shall not encroach upon the inherent powers of the judiciary"); People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980); People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977); Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952); Feldcott v. Featherstone, 290 Ill. 485, 125 N.E. 361 (1919); Wallbaum v. Haskin, 49 Ill. 313 (1868).

court". In entering such orders, the supreme court will use the Illinois Code of Civil Procedure "as a guide" "[w]henever [such procedure is deemed to be] appropriate." Such procedure will not be deemed to be appropriate unless the court shall have entered an order to this effect.

Therefore, Smith and his attorneys argued Rule 2-611 as amended by Public Act 84-1431 could not apply to the filing of the *Smith* petition since no order to this effect had been entered prior to the filing of that motion. Smith and the attorneys also argued that the Illinois Supreme Court could not enter an order retroactively applying the provisions of Rule 2-611, as amended by Public Act 84-1431, to the filing of the *Smith* petition for the reasons (a) that doing so would controvert basic principles of due process,[42] and (b) that no support for such an order could be found in common law practice.[43]

B. SUI GENERIS PROCEEDINGS

"Disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and result

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42. The argument was that a retrospective application of the amended rule would deny due process in that Smith and/or his attorneys could be sanctioned for violating the dictates of Rule 2-611 without ever having been provided notice of its applicability and the opportunity to comply with its requirements. For the proposition that court rules cannot be retroactively applied when to do so would work an injustice, *see* 35A C.J.S. *Federal Civil Procedure* § 20 (1960); 32 AM. JUR. 2D *Federal Practice and Procedure* § 519, § 520 (1982); Aetna Casualty and Surety Co. v. First Nat'l. Bank, 103 F.2d 977, 979 (3d Cir. 1939); Reconstruction Finance Corp. v. Barnett, 118 F.2d 190, 190-91 (7th Cir. 1941), *cert. denied*, 314 U.S. 641, *reh'g denied*, 314 U.S. 709 (1941); Williamson v. Columbia Gas & Electric Corp., 27 F. Supp. 198, 206 (D. Del. 1939), *aff'd*, 110 F.2d 15, *cert. denied*, 310 U.S. 639 (1940).

43. Although "[t]he . . . rule requiring that counsel sign pleadings dates back to English equity practice at the time of Sir Thomas More", that rule appears to have been primarily concerned with "assur[ing] that pleadings complied with the correct forms and . . . grant[ing] counsel a monopoly over cases brought before chancery courts." SOLOVY, WEDOFF & BART-HOWE, SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11, *reprinted in* J. Solovy & C. Shaffer, Jr., Rule 11 and Other Sanctions at 9, 15 (PLI 1987); *see also* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 8-14 (1976). And although nineteenth century federal equity procedure "required every bill to contain counsel's signature as an 'affirmation' that there was 'good cause' for the suit", this requirement did not contemplate the imposition of sanctions within the meaning of the present federal rule. *See supra* SOLOVY, WEDOFF & BART-HOWE, at 16.

"At common law, a successful litigant was not entitled to recover from his losing adversary the costs and expenses of the litigation; hence, the allowance and recovery of costs rests entirely on statutory provisions . . . ." ILL. LAW & PRACTICE *Costs* § 2 (1968).

from the inherent power of courts over their officers."[44] As such, "[a] disbarment action or proceeding to suspend an attorney at law does not come within the Civil Practice Act."[45]

Because actions for reinstatement as an attorney at law also derive "from the inherent power of courts over their officers",[46] they, too, are "neither civil nor criminal in nature but are special proceedings, sui generis"[47] and do "not come within the Civil Practice Act." Because reinstatement proceedings do "not come within the Civil Practice Act", Rule 2-611 cannot apply to such proceedings.

Rule 2-611 is contained within the present "Civil Practice Law."[48] As such, it applies only to civil proceedings. This conclusion is

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44. *In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970), *citing Ex parte* Wall, 107 U.S. 265 (1882). *Accord*, *In re* Czachorski, 41 Ill. 2d 549, 554, 244 N.E.2d 164, 167 (1969); *In re* Damisch, 38 Ill. 2d 195, 206, 230 N.E.2d 254, 260 (1967); *In re* Yablunsky, 407 Ill. 111, 120, 94 N.E.2d 841, 846 (1950). *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 101:2101-2103 (1984) ("disciplinary proceedings are sui generis . . . distinct from [either] civil or criminal proceedings") *citing to* ABA, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS, Standard 1.2 (1979). *See also* Swett, *Illinois Attorney Discipline*, 26 DE PAUL L. REV. 325, 331 (1977) ("disciplinary proceedings . . . are considered to be judicial in character, yet are neither criminal nor civil in nature") (footnotes omitted); Murphy, *A Short History of Disciplinary Procedures in Illinois*, 60 ILL. BAR J. 528, 532 (1972). *See generally* 7 AM. JUR. 2D *Attorneys at Law* § 87 (1980).

45. Weyland v. City of Chicago, 369 Ill. 43, 49, 15 N.E.2d 516, 519 (1938). *See also* Phipps v. Wilson, 186 F.2d 748 (7th Cir. 1951).

46. *See supra* notes 44-45.

47. *See generally*, 7A C.J.S. *Attorney & Client* §§ 122-124 (1980); 7 AM. JUR. 2D *Attorneys at Law* § 87 (1980); Annotation, *Reinstatement of Attorney*, 70 A.L.R.2d 314 (1960). *See also supra* note 44.

The *sui generis* character of reinstatement proceedings is derivable not only from the fact that such proceedings are predicated upon "the inherent power of courts over their officers", but also from the distinctive burden of proof involved therein: "When a disbarred attorney petitions for reinstatement the burden is on the petitioner to prove his or her qualification for reinstatement by clear and convincing evidence." *In re* Carnow, 114 Ill. 2d 461, 501 N.E.2d 128, 131 (1986). *Accord*, *In re* Rothenberg, 108 Ill. 2d 313, 484 N.E.2d 289 (1985); *In re* Mandell, 89 Ill. 2d 14, 431 N.E.2d 382 (1982); *In re* Kuta, 86 Ill. 2d 154, 427 N.E.2d 136 (1981). Since the standard of proof in a civil case is the "preponderance of the evidence standard", and since criminal proceedings require proof "beyond a reasonable doubt", the use of the "clear and convincing" standard is itself sufficient to establish that proceedings for reinstatement are of a distinct and peculiar nature. *See* Scholle v. Continental Nat. Am. Group, 44 Ill. App. 3d 716, 358 N.E.2d 893 (1976) (civil standard); Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207 (1927) (same); ILL. REV. STAT. ch. 38, para. 3-1 (1983) (criminal standard).

48. *Weyland*'s reference to the "Civil Practice Act" was a reference to the precursor of the present "Civil Practice Law", which is codified as Article II of the

derivable, first of all, from the plain language of the Illinois Code of Civil Procedure which includes Rule 2-611 and which was considered above.[49] The conclusion is also derivable from an analysis of the provisions of the federal rule upon which Rule 2-611 was modeled.

As was noted above, Rule 2-611 is an almost-verbatim reiteration of the provisions of Federal Rules of Civil Procedure 11.[50] Although Rule 2-611 includes language which does not appear in the federal rule, and although Rule 2-611 deletes one sentence which does appear in the federal rule, the provisions of Rule 2-611 which were invoked by the Attorney Registration and Disciplinary Commission [hereinafter ARDC] motion for sanctions against Smith and his attorneys are identical to those contained within Federal Rules of Civil Procedure 11.[51]

The federal rule must, therefore, provide the model for interpreting and applying Rule 2-611, at least with respect to motions such as that filed by the Administrator of the ARDC. An analysis of the federal rule, however, requires the conclusion that the Administrator's motion cannot be granted for the reason that neither Federal Rules of Civil Procedure 11 nor Rule 2-611 applies to attorney admission and disciplinary proceedings.[52]

Rule 11, which was amended in 1983 to permit the imposition of sanctions for "pleading and motion abuses",[53] is included within the Federal Rules of Civil Procedure, the "scope" of which is defined by

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Illinois Code of Civil Procedure. *See* ILL. REV. STAT. ch. 110, para. 1-101(a), (b). ILL. REV. STAT. ch. 110, para. 2-611, of course, is included within Article II of the Illinois Code of Civil Procedure. *See supra* note 10.

49. *See supra* Section II(A). Although ILL. REV. STAT. ch. 110, para. 1-108 does not expressly limit the application of Article II of the Code of Civil Procedure to civil proceedings, it achieves this outcome by expressly delineating the proceedings to which the code does apply. *See supra* note 14 and accompanying text.

50. *See supra* notes 9-10 and accompanying text.

51. *See id.*

52. Implicit in this and similar statements which appear in the text above is the proposition that ILL. REV. STAT. ch. 110, para. 2-611 does not apply to attorney admission and disciplinary proceedings absent an explicit order entered by the Illinois Supreme Court to this effect. The argument adduced above is in no way intended to suggest that the Illinois Supreme Court *cannot* require that pleadings in such proceedings conform to the dictates of ILL. REV. STAT. ch. 110, para. 2-611 or some other, similar provision; the authority to enter such an order is, of course, implicit in the Court's "inherent authority" over such proceedings.

53. In 1983, the existing Rule 11 was amended to allow for the imposition of "appropriate sanction[s]" for such abuses. *See* Advisory Committee Note, 1983 Amendment to FED. R. CIV. P. 11. For a discussion of the provisions and application of the amended rule, *see* Schwarzer, *Sanctions under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 204 (1985).

Rule 1. Federal Rules of Civil Procedure 1 provides that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81."[54] At least one decision has held that the Federal Rules of Civil Procedure do not apply to disbarment proceedings, since the "Rules . . . govern only suits of a civil nature" and disbarment proceedings are not "suits of a civil nature."[55]

Since the Federal Rules of Civil Procedure do not apply to disbarment proceedings, Rule 11 of those rules does not apply to such proceedings and, by logical extension based upon the principles discussed above,[56] does not apply to proceedings for reinstatement after disbarment. Since Rule 2-611 is based upon Federal Rules of Civil Procedure 11, it follows that Rule 2-611 does not apply to proceedings for reinstatement after disbarment. Therefore, Smith and his former attorneys argued, the Administrator's motion for sanctions pursuant to Rule 2-611 could not be granted.[57]

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54. FED. R. CIV. P. 81 provides, for example, that the Federal Rules of Civil Procedure do not "apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-7681", to proceedings in bankruptcy or in copyright, or to "mental health proceedings in the United States District Court for the District of Columbia." *See* FED. R. CIV. P. 81(a).

55. Coughlan v. United States, 236 F.2d 927, 928 (9th Cir. 1956); *see also* Alaska Bar Association v. Dickerson, 240 F. Supp. 732, 734-35 (D. Alaska 1965) (disciplinary proceeding before a state bar association was not a "civil action" within the meaning of the federal removal statute). For the proposition that "the new Rule 11 does not refer to disciplinary action against an attorney", *see* SOLOVY, WEDOFF & BART-HOWE, SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11, *reprinted in* J. SOLOVY & C. SHAFFER, RULE 11 AND OTHER SANCTIONS at 9, 50 (PLI 1987).

56. *See supra* notes 44-47.

57. They also argued that even if the court were to hold that Rule 2-611 *did* apply to such proceedings, the requests contained in the Administrator's motion could not be granted as presented for the following reason: Smith and his attorneys argued that sanctions under ILL. REV. STAT. ch. 110, para. 2-611, if they applied, could only be applied as an alternative to the contempt sanction which was also requested in the Administrator's motion. The Smith respondents contended that sanctions under ILL. REV. STAT. ch. 110, para. 2-611 are imposed for the filing of pleadings which contain frivolous or unwarranted assertions due to the attorney's failure to make a "reasonable inquiry" into the factual foundation for such assertions. Rule 11 expressly imposes an affirmative duty to investigate the facts and law that support a pleading, motion or other paper. *See* SOLOVY-SHAFFER, *supra* note 43, at 22. A failure to conduct a reasonable investigation violates Rule 11, regardless of the merit of the pleading or motion. *Id.* at 23.

Smith and the attorneys then argued that "reasonableness" is the identifying characteristic of a negligence inquiry, concluding that sanctions under FED. R. CIV.

It is also possible to support this argument by means of an alternative analysis, an analysis which is predicated upon a proposition with which the authors disagree, i.e., that proceedings for disbarment from and reinstatement to the Illinois bar can properly be characterized either as a variety of appellate proceeding or as the functional equivalent thereof. The proposition is predicated upon the essentially intuitive assumption that, because such proceedings are before the Illinois Supreme Court, which generally entertains only *appellate* proceedings, they are, therefore, themselves a form of "appellate proceeding."[58]

P. 11 and, by derivation, under Rule 2-611, are imposed for the negligent submission of frivolous or unfounded assertions and/or pleadings. "Negligence is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do." W. PROSSER, THE LAW OF TORTS, 53 (3d ed. 1964).

Smith and the attorneys then argued that contempt sanctions are imposed for conduct which involves a higher standard of reprehensibility than that which is associated with mere negligence. In support of their arguments, Smith and the attorneys pointed out that certain types of contempt are considered "crimes," so that proceedings for their adjudication and punishment must conform to the traditional guarantees of due process which are attendant upon the criminal sanctioning process. *See, e.g., infra* Sections III(A), (B). Since contempt can constitute a criminal offense, particularly when it involves the perpetration of a fraud upon the court, the Smith parties argued that it would be impermissible to impose sanctions for "negligence" under ILL. REV. STAT. ch. 110, para. 2-611 and for criminal contempt, since logic dictated that the act of filing a false pleading must either be the consequence of negligence or of wilfulness sufficient to warrant the imposition of criminal sanctions. Negligence differs from intentional acts. While negligence can include the mere knowledge and appreciation of a risk, intent exists when the actor believes that certain consequences are substantially certain to result from his actions. PROSSER, *supra*, at 31-32.

To sustain a conviction for indirect criminal contempt, the state must prove beyond a reasonable doubt that an alleged contemnor had the *intent* to embarrass, hinder or obstruct the court in the administration of justice, to lessen its authority or dignity or bring the administration of law into disrepute; only conduct which is performed willfully can constitute indirect criminal contempt. *See, e.g.*, People v. Douglas, 73 Ill. App. 3d 520, 392 N.E.2d 75 (1979); People v. Witherspoon, 52 Ill. App. 3d 151, 367 N.E.2d 313 (1971).

58. The authors' disagreement with this assumption is predicated upon their agreement with the proposition that reinstatement and/or disciplinary proceedings are "original proceedings" which are *sui generis* in character. *See supra* Sections II(A), (B). If reinstatement and/or disciplinary proceedings are "original proceedings" of a *sui generis* nature, they cannot, by definition, constitute "appellate proceedings" within the meaning of the assumption adduced above. That is, "appellate proceedings" is a phrase which must be construed as denoting the efforts involved in seeking review of a lower court's decision, whether in a civil or criminal matter,

The acceptance of this proposition gives rise to the following premise: In order to determine whether Rule 2-611 applies to disbarment and/or reinstatement proceedings, it is necessary to determine whether Federal Rules of Civil Procedure 11 applies to federal appellate proceedings; the premise is predicated upon the proposition that since Rule 2-611 is modeled after the federal provision, it must emulate the federal provision's applicability, or inapplicability, to such proceedings. Therefore, in this scenario, if Federal Rules of Civil Procedure 11 applies to "appellate proceedings," then Illinois Rule 2-611 must also apply to "appellate proceedings." By virtue of the assumption described above, Rule 2-611 must also apply to disbarment and/or reinstatement proceedings, having been characterized as but a variety of Illinois appellate proceedings.

Unfortunately, however, even if one accepts the proposition that such proceedings can be characterized as "appellate proceedings," one is still led to the conclusion that Federal Rules of Civil Procedure 11 does not apply to appellate proceedings; one must also conclude that Rule 2-611 cannot apply to proceedings for disbarment and/or reinstatement. These conclusions are derivable from the following considerations: federal appeals, both civil and criminal, are governed by the Federal Rules of Appellate Procedure.[59] Federal Rules of Appellate Procedure 38 provides that "[i]f a court of appeals shall determine an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Under Federal Rules of Appellate Procedure 38, costs and "double costs" have been assessed against appellants and against "appellant's counsel personally."[60] The rule "is designed to penalize appellants

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by some appellate tribunal. *See, e.g.*, Supreme Court Rules 301-374 (civil appeals), Rules 601-651 (criminal appeals); BLACK'S LAW DICTIONARY 89-90 (5th ed. 1979). No such efforts are, however, involved in reinstatement and/or disciplinary proceedings, since they concern the Supreme Court's exercising its "inherent power" over the practice of law in Illinois, rather than the review of a decision entered by a lower court.

59. *See* FED. R. APP. P. 1(a) ("scope of rules"). *See also* FED. R. APP. P. 4 (appeals in civil and criminal cases).

60. 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE para. 238.02 (2d ed. 1987); *see, e.g.*, Stelly v. CIR, 761 F.2d 1113 (5th Cir.), *cert. denied*, 106 S. Ct. 149 (1985); Haggerty v. Succession of Clement, 749 F.2d 217 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 333 (1985); Nevijel v. North Coast Life Ins. Co., 651 F.2d 671 (9th Cir. 1981); Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133, 1137-38 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 959 (1985); United States v. Potamkin Cadillac Corp., 697 F.2d 491 (2d Cir.), *cert. denied*, 462 U.S. 1144 (1983). *See also* 28 U.S.C. § 1912 ("Where a judgment is affirmed by the Supreme

who bring frivolous appeals and to compensate appellees who must answer frivolous appeals."[61] Since Federal Rules of Appellate Procedure 38 and 28 U.S.C. § 1912[62] permit sanctions to be imposed for frivolous appeals which are submitted to the federal appellate and United States Supreme Court, one must conclude, as has the Seventh Circuit, that Rule 11 does not apply to federal appellate proceedings.[63] To conclude otherwise would be to ignore the plain language of Federal Rules of Appellate Procedure 38 and 28 U.S.C. § 1912.

Therefore, (a) since Federal Rules of Civil Procedure 11 does not apply to federal appellate proceedings, and (b) since Illinois Rule 2-611 is based upon Federal Rules of Civil Procedure 11, one must conclude that Illinois Rule 2-611 does not apply to disbarment and/or reinstatement proceedings even if the latter are conceptualized as a variety of appellate proceedings.

Recently, in *In re W. Jason Mitan,*[64] the Supreme Court of Illinois has addressed the issue as to the applicability of Rule 2-611 to Illinois Attorney Disciplinary Proceedings. In *Mitan*, the Administrator of the ARDC filed a motion for sanctions with the Supreme Court of Illinois, averring that Mitan's petition for reinstatement was manifestly fraudulent and frivolous. The administrator relied on Rule 2-611 of the Illinois Code of Civil Procedure[65] and the inherent powers of the court in requesting a rule to show cause why Mitan should not be held in contempt of court for filing a fraudulent petition for reinstatement.

The administrator's sole argument in support of this contention was that the statute, in authorizing sanctions, does not limit its use

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Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.").

61. Dobbin & Lewis, *Sanctions Available under Rules 16, 26, and 37, 28 U.S.C. Sections 1912, 1927, and Rule 38 of Federal Rules of Appellate Procedure, reprinted in* J. SOLOVY & C. SHAFFER, JR., RULE 11 AND OTHER SANCTIONS at 453, 454 (1987). *See also* Clarion Corp. v. American Home Products Corp., 494 F.2d 860 (7th Cir.), *cert. denied*, 419 U.S. 870 (1974). 28 U.S.C. § 1912 contains similar provisions: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." *Id.*

62. *See supra* notes 60-61.

63. *See, e.g.*, Hill v. Norfolk and Western Railway Co., 814 F.2d 1192, 1200 (7th Cir. 1987); *see also* Covington v. Allsbrook, 636 F.2d 63, 64 n.2 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981); *cf. In re* Kelly, 808 F.2d 549, 551 (7th Cir. 1986); In re Curl, 803 F.2d 1004, 1007 (9th Cir. 1986); Thorton v. Wahl, 787 F.2d 1151, 1153 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 181 (1987).

64. *In re* Jason Mitan, Supreme Court M.R. 4172, slip op. (Dec. 30, 1987).

65. ILL. REV. STAT. ch. 110, para. 2-611 (Supp. 1986).

of the word "court" to the lower courts of this State. The argument followed that if the legislature did not intend for the Supreme Court of Illinois to have the power to impose sanctions pursuant to Rule 2-611, then it could have and should have said so. Mitan's counsel argued that Rule 2-611 did not apply to these proceedings.

The court addressed the issue of whether Rule 2-611 applied to the filing of a verified petition for reinstatement as an attorney. The court noted that no Illinois court of review had yet had the opportunity to interpret or apply the amended Rule 2-611. It also noted that there was no federal case law involving Federal Rules of Civil Procedure 11 that would lead analogously to the resolution of the question whether Rule 2-611 reaches to the filing of a verified petition for reinstatement.

The Supreme Court of Illinois was not pursuaded by the Administrator's argument. It stated that the question at hand was not whether the Supreme Court of Illinois could impose sanctions pursuant to Rule 2-611 in other appropriate cases, but rather the different and narrow question whether the statute applies to the unique situation where an allegedly false petition for reinstatement has been filed. The court agreed that Rule 2-611 does not expressly preclude the Supreme Court of Illinois from availing itself of its sanctioning power in appropriate cases. However, the plain language of Rule 2-611 offers no support for the proposition that the statute, without more, applies to reinstatement proceedings. Rule 2-611 applies only in civil actions, and reinstatement proceedings are not civil actions.

The court stated that the procedure for the hearing and review of the petition is the same as that for attorney disciplinary cases. Like disciplinary proceedings, proceedings for reinstatement are sui generis, being neither civil nor criminal in nature.[66] The sui generis status of reinstatement proceedings follows, not only from the fact that such proceedings are based upon the inherent powers of courts over their officers, but also from the special burden of proof a petitioner bears. A petitioner must prove his or her qualifications for reinstatement by clear and convincing evidence. The court concluded that Rule 2-611 neither authorizes nor prohibits the imposition of sanctions where an allegedly false verified petition for reinstatement is filed pursuant to Supreme Court Rule 767.

The court continued that it could still impose sanctions based on its inherent power to govern admission to the practice of law in

66. *Mitan*, Supreme Court M.R. at ____ , *citing In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970); *In re* Czachorski, 41 Ill. 2d. 549, 554 (1969).

Illinois.[67] It is the Supreme Court of Illinois which possesses the inherent and exclusive power to regulate the practice of law in Illinois and to sanction or discipline the unprofessional conduct of attorneys admitted to practice before it.[68]

III. CONTEMPT

In addition to requesting that sanctions be imposed against Smith and his attorneys pursuant to Rule 2-611, the Administrator's motion also requested the issuance of a rule to show cause why Smith and his attorneys should not be held in contempt of court for the filing of a false and fraudulent pleading.[69] After hearing oral argument on the request for sanctions pursuant to Rule 2-611, the supreme court denied that request and entered an order requiring Smith and the attorneys to appear and to show cause why they should not be held in contempt for the filing of a petition for reinstatement which "appears to be false and fraudulent."

Because neither the Administrator's motion nor the supreme court's order indicated whether the rule to show cause contemplated a citation (a) for civil or criminal contempt, and (b) for direct or indirect contempt,[70] Smith and the attorneys filed motions requesting clarification of the court's order.[71] The court's response was to

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67. *In re* Application of Day, 181 Ill. 73 (1899).

68. *In re* Nesselson, 76 Ill. 2d 135, 137-38 (1979); *In re* Reynolds, 32 Ill. 2d 331, 336 (1965).

69. *See supra* note 5 and accompanying text.

70. [T]here are four types of contempt, which are delineated as follows: (1) indirect contempt which entails a contumacious act committed outside the presence of the court . . .; (2) direct contempt which involves an act committed in the presence of the court . . .; (3) civil contempt which consists of failing to do something ordered by the court, usually for the benefit of the opposing litigant . . .; and (4) criminal contempt which comprises conduct directed against the dignity and authority of the court or the judge acting judicially. . . .

Eden v. Eden, 34 Ill. App. 3d 382, 388, 340 N.E.2d 141, 146 (1975) (citations omitted).

71. The motions were based upon the following proposition:

[i]n proceedings to punish indirect criminal contempts, due process requires that the accused be accorded notice and a fair hearing. The accused contemnor has 'the constitutional right to know the nature of the charge against him, to have it definitely and specifically set forth by citation or rule to show cause, and to be accorded an opportunity to answer and to introduce evidence in his own defense.

People v. Waldron, 114 Ill. 2d 295, 302-03, 500 N.E.2d 17, 21 (1986) (citations omitted), *quoting* People v. Pomeroy, 405 Ill. 175, 181, 90 N.E.2d 102, 105 (1950);

establish a briefing schedule on this issue, requiring all parties to submit arguments as to the type of contempt at issue and the appropriate sanctions therefor. Sections (A) and (B), below, discuss the distinctions between civil and criminal contempt, and direct and indirect contempt, while section (C) presents the arguments adduced by the respective parties.

A. CIVIL VERSUS CRIMINAL CONTEMPT

> Rules for preserving discipline, essential to the administration of justice, came into existence with the law itself, and Contempt of Court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century to the present time. . . .
>
> The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the Court: (a) enforcement of the process and orders of the Court, disobedience to which may be described as 'civil contempt', and (b) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the Court while it is sitting (contempt in court) or libelling a Judge or publishing comments on a pending case (contempt out of court), which are both distinguished as 'criminal contempt.'
>
> Civil . . . contempt is a wrong for which the law awards reparation to the injured party; though nominally a contempt of court, it is in fact a wrong of a private nature as between subject and subject. . . . Some contempts partake of both natures.[72]

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citing Johnson v. Mississippi, 403 U.S. 212, 215 (1971); *In re* Oliver, 333 U.S. 257, 275-76 (1948). *See also* People v. Spain, 307 Ill. 283, 292, 138 N.E. 614, 618 (1923) ("Where one is charged with criminal contempt, he is entitled to the same orderly trial accorded any other defendant. He is presumed to be innocent until his guilt is established beyond a reasonable doubt, and he cannot be compelled to give evidence against himself.") *See also infra* Sections III(A), (B).

72. J. FOX, THE HISTORY OF CONTEMPT OF COURT 1-2 (1927). *See also* Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911). "In the Anglo-Saxon laws and through Domesday Book, the records of the *Curia Regis* and the Parliament, the first treatises on law and the Year Books, the development of 'contempt' in the legal sense can be traced, until by the fourteenth century the principles upon which punishment was inflicted . . . had become firmly entrenched." FOX, *supra*, at 1. *See generally* IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: ON PUBLIC WRONGS 125-26 (1966).

Although the Illinois courts have held that contempt is divisible into "civil" and "criminal" contempt,[73] the courts have also held that the same conduct can constitute both civil and criminal contempt.[74] In *People v. Barasch*,[75] the Illinois Supreme Court characterized the distinctions between civil and criminal contempt. Criminal contempt is intended to preserve the dignity and authority of the court, while civil contempt enforces private rights. The punishment for each reflects this, as imprisonment for civil contempt is usually coercive, i.e. not punishment for what has been done, as is the case with criminal contempt.[76] The appellate court offered its own description of the two concepts in *People ex rel. Fahner v. Colorado Lot Owners Assn.*[77] Because civil contempt is inherently coercive, the contemnor must be allowed the opportunity to comply with the court

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73. *See, e.g.*, Central Prod. Credit Ass'n v. Kruse, 156 Ill. App. 3d 526, 509 N.E.2d 136 (2d Dist. 1987); People v. Romanski, 155 Ill. App. 3d 47, 507 N.E.2d 887 (3d Dist. 1987); People v. Barasch, 21 Ill. 2d 407, 173 N.E.2d 417 (1961); People v. Elbert, 287 Ill. 458, 122 N.E. 816 (1919); People v. Diedrich, 141 Ill. 665, 20 N.E. 1038 (1892).

74. *See, e.g.*, People *ex rel.* Fahner v. Colorado Lot Owners Assn, 108 Ill. App. 3d 266, 277, 438 N.E.2d 1273, 1280 (1982); People v. Barasch, 21 Ill. 2d 407, 173 N.E.2d 417, 418 (1961); People v. Gholson, 412 Ill. 294, 106 N.E.2d 333 (1952). *See also* United States v. United Mine Workers of Am., 330 U.S. 258, 298-99 (1947) ("Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures.").

75. 21 Ill. 2d 407, 173 N.E.2d 417 (1961).

76. 21 Ill. 2d 407, 409, 173 N.E.2d 417, 418 (1961).

77.

> Proceedings in the nature of civil contempt ordinarily are prosecuted to enforce the rights of private parties and to compel obedience to orders or decrees for the benefit of opposing parties. Proceedings in the nature of criminal contempt are directed to the preservation of the dignity and authority of the court, or a judge acting judicially. A sanction for civil contempt is coercive in nature and is instituted to compel obedience to a court order. The contemnor can avoid the sanction by compliance with the order. The sanction invoked, such as incarceration, will continue in effect until there is compliance or termination of the sanction by the terms of the order itself. A sanction for criminal contempt is punitive in nature and is instituted to punish, as opposed to coerce, a contemnor for contumacious conduct.

108 Ill. App. 3d 266, 277, 438 N.E.2d 1273, 1280 (1982) (footnotes omitted). *See also* 47th & State Currency Exch., Inc. v. B. Coleman Corp., 56 Ill. App. 3d 229, 233, 371 N.E.2d 294, 297-98 (1977); *In re* Estate of Schlensky, 49 Ill. App. 3d 885, 891-92, 364 N.E.2d 430, 435 (1977); People v. Elbert, 287 Ill. 458, 122 N.E. 816 (1919).

order, the disobedience of which gave rise to the contempt citation.[78]

The distinction between coercion and punishment, between a sanction imposed for a failure to act and a sanction imposed for an affirmative "bad" act, occasions little confusion between the categories of civil and criminal contempt. Indeed, as the *Barasch* court noted,[79] one generally need only look to the "purpose of punishment" to determine whether civil or criminal contempt is at issue.[80] Unfor-

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78. The essence of a civil contempt is that when the trial court's command is disobeyed, the loss of benefit or advantage falls upon the adversary and the dignity of the court is only incidentally involved. . . . A civil contempt decree must provide [a] defendant with the keys to his cell, enabling him through compliance with the terms of the command to purge himself of contempt.

Continental Ill. Nat'l Bank v. Brach, 71 Ill. App. 3d 789, 792-93, 390 N.E.2d 373, 373-76 (1979). *Accord In re* Marriage of Harvey, 136 Ill. App. 3d 116, 483 N.E.2d 397 (1985); Welding Indus. Supply Co., Inc. v. Northtown Indus., Inc., 58 Ill. App. 3d 625, 374 N.E.2d 1002 (1978); Taapken v. Taapken, 39 Ill. App. 3d 785, 350 N.E.2d 794 (1976).

If imprisonment is imposed for civil contempt it must ordinarily be coercive or remedial in nature rather than punitive. Imprisonment for civil contempt usually is not for a definite term, but the party in contempt stands committed unless and until he performs the affirmative act required by the order of the court. It is for this reason that in civil contempt it is stated that the contemnor carries the key of his prison in his pocket.

People v. Mowery, 116 Ill. App. 3d 695, 702, 452 N.E.2d 363, 368 (1983), *quoting* 17 C.J.S. *Contempt* § 93, at 268-69 (1963). Imprisonment for criminal contempt is for a definite term. *See, e.g.*, People v. Harrison, 403 Ill. 320, 86 N.E.2d 208 (1949); People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949). In addition, a contemnor cannot be sentenced to a term of imprisonment which exceeds a period of six months without first having been accorded the right to a trial by jury. Bloom v. Illinois, 391 U.S. 194, 210-11 (1968).

79. *See supra* notes 75-76 and accompanying text.

80. Although, as noted above, "the contemptuous act may partake of the characteristics of both civil and criminal contempt" as when, for example, "the violation of a single order . . . may give rise to both civil and criminal contempt proceedings"; the *nature* of a particular proceeding is seldom in doubt, since one need only determine the purpose which is to be achieved by the imposition of a particular sanction. *See* 5 J. MOORE, J. LUCAS, & G. GROTHER, JR., MOORE'S FEDERAL PRACTICE para. 38.33[1] (2d ed. 1985). Since the institution of both types of proceedings will have been undertaken in order to achieve two disparate ends, i.e., coercing the party into complying with a particular order of the court and punishing the same party for past disobedience of that order and/or for contumacious conduct associated with the disobedience of that order, it is not, typically, difficult to distinguish the procedural and substantive characteristics of the two proceedings. *See, e.g.*, United States v. United Mine Workers of Am., 330 U.S. 258, 298-300 (1947). "In patent cases it has been usual to embrace in one proceeding the public and private remedy—to punish the defendant if found worthy of punishment, and,

tunately, however, the categories of direct and indirect contempt are far less distinguishable.

B. DIRECT VERSUS INDIRECT CONTEMPT

In *People v. Harrison*,[81] the supreme court noted the distinction between direct and indirect contempt, the former occurring in the physical presence of a judge or admitted in open court, while the latter, having neither of those characteristics, must be proven by extrinsic evidence.[82] The distinction is perhaps best illustrated by examining the underlying facts and eventual holding in *People v. Jashunsky*,[83] which involved both varieties of contempt. In *Jashunsky* ten defendants were found to be in direct contempt of the Circuit Court of Cook County, and sentenced to varying terms of imprisonment.[84] The contempt citation was issued when, while court was in session, one of the defendants began shouting, resisted removal from the courtroom, and incited a melee.[85]

The defendants were charged and convicted of direct contempt.[86] The record revealed that the trial court had personally observed the contemptuous conduct of defendants Jashunsky and Caref, while it

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at the same time, or as an alternative, to assess damages and costs for the benefit of the plaintiff." *Id.* at 299 n.71, *quoting* Hendryx v. Fitzpatrick, 19 F. 810, 813 (C.C.D. Mass. 1884).

81. 403 Ill. 320, 86 N.E.2d 208 (1949).

82. *Id.* at 323-24, 86 N.E.2d at 210. *See also* Central Prod. Credit Ass'n v. Kruse, 156 Ill. App. 3d 526, 509 N.E.2d 136 (2d Dist. 1987); People v. Romanski, 155 Ill. App. 3d 47, 507 N.E.2d 887 (3d Dist. 1987); Siegel v. Siegel, 80 Ill. App. 3d 583, 400 N.E.2d 6 (1979); People v. Jashunsky, 51 Ill. 2d 220, 282 N.E.2d 1 (1972).

83. 51 Ill. 2d 220, 282 N.E.2d 1 (1972), *cert. denied*, 409 U.S. 989 (1973).

84. The defendants were Albert Jashunsky, Carol Caref, Jerome H. Harris, Reynold E. Sodini, Arthur Hirsch, Randiee Ascher, Dennis Johnson, Jaroslaw Salek, Kathleen A. Lindsley, and Marlow Lowentha. *Id.* at 221, 282 N.E.2d at 2. "Sentences of four months were imposed on Jashunsky and Caref, and the other defendants received sentences of 30 days." *Id.*

85. *Id.* at 221, 282 N.E.2d at 2-3.

> The defendants were in the courtroom of Judge Meyer Goldstein on the morning of August 12, 1970. . . . When the court session opened, the court admonished against any disorders in the courtroom. However, as [a] criminal case was called, Caref began shouting. The court directed her to be quiet, and, when she continued to shout, ordered the bailiff to remove her from the courtroom. She resisted the bailiff's attempt to remove her and other bailiffs came to his assistance. At that, other persons in the courtroom came to the aid of Caref and a melee broke out.

Id.

86. *Id.* at 222-23, 282 N.E.2d at 2-3.

relied on extrinsic evidence to convict the other codefendants.[87]

The *Jashunsky* defendants appealed their convictions, arguing that the trial court had acted improperly in finding them guilty of direct contempt,[88] as opposed to indirect contempt, for which, as a matter of due process, they were entitled to formal hearings.[89]

In the case of an indirect contempt citation, the accused must be afforded notice and an opportunity to cross-examine witnesses in a fair hearing.[90] In contrast, direct contempt allows for summary adjudication.[91] The *Jashunsky* court held that Jashunsky and Caret were

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87. *Id.* at 223, 282 N.E.2d at 3. The court stated that:

> [t]he defendants were charged with direct contempt, and not guilty pleas were accepted by the court from each of the defendants. In every case except that of Jashunsky, the court heard testimony presented by police officers and deputies who had been in the courtroom at the time of the disturbance. . . . It appear[ed] that in Jashunsky's case the court intended to hear the testimony of a police officer and that of Jashunsky. The court said it would hear any witnesses Jashunsky had to offer even though, he explained: 'I personally saw Albert Jashunsky grab—lean over the rail and strike the officer. * * * I can send you [Jashunsky] to jail immediately.' However, when Jashunsky interrupted a . . . witness by demanding an attorney and declaring his innocence, the court stopped the hearing, declaring that Jashunsky's conduct was 'contemptuous and in utter disregard of the judicial process.' He was found guilty of direct contempt of court. The other defendants were permitted to testify at their individual hearings and some of them cross-examined witnesses who appeared against them. . . . At Caref's hearing the court, after hearing the testimony of a police officer, stated that it had seen Caref begin the disturbance by shouting and ignoring the court's order for silence and had seen her resisting officers who were endeavoring to escort her from the courtroom.

Id. at 222-23, 282 N.E.2d at 2-3.

88. *Id.* at 221-23, 282 N.E.2d at 2-3.

89. *Id.* at 223, 282 N.E.2d at 3.

90. People v. Ziporyn, 121 Ill. App. 3d 1051, 1055, 460 N.E.2d 385, 388 (1984), *citing* Johnson v. Mississippi, 403 U.S. 212, 215 (1971).

91. *Id. See also In re* Oliver, 333 U.S. 257, 275-76 (1948), which states:

> Except for a narrowly limited category of contempts, due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. If

not deprived of due process because the court's personal observations of their contemptuous actions supported a finding of direct contempt. The actions of the other codefendants, however, only amounted to indirect contempt and thus necessitated due process requirements which were not met.[92]

Jashunsky illustrates the factors which have traditionally been considered in determining whether particular contemptuous conduct constitutes direct or indirect contempt, i.e., whether the conduct occurred in the "presence" of the court and whether the court's adjudication of the contempt required it to consider evidence other than that contained within its own personal knowledge.[93] Although the application of these factors should logically give rise to fixed, relatively precise distinctions,[94] this has not always been the case.

It appears, first of all, that the Illinois courts draw a distinction between conduct which occurs in the "actual" presence of the court and conduct which occurs in the "constructive" presence of the

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some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing.

Id. at 275-76. *See also* Johnson v. Mississippi, 403 U.S. 212 (1971); People v. Waldron, 114 Ill. 2d 295, 500 N.E.2d 17 (1986); Aurora Stell Prod. v. United Steelworkers of Am., 94 Ill. App. 3d 97, 418 N.E.2d 492 (1981).

92. 51 Ill. 2d at 224, 282 N.E.2d at 4, *citing* People *ex rel.* Melendez v. Melendez, 47 Ill. 2d 383, 266 N.E.2d 327 (1971); People v. Gholson, 412 Ill. 294, 298-99, 106 N.E.2d 333, 335-36 (1952); Durkin v. Hey, 376 Ill. 292, 33 N.E.2d 463 (1941).

93. *See, e.g.*, People v. Hagopian, 408 Ill. 616, 97 N.E.2d 782 (1951); People v. Javaras, 51 Ill. 2d 296, 281 N.E.2d 670 (1972).

94. The distinctions should be drawn as follows: (a) direct contempt consists of conduct occurring in the "presence" of the court which can be summarily punished due to the fact that the court need not hear extrinsic evidence in order to establish the occurrence and nature of the contumacious conduct; and (b) indirect contempt consists of conduct which did not occur in the "presence" of the court and/or which requires the court to hear extrinsic evidence in order to establish the occurrence and nature of the contumacious conduct. *See, e.g.*, IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: ON PUBLIC WRONGS 287-88 (1962). At least one decision has added an additional factor, however. People v. Randall, 89 Ill. App. 3d 406, 411 N.E.2d 1017 (1980), held that a direct contempt is not only "'one which takes place in the very presence of the judge, making all of the elements of the offense matters within the personal knowledge of the judge'" but must, in addition, involve conduct "'tending directly to obstruct and prevent the administration of justice'". *Id.* at 411, 411 N.E.2d at 1020, *quoting* People v. Jashunsky, 51 Ill. 2d 220, 223-24, 282 N.E.2d 1, 3-4 (1972), *cert. denied*, 409 U.S. 989 (1973).

court.[95] *People v. Andalman*[96] is an early decision applying this distinction. Samuel J. Andalman, an attorney, was held in contempt of court for filing pleadings in a habeas corpus proceeding after the court had ordered that no such filing should occur.[97] Andalman appealed the conviction, arguing "that the contempt of court, if any, was an indirect contempt".[98] The Illinois Supreme Court disagreed, holding that the "immediate presence of the court" includes contemptuous acts committed in any constituent part of the court.[99] The court held that Andalman's conduct was a direct contempt of court, and affirmed the judgment of the lower court.[100]

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95. *See, e.g.*, J. Bassit, *Lawyer Contempt of Court: Attorney Conduct*, Illinois Institute of Continuing Legal Education §§ 3.8-3.10 (1985).

96. 346 Ill. 149, 178 N.E. 412 (1931).

97. Andalman represented a divorced woman whose husband was "confined in the county jail of Cook county for contempt of court in failing to pay alimony in accordance with a decree of the superior court of that county." *Id.* at 150, 178 N.E. at 413. The husband, Michael J. Healy, filed a petition for a writ of habeas corpus, "alleging that the order committing him to the county jail was void." *Id.* Andalman served notice that he would appear before the judge before whom the habeas petition was pending, and would then and there "'present a petition on behalf of Violet Healy for leave to intervene'" in that proceeding. *Id.* at 151, 178 N.E. at 413. Andalman appeared before the court, but the presiding judge, Judge McKinley, refused to entertain the petition "unless he was shown some authorities to the effect that Andalman's client had a right to intervene." *Id.* After Andalman persisted, Judge McKinley ordered "Andalman not to file the papers and the minute clerk not to receive them." *Id.* In disregard of the court's order, Andalman filed the papers with the court clerk's office, thereby avoiding Judge McKinley and his minute clerk; when the judge learned of Andalman's actions, he held Andalman in direct contempt of court and sentenced "him to be confined in the county jail one hundred and twenty hours." *Id.*

98. *Id.* at 152, 178 N.E. at 414.

99. *Id.*, *citing* People v. Cochrane, 307 Ill. 126, 138 N.E. 291 (1923), where the court stated:

> The right to punish an offender for a contempt of court is a right inherent in the superior court of Cook county . . . and when the act constituting such contempt is committed in the presence of the court, the court has a right to deal summarily with the offender and without hearing any evidence punish the offender. In such case the court acts upon view and upon its own knowledge. . . . *A contempt committed in any place set apart for the use of any constituent part of the court during the session of the court is committed in the presence of the court, and any conduct constituting a contempt in the presence of any one of the constituent parts of the court while engaged in the business devolved upon it by law is a contempt committed in the immediate presence of the court.*

346 Ill. at 153, 178 N.E. at 414 (emphasis added and citations omitted).

100. 346 Ill. 149, 178 N.E. 412 (1931). The court did, however, remand with

Six years later, in *In re Kelly's Estate*,[101] the Illinois Supreme Court relied upon *Andalman* in affirming an order holding six defendants in direct criminal contempt of court "by the probate court of Cook county and sentenc[ing] [them] to imprisonment in the county jail for the period of one year."[102] The defendants allegedly presented a document to the probate court which was not the will of the named decedent.[103] After receiving the petition the court heard the testimony of the six persons named in the petition. The court also listened to the testimony of other witnesses, including Waitches, who had declared himself willing to testify. Both the probate judge and counsel for the public administrator questioned each witness.[104] During the course of this interrogation, "Waitches admitted that he personally presented the false will to the presiding judge in his courtroom for the purpose of inducing him to enter orders making that document a part of the record on the same day he caused it to be filed in the clerk's office."[105]

These admissions notwithstanding, Waitches appealed his contempt citation.[106] The supreme court affirmed stating that while the

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instructions "to impose a fine upon" Andalman in lieu of the sentence of imprisonment, which had been set aside by the appellate court in an earlier appeal. *Id.* at 152-53, 178 N.E. at 413-14.

101. 365 Ill. 174, 6 N.E.2d 113 (1937).

102. *In re* Kelly's Estate, 365 Ill. 174, 175, 6 N.E.2d 113, 114 (1937).

103. *Id.* at 174, 6 N.E.2d at 114.

> James Thomas Kelly, a resident of Chicago, died on February 26, 1935. Eight days later, . . . Waitches filed an application for letters testamentary in the probate court of Cook County. This application was signed by Bella Butman and Radis. . . . Waitches appeared on the same day before the . . . judge of the probate court, and exhibited to him a document purporting to be Kelly's last will and testament. . . . Raids and Mrs. Butman were named executor and executrix. . . . Waitches was named as attorney for the estate, and it fixed his compensation for legal services to be rendered in that capacity. Waitches and the other [defendants] . . . were brought into the [probate court's] courtroom on the following morning. . . . At the opening of court a verified petition . . . was presented to . . . the probate court. The petition . . . charge[d] . . . that certain acts of the six defendants constituted a direct contempt against the court. In particular, the petition alleged that the document presented to the court by Waitches . . . was not the last will and testament of Kelly . . . and that each person named in the petition knew, not only at the time of presentation but prior thereto, that the document was a forgery. The petition asked the court to require the defendants to show cause why they should not be held in contempt of court.

Id.

104. *Id.*

105. *Id.* at 175-76, 6 N.E.2d at 115-16.

106. *Id.* at 176, 6 N.E.2d at 114.

contemptuous act did not occur in the presence of the judge, fraud was committed against the court because the act had occurred in an area "set apart for the constituent part of the court."[107] Because the contempt occurred outside the presence of the judge, extrinsic evidence was essential to substantiate the charge.[108]

Kelly's Estate is something of an anomaly insofar as it appears to controvert the fundamental proposition that direct contempt exists whenever contemptuous conduct occurs in the court's presence and can be sanctioned without the necessity for entertaining extrinsic evidence. *Andalman* is distinguishable in this regard, for Andalman's conduct was in direct derogation of an explicit order from the court. Once the court had been apprised of the fact that Andalman's petition to intervene had been filed with a court clerk, no further evidence was necessary in order to support a finding of contempt; in other words, the fact of Andalman's contemptuous conduct was apparent from the face of the record in that action, the existence of the petition to intervene conclusively establishing Andalman's contumacious conduct.[109]

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107. The document itself was apparently of such a character that the court became suspicious. The investigation which followed disclosed an "attempt to pervert the process of the court." *Id.* at 180, 6 N.E.2d at 116. In an omitted passage of the opinion, the Court in *Andalman* stated "[t]he contention was made on review, as here, that the contempt of court, if any, was an indirect contempt and that the rules governing such contempts should apply." *Id.* at 181, 6 N.E.2d at 116. Having made this observation, the Court then disposed of the contention by quoting the *Analman* holding concerning "conduct . . . in the presence of any one of the constituent parts of the court." *Id.*

108. *Id.* at 180, 6 N.E.2d at 116. The court continued as follows:

> In the *Andalman* case, as in the present case, the contempt consisted of filing papers in the office of the clerk of the court. It was accordingly necessary for the trial judge in that case, as in this case, to be informed that the contemner [sic] had filed the papers in question in the clerk's office and that the defendant personally filed them. Neither contempt was of such a character as to be apparent to the ocular or auditory senses of the judge of the court. Manifestly, if the contempt committed in the office of the clerk of the superior court was a direct contempt, the contemptuous conduct of Waitches in the office of the clerk of the probate court was likewise direct.

Id. at 181, 6 N.E.2d at 116.

109. *See, e.g.*, People *ex rel.* Kunce v. Hogan, 67 Ill. 2d 55, 364 N.E.2d 50 (1977) (direct contempt for defense counsel in a pending criminal proceeding to file a civil action against the presiding judge). As a further illustration of the point, assume that an attorney files a pleading with a court; assume, further, that the pleading in question contains racial, religious and/or sexual epithets which are specifically addressed to the judge who is presiding over the proceeding in which the

Kelly's Estate, however, is not so easily distinguished, particularly since the fact of the contempt was not apparent from the face of the

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document is submitted. In such an instance, the act of filing the pleading is an act of direct contempt which occurs in a "constituent part of the court." Although act upon which a contempt citation would be predicated, i.e., the act of filing the document with the court clerk, did not occur in the actual, physical presence of "the court", i.e., of the presiding judge of that court, the act was "of such a character as to be apparent to the ocular . . . senses of the judge of the court." That is, because the offensive material was contained within the body of the pleading, and because the offensive character of the material was apparent upon perusing the document, no recourse to extrinsic evidence was necessary in order to establish the nature and occurrence of the contumacious conduct. Because recourse to extrinsic evidence was not necessary to establish the contempt, it constitutes a direct contempt and may be punished as such. *See, e.g.*, 17 C.J.S. *Contempt* § 28 (1963) ("Contempt may arise out of the filing of papers in court, as where the papers are filed in a disrespectful manner, or are of such a nature as to show disrespect for the authority or dignity of the court. Thus, contempt may be committed by incorporating impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court in pleadings.").

As this illustration suggests, the preferable factor to be utilized in ascertaining whether contempt is direct or indirect is the issue as to whether extrinsic evidence is necessary in order to establish the occurrence of contemptuous conduct. People v. Ziporyn, 121 Ill. App. 3d 1051, 460 N.E.2d 385 (1984), illustrates the validity of this proposition. In *Ziporyn*, a defendant who had been convicted of murder was in court for a pre-sentencing hearing to determine whether he should receive the death penalty. *Id.* at 1053, 460 N.E.2d at 386. After the defendant had taken the stand and had been cross-examined "vigorously" by Assistant State's Attorney Garza, he took advantage of a bench conference to walk over to the counsel table at which Garza was seated. *Id.* at 1053, 460 N.E.2d at 386-87. When Garza ignored the defendant's efforts to gain his attention, the latter whispered a "vile epithet" to Garza. *Id.* The "vile epithet was brought to the court's attention only when Garza jumped up, repeated the remark in a louder than conversational tone in front of the jury and all those present, and demanded that defendant be held in contempt of court." *Id.*

After a hearing at which Garza and several other witnesses testified, the defendant was "found guilty of indirect criminal contempt and sentenced to one year misdemeanor probation." *Id.* The defendant appealed the conviction, and the appellate court reversed for reasons which are not relevant to the point presently under consideration. *Id.* at 1060, 460 N.E.2d at 391. The opinion is, however, significant in that the court found that the defendant's conduct could only be characterized as constituting indirect contempt because "the allegedly contemptuous conduct occurred outside the presence of the court, i.e., defendant's conduct was neither heard nor seen by the trial judge." *Id.* at 1055, 460 N.E.2d at 388. The trial judge's actual physical presence in the courtroom at the time the remark was made was not dispositive; what was dispositive was that extrinsic evidence was required in order to establish the occurrence of the conduct and its contemptuous character. *See id.*

Another decision reached a similar result: People v. Randall, 89 Ill. App. 3d 406, 411 N.E.2d 1017 (1980), involved a defendant who, seeking to have a bond forfeiture set aside, filed a letter with the court stating that he had been hospitalized

record in that proceeding but, as is noted in the passage quoted immediately above, was established only after the court heard extrinsic evidence in the form of testimony from those to whom the rule to show cause had been issued.[110] At first blush, the taking of extrinsic evidence in support of a finding of direct contempt, predicated upon an act committed "in the presence of a necessary constituent part of the court instead of in the immediate presence of the judge," would appear to be an absolute contradiction of the principles which were adduced at the beginning of this portion of the discussion.[111]

It appears, however, that it may be possible to reconcile *Kelly's Estate* with these principles; the reconciliation can be predicated upon either of two premises: (a) because Waitches admitted his perfidy, the conduct was punishable as direct contempt; and/or (b) the taking of extrinsic evidence in *Kelly's Estate* was a function of an antiquated and since-discarded contempt procedure which gave the appearance of utilizing extrinsic evidence when, in point of fact, this was not the case. Support for the first premise appears in a decision which the Illinois Supreme Court entered thirty-two years after *Kelly's Estate*, i.e., *In re Estate of Melody*.[112]

The defendant in *Melody*, Pauline Owens, was convicted of criminal contempt and sentenced to one year's imprisonment for her transgressions.[113] Like those of Mr. Waitches, Ms. Owens' transgressions also involved the "filing of [a] spurious will" with the probate

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on the date of the forfeiture. *Id.* at 407-08, 411 N.E.2d at 1018. "The court, after examining the letter, concluded that the letter was a forgery and, . . . without granting a hearing or receiving any evidence, found the defendant guilty and sentenced him to six months in jail." *Id.* The defendant appealed, and the Appellate Court reversed. The court concluded that the trial court had denied the defendant due process by summarily finding him in direct contempt when "[t]he falsity of the document was not . . . a matter within the trial court's *personal knowledge.*" *Id.* at 413, 411 N.E.2d at 1022. The trial court made an independent inquiry and ascertained that the treating physician's name was misspelled on the letter. *Id.* at 409-10, 411 N.E.2d at 1019. The appellate court held that because extrinsic evidence was necessary in order to establish the falsity of the letter and, thereby, the occurrence of contemptuous conduct, the defendant's conduct could only be characterized as indirect contempt, which required that he be accorded all the incidents of due process in the proceeding at which his contempt was adjudicated. *Id.* at 409-15, 411 N.E.2d at 1019-22.

110. *Kelly's Estate*, 365 Ill. at 177-78, 6 N.E.2d at 114-15.

111. *See supra* notes 81-95 and accompanying text.

112. 42 Ill. 2d 451, 248 N.E.2d 104 (1969).

113. *Id.* at 452, 248 N.E.2d at 105.

division of the circuit court of Cook County.[114] It appears that, like Mr. Waitches, Ms. Owens chose to admit that she had been responsible for having a "spurious will" filed with the probate court of Cook County.

Such admissions are of profound significance if the filing of "spurious pleadings" is analyzed as if it constitutes a form of perjury.[115] The Illinois Supreme Court considered the issue of perjury

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114. *Id.*

> Although defendant did not do the actual filing of the will, it was she who was the instigator of the entire plan, which had as its purpose the admission to probate of a spurious will. Her part included not only obtaining the lawyer to draft and probate the spurious will, but obtaining and coaching persons to commit perjury as attesting witnesses before the probate division. . . . The fact that the scheme 'blew up' *after* counsel offered the will for probate, when the court on motion of one of the heirs appointed an *amicus curiae* to investigate the conditions attending its execution, and that her part of the scheme was not committed in the physical presence of the court, did not make her conduct any less a criminal contempt of the . . . court. Her acts, committed outside the presence of the court, could certainly be deemed indirect contempt. *Since such indirect contempt was admitted, it may be punished as a direct contempt.*

Id. at 453, 248 N.E.2d at 106 (emphasis added and citations omitted). The attorney whom Ms. Owens, "a practical nurse for the decedent," retained to draft and file the spurious will was named S. Edward Bloom; Mr. Bloom appealed his contempt conviction and twenty-four month sentence to the Illinois Supreme Court, which reversed and remanded for a jury trial. Bloom v. Illinois, 391 U.S. 194, 210 (1968). *See also* People v. Bloom, 35 Ill. 2d 255, 220 N.E.2d 475 (1966), *cert. granted*, 386 U.S. 1003 (1967), *rev'd sub nom.*, Bloom v. Illinois, 391 U.S. 194 (1968).

115. *See, e.g.*, 17 C.J.S. *Contempt* § 28 (1963) ("filing false papers in court"). Perjury is defined as "[t]he willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false." BLACK'S LAW DICTIONARY 1297 (Rev. 4th ed. 1968). Therefore, if a pleading is executed under oath and includes false statements as to "a matter of fact, opinion, belief, or knowledge . . . being material to the issue or point of inquiry and known to such witness to be false," then such conduct would appear to constitute a form of perjury; and if the essence of perjury is construed as being an attempt to impede the legitimate administration of justice by submitting false allegations and or evidence, then the absence of the oath would not appear to constitute a serious impediment to the analysis which is suggested above, i.e., that contemptuous conduct consisting of the intentional submission of false pleadings is most appropriately analyzed as if it were a form of perjury. *See, e.g.*, Fred Nemerovski & Co. v. Barbara, 106 Ill. App. 2d 466, 246 N.E.2d 124 (1969) (one who wilfully swears to a pleading, knowing it to contain false statements as to material facts, may thereby commit perjury).

in *People v. Harrison*.[116] *Harrison* arose out of a divorce proceeding in which "the three plaintiffs in error [Ernest A. Harrison, Jeanette Harrison and Joseph Harrison] testified to a certain act of cruelty allegedly committed by Maria Harrison against Ernest A. Harrison on July 10, 1947, at their home."[117]

Ernest A. Harrison had sued his wife "for a divorce on the ground of extreme and repeated cruelty."[118] After she did not enter an appearance, a default decree was entered granting the divorce.[119] The wife, Maria Harrison, then filed a petition to set aside the decree and, after leave was granted, filed an answer and a counterclaim for separate maintenance.[120]

On May 14, 1948, the judge from the original divorce proceeding entered an order, naming the plaintiffs in error, for a rule to show cause for direct contempt. At the contempt hearing Margery Quandt, the medical records librarian at Wesley Memorial Hospital, testifed that Maria Harrison had been a patient at the hospital and under observation on July 10, 1947, the date of the alleged act of cruelty.[121]

After hearing the evidence, the trial court entered an order finding "the plaintiffs in error guilty of direct criminal contempt for uttering false and perjured testimony and passed sentence upon them."[122]

The three Harrisons appealed their convictions and the Supreme Court reversed, concluding that "the summary method by which the trial court sought to punish plaintiffs in error denied them due process of law."[123] The court concluded that the trial court had erred in characterizing the Harrisons' conduct as direct contempt: "[W]here the record shows the falsity of the witness was not known to the court at the time [of the testimony], but the fact was developed by a subsequent inquiry, a charge of direct contempt cannot lie."[124] "'In

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116. 403 Ill. 320, 86 N.E.2d 208 (1949).

117. *Id.* at 322-23, 86 N.E.2d at 209.

118. *Id.* at 322, 86 N.E.2d at 209.

119. *Id.*

120. *Id.*

121. *Id.* at 323, 86 N.E.2d at 209. "Records substantiating this were also introduced . . . [and] Maria Harrison . . . testified . . . that she had been confined to the hospital on July 19, 1947; and that she did not, on that date, commit any act of cruelty against her husband." *Id.* at 323, 86 N.E.2d at 209-10.

122. *Id.* at 323, 86 N.E.2d at 210.

123. *Id.* at 328, 86 N.E.2d at 212.

124. *Id.* at 325, 86 N.E.2d at 211, *citing* People v. Stone, 181 Ill. App. 475 (1913); People v. LaScola, 282 Ill. App. 328 (1935); Butwill v. Butwill, 312 Ill. App. 218, 38 N.E.2d 377 (1941). After noting that a direct criminal contempt "has been defined by this court as being one which takes place in the very presence of the

a case of direct contempt, [the court] may act upon that of which it may take judicial notice, *but it cannot judicially know that evidence is false unless at the trial it is so made to appear by the witness's own admission or perhaps by unquestioned and incontrovertible evidence.*'"[125]

When perjury, false swearing or failure to comply with a court order is admitted, it is punishable as direct contempt.[126] Because Waitches and Owens admitted their respective indulgences in perjurious conduct, i.e., the filing of "spurious wills" which were intended to deceive the Cook County probate court, their conduct was punishable as direct contempt.

But if that is the case, then why did the court in *Kelly's Estate* proceed to take testimony from witnesses other than Waitches? The answer lies in the often arcane intricacies of the contempt procedure which was in effect at the time *Kelly's Estate* was decided.

In William Blackstone's *Commentaries on the Law of England*, these common law contempt procedures are described:

> If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they . . . make a rule on the suspected party to shew cause why an attachment should not issue against him. . . . This process of attachment is merely intended to bring the party into court: and, when there, he must . . . answer upon oath to such *interrogatories* as shall be administered to him . . . . If the party can clear himself upon

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judge, making all of the elements of the offense matters within his own personal knowledge", the court concluded that the Harrisons' conduct could not constitute direct contempt: "In the instant case, the alleged contempt occurred in the very presence of the court, but it is questionable whether all elements of the offense were matters within the personal knowledge of the judge. *The alleged false swearing was not admitted and was dependent for its proof on extrinsic evidence.*" 403 Ill. 320, 325, 86 N.E.2d 208, 210 (1949) (emphasis added).

125. *Id.* at 326, 86 N.E.2d at 211 (emphasis added), *quoting* People v. Stone, 181 Ill. App. at 477.

126. *See, e.g.*, People v. Davis, 156 Ill. App. 3d 35, 508 N.E.2d 1233 (2d Dist. 1987); Matter of Swan, 92 Ill. App. 3d 856, 415 N.E.2d 1354 (1981).

> oath, he is discharged; but, if perjured, may be prosecuted for the perjury.[127]

This passage describes the doctrine of "purgation by oath", which was in force in Illinois until 1952,[128] when the supreme court held that the doctrine would no longer be followed in the state of Illinois.[129] This means, of course, that the doctrine was in effect at the time *Kelly's Estate* was decided.

The opinion in *Kelly's Estate* indicates that after the petition for the issuance of a rule to show cause was filed with the court, it "proceeded to hear the testimony of the six persons named in the petition as well as the testimony of other witnesses."[130] It is clear that

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127. IV W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND: *Of Public Wrongs* 287-88 (1962). In a subsequent passage, Blackstone criticizes this practice:

> [T]his method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance. . . . [In the equity courts], after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed.

Id. at 288. An Illinois author described the doctrine in the following terms:

> Developed as a reaction to the Star Chamber Court and its methods, the defense was a perversion of canon law, which worked to emasculate the inherent power of a court because it allowed the contemner to trade the slight risk of a trial for perjury to overcome the court's power to punish for contempt.

Note, *Contempt—Power to Punish and Proceedings Therefor*, 31 CHI-KENT L. REV. 181, 182 (1953), *citing* Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51 (1921). *See also* Note, *Contempt—Doctrine of "Purgation by Oath" Overruled in Illinois*, 2 DEPAUL L. REV. 105 (1952-3).

128. *See, e.g.*, People v. Rongetti, 344 Ill. 107, 176 N.E. 292 (1931); People v. McLaughlin, 334 Ill. 354, 166 N.E. 67 (1929); People v. McDonald, 314 Ill. 548, 145 N.E. 636 (1924). The United States Supreme Court had rejected the doctrine some years before. *See* Clark v. United States, 289 U.S. 1 (1932).

129. *See* People v. Gholson, 412 Ill. 294, 106 N.E.2d 333 (1952), *aff'g*, 344 Ill. App. 199, 100 N.E.2d 343 (1951). The court stated that "[t]he doctrine of 'purgation by oath' will no longer be adhered to by this Court and all previous decisions of this Court upholding and applying that doctrine, in that respect, are hereby expressly overruled." 412 Ill. at 303, 106 N.E.2d at 338.

130. *In re* Kelly's Estate, 365 Ill. at 177, 6 N.E.2d at 114. The court found that the purported will of Kelly was not witnessed until after his death; the court further found that all of the parties involved were aware of this fact and were scheming to perpetrate a fraud upon the court; the court held all of the parties involved in contempt of court and sentenced them to serve one year in the county jail. *In re* Kelly's Estate, 285 Ill. App. at 146, 1 N.E.2d at 906.

Waitches testified and that he "admitted . . . that he personally presented the false will to the presiding judge in his courtroom for the purpose of inducing him to enter orders making that document a part of the records of the probate court. . . ."[131]

It is also clear that Waitches' appeal from his conviction was based upon the following argument: "Waitches contends that an indirect contempt was charged in the petition upon which the proceeding originated, and that, in consequence, he should have been discharged upon his oral answer denying the charges against him."[132] The supreme court rejected the argument because it found that the contempt was direct; it appears that the court predicated its finding that the contempt was direct, rather than indirect, upon the fact that Waitches "admitted filing the spurious will and the verified petition seeking letters testamentary."[133]

Waitches' argument was apparently based upon the contention that, although he had admitted filing the spurious will and the petition for letters testamentary, there was no evidence to establish that, in so doing, he had *intended* to perpetrate a fraud upon the court.[134] It also appears that Waitches had testified that "he knew nothing about the preparation of the forged will."[135] The Illinois Supreme Court found this, together with the fact that Waitches had been acting as an officer

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131. 365 Ill. at 180, 6 N.E.2d at 115-16. Although six defendants were "adjudged guilty of contempt of court" in the proceeding that led to Waitches' appeal, it was his writ of error, and his writ of error only, that was at issue in In re Kelly's Estate. *See id.* at 175-76, 6 N.E.2d at 114. At least one other defendant, Nicholas Radis, also prosecuted a writ of error; his conviction, too, was affirmed by the Illinois Supreme Court. *In re* Estate of Kelly, 365 Ill. 194, 6 N.E.2d 118 (1937).

132. 365 Ill. at 178, 6 N.E.2d at 115. Waitches also argued that the petition for issuance of the rule to show cause was substantively deficient, and that "the sentence . . . [was] void because the record [did] not recite any jurisdiction over him and [did] not show that he was present when sentence was passed." *Id.* at 183, 6 N.E.2d at 117. The supreme court rejected both arguments. *Id.*

133. *Id.* at 184, 6 N.E.2d at 117. *See also supra* notes 105-08 and accompanying text. This conclusion finds additional support in the court's opinion in *Kelly's Estate II*, which affirmed Nicholas Radis' conviction based upon the fact that he, too, had admitted his participation in Waitches' scheme to probate the "spurious will." From the testimony of defendant Radis, it appears that he knew that the will filed in the probate court was a forgery; he testified that he did not know and had never heard of the decedent, that he saw the will for the first time when Mrs. Butman (the executrix) gave it to him for the purpose of obtaining Zalinck's signature as an attesting witness thereto, and that Zalinck signed the document as a witness in his presence and at his request. *Id.* at 195, 6 N.E.2d at 118-19.

134. *Id.* at 183-84, 6 N.E.2d at 117.

135. *Id.* at 184, 6 N.E.2d at 117.

of the court at the time he filed the documents in question, sufficient to establish "that Waitches had knowledge of the sordid circumstances attending the execution of the false will despite his protestations to the contrary."[136]

> Courts should require that practicing attorneys have a higher regard for the administration of justice than that which is required of the layman. Utter disregard of attorneys as to the truth or falsity of matters contained in papers and documents presented to courts warrants condemnation as unethical and contemptuous. . . . If the acts of a contemner are inconsistent with the alleged intention, and if the acts charged and proved or not denied amount to a contempt, the answer averring [that] the party charged intended no contempt will not purge him.[137]

This finding is based upon practice under the doctrine of purgation by oath. Under that doctrine, "the sworn answers of [a] defendant fully denying the alleged contempt are conclusive, entitling him to a discharge."[138] However, if the conduct constitutes contempt regardless of the defendant's lack of intent then no disavowal by sworn statement will discharge the contempt citation.[139]

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136. *Id.*

137. *Id.* at 184, 6 N.E.2d at 117-18, *citing* People v. Sherwin, 334 Ill. 609, 166 N.E. 513 (1929) and People v. Burr, 316 Ill. 166, 147 N.E. 47 (1927).

138. 17 C.J.S. *Contempt* § 83(b) (1963) states that:

> In cases where intention is an element of the offense . . . a defendant is . . . entitled to be discharged on filing a sworn answer which sufficiently disclaims or disavows any intention to commit contempt. Even where [the] defendant admits the commission of the acts with which he is charged, where his answer explains his actions in such [a] way as to show that no contempt was intended, he must be discharged unless his answer is insufficient as a matter of law. . . .

Id. (footnote omitted). *See also* People v. Gholson, 412 Ill. 294, 297, 106 N.E.2d 333, 335 (1952).

139. *See* 17 C.J.S. *Contempt* § 83(b) (1963). It is suggested that

> [a] defendant is not entitled to a discharge on filing a disclaimer of intent under oath if the conduct relied on as constituting the offense amounts to a contempt regardless of want of intention. Thus a direct contempt, where the offense involves the personal presence and overt acts of defendant in open court, is not purged by a disavowal of intent under oath.

Id. (footnotes omitted). It is further stated that "a sworn disclaimer of intent is unavailing even in cases where intention is an element of the offense charged, if the alleged contemptuous acts are unambiguous and subject only to the one reasonable construction that a contempt was intended." *Id.* (footnote omitted), *citing In re* Kelly's Estate, 365 Ill. 174, 6 N.E.2d 113 (1937).

The import of *Kelly's Estate* is evident: Waitches' "testimony" (and, perhaps, the testimony of his fellow miscreants as well) was actually the "answer" by which he sought, under the doctrine of purgation by oath, to discharge the contempt proceedings which had been instituted against him. Since an answer in a contempt proceeding may be oral,[140] and Waitches' answer *was* an oral answer,[141] then *Kelly's Estate* did not involve either (a) the taking of extrinsic evidence to establish the fact of a direct criminal contempt consisting of the act of filing "spurious" documents with the court, or (b) a finding that the filing of "spurious" documents with the court is a direct criminal contempt which can be summarily determined and sanctioned without the necessity for hearing extrinsic evidence. What *Kelly's Estate* did involve was the following legal scenario: Waitches filed "spurious" pleadings with the probate court. Upon the issuance of a rule to show cause why he should not be held in contempt for that filing, Waitches responded with an oral answer in which he admitted the act of filing the "spurious" pleadings but denied (a) that he knew that the documents were fraudulent, and/or (b) that the filing was attended by any intent to defraud the court.[142] Waitches believed that his answer was sufficient to discharge the proceeding because he believed he was being held to answer to a charge of indirect criminal contempt.[143]

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140. *See* 17 C.J.S. *Contempt* §83(a) (1963). *See also* People v. McDonald, 314 Ill. 548, 145 N.E. 636 (1924). McDonald was accused of striking Goldstein in an area outside of Judge Sullivan's court, and was arrested by Judge Sullivan's bailiffs at Goldstein's insistence. *Id.* at 549, 145 N.E. at 636. Judge Sullivan interviewed both parties and the bailiffs; McDonald denied the assault, and none of the bailiffs had actually witnessed his striking Goldstein. *Id.* at 549-50, 145 N.E.at 636. Only Goldstein could connect McDonald with the assault. *Id.* at 550, 145 N.E. at 636. Judge Sullivan proceeded to hold McDonald in direct contempt of court, and sentenced him to sixty days in the county jail. *Id.* at 550, 145 N.E. at 637. On appeal, the Illinois Supreme Court held that the contempt was not direct because it was not committed in the court's presence and/or so near as to interrupt the proceedings of the court. *Id.* at 551, 145 N.E. at 637. Thus, the supreme court held, it was improper to issue a finding of contempt absent a full hearing on the matter; the court also held that, in proceedings for contempt which was not committed in the court's actual physical presence, an answer denying the wrongful act is held to be conclusive. *Id.* at 552, 145 N.E. at 637. If the answer is later proven to be false, the remedy is an indictment for perjury. *Id.*

141. "Waitches contends . . . that . . . he should have been discharged *upon his oral answer denying the charges against him.*" 365 Ill. at 178, 6 N.E.2d at 115 (emphasis added). *See also supra* notes 131-33 and accompanying text.

142. 365 Ill. at 183-84, 6 N.E.2d at 117.

143. *See supra* notes 131-33 and accompanying text.

What Waitches did not realize, however, was that by admitting the act of filing the "spurious" pleadings he transformed the proceeding into a proceeding for direct criminal contempt in which the issue of intent was inferrable from the act of filing such pleadings.[144] Having done so, his attempt to rely upon the doctrine of purgation by oath was unavailing, and he was convicted of direct criminal contempt for conduct which was analogous to that involved in the commission of perjury in open court.[145]

Kelly's Estate is, therefore, not an anomaly in the Illinois law of contempt, but instead supports the propositions adduced in an earlier section of this discussion, i.e., that direct contempt can be prosecuted summarily upon the court's own knowledge but that because indirect contempt requires the presentation of extrinsic evidence to establish the underlying contemptuous conduct, it must be prosecuted in accordance with the dictates of due process. The following discussion explains how the parties in the *Smith* proceeding attempted to turn these propositions to their respective advantage.

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144. 365 Ill. at 183-84, 6 N.E.2d at 117. As noted above, since the act of filing false and fraudulent pleadings with a court must be conceptualized as analogous to the act of committing perjury, the admission of the underlying conduct is sufficient to transform the contempt into a direct, rather than an indirect contempt. *See supra* note 111 and accompanying text. Once such an admission has been made, it is then permissible to infer the necessary intent from the fact of communicating false assertions in a judicial proceeding. *See, e.g.*, People v. Davis, 156 Ill. App. 3d 35, 508 N.E.2d 1233 (2d Dist. 1987); People *ex rel.* Kunce v. Hogan, 67 Ill. 2d 55, 364 N.E.2d 50, *cert. denied*, 434 U.S. 1023 (1977); *In re* Willis, 57 Ill. App. 3d 378, 373 N.E.2d 77 (1978).

It is also possible to predicate the *Kelly's Estate* holding upon another, associate proposition: "While the filing of a false pleading is not contempt, . . . an attorney may be held guilty of contempt where he shows an utter disregard for the genuineness of documents presented in court, or for the truth of falsity of matters contained therein." 17 C.J.S. *Contempt* § 28 (1963) (footnote omitted), *citing In re* Kelly's Estate, 365 Ill. 174, 6 N.E.2d 113 (1937). *See also supra* notes 131-33 and accompanying text.

145. As noted earlier, perjury is indirect contempt if the falsity of the testimony is not admitted, but is punishable as direct contempt if the falsity is admitted. *See, e.g., In re* Estate of Melody, 42 Ill. 2d 451, 453, 248 N.E.2d 104, 106 (1969). The rationale is, of course, the necessity to entertain extrinsic evidence in adjudicating the merits of the contempt allegations. By the same token, Waitches committed an act which, although not committed in open court, but rather committed within a "necessary constituent part of the court", involved the communication of false allegations to that court. By admitting the underlying conduct at issue, Waitches eliminated the necessity for entertaining extrinsic evidence and thereby permitted the court to transform the proceeding into an action for direct contempt.

C. SMITH ARGUMENTS

The first issue upon which the parties to the *Smith* proceeding disagreed was whether the filing of a fraudulent petition for reinstatement, assuming *arguendo* that such a petition had been filed, constituted civil or criminal contempt. Smith and his erstwhile representatives argued that, even if one assumed for the purposes of argument that such a petition had been filed with the court, it would constitute, at most, an act of civil contempt. They predicated their argument upon the nature of the hypothesized conduct and the nature of the "harm" which it was presumed to inflict: The Smith parties contended that the offensiveness of such a petition, again assuming that it existed, lay in the act of having submitted it to the court for its consideration. They then asserted that the appropriate action to be taken with respect to this presumed offense would be to withdraw it from the court, thereby "purging" any contempt which might, for the purposes of argument only, have been assumed to attend its submission to that august body.

In making this argument, the Smith respondents relied upon the proposition that the appropriate remedy for civil contempt is to permit the alleged contemnor to purge himself of his contemptuous conduct,[146] and upon a provision of the Illinois Code of Professional Responsibility.[147] Rule 7-102(b)(1) of the Illinois Code of Professional Responsibility provides as follows:

> A lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.[148]

Smith and those who had represented him during the drafting and filing of the petition argued that even assuming, *arguendo*, that the petition was factually imperfect in contravention of the requirements of Supreme Court Rule 767,[149] the appropriate response would be to "rectify" those imperfections by withdrawing the petition. They suggested that Rule 7-102(b)(1) articulates a purgation requirement

146. *See supra* Section II(A).
147. ILL. REV. STAT. ch. 110A, Rule 1-101 through 9-102 (1985).
148. *Id.* at Rule 7-102(b)(1).
149. *See supra* notes 2-3.

which is applicable in any instance in which fraud, or factual misstatements, have been submitted to an Illinois court.

The Administrator rejected the Smith argument, asserting (a) that the petition for reinstatement was "riddled with fraud and falsehood," and (b) that the fraudulent nature of the petition rendered its filing with the Illinois Supreme Court an act of criminal contempt, an act against the dignity of that court. The Administrator argued that the perpetration of the fraud, and the offense against the court, was complete with the act of filing the petition, so that purgation was inapposite; the Administrator also pointed out that it is not possible to purge criminal contempt.[150]

The Administrator also argued that the act of filing the petition for reinstatement was an act of direct criminal contempt, and should be sanctioned as such. The Administrator denied the necessity for according Smith and his former attorneys the dictates of due process, such as the opportunity to put in evidence controverting the allegations that the petition was false and fraudulent, and argued that the court could punish the alleged malfeasance summarily.

The Administrator based this portion of his argument upon the fact that he had submitted a number of exhibits as attachments to his motion for sanctions and/or for a contempt citation. The Administrator contended (a) that these exhibits conclusively established that the petition was fraudulent, and (b) because these exhibits were a part of the record in the proceeding, it was possible to adjudicate Smith's criminal contempt on the basis of the record that was before the court, with no recourse to extrinsic evidence being necessary.

In support of this argument, the Administrator relied heavily upon the Illinois Supreme Court's decision in *Kelly's Estate*.[151] The Administrator urged that *Kelly's Estate* stands for the proposition that the filing of a fraudulent document with an Illinois court is direct contempt and may be sanctioned as such.

Without conceding that the filing of the petition could constitute criminal contempt, Smith and his attorneys countered the Administrator's argument by asserting that even if the petition were fraudulent, its filing could only be characterized as indirect contempt, the adjudication of which required that they be provided the opportunity to respond to the Administrator's allegations as to the falsity of that

150. *See, e.g.*, Estate of Schlensky, 49 Ill. App. 3d 885, 364 N.E.2d 430 (1977); People v. Gray, 36 Ill. App. 3d 720, 344 N.E.2d 683 (1976).

151. *See supra* Section II(B).

document.[152] Smith and his attorneys asserted that, rather than conceding that the petition for reinstatement was false, they were prepared to produce evidence which established that the assertions contained therein were accurate in every material respect.

Since they refused to admit that the petition for reinstatement was false, Smith and his attorneys argued that the filing of the document could only be construed as constituting a possible act of indirect contempt, the existence of which required that they be permitted the opportunity to appear and adduce evidence in their own behalf. The Smith parties relied upon the distinction presented in § III(B), *supra*, for the proposition that *Kelly's Estate* does not permit the conclusion that the filing of a document, which is alleged to be fraudulent, constitutes direct criminal contempt and may be punished as such.

Fortunately or unfortunately, however, the Supreme Court did not have occasion to adjudicate the arguments presented as to the import of its decision in *Kelly's Estate*, as subsequent events rendered the controversy moot.

IV. CONCLUSION

This article has utilized a hypothetical scenario to consider the application of Rule 2-611 to attorney disciplinary proceedings and has argued that the provision cannot apply in the absence of an order to this effect entered by the Illinois Supreme Court. The article has utilized the same scenario in considering the applicability of the contempt sanction to the filing of fraudulent documents with an Illinois court of record, and has demonstrated that the decision in *In*

152. As primary support for his allegations of "fraud and falsehood," the Administrator had relied upon the testimony of two former attorneys who attacked the information and statements contained in Smith's petition. The sworn statements of these two attorneys constituted the exhibits which had been attached to the Administrator's motion and upon which he based his contention that the record in the proceeding was sufficient to permit the adjudication of the matter summarily, in a proceeding for direct contempt. After the parties had submitted their briefs on this issue to the court, however, the Administrator learned, through independent sources, that the two witness-attorneys had perjured themselves in an attempt to discredit Mr. Smith; their attempt to discredit Mr. Smith was the result of resentments produced from what they considered wrongs that had been done them in the past. Once the Administrator realized that his action against Smith was, itself, the product of perjured testimony, he disclosed this fact to the court and petitioned for the dismissal of the proceeding. The court granted his petition, and dismissed the proceeding with orders that Smith should be allowed to reinstate at his discretion.

re Kelly's Estate does not support the characterization of such conduct as constituting a species of direct criminal contempt.