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## Dropping the K-Bomb: A Compendium of Kangaroo Tales from American Judicial Opinions

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# **DROPPING THE K-BOMB: A COMPENDIUM OF KANGAROO TALES FROM AMERICAN JUDICIAL OPINIONS**

*Parker B. Potter, Jr.<sup>1</sup>*

It is well understood that kangaroo courts are to be avoided, if at all possible. What is less well understood is that it is generally a good idea to avoid telling a judge that he or she is presiding over a kangaroo court. Litigants and even attorneys have found any number of creative and colorful ways to announce their displeasure by dropping the K-bomb outside of court, in pleadings, and in open court, directly to the face of an alleged marsupial decision-maker. Rarely has this proven to be a winning litigation strategy.

## **Table of Contents**

### **INTRODUCTION**

#### **I. MAN BITES DINGO**

#### **II. DIDGERIDOO-INGS OUTSIDE THE COURTHOUSE**

#### **III. PAPERING UP THE KANGAROO**

#### **IV. THE JUDGE STRIKES BACK**

##### **A. Sanctions for Uncivil Civilians**

##### **1. Removal**

###### **a. By the Court**

###### **b. Self-Removal**

##### **2. Contempt**

###### **a. Contempt Affirmed**

###### **b. Contempt Reversed**

###### **c. Contempt with Another Sanction on the Side**

##### **3. Other Unhappy Endings**

##### **4. Happily Ever After**

##### **B. Sanctions for Unconciliatory Counsel**

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1. Reprimand
2. Time and Money
3. Suspension and Disbarment
4. One That Got Away

C. (But One Judge Strikes Out)

## V. OUT OF THE FRYING PAN AND INTO THE FIRE CONCLUSION

### INTRODUCTION

In law school, no professor ever told me it was a bad idea to tell a judge that he or she was presiding over a kangaroo court. Writing the preceding sentence makes the proposition seem self-evident. So imagine my surprise when I discovered dozens and dozens of judicial opinions in which unhappy litigants – and even a few lawyers – threw caution to the wind and unleashed an antipodal invective.<sup>2</sup> This article reports some rather colorful lapses in judgment and chronicles the consequences to litigants and lawyers who have dropped a K-bomb on a black-robed target.<sup>3</sup> I begin, however, with a brief review of the essential characteristics of kangaroo courts.

The term “kangaroo court” has two separate but allied meanings. Under the first, and somewhat more literal definition, the term refers to courts “assembled by various groups, such as prisoners in a jail (to settle disputes between inmates) and players on a baseball team (to ‘punish’ teammates who commit fielding errors).”<sup>4</sup> Generally, the people running kangaroo courts of this first type are unlikely to be offended by references to their tribunals as kangaroo courts. In fact, such tribunals often use the term to identify themselves.<sup>5</sup>

Under the second, and somewhat more metaphorical definition, the term refers to a “self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied . . . , [a]

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<sup>2</sup> Antipodes are “[a]ny two places or regions that are on opposite sides of the earth.” AMERICAN HERITAGE DICTIONARY 116 (2d coll. ed. 1982). Australia is on the opposite side of the earth from the spot where I drafted this article. Thus, the term “kangaroo court,” an insult that refers to the iconic Australian marsupial, is an antipodal invective, at least in the northeastern United States.

<sup>3</sup> This article is the third installment in my kangaroo court trilogy. See Parker B. Potter, Jr., *Antipodal Invective: A Field Guide to Kangaroos in American Courtrooms*, 39 AKRON L. REV. 73 (2006); Parker B. Potter, Jr., *The Good, the Bad, the Ugly, and More: A Survey of Litigation Arising from the Operation of Kangaroo Courts*, 1 INT’L J. PUNISHMENT & SENTENCING 118 (2005).

<sup>4</sup> BLACK’S LAW DICTIONARY 382 (8th ed. 1999).

<sup>5</sup> See, e.g., *Riggs v. German*, 142 P. 479, 479 (Wash. 1914) (setting out “Rules of the Kangaroo Court of Kittitas County Jail”); *Lesser v. Neosho County Cmty. Coll.*, 741 F. Supp. 854, 857-58 (D. Kan. 1990) (discussing kangaroo court that enforced various disciplinary rules of college baseball team).

court or tribunal characterized by unorthodox or irregular procedures, esp[ecially] so as to render a fair proceeding impossible, [and] sham legal proceeding[s].”<sup>6</sup> This second usage is invariably intended as an insult,<sup>7</sup> and is nearly always perceived as such.<sup>8</sup>

In addition to the foregoing dictionary definitions, there are a variety of judicial definitions of the term “kangaroo court.” Among other things, kangaroo-ism occurs when: police officers coerce confessions from criminal suspects,<sup>9</sup> courts operate without jurisdiction,<sup>10</sup> the accused is not given the right to be heard,<sup>11</sup> convictions are based upon unreliable evi-

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<sup>6</sup> BLACK’S LAW DICTIONARY 382.

<sup>7</sup> See, e.g., *Kearney v. Town of Wareham*, 316 F.3d 18, 23 (1st Cir. 2002) (“While Kearney intimates that it [his suspension hearing] was a kangaroo court, he fails to support his invective with an evidentiary predicate.”); *Commonwealth v. Hill*, 632 A.2d 928, 928 (Pa. Super. Ct. 1993) (“Hill rants over ‘the crooked Lycoming County kangaroo court’ . . .”); *Fureigh v. Haney (In re Haney)*, 238 B.R. 427, 430 n.5 (Bankr. E.D. Ark. 1999) (“The debtor’s Motion to Set Aside Order is replete with inflammatory language, describing the Court as arrogant and feigning the powers of a ‘kangaroo court.’”); *Cheek v. Comm’r*, 53 T.C.M. (CCH) 111, 111 n.2 (T.C. 1987) (“The transcript of the trial generally consists of petitioner’s frivolous, protester-type arguments and petitioner’s unbridled harangue against this Court as ‘biased and prejudiced,’ ‘a fraud,’ ‘a kangaroo court,’ and ‘this star chamber Sixteenth Century court.’”); *Harris v. Bd. of Registration in Chiropody (Podiatry)*, 179 N.E.2d 910, 912 (Mass. 1962) (“he [petitioner’s attorney] did, however, make some unnecessarily provocative remarks, such as his characterization of the hearings as ‘two steps below the kangaroo court’”).

<sup>8</sup> See, e.g., *State ex rel. Neb. State Bar Ass’n v. Rhodes*, 131 N.W.2d 118, 120 (Neb. 1964) (“[T]he terms ‘Kangaroo Court’ and ‘Kangaroo Judge’ are terms of contempt and utter disrespect, and their use tends to bring discredit on the judiciary.”).

<sup>9</sup> See, e.g., *Williams v. United States*, 341 U.S. 97, 101-02 (1951) (parallel citations omitted) (“It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys.”); *Spano v. New York*, 360 U.S. 315, 325 (1959) (“This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction.”); *Pool v. United States*, 260 F.2d 57, 63 (9th Cir. 1958) (quoting *Williams* and rejecting defendant police officer’s argument that his beating of suspects was not actionable because beating did not lead to confession); *Brodkowicz v. State*, 474 S.W.2d 822, 829 (Mo. 1979) (Seiler, J., concurring) (“I know of no warrant for the jailers to hold kangaroo court and decide the punishment for assault and attempted jail break, and I am skeptical about a guilty plea taken from a defendant who concededly has been whipped with a leather belt while forced to spread-eagle himself against the wall and kept naked in a ‘dry cell’ over a period of weeks in the dead of winter. . .”).

<sup>10</sup> See, e.g., *Lambert v. Blackwell*, 387 F.3d 210, 238 (3d Cir. 2004); *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991) (“In 1915 the [Supreme] Court equated a kangaroo court with lack of jurisdiction . . .”) (citing *Frank v. Mangum*, 237 U.S. 309, 330-35 (1915)); *Brown v. United States*, 365 F. Supp. 328, 345 (E.D. Pa. 1973); *State v. Petterway*, 403 So. 2d 1157, 1162 (La. 1981) (Redmann, J., dissenting).

<sup>11</sup> *Cale v. Johnson*, 861 F.2d 943, 944 (6th Cir. 1988).

dence or no evidence at all,<sup>12</sup> decision-makers are biased,<sup>13</sup> and hearings are "precipitously or secretly convened."<sup>14</sup> As well, kangaroo-ism arises at: trials that receive excessive publicity,<sup>15</sup> closed hearings,<sup>16</sup> and hearings with predetermined outcomes.<sup>17</sup> Judges have also opined that kangaroo-ism is afoot when a proceeding is "a sham conducted in bad faith . . . run with the cynical purpose of harming [its subject] while pretending to be fair"<sup>18</sup> or is "random and unauthorized,"<sup>19</sup> when a party's advocate has a serious conflict of interest,<sup>20</sup> or when a mentally incompetent person is put on trial.<sup>21</sup>

In *Garland v. State*,<sup>22</sup> Justice Marshall of the Georgia Supreme Court provided an excellent thumbnail definition of kangaroo-ism. In that case, the trial court convicted an attorney for criminal contempt based upon statements he had given in an interview with a newspaper reporter.<sup>23</sup> The majority reversed, and Justice Marshall dissented:

I cannot conceive of more contemptuous statements, short of obscenity, than those made by the appellant: "That the trial court had conducted 'a sham proceeding'; that the trial court's 'conducting an inquisition was unlawful and improper'; that '[t]his is a political effort to turn a tragedy into political hay for' the trial judge and that 'it stinks'; . . ." Paraphrased, appellant accused the judge of running a "Kangaroo court," acting as an inquisitor, using the court as a political vehicle, and, in sum, conducting an operation that

<sup>12</sup> *California v. Green*, 399 U.S. 149, 187 n.20 (1970).

<sup>13</sup> *Williams v. Wilkinson*, 132 F. Supp. 2d 601, 611 (S.D. Ohio 2001).

<sup>14</sup> *Due v. Fla. Agric. & Mech. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963).

<sup>15</sup> See, e.g., *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

<sup>16</sup> *Natural Parents of J.B. v. Fla. Dep't of Children & Family Servs.*, 780 So. 2d 6, 14-15 (Fla. 2001) (Anstead, J., dissenting) (citations omitted).

<sup>17</sup> *Curry v. Pullinam*, 234 F. Supp. 2d 921, 928 (S.D. Ind. 2002) (citation omitted); *Clisham v. Bd. of Police Comm'rs*, No. 090211, 1991 WL 158159, at \*7 (Conn. Super. Ct. Aug. 12, 1991), *rev'd*, *Clisham v. Bd. of Police Comm'rs*, 613 A.2d 254 (Conn. 1992).

<sup>18</sup> *Austin v. Am. Ass'n of Neurological Surgeons*, 120 F. Supp. 2d 1151, 1154 (N.D. Ill. 2000).

<sup>19</sup> *McKinney v. Pate*, 985 F.2d 1502, 1514 (11th Cir. 1993) (Tjoflat, J., specially concurring), *reh'g granted* and *vacated*, *McKinney v. Pate*, 994 F.2d 772 (11th Cir. 1993); see also *Marcilis v. Bertucci*, 985 F.2d 560 (unpublished table decision), No. 92-1176, 1993 WL 20534, at \*1 (6th Cir. Feb. 1, 1993) (referring to resolution of trumped-up misconduct charges "in a kangaroo court held without authorization by the officers who wrote the misconduct violations.").

<sup>20</sup> *In re Soto*, 165 N.E.2d 855, 857 (N.Y. 1960) (Froessel, J., dissenting) (union attorney at employee disciplinary proceeding had once represented employer in different proceeding pertaining to same matter).

<sup>21</sup> *United States v. Zannino*, Crim. No. 83-235-N, 1985 WL 2305, at \*2 (D. Mass. June 5, 1985).

<sup>22</sup> 325 S.E.2d 131 (Ga. 1985).

<sup>23</sup> *Id.* at 134.

smells to high heaven. Such statements cannot fail to obstruct justice in the South Georgia Circuit and the State of Georgia.<sup>24</sup>

Justice Marshall's dissent leaves little doubt regarding his definition of kangaroo-ism. Litigants have also identified several salient characteristics of adjudicatory kangaroo-ism, including denial of the right to be heard,<sup>25</sup> bias,<sup>26</sup> and procedural irregularity.<sup>27</sup> One of the more colorful civilian descriptions of kangaroo-ism comes from *State Rubbish Collectors Association v. Siliznoff*.<sup>28</sup> John Siliznoff claimed that the actions of the board of directors of the State Rubbish Collectors Association while settling a dispute between him and another rubbish collector caused him emotional distress that manifested itself in physical symptoms.<sup>29</sup> At trial:

The argument to the jury by counsel for Siliznoff consisted of a bitter denunciation of the methods and motives of the directors of the association. They were accused of holding a

<sup>24</sup> *Id.* at 135 (Marshall, P.J., dissenting).

<sup>25</sup> *Brobson v. Borough of New Hope*, No. CIV. A. 00-0003, 2000 WL 1738669, at \*3 (E.D. Pa. Nov. 22, 2000) ("Plaintiff asserts that his due process rights were violated when Defendants dissolved Commission A and appointed Commission B, a 'kangaroo court' that did not hear live testimony or allow Plaintiff a meaningful opportunity to be heard."); *Jones v. Iron Workers Dist. Council Pension Trust*, 829 F. Supp. 268, 272 n.4 (S.D. Ind. 1993) ("I can only liken that hearing to a 'kangaroo court' because I was given very little chance to say anything and the questions that they asked me were repeated over and over with no let up until they were suggestive of what they wanted.").

<sup>26</sup> *Thompson v. Office & Prof'l Employees Int'l Union, AFL-CIO*, 74 F.3d 1492, 1498 (6th Cir. 1996) ("Shortly before the trusteeship hearing, Wright heard that Pope was telling the members that the hearing was going to be a 'kangaroo court' because, in Pope's opinion, the outcome was a foregone conclusion."); *Murphy v. Se. Pa. Transp. Auth.*, No. Civ. A. 93-3213, 1993 WL 313133, at \*1 (E.D. Pa. Aug. 9, 1993) ("When a hearing was finally commenced, Murphy contends the proceedings were biased against him because the arbitrator was a SEPTA employee who conducted a 'kangaroo court' and refused to hear his counsel's objections."); *Morgan v. Ward*, 699 F. Supp. 1025, 1044 (N.D.N.Y. 1988) ("Morgan testified that he felt that the Adjustment Committee was a 'kangaroo court' that perfunctorily credited false or trivial charges made by Clinton's correctional officers.").

<sup>27</sup> *United States v. Koreh*, 856 F. Supp. 891, 896 (D.N.J. 1994) ("Defendant served seven months of his one year term of imprisonment, now contending that his trial was before a 'kangaroo court' dominated by Communists and that he was denied most of the procedural protections a defendant enjoys in this country."); *United States v. Noblitt*, 983 F.2d 1079 (unpublished table decision), No. 92-50025, 1993 WL 5176, at \*2 n.1 (9th Cir. Jan 11, 1993) ("Noblitt also argues that his complaints about the 'kangaroo court's' failure to allow him to represent himself or obtain competent counsel at trial should have alerted the district court to his desire to proceed pro se at the revocation hearing."); *Larsen v. Kaufmann*, 579 A.2d 1302, 1302 (Pa. 1990) (reporting plaintiff's charge that applicable procedure for appellate review allowed Board to "'establish its own composition,' 'play it by ear[,] make it up as it goes along' and 'keep doing it over until it gets it right'").

<sup>28</sup> 235 P.2d 95 (Cal. Ct. App. 1951), *vacated*, *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

<sup>29</sup> *Siliznoff*, 235 P.2d at 96.

“Kangaroo Court” with methods inconsistent with “good, decent, American business;” and with forcing their decision upon innocent people and who needed a “trouncing”; they were compared with people who poison horses, cut tires, smash windows, blackjack their victims and throw acid upon customers’ clothes. It was suggested that something evil might happen to the “brave” witnesses who came to testify for Siliznoff. The arbitration procedure of the by-laws was ridiculed as illegal, arbitrary and unauthorized.<sup>30</sup>

The jury awarded Siliznoff compensatory and punitive damages for the emotional distress he allegedly suffered from the Association’s kangarooism.<sup>31</sup> The District Court of Appeal reversed,<sup>32</sup> but Siliznoff got his award back at the California Supreme Court.<sup>33</sup>

Finally, however, while the case law is replete with examples of adjudicatory behavior that judges, attorneys, and litigants consider to be kangaroo-like, not a single one of the more than four hundred kangaroo court opinions I found explains why the kangaroo was selected – rather than, say, the warthog, the crocodile, or the armadillo – to serve as the animal symbol for decision-making malfeasance. The best I can offer is the following observation from Judge Marvin J. Garbis:

The fact is, or seems to be, that the term “kangaroo court” is not disparaging of the Australian judicial process. Rather, it appears that the term arose in the American West in the 1850’s to refer to informal tribunals that dispensed instant “justice.” The marsupial analogy may have been a sardonic comparison between the hopping gait of a kangaroo and the ad hoc and unpredictable leaps of logic and procedures of the American frontier tribunals.<sup>34</sup>

While the foregoing passage comes from an article in *The Green Bag* rather than a judicial opinion, Judge Garbis is, after all, an Article III

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<sup>30</sup> *Id.* at 100.

<sup>31</sup> *Id.* at 101.

<sup>32</sup> *Id.*

<sup>33</sup> *Siliznoff*, 240 P.2d 282.

<sup>34</sup> Marvin J. Garbis, *Aussie Inspired Musings on Technological Issues – Of Kangaroo Courts, Tutorials & Hot Tub Cross-Examination*, 6 *GREEN BAG* 2D 141, 142 n.8 (2003). According to BLACK’S LAW DICTIONARY:

The term’s origin is uncertain, but it appears to be an Americanism. It has been traced to 1853 in the American West. “Kangaroo” might refer to the illogical leaps between “facts” and conclusions, or to the hapless defendant’s quick bounce from court to gallows.

*Id.* at 382.

judge, which lends a comforting degree of authority to his marsupial mus-ing.

Having established, with some specificity, the nature of the complaints a litigant may be attempting to make by calling a tribunal a kangaroo court, I turn to the heart of this article, which is a compendium of colorful charges of kangaroo-ism. My strategy is to present a collection dramatic incidents that are likely to have been the topic of courthouse conversation for months, if not years, after they occurred.<sup>35</sup> The sections that follow are devoted to out-of-court claims of kangaroo-ism, claims made in pleadings, in-court vituperations that have inspired a presiding judge to discuss or impose sanctions either on a litigant or an attorney, and accusations of kangaroo-ism made by attorneys seeking relief from disciplinary actions. However, I begin with a story that stands out even among the picaresque tales of courtroom mayhem that follow it.

### I. MAN BITES DINGO<sup>36</sup>

Every once in a while, man bites dog – or dingo: on rare occasion, a decision maker will identify his or her own tribunal as a kangaroo court. For example, Hearing Officer West of the Wabash Valley (Indiana) Correctional Institution Conduct Adjustment Board allegedly “referred to his court as a ‘kangaroo court’ and to himself as ‘Captain Kangaroo’”<sup>37</sup> Sadly for inmate James Higgason, the Indiana Court of Appeals affirmed the district court’s denial of his habeas corpus petition, ruling that the comments Higgason alleged did not demonstrate bias toward him on the part of Hearing Officer West.<sup>38</sup>

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<sup>35</sup> Of course, I have not done the oral history research necessary to confirm that these incidents actually entered into courthouse folklore. As career law clerk who has worked in two different court systems, I have a pretty good idea of what makes an impression on the collective consciousness of a courthouse. Moreover, every once in a while, a judge will offer a perspective from the bench on the relative memorability of a particular outburst. See, e.g., *United States v. Solomon*, No. 95 Cr. 154 (LAP), 1997 WL 232523, at \*4 (S.D.N.Y. May 8, 1997) (“Mr. Solomon’s antics, although memorable, were thus not without precedent; mine was not the first courtroom that a defendant attempted to turn into a stage for the performance of a ‘solemn farce’ . . .”).

<sup>36</sup> Man would be well advised not to bite dingo, given dingo’s capacity for retribution. See *Adolph Coors Co. v. Am. Ins. Co.*, 164 F.R.D. 507, 512 (D. Colo. 1993) (“With the persistence of Kipling’s Yellow Dog Dingo pursuing Old Man Kangaroo, Coors chased Liberty Mutual.”). One would also be well advised not to say, in print, that one was “morally certain that [someone else] stole that sickly grin from the striped hyena and his personal beauty from the kangaroo.” *Danville Press Co. v. Harrison*, 99 Ill. App. 244, 1901 WL 2196, at \*3 (Ill. Ct. App. May term 1901). That statement, plus other assorted squirts of vitrol, earned the target of the invective a jury award of \$800. *Id.* Eight hundred 1901 dollars, adjusted for inflation, would make quite a handsome pile of 2006 greenbacks.

<sup>37</sup> *Higgason v. Hanks*, 134 F.3d 374 (unpublished table decision), Nos. 97-1687 & 97-1688, 1998 WL 4741, at \*\*3 (7th Cir. Jan. 7, 1998).

<sup>38</sup> *Id.*



A substantially more serious instance of self-identified kangarooism occurred in *State v. Petterway*.<sup>39</sup> In *Petterway*, a case from Louisiana, a panel composed of "four Supreme Court justices and three Court of Appeal judges sitting as Justices ad hoc" decided a criminal appeal.<sup>40</sup> Such mixed panels routinely heard criminal appeals in Louisiana for approximately two years.<sup>41</sup> The purpose was to familiarize Court of Appeal judges with criminal law and procedure, in anticipation of implementing legislative and constitutional changes which shifted jurisdiction over most criminal appeals from the Supreme Court to the Court of Appeal.<sup>42</sup> Justice Pro Tem Redmann, a judge of the Court of Appeal who had been assigned, under protest, to a mixed panel, questioned the constitutionality of the arrangement:

"It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court."

This "Louisiana Supreme Court" is not a legally constituted court. Worse, its members are not in fact allowed the power to decide the cases it hears. The only power this court derives from its colorable constitution by the elected Justices of the Louisiana Supreme Court is the power to declare itself unconstitutionally constituted and therefore without any jurisdiction to imprison any accused, and thus obliged, borrowing the words of *Marbury v. Madison*, 1803, 5 U.S. (1 Cranch) 137 "to disclaim all pretensions to such a jurisdiction" as an "extravagance . . . absurd and excessive . . ."<sup>43</sup>

While Justice Redmann was not nearly so proud of his kangaroo court as Hearing Officer West appears to have been, those two stand united as the only jurists I found who ever admitted to presiding over, or sitting on, kangaroo courts.

People other than judges have also gazed into the mirror only to see a kangaroo staring back. In *Lee v. Rapid City Area School District No. 51-4*,<sup>44</sup> it was not "plainly unwarranted and clearly injurious"<sup>45</sup> to permit "Lee's counsel to refer to South Dakota's continuing contract law as pro-

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<sup>39</sup> 403 So. 2d 1157, 1161-62 (La. 1981) (Redmann, J, dissenting) (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951)).

<sup>40</sup> *Petterway*, 403 So. 2d at 1160.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1161-62 (parallel citation omitted).

<sup>44</sup> 981 F.2d 316 (8th Cir. 1992).

<sup>45</sup> *Id.* at 331-32.

viding a ‘kangaroo court’”<sup>46</sup> at least in part because the School Board president admitted that the statutory hearing available before the board over which he presided could, indeed, be a kangaroo court.<sup>47</sup>

## II. DIDGERIDOO-INGS OUTSIDE THE COURTHOUSE<sup>48</sup>

In the usual case, a litigant accuses a judge directly of running a kangaroo court. Nevertheless, some of the more creative accusations of kangaroo-ism have been made outside the courthouse entirely.

In *Commonwealth v. Sholley*,<sup>49</sup> a group of men protesting judicial treatment of men in domestic violence cases picketed the Quincy (Massachusetts) District Court carrying signs reading “Free Raymond Barrio,” “This is a Kangaroo Court,” and “Man can get no justice in this Court.”<sup>50</sup> Just up the road in New Hampshire, James MacFarlane, displeased with the outcome of his divorce proceeding, attempted to take advantage of a large assemblage of media outside the New Hampshire Supreme Court by distributing a handbill “entitled ‘Legal Rubbish – By David Brock, NH Supreme Court 1990’ [that bore], among other things, the image of two kangaroos (presumably symbols of MacFarlane’s perception that he was the victim of a so-called ‘kangaroo court’).”<sup>51</sup> Chief Justice Brock was not the first judge to earn the wrath of James MacFarlane. Several years earlier, after being arrested for failing to pay alimony, he

perceived partiality shown by the presiding judge, defendant Smith [of the New Hampshire Superior Court], in favor of Rich [his ex wife] . . . [and] [i]n response . . . filed motions for the recusal of Judge Smith, which were denied . . . [and] began to speak out against Judge Smith, distributing thou-

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<sup>46</sup> *Id.* (ruling that allowing the “kangaroo court” reference did not constitute reversible error).

<sup>47</sup> *Id.*

<sup>48</sup> A didgeridoo is “a large musical pipe of the Australian aborigines made from bamboo or a hollow sapling.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 628 (1993).

<sup>49</sup> 726 N.E.2d 415 (Mass. App. Ct.), *aff’d in part, rev’d in part*, 739 N.E.2d 236 (Mass. 2000).

<sup>50</sup> *Id.* at 418 n.3. Raymond Barrio was on trial for violating a protective order. *Id.* at 416. Earl Sholly, one of the picketers, was “a self-described ‘father’s rights activist.’” *Id.*

<sup>51</sup> *McFarlane v. Kenison*, No. Civ. 98-353-M, 1999 WL 813956, at \*1 n.1 (D.N.H. Aug. 31, 1999) (granting, on grounds of qualified immunity, defendant’s motion to dismiss MacFarlane’s § 1983 action alleging that state official violated his First Amendment rights by threatening to have him arrested if he mounted his protest on state property without first obtaining a permit).

sands of embossed pencils with the legend "Kangaroo Court – 'Judge' Peter Smith" printed on them.<sup>52</sup>

In another case involving handbills, Anthony Ruby was charged with retaliation for past official action for posting handbills criticizing a judge who had sentenced him approximately five years earlier.<sup>53</sup> The handbill was titled "BOXING IN THE KANGAROO COURT? / With The Honorable Michael T. Joyce / The kangaroo as prizefighter,"<sup>54</sup> and it "accused the judge of various acts of moral turpitude, and attacked his professional character as being nothing more than incompetent."<sup>55</sup>

Finally, in *Coyne v. Bureau of Motor Vehicles*,<sup>56</sup> John Coyne made a particularly imposing out-of-court accusation of kangaroo-ism:

Appellant [Coyne] is the owner of a World War II vintage Sherman tank. The record reveals that this tank was parked in front of the Clermont County Courthouse, Batavia, Ohio, from approximately November 14, 1978, to March 6, 1979. The tank was moved several times to accommodate work to be done around the courthouse and to accommodate a trailer for Santa Claus.

Numerous signs were placed on the tank during the relevant time period reflecting appellant's feelings concerning his dispute with a local common pleas court judge. Examples of these signs are:

Batavia: A Rotten Can of Worms; Liberty and Justice for \$um; Clermont County Kangaroo Court, Batavia, Ohio, Judge Ralph Hill, Presiding; Judge Ralph Hill, Military

The tank was parked in parking stalls and [c]oins were periodically inserted into the parking meters. At one point appellant ran the tank over his own Cadillac parked nearby. These activities were not part of any parade or organized social event.<sup>57</sup>

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<sup>52</sup> *MacFarlane v. Smith*, 947 F. Supp. 572, 574 (D.N.H. 1996) (granting Judge Smith's motion to dismiss MacFarlane's § 1983 action on grounds of judicial immunity).

<sup>53</sup> *Commonwealth v. Ruby*, 31 Pa. D. & C.4th 515 (Pa. Ct. Com. Pl. 1996) (denying defendant's motion to dismiss), *vacated*, 726 A.2d 415 (unpublished table decision), No. 00596PGH97 (Pa. Super. Ct. Aug. 19, 1998).

<sup>54</sup> *Ruby*, 31 Pa. D. & C.4th at 541.

<sup>55</sup> *Id.* at 518. The text of the handbill, which lives up to Judge Connelly's description, is reproduced as Appendix A in the opinion. *Id.* at 541. It concluded "JOIN IN THE BOXER REBELLION!!! / AND DUMP OUR USELESS DEMOCRACY / Paid for by Robot J. Puppet, Scribe 'Concerned Citizens for Martial Law.'" *Id.* at 543.

<sup>56</sup> No. CA-1061, 1983 WL 4259 (Ohio Ct. App. Jan. 19, 1983).

<sup>57</sup> *Id.* at \*1.

Coyne and his tank landed in court when the Registrar of the Bureau of Motor Vehicles ordered him to surrender his historical vehicle license plate, an action which was upheld by the Ohio Court of Appeals,<sup>58</sup> albeit over a dissent.<sup>59</sup>

### III. PAPERING UP THE KANGAROO

It is one thing for a litigant to blurt out, in the heat of the moment, that the judge who is ruling against him or her is running a kangaroo court. It is quite another to write such an accusation into a pleading. Yet, despite the seemingly unassailable logic of the proposition that a litigant will catch more judges with honey than with vinegar,<sup>60</sup> several erstwhile litigants

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<sup>58</sup> *Id.* at \*2.

<sup>59</sup> *Id.* (Hendrickson, P.J., dissenting) (objecting to majority's limitation of the term "exhibition" in the historical vehicle licensing statute to "activities relating [solely] to the historical nature of the vehicles").

<sup>60</sup> While no judge has written that one can catch more judges with honey than with vinegar, several have noted that "one catches more flies with honey than with vinegar." *United States v. Bay-Houston Towing Co.*, 197 F. Supp. 2d 788, 823 (E.D. Mich. 2002) (discussing the process for obtaining a peat mining permit); *see also McGraw v. Holland*, 257 F.3d 513, 519 (6th Cir. 2001) (discussing detective's attitude toward suspect from whom he elicited confession); *People v. Burns*, 540 N.Y.S.2d 157, 160 (N.Y. Sup. Ct. 1989) (discussing behavior of police officers conducting *Terry* stop in *People v. De Bour*, 352 N.E.2d 562 (N.Y. 1976)).

But judges and flies have different tastes and one judge, at least, has been repulsed rather than attracted by honey. In *Galbreath v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 121 S.W.3d 360 (Tenn. 2003), the Tennessee Supreme Court affirmed a thirty-day suspension of an attorney's right to practice based, in part, on the following:

On October 4, 1999, during a regular court proceeding, Galbreath addressed [Judge] Lyle as "honey." Lyle immediately recessed the proceedings. Upon their resumption, Galbreath apologized, explaining that it was his custom to address "nice looking women" as "honey."

*Id.* at 664. In the court's view, "The incident in which Galbreath referred to Lyle as 'honey' underscores Galbreath's lack of respect for the judicial office and its processes. Such conduct alone justifies some type of discipline." *Id.* at 666.

Thanks to Judge Smith of the Court of Appeals of Maryland, the literary source of the distinction between honey and vinegar is now a footnote to American jurisprudence:

"More flies are taken with a Drop of Honey than a Tun of Vinegar." Thomas Fuller (1654-1734), *Gnomologica*.

"Strive not to hew your path  
through life – it really doesn't pay;  
Be sure the salve of flattery soaps  
all you do and say;  
Herein the only royal road to fame and fortune lies;  
Put not your trust in vinegar –  
molasses catches flies!

have mingled their prayers for relief with a suggestion that the very source of the relief they were seeking was a robed marsupial.

In *United States v. Ramos*,<sup>61</sup> the *pro se* defendant filed three motions to dismiss his indictment and one petition for a writ of habeas corpus.<sup>62</sup>

In Defendant's Motions and Petition, the Court has found, *inter alia*, a request for surety, the allegation that the United States is bankrupt, the assertion that the fringe color of the United States flag is improper, several "notices" that the government's "dishonor" is being "accepted for value" by Defendant, repeated demands that the United States "settle" his indictment by paying him millions of dollars, and claims under the United States Bankruptcy Code, "Regulation Z," diversity of citizenship jurisdiction, and the rules governing commercial paper issued by the United States. The majority of these claims were purportedly written by Defendant as an appointed representative for an entity named Mario G. Ramos(c) 1982, a distinction also alleged to have legal significance. Defendant also alleges that his appointed attorney is a "spy for the accusers" uninterested in protecting his rights before this "illegal, sham and kangaroo court."<sup>63</sup>

Perhaps needless to say, Ramos did not prevail.<sup>64</sup> In a case brought before the United States Tax Court, the petitioners, John and Nancy Williamson, filed both a petition and a "counterclaim" in which they described the Tax Court "as a 'KANGAROO' court which abrogates their right to a trial by jury."<sup>65</sup>

Eugene Field (1850-1895), *Uncle Eph.*, stanza 4.

*Wilson v. Bd. of County Comm'rs*, 327 A.2d 488, 499 n.1 (Md. 1974).

<sup>61</sup> No. Crim.A. 03-379, 2004 WL 356412 (E.D. Pa. Feb. 5, 2002) (prosecution for possessing drugs with the intent to distribute and for possessing firearms in furtherance of drug trafficking).

<sup>62</sup> *Id.* at \*1.

<sup>63</sup> *Id.* at \*2 n.5. Challenges to jurisdiction based upon the appearance of gold fringe on a courtroom flag are not uncommon. A westlaw search on the query "fringe /10 flag" in the ALLCASES database yielded twenty-two federal cases from seventeen different district and circuit courts and fourteen state cases from thirteen different states.

<sup>64</sup> *Id.* at \*2.

<sup>65</sup> *Williamson v. Comm'r*, 53 T.C.M. (CCH) 287, 287 1987 WL 40195 (T.C. March 3, 1987). In response to the Commissioner's motion to dismiss, the Williamsons filed a pleading stating:

[The Tax] Court has no statutory authority to enter a binding opinion in this matter; that this Court follows the procedures used in communist courts; that it un-

The most popular procedural posture for papering up the kangaroo appears to be the post-trial phase of litigation. For example, Virgil Carl Sweeden wrote directly to the judge who sentenced him for passing and possessing counterfeit money and told the judge that he “was given a kangaroo trial in [the judge’s] court.”<sup>66</sup> He then asked the judge for “the opportunity to plead [his] own case either in open court or in the privacy of [the judge’s] chambers or [for the judge to] grant [him] an appeal or reduce [his] exorbitant sentence.”<sup>67</sup> In *United States v. Gilley*,<sup>68</sup> the United States Court of Appeals for the Armed Forces held that David Gilley “was denied effective assistance of counsel during the post-trial phase of his court martial.”<sup>69</sup> The appellate court based its decision, in part, on Gilley’s counsel’s submission of a letter Gilley’s father wrote to the trial court, which the appellate court characterized as a “vitriolic attack on the Air Force and its judicial system.”<sup>70</sup> Among other things, Gilley’s father criticized the court martial: “[t]he whole dammed thing was a kangaroo court.”<sup>71</sup>

One enterprising defense attorney argued to the Ohio Court of Appeals, without success, that “the trial court improperly sentenced [his client] based upon passion”<sup>72</sup> that resulted from the client’s statement, contained in a presentence investigation report and quoted by the trial judge just prior to pronouncing sentence, that “the only reason he had been convicted . . . was because Crawford County was a ‘kangaroo court’ and the judge had mishandled the courtroom.”<sup>73</sup> Finally, in *McLaughlin v. Village of Shawnee Hills*,<sup>74</sup> a prison inmate filed a notice of voluntary dismissal of his petition for post-conviction relief, stating that “[t]he actions of the courts in this state and the defendants herein would raise a stench in the

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constitutionally denies citizens a jury trial; that petitioners are not Federal government workers and therefore are not taxable under the Code; and that the United States Supreme Court has determined that there is no tax on wages. This document ends with petitioners’ prayer “that the LORD GOD will show the plaintiffs [respondent] and the tax court the folly of their communist lying, cheating ways and they will dismiss the claim by the Plaintiffs [sic].”

*Id.* The court granted the Commissioner’s motion to dismiss for failure to state a claim on which relief can be granted and, in addition, awarded the United States \$5,000 in damages for having to defend against the Williamsons’ “frivolous and groundless” arguments. *Id.*

<sup>66</sup> Sweeden v. United States, 209 F.2d 524, 525 (8th Cir. 1954).

<sup>67</sup> *Id.* The record does not disclose Judge Ridge’s response, if any. In a subsequent proceeding, Sweeden’s counsel reported to the presiding judge that Sweeden said “he made a mistake in writing this letter,” *id.*, and that the “letter was written because of some bad advice he received,” *Id.*

<sup>68</sup> 56 M.J. 113 (C.A.A.F. 2001).

<sup>69</sup> *Id.* at 125.

<sup>70</sup> *Id.* at 119.

<sup>71</sup> *Id.* The accusation of kangaroo-ism was, however, one of the milder parts of the letter. *See id.*

<sup>72</sup> State v. Rittenhour, 678 N.E.2d 293, 296 (Ohio Ct. App. 1996).

<sup>73</sup> *Id.*

<sup>74</sup> No. 82-CA-32, 1983 WL 5081 (Ohio Ct. App. March 21, 1983).

nostrils of a kangaroo court.”<sup>75</sup> McLaughlin fired his burst of antipodal invective despite having received a considerable amount of due process:

I have never seen a case in which more due process has ever been offered to a defendant. The defendant received a fair and full jury on the merits. He received the full appeal allowed by law. The Supreme Court has found no Constitutional issues involved. Since his original trial, the defendant has had an evidentiary hearing upon his petition for post conviction relief and was allowed different counsel to represent him. He has, in all, filed four petitions under 2953.21 et seq. He has invoked the jurisdiction of the [Ohio] Court of Appeals at least three to four times. A full jury trial with its following attendant rights is the basis for our system of justice. Imperfect as the system may be, and despite defendant's opinion of the same, this Court feels that he has had adequate due process.<sup>76</sup>

Not surprisingly, McLaughlin received no further relief.

While accusations of kangaroo-ism, on paper or otherwise, are not uncommon, some judges find such accusations so offensive as to merit expungement from the record. In *Skolnick v. Hallett*,<sup>77</sup> the “[p]laintiff’s complaint charge[d] that defendants [including Judge Hallett] conducted a ‘kangaroo court’ with him as a victim.”<sup>78</sup> The district court dismissed the complaint for failure to state a claim on which relief could be granted,<sup>79</sup> and also “found and held the complaint was replete with scurrilous, offensive and objectionable allegations principally leveled at Judge Hallett, and should not be permitted to remain of record.”<sup>80</sup> The United States Court of Appeals for the Seventh Circuit affirmed.<sup>81</sup>

A somewhat different result was reached in *Newcomer v. Huey*.<sup>82</sup> There, the defendant filed a motion requesting a change of venue in which he “expresse[d] his opinion ‘that this Court is of the nature of a Kangaroo Court, having no respect for the Law whatever,’ and that the court is ‘mas-

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<sup>75</sup> *Id.* at \*3.

<sup>76</sup> *Id.* at \*2. To the foregoing litany, Judge Wise added the following: “In addition, this plaintiff-appellant has had a hearing before the Federal District Court and the Sixth [Circuit] Court of Appeals on basically the same matters which are attempted to be litigated in this complaint brought in the Delaware County Court of Common Pleas and now before this Court.” *Id.* Not surprisingly, McLaughlin received no further relief. *Id.*

<sup>77</sup> 350 F.2d 861 (7th Cir. 1965).

<sup>78</sup> *Id.* at 861.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 18 Pa. D. & C.2d 202 (Pa. Ct. Com. Pl. 1959).

terminated' by a 'politician' whose attorney represents the [plaintiffs] and concerning whom [defendant] has also made uncomplimentary remarks."<sup>83</sup> The plaintiffs moved "to strike the defendant's paper writing as impertinent and scandalous."<sup>84</sup> Despite determining that the defendant's pleading "might well, for the most part, be stricken upon that ground,"<sup>85</sup> the Pennsylvania Court of Common Pleas "deem[ed] it better, in order to make clear the unfounded nature of [the defendant's] complaints of unfair treatment, to consider the merits of the application."<sup>86</sup>

#### IV. THE JUDGE STRIKES BACK

Some litigants have gone to great lengths to express their displeasure with a court that has, in their opinion, done them wrong. Most, however, settle for telling a judge, in open court, that he or she is acting like a kangaroo. Indiana's Captain Kangaroo stands alone; I found no other case in which an individual adjudicator either proclaimed himself to be a kangaroo or embraced a litigant's suggestion that she was a kangaroo. Stoic forbearance is the closest any other judge has come to Captain Kangaroo's proud marsupial self-identification; occasionally a judge will let an oral charge of kangaroo-ism pass without imposing sanctions of some sort.<sup>87</sup> Far more frequently, there is a price to be paid by a litigant or an attorney who dares to voice an accusation of kangaroo-ism.<sup>88</sup> This section is devoted to opinions in which a litigant or an attorney has dropped the K-bomb, only to have it land on him- or herself, in the form judicially imposed discipline. This section is, in other words, a listing of those tribunals

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<sup>83</sup> *Id.* at 205.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See, e.g.,* Meyer v. Sargent, 854 F.2d 1110, 1112 (8th Cir. 1988); Marquess v. State, 721 S.W.2d 173, 173 (Mo. Ct. App. 1986).

<sup>88</sup> While dozens of judges have used the tools at their disposal to strike back at litigants and lawyers who have accused them of at least one court has held that in the world outside the courtroom, the epithet "fuckin' kangaroo" does not qualify as fighting words under the doctrine originated in *Chaplinsky v. New Hampshire*, 315 U.S. 569 (1942). *See* State v. John W., 418 A.2d 1097 (Me. 1980) (holding that use of the phrase "fuckin' kangaroo" was not disorderly conduct). In *John W.*, the police first arrested John W.'s sister, and then John W. sought more information about her arrest. *Id.* at 1103. Dissatisfied with the suggestion of one of the officers that he come down to the police station, "John screamed at him, 'Hey, turn around and come back here;' and 'Hey, you fucking pig, you fuckin' kangaroo.'" *Id.* "Officer Paul then ordered John to get back into his car. John hollered, 'Fuck you.' Officer Paul thereupon arrested him." *Id.* Based upon the foregoing, and taking into account the context of the utterances – an argument over an arrest – the court "conclude[d] that John W.'s conduct was not such as 'would in fact have a direct tendency to cause a violent response by an ordinary person in the situation of the person so . . . insulted or taunted.'" *Id.* at 1104.



in which a litigant or an attorney suspecting kangaroo-ism would be well advised not to share those suspicions in open court.

### *A. Sanctions for Uncivil Civilians*

#### 1. Removal

##### a. By the Court

Among the most common sanctions for uncivil civilians is removal from the courtroom. Amir Soloman argued in a motion for post-trial relief that his constitutional right to be present at trial had been violated by his removal from the courtroom.<sup>89</sup> Judge Preska detailed the circumstances leading to Soloman's removal:

The next morning, October 10, Mr. Solomon refused to leave the [Metropolitan Correction Center] for court. I ordered him brought to court "so that his right of confrontation [could] be explained to him and he [could] be given the opportunity to choose what he wishes to do; whether he wishes to attend or whether he wishes to waive those rights." When Mr. Solomon arrived, I began to advise him of his right of confrontation and to encourage him to remain present. In response to my initial salutation, "good morning, Mr. Solomon. Won't you be seated, sir," Mr. Solomon said "Don't physically abuse me" and referred to "this kangaroo proceeding." Because Mr. Solomon insisted on shouting over me, I eventually addressed myself to Mr. Solomon's counsel, although the remarks were heard by and in fact intended for Mr. Solomon, who was present in court next to counsel. I then carefully advised Mr. Solomon that he had a constitutional right to confront and cross-examine the witnesses against him and gave him several examples of why, based on the evidence the Government was expected to offer, he would best be able to assist in his own defense if he was present in court. I also stated:

Now, if Mr. Solomon wished to remain present, he would have to do so acting properly. As I explained to him yesterday, Mr. Solomon is welcome and I encourage him to remain present. He would have to confer

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<sup>89</sup> United States v. Soloman, No. 95 Cr. 154 (LAP), 1997 WL 232523, at \*3 (S.D.N.Y. May 8, 1997).

quietly with [his counsel] if he was going to confer, he would not be able to speak out or make any audible –

DEFENDANT A. SOLOMON: I will not be able to defend myself is what you are saying. This is a kangaroo court.

THE COURT: Excuse me, I'm speaking. If Mr. Solomon were to remain present he would not be able to speak out or make any audible sounds or gestures. But if he were to conduct himself properly, he could remain present and I encourage him to remain present.

I further explained to him that he could waive his rights, either by expressly stating that he wished to do so or by his conduct, for example, by obstreperous behavior or by refusing to come to court from the MCC.

It was only after Mr. Solomon again began interrupting, and speaking over me, that I warned him yet again that "if you do not behave, I will take that as a waiver of your right to be present." Finally, after a somewhat calmer discussion, beginning with Mr. Solomon's counsel, Mr. Madden, Mr. Solomon became extremely agitated and continued interrupting and talking over me, again in contravention of direct orders ("Listen to me now"; "you may not speak out, do you understand that?"; "Mr. Solomon, stop speaking.") At that time, I ordered the Deputy United States Marshals to remove Mr. Solomon from the courtroom, finding that his refusal to obey my orders constituted a waiver of his right to be present in court.

In response, Mr. Solomon became extremely violent, both physically and verbally. Physically, he attempted (almost successfully) to overturn the large, heavy counsel table in front of him and, when that caused the Marshals to attempt to seize and restrain him, he reacted violently, twisting and wresting his body away, apparently trying to escape their grasp. When the efforts of several Marshals succeeded in restraining Mr. Solomon and they began to move him toward the open door into the holding cell area, he violently and repeatedly kicked the door closed so that it was necessary to restrain his feet in order to move him through the doorway. Verbally, Mr. Solomon gave vent to repeated, vituperative outbursts, including several directed at me personally (and which, given the physical chaos, were understandably enough not recorded). Upon the Marshals' attempting to restrain him from turning over the table, he began shrieking, which shrieking continued to be audible throughout the re-

moval process and thereafter from inside the holding cell area.

Beginning in the afternoon following these disturbing events, I repeatedly stated that Mr. Solomon was welcome to return to the exercise of his confrontation rights at any time that he was ready to undertake to behave properly. (*E.g.*, “I think it also should be said for the record that if at any time Mr. Solomon demonstrates his both willingness to attend and his ability to behave in a proper fashion, he may resume his attendance at the proceedings.”).<sup>90</sup>

Judge Preska ruled that Solomon’s right to be present at trial was not violated by his removal from the courtroom because the removal was necessitated by his obstreperous behavior.<sup>91</sup>

In *United States v. Smith*,<sup>92</sup> the question was whether Faustino Selvera’s conduct was sufficiently prejudicial to warrant granting his co-defendants’ motion for severance (and a mistrial):

During the opening remarks of the United States Attorney, Selvera interrupted on three or four occasions and said it was “a God-damned lie.” The trial court cautioned Selvera and his counsel. The next day, Selvera interrupted the trial again when Conway began to testify. He accused Conway of lying and called the proceeding a “kangaroo court.” The trial court again cautioned Selvera who was then escorted out of the courtroom by a United States Marshal. Selvera returned to the courtroom later in the day. Selvera’s counsel stated to the jury that he hoped that the unfortunate remarks made by Selvera would not prejudice them. The trial court instructed the jury that Selvera’s outbursts had nothing to do with the other defendants and should not be considered in rendering the verdict.<sup>93</sup>

The district court denied the motion for severance.<sup>94</sup> After “recogniz[ing] that Selvera’s outbursts ‘injected a brief but unfortunate interlude of irrelevance into the trial,’”<sup>95</sup> the United States Court of Appeals for the Second

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<sup>90</sup> *Id.* at \*4.\*5 (citations to the record and footnotes omitted).

<sup>91</sup> *Id.* at \*4 (citing FED. R. CRIM. P. 43(b)(3)); *see also* State v. Parrish, No. CA2000-10-199, 2002 WL 31256647, at \*3 (Ohio Ct. App. Oct. 7, 2002) (holding that trial in absentia was constitutionally permissible when, among other things, defendant accused trial judge of running a “crazy ass court” and a “kangaroo ass court”).

<sup>92</sup> 578 F.2d 1227 (8th Cir. 1978).

<sup>93</sup> *Id.* at 1231.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1236.

Circuit affirmed.<sup>96</sup> The court observed that the trial court “promptly removed Selvera after his outburst on the second day of trial”<sup>97</sup> and distinguished the case at bar from one cited by the appellants “where the outbursts were substantially more disruptive and the trial judge did not have the disruptive defendant removed.”<sup>98</sup> Furthermore, the court noted “that even more disruptive outbursts than those which occurred here have not been found to warrant a new trial when the trial court took adequate corrective measures.”<sup>99</sup>

In *People v. Elmore*,<sup>100</sup> the defendant argued on appeal he was prejudiced by the trial court’s failure to give a cautionary jury instruction concerning the following outburst:

The Respondent: Want to tie me up, gag me, tie me up, gag me, tie me up and gag me; no–no–no, I can’t do it decently. He won’t dismiss himself. He say I’m number two dope seller. He’s the king. He’s the kangaroo, so he ain’t going to try me. Just tie me in the corner just like I’m a god damned nigger. That’s the way you treating me, so tie me up in the corner. You didn’t then and (Respondent talking in an unintelligible manner at this time) for something, God damned. He believe a junkie, and same junkie going to come back down here.

(At this time several deputies escorting the Defendant out of the Courtroom)

The Respondent: Take me out; take me out; take me out.

(The following remarks are from the Defendant who is at this time out of the Courtroom in the hallway)

The Respondent: Now you all go in and try me and give me a hundred more years, mother fucker. You ain’t going to try me no more, give me hundred and ten years on what the junkie said.<sup>101</sup>

Based upon the discretion given trial judges when determining whether a cautionary instruction is warranted, and the possibility that any such instruction might amplify rather than diminish the effect of the defendant’s

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1236 n.14 (citing *Aratari v. Cardwell*, 357 F. Supp. 681 (S.D. Ohio 1973)).

<sup>99</sup> *Id.* (citing *United States v. Marshall*, 458 F.2d 446 (2d Cir. 1972); *United States v. Bamberger*, 456 F.2d 1119 (3d Cir. 1972); *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963)).

<sup>100</sup> 285 N.W.2d 417 (Mich. Ct. App. 1979).

<sup>101</sup> *Id.* at 419 n.1.

outburst, the Michigan Court of Appeals affirmed the trial court's decision not to give a cautionary instruction.<sup>102</sup>

The issue in *Atkins v. State*<sup>103</sup> was whether wearing leg restraints at his trial unfairly prejudiced Howell Atkins.<sup>104</sup>

During Atkins' original trial, which ended in a mistrial, he objected to the use of leg restraints. The court responded that such restraints were routinely used in his courtroom, and were not visible to the jurors.

Assuming that Atkins was likewise restrained during the instant trial, he failed to renew his objection. To the contrary, his conduct and communication with the court invited restraint. Atkins made the following comments directly to the court:

ATKINS: Now, I'll make you tie me down in here, okay? I mean, if you want a mistrial, we can have one.

(Record, p. 813).

ATKINS: I want you to put that over my mouth and let me have it, and take me back to jail, and you just hold this kangaroo court out here, and let's talk about the fact that my mother was beat up in court yesterday, and we had a police –

(Record, p. 1377).

Atkins' outbursts and admitted attempts to invoke a mistrial necessitated, after repeated warnings, his removal from the courtroom.<sup>105</sup>

The Indiana Court of Appeals found no error because, in its view, Atkins invited the restraint to which he was subjected – in part by referring to his trial as a kangaroo court.<sup>106</sup> Litigant accusations of kangaroo-ism, followed by removal from the courtroom, have even prompted appellate arguments that the accusatory litigants were, at the time of their outbursts, incompetent to stand trial.<sup>107</sup>

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<sup>102</sup> *Id.* at 420.

<sup>103</sup> 561 N.E.2d 797 (Ind. Ct. App. 1990).

<sup>104</sup> *Id.* at 799.

<sup>105</sup> *Id.* at 800.

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., *State v. Perkins*, 811 P.2d 1142 (Kan. 1991) (affirming trial court's determination that defendant claiming multiple personalities was feigning mental illness); *State v. Cowans*, 717 N.E.2d 298, 313 (Ohio Ct. App. 1999) (affirming trial court's deter-

While all the people discussed in this section so far were parties to the proceedings from which they were removed, courtroom participants other than parties have also been ushered out of a courtroom for letting the K-word slip from their lips. In *United States v. Boertje*,<sup>108</sup> the trial judge granted a mistrial, over the defendants' objection, "based upon the contumacious and outrageous conduct of the defendants and their sympathizers which pervaded the courtroom during the second day of the trial."<sup>109</sup> Judge Broderick described the spectator behavior necessitating a mistrial:

After the Court ruled that a document discussing the religious basis for the defendants' actions could not be read to the jury, one sympathizer rose and began to read the document to the jury. As that sympathizer was being removed from the courtroom by the marshals, a second sympathizer stood and continued to read the document from the point where the first sympathizer had stopped reading. As the second sympathizer was being removed from the courtroom by the marshals, a third stood and continued to read from the document from the point where the second sympathizer had stopped reading. Their plan proceed[ed] as follows:

#### Spectator # 1: The vision of the prophet Isaiah who

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mination that defendant who, *inter alia*, "[i]n disrespectful and sometimes foul language . . . protested that he regarded the court as a 'kangaroo court' and did not want to be in the courthouse at all . . . evidenced no mental instability but rather acted out his pique"). In *State v. Marshall*, 472 N.E.2d 1139 (Ohio Ct. App. 1984), which did not involve removal from the courtroom, the court of appeals affirmed the trial court's decision not to order additional inquiry into defendant's competency to stand trial despite

various outbursts including an accusation that the trial judge and prosecuting attorney were selling drugs; repeated references to the trial as a "kangaroo court"; reference to trial counsel as "this little gay-guy sitting here"; and defendant's statement on the stand that he had been raped by the sheriffs and corrections officers while in jail.

*Id.* at 1142. While accusations of kangaroo-ism, even combined with other behavior warranting removal from the courtroom, typically do not lead to a conclusion that a criminal defendant is incompetent to stand trial, such conduct at trial can serve as a basis for denying an offense level reduction for acceptance of responsibility under the Federal Sentencing Guidelines. See *United States v. Reynolds*, 10 Fed. Appx. 62, 66-67 (4th Cir. 2001) (affirming district court's denial of sentence level reduction for acceptance of responsibility when defendant, *inter alia*, "accused the judge of being 'part of the group' and of running a 'kangaroo courtroom,' and stated that it was his intention to disrupt the courtroom and that the court would have to 'cuff and gag' him").

<sup>108</sup> Crim. Nos. 87-00030-01 & 87-00030-04, 1987 WL 14849 (E.D. Pa. July 29, 1987).

<sup>109</sup> *Id.* at \*1. The defendants in that case were on trial for damaging government property, conspiring to damage government property, and aiding and abetting the damaging of government property in the form of several aircraft at the Willow Grove Naval Air Station.

proclaimed the message of the Lord, "And they shall beat their swords into plowshares, and their spears into pruning hooks.

Spectator # 2: With these inspirations we –

Spectator # 3: We beat with hammers and spill our blood on these modern swords – the P3 Orion.

Spectator # 4: You should know that there are many documents you should be hearing, but you are not allowed to hear because there has been a ruling against your hearing the whole truth. It is very important that you consider that. Other incidents occurred with individual sympathizers shouting out to the jurors and Judge as follows:

Spectator: God's law supersedes the law of this Court.

\* \* \*

Spectator: Isn't it criminal to swear on the Bible when it has been ruled irrelevant – the Word of God. How can I raise my daughter when this Court is saying that the Word of God is irrelevant?

\* \* \*

Spectator: It's outrageous to hurt somebody like this. This whole trial is a farce anyway. Totally unfair. A baby could have gotten killed.

\* \* \*

Spectator: It's unfortunate the people – that government officials – government officials who commit war crimes get immunity, get immunity. I came to try to disarm. This is making me ill. These people are facing 15 years imprisonment. It's really ironic –

\* \* \*

Spectator: I'll be happy to leave – more than happy. It's a travesty of justice.

\* \* \*

Child: Are we going to be put in jail, Mommy?  
Woman: No, we are not going to be put in jail. Not now anyway. She goes to bed crying asking if the bad weapons are going to kill her. It's injustice to give children nightmares.

\* \* \*

Spectator: Lin and Greg have been saving lives – God bless them for it.

Our Father who art in heaven. . . .  
 God bless you guys.

\* \* \*

Spectator: The jury should be allowed to hear the truth. They are being stifled from information that is important to this case. This is not a fair trial. It is a kangaroo court and a kangaroo judge.<sup>110</sup>

One spectator at another trial, however, did get away with dropping a K-bomb. In *Miller v. State*,<sup>111</sup> Michael Miller “was present in the Justice of the Peace Court of Robert P. Hodge in Auburn, Indiana . . . to testify on behalf of a friend, Harold Perry, who had been charged with a moving traffic violation.”<sup>112</sup> After Perry was found guilty, Miller

arose from his seat, and . . . stated, “This is nothing but a damn farce.” [Trooper] Colgate turned to appellant and warned him to remain silent. Appellant replied, “It’s nothing but a goddamn kangaroo court,” and he started to leave the courtroom. At that time, Colgate told the appellant to apologize to the Court, but the appellant refused, stating, “Hell, I’m not apologizing to anybody.” Colgate then placed appellant under arrest, handcuffed him, and took him to jail.<sup>113</sup>

Presumably because Miller’s remarks were not directed toward the court – the Justice of the Peace “testified that he did not hear [Miller’s] remarks”<sup>114</sup> – Miller was charged with, and convicted of, disorderly conduct, rather than contempt of court, which would have been the appropriate charge if Miller had “disrupted or interfered with the proceedings of [the] court at any time.”<sup>115</sup> While the Indiana Supreme Court deemed the evidence sufficient to prove that Miller “made some insulting remarks about the Justice of the Peace Court,”<sup>116</sup> it reversed Miller’s conviction for disorderly conduct because the speech in question had no tendency to lead to violence.<sup>117</sup>

In *Caterpillar Tractor Co. v. Hulvey*,<sup>118</sup> the kangaroo got into the jury room. At a hearing to set aside a defendant’s verdict in a products liability action because of juror misconduct, “juror Most [testified that] there was ‘a milkman’ on the jury who ‘was making little remarks, and

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<sup>110</sup> *Id.* at \*8-\*9.

<sup>111</sup> 279 N.E.2d 222 (Ind. 1972).

<sup>112</sup> *Id.* at 223.

<sup>113</sup> *Id.* at 223-24.

<sup>114</sup> *Id.* at 224.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (quoting *Whited v. State*, 269 N.E.2d 149, 152 (Ind. 1971)).

<sup>118</sup> 353 S.E.2d 747 (Va. 1987).



thought maybe the jury was sort of a kangaroo court. . . .”<sup>119</sup> While the trial court found the foregoing incident, plus several others, sufficient to support its grant of a mistrial, the Virginia Supreme Court did not; it reversed the decision granting the mistrial and reinstated the defendant’s verdict.<sup>120</sup> The lesson it seems, is that marsupials are more welcome in the jury room than in the spectators’ gallery.

#### b. Self-Removal

As a rule, disruptive litigants are removed from the courtroom by order of the trial judge.<sup>121</sup> On occasion, however, a criminal defendant will decide to leave the courtroom on his or her own. In *State v. Koser*,<sup>122</sup> James Koser was represented at trial by a Mr. Hatch.<sup>123</sup> At the start of the trial, the following exchange took place:

MR. HATCH: Your Honor, I believe that I’m ready to go to trial.

At this point, Koser became verbally abusive. He was adamant that assigned counsel did not represent him, he referred to the lawyers as lazy political shysters, and to the court as a kangaroo court.

THE COURT: As far as I’m concerned, your demeanor and your attitude, sir, that you just indicated have been very disrespectful, and, as far as I’m concerned, I’m going to tell you right now, it is contemptuous in most situations, but I understand your frustration, but at the same time, . . . I’m not going to put up with it.

Now, at this point in time, I’ve already indicated, Mr. Hatch, you have been assigned to take this over, whether he likes it or not, whether you like it or not, and you can appeal the issue, Mr. Koser, when this matter is done. You can escort the gentleman back.

Following this, the court explained to Koser that he had a right to attend trial provided he did not continue his “inappropriate and contemptuous” behavior. The court gave him three alternatives, i.e., (1) to attend trial and be represented by counsel; (2) to be bound and gagged in the court-

<sup>119</sup> *Id.* at 749.

<sup>120</sup> *Id.* at 752.

<sup>121</sup> See Section IV.A.1.a, *supra*.

<sup>122</sup> 98 Wash. App. 1062 (unpublished table decision), No. 23906-0-II, 2000 WL 60061 (Wash. Ct. App. Jan. 14, 2000) (affirming trial court’s termination of Koser’s right to proceed *pro se*). Koser was on trial for assault, because he allegedly spit on a police officer and members of the staff at the county jail. *Id.* at \*2.

<sup>123</sup> *Id.* at \*4.

room; or (3) to have the court remove him if he engaged in disruptive behavior. Koser responded:

THE DEFENDANT: I will not attend any of these court hearings unless I represent myself per se, 100 percent. And as far as having some bureaucrat step in as an aide, or whatever you want to call it, like him, I would prefer withholding myself.

....

THE COURT: Then am I to interpret that you would disrupt the proceedings, just as you were doing this morning, with your demonstration towards your attitude towards me and counsel? You will continue to do that; is that correct?

THE DEFENDANT: If that's the only thing I can do to keep from going, yeah, okay.<sup>124</sup>

While Koser left the courtroom on his own after an explanation of his options, some cases involve a combination of both self-removal and forced removal. For example, in *Osborne v. White*,<sup>125</sup> Jimmie Osborne

was told numerous times by the Court to "sit down" and then he was ultimately threatened by the judge who told him that "if [he] didn't sit down and keep [his] mouth shut, [he was] going to be gagged and bound." In response to these threats from the judge Osborne elected to leave the courtroom:

OSBORNE: Your Honor, I would rather go out of this courtroom into another room, with the type of procedures that is [sic] being handled against me, that to sit in here and listen and watch this kangaroo court.

THE COURT: You have no choice, then, Mr. Osborne.

OSBORNE: Yes, I would rather go out of this courtroom because my rights are being violated all the way.

THE COURT: Thank you. Mr. deputy. Mr. Osborne, in the event that you change your mind, please notify the bailiff and you'll be brought right back in.

OSBORNE: You change your mind about an attorney, Your Honor, I'll come back...<sup>126</sup>

In all, Osborne left the courtroom once on his own and was removed by the court three times, exhibiting disruptive behavior that made his removal

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<sup>124</sup> *Id.* at \*4-\*5.

<sup>125</sup> No. 96-3407 MJJ, 2000 WL 635456 (N.D. Cal. May 9, 2000).

<sup>126</sup> *Id.* at \*9 (citations to the record omitted).

constitutionally permissible.<sup>127</sup> *People v. Howze*<sup>128</sup> involved another criminal defendant who was absent from the courtroom both voluntarily and by order of the judge. On his scheduled trial date, Johnny Lee Howze refused to leave his jail cell and told “the deputy at the jail that he did not wish to participate in a ‘kangaroo court.’”<sup>129</sup> Ultimately, he did participate in parts of his trial, but “refused to answer any questions on cross-examination, and then improperly informed the jury that the People were trying to give him 140 years and ‘strike me out.’”<sup>130</sup> Then, “[w]hen the court finally ordered defendant removed and asked him if he at least wanted to listen to the proceedings on a loudspeaker, he stated, ‘I don’t want to hear anything. This is a kangaroo court.’ He then reiterated, ‘I am not going to participate.’”<sup>131</sup> Under the circumstances, the California Court of Appeal ruled that Howze’s absence was voluntary, and that, as a consequence, his Sixth Amendment confrontation right was not violated.<sup>132</sup>

Finally, in *State v. Talarico*,<sup>133</sup> the South Dakota Supreme Court held that a defendant was initially present at the start of his trial – a necessary prerequisite for its subsequent holding that the defendant’s trial in absentia was permissible<sup>134</sup> – under the following circumstances:

Prior to and during the trial, Talarico was in custody. He was brought into the courtroom for all scheduled proceedings. On the day of trial Talarico was physically present in the courtroom where the trial was to be held, all parties were present, the jurors had reported and were waiting to be brought into the courtroom. Talarico understood that the

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<sup>127</sup> *Id.*

<sup>128</sup> 102 Cal. Rptr. 2d 887 (Cal. Ct. App. 2001).

<sup>129</sup> *Id.* at 895. By the time of his trial, Howze had repeatedly refused to leave his cell for various pre-trial courtroom events. For example:

On December 10, 1998, defendant refused to come to court and a hearing was held concerning his medical and mental condition. Evidence was presented that defendant had rubbed feces over his body and hands and then challenged deputies to come into the cell to extract him. When the deputies prepared to videotape defendant in his cell, he masturbated and ejaculated toward the camera and threw food at the deputy who was doing the videotaping.

*Id.* at 894. Howze was not much better behaved in court. “At [his] preliminary hearing, [he] claimed to be possessed by two different people, including rap artist Tupac Shakur.” *Id.* at 893. On another occasion, he “appeared in court and started screaming. He continued to scream in court, and then ‘fell over on the floor’ and struggled with the sheriff’s deputies.” *Howze*, 102 Cal. Rptr. 2d at 894. And on multiple occasions, he stripped naked in jail holding cells. *Id.*

<sup>130</sup> *Id.* at 896.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 898-99.

<sup>133</sup> 661 N.W.2d 11 (S.D. 2003).

<sup>134</sup> *Id.* at 12.

proceedings against him were underway. The trial judge announced as he started the proceeding, "We're on the record outside the presence of the jury, it's February 26th, this is the time and place set for a trial in the matter of State of South Dakota versus Ronald Louis Talarico." Talarico immediately began to protest and requested a different attorney. To which the court again replied, "The time and place for the trial is today, we have gone through this before. . . ." Talarico tells the court:

You know, you can either give me a week's continuance and subpoena my witnesses and I'll represent myself or send me on back to my cell, Judge, because I really don't want to act like an asshole here. What good is it going to do any of you people if I spit in his face in front of the jury? Because that's what I'm going to do, man. So send me back to my cell, have your little kangaroo court and convict me. You know, I mean that's the bottom line here.

After further discussion with Talarico and his attorney concerning Talarico's request for a continuance, the following dialogue transpired:

THE COURT: Well, Mr. Talarico, the – what you're asking right now, because I'll tell you I'm going to deny your request for substitute counsel, I'm going to deny your request for a continuance, and what you're asking is at this point before the jury is even selected, before they have even come in to have any kind of – you have been through it, I mean, you know –

THE DEFENDANT: Yeah, I know exactly what's going on.

THE COURT: Okay. So before that even starts you're just saying, "Judge, please let me go?"

THE DEFENDANT: Absolutely, if he's representing me, yeah.

THE COURT: Okay. Well, I'll – I mean, I – again, I think the law provides that you can voluntarily absent yourself.

THE DEFENDANT: Okay.

THE COURT: . . . But, I'm going to do this: every time we have a break I'm going to send word back through the jail to tell you that we're on a break and re-invite you.

THE DEFENDANT: Okay, well, you might as well save your breath because I'm not going back as long as he's here.<sup>135</sup>

Because the defendant was present at the start of his trial, and had voluntarily waived his right to be present, his conviction after a trial in absentia was ruled not to be unconstitutional.<sup>136</sup>

## 2. Contempt

One step up from removal from the courtroom is a citation for contempt. Interestingly, while I found no case in which a trial judge was reversed on appeal for having a defendant removed from the courtroom, kangaroo-fueled convictions for contempt seem to have a relatively high rate of reversal.

### a. Contempt Affirmed

Among the more famous personages I discovered in my search for kangaroo courts is Gus Hall, former leader of the American Communist Party.<sup>137</sup> In *United States v. Hall*, the United States Court of Appeals for the Second Circuit, quoted extensively from the district judge's contempt order:

"On May 26, 1949, at a time when the defendant Davis spoke out in the courtroom in the midst of the judicial proceedings, the Court stated to the defendant Davis and his co-defendants [including Hall] in the case of William Z. Foster, et al., C128-87, as follows:

. . . .

"I have penalties at my disposal, if the defendants insist upon interrupting the proceedings and holding forth, although they have lawyers to represent them, and I dislike very much doing some of the things that the law places it in my power to do.

"Now, I just want you to remember that. I believe that the best way to go ahead here is for the defendants to just sit there and let your lawyers represent you instead of jumping up every once in a while to get your own comments

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<sup>135</sup> *Id.* at 18-19.

<sup>136</sup> *Id.* at 20.

<sup>137</sup> *United States v. Hall*, 176 F.2d 163, 165 (2d Cir. 1949). Hall was on trial, with ten other defendants, for advocating the overthrow of the United States government. *Id.*

in, and your own views, and I tell you, for your own good, that I recommend that.”

“On June 3, 1949, the co-defendant John Gates was sentenced in the absence of the jury for contempt committed by refusing to comply with an order of the Court that he answer a question propounded to him on cross-examination by United States Attorney McGohey.

“Immediately upon the pronouncement of the judgment on contempt, the defense attorneys and the remaining ten defendants rose in the courtroom. The defendant Henry Winston and the defendant Gus Hall, each taking several steps past the end of the counsel table and toward the bench, began, in a disorderly and threatening manner, to shout at the court in loud, angry voices.

“The defendant Winston said in part:

“If your Honor please, may I now be heard? More than 5,000 Negroes have been lynched in this country for such –

“The Court: Now, Mr. Winston –

“Defendant Winston: – and the Government of the United States should be ashamed for bringing in such monstrosity.” (pp. 6973-6974)

He was then remanded to the custody of the Marshal.

“The defendant Hall said in part: “It sounds more like a kangaroo court than a court of the United States. I have heard more law and more law and more constitutional rights in kangaroo courts.”

He was then remanded to the custody of the Marshal.

“The situation at that time, with the ten of the defendants and the defense attorneys on their feet, became so serious that it became necessary to send for additional Deputies Marshal, who were then in other courtrooms in the building, to assist in restoring order and to prevent any further incidents in the courtroom.<sup>138</sup>

The district court found Hall in contempt and the Second Circuit affirmed.<sup>139</sup>

In another case involving a semi-celebrity contemnor, the United States Court of Appeals for the First Circuit affirmed a sixty-day sentence for contempt imposed as a result of the following “vituperous dissertation:”<sup>140</sup>

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<sup>138</sup> *Id.* at 166-67.

<sup>139</sup> *Id.* at 169.

<sup>140</sup> *Gordon v. United States*, 592 F.2d 1215, 1217 (1st Cir. 1979).

MR. GORDON: Your Honor, I received no papers, no notice of any kind. This probation, which I allege was illegal, and which was imposed for political reasons I think we've been through that.

THE COURT: Oh, we certainly have, we certainly have.

Let's skip over that and get around to whether you have a copy, now, of the probation notice?

MR. GORDON: No, I have not. I am stating for the record, so there will be no question about it, this is a continuation of the same use of the Federal Court in a criminal misuse and abuse of the judicial process and continuing thing, because, your Honor, you, Mr. Lawyer, criminally tampered with the presidential election in 1976.

THE COURT: I remember that. I caused you to be in jail.

MR. GORDON: Yes, you politically had me arrested while I was campaigning in New Hampshire for the specific reason of removing me from the presidential campaign.

Now, I stated for the record, you may have the guns to hold me at the moment, and you do, in this ongoing criminal misuse and abuse of the judicial process, but I think, your Honor, history may show that things may change.

Now, the point is that I do not recognize, and I never recognized the totally corrupt flim flam kangaroo court proceedings that took place in 1975. My rights were totally, criminally violated. This Court engaged in an absolutely flagrant, outrageous, vicious criminal misuse and abuse of the judicial process. But you did something, your Honor, which is going to go down in history. You are the first lawyer who criminally tampered and rigged a presidential election, and that issue isn't settled yet. I think you are going to find within the next few months that issue is going to be tried in certain courts. But getting back to this probation –<sup>141</sup>

Subsequently, Judge Skinner told the defendant: "I have two choices, Mr. Gordon. I have either to take you seriously, hold you in contempt and put you in jail for a heck of a lot longer, or consider you a harmless nut and forget it. I'm somewhat inclined to do the latter, but I have to give it some thought."<sup>142</sup> On reflection, Judge Skinner decided that Gordon was something more than a harmless nut and held him in contempt.<sup>143</sup> The First

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<sup>141</sup> *Id.* at 1217 n.1.

<sup>142</sup> *Id.* at 1218 n.2.

<sup>143</sup> *Id.* at 1217.

Circuit agreed with Judge Skinner that Gordon's outburst was a close call, but affirmed.<sup>144</sup>

*Shields v. State*<sup>145</sup> was an appeal of two convictions for direct criminal contempt. The first conviction was based upon an exchange that took place during a pre-trial proceeding:

BY MR. SHIELDS: If you so say it and not going by the law and just wanting to have a kangaroo court send me back over to the jail and it ya'll have a kangaroo party and send me a copy of the outcome. Ain't no need for me being here because ya'll don't go by the law yourself then there is no justice here just have a party and send me the outcome. In fact you act like a kangaroo so much you even look and smell like one.

BY THE COURT: Mr. Bell, instruct your client as to what constitutes direct contempt.

BY MR. SHIELDS: Contempt it all you want to big kangaroo.

....

BY MR. SHIELDS: There ain't no need in bringing me over here. You're going to do what you want to anyhow. You ain't going by no law. Maybe you was wanting some of that eight thousands dollars that lawyer told me to pay.

BY THE COURT: Sheriff, you can take him back 9:00 o'clock in the morning we will begin [with the trial].

BY MR. SHIELDS: See ya big kangaroo.<sup>146</sup>

Shields's ten-day sentence to the county jail was affirmed on appeal.<sup>147</sup>

In *State v. Jones*,<sup>148</sup> Judge Milmed of the Essex County (New Jersey) Court, hearing the issue of contempt on remand, held defendant Everett LeRoi Jones in contempt based upon the following scenario:

[O]n October 24, 1967, during the trial of the case against defendant and his two co-defendants, the following occurred:

"MR. BOOKER: Your Honor, regarding a request by Mr. Jones out of my presence while I was in the County Clerk's Office, I was led to believe the request was made to address the Court and it was indicated

<sup>144</sup> *Id.* at 1217-18.

<sup>145</sup> 702 So. 2d 380 (Miss. 1997).

<sup>146</sup> *Id.* at 384.

<sup>147</sup> *Id.* The court also affirmed a substantially stiffer sentence for contempt – 120 days – resulting from Shields's accusation that the trial judge gave him an unfair trial because he refused to pay a bribe. *Id.*

<sup>148</sup> 253 A.2d 193 (N.J. Essex County Ct. Law Div. 1969).



to Mr. Jones that he would have the opportunity to speak to the Court out of the presence of the jury when I returned.

THE COURT: No. I said he could speak through you.

MR. BOOKER: I am prepared now to address the Court then on behalf of Mr. Jones.

THE COURT: I will hear you at side bar.

DEFENDANT JONES: Why can't I make a statement?

THE COURT: Mr. Jones, I told you that you have an attorney and he may speak for you.

DEFENDANT JONES: This is something I want to say.

THE COURT: Just a minute. You are in a Court of justice and –

DEFENDANT JONES: This isn't a Court of justice.

THE COURT: Just a minute, sir.

DEFENDANT JONES: You're disqualified to conduct this case. I read your decision last night. You quoted this man and you quoted that. I'll not be judged by a hundred white people in this Court. They are not my peers. They are my oppressors.

I'll not be held by you or anybody like you.

THE COURT: Hold him there. Retain him.

DEFENDANT JONES: I'm going out of here.

THE COURT: You take him into custody.

DEFENDANT JONES: Take me into custody for what? Because I won't be judged by this kangaroo [sic] court?

What are you pushing me for?"<sup>149</sup>

Despite the defendant's testimony that "his reference to a 'kangaroo court' was made to people around him as he was facing the rear of the court in his attempt to leave,"<sup>150</sup> Judge Milmed found, among other things, that the "defendant . . . by insolent language in the court's presence did willfully disturb its proceedings then in progress."<sup>151</sup>

<sup>149</sup> *Id.* at 195.

<sup>150</sup> *Id.* at 197.

<sup>151</sup> *Id.* at 200. On the other hand, Judge Milmed found Jones not guilty of a second charge of contempt, arising out of the original trial judge's finding that "the defendant 'did utter in an audible and disrespectful manner his disapproval of \* \* \* (a) a ruling by the Court by an epithet descriptive of excrement \* \* \*.'" *Jones*, 253 A.2d 193 at 195. Judge Milmed found that Jones did, as a factual matter "utter[] a word defined as 'excrement' and

While Evertt LeRoi Jones was contemptuous enough to earn a fine of \$200, he was substantially outdone by Pennsylvania's Richard Mayberry. Merberry received five one-year sentences for contempt – affirmed on appeal – for, among other things, “throwing a book at the trial judge and narrowly missing him,” telling “the judge that he wished he would ‘break his neck instead of hurting his back,’” and “referr[ing] to the proceedings as a ‘kangaroo court.’”<sup>152</sup> In *Benton v. Dover District Court*,<sup>153</sup> Leon Benton was convicted of contempt for the following conduct during a preliminary appearance:

The plaintiff objected to restraint against approaching the bench, made obscene remarks to the officer, and finally said: “You should have a kangaroo standing here.” When the court inquired what was meant by this remark, Benton responded: “You should have a kangaroo standing here, this is

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usually considered a vulgar word, and also defined as a slang word meaning ‘nonsenseness’ or ‘foolishness,’” but he also found that “the utterance of this word did not disrupt the judicial proceeding then in progress,” *Id.* at 199.

<sup>152</sup> *Commonwealth v. Mayberry*, 255 A.2d 548, 549 (Pa. 1969). For the record, the book Mayberry threw was a *World Almanac*. *Id.* at 550 (Bell, C.J., concurring).

Mayberry, it turns out, was a world-class contemnor. In another case, *Commonwealth v. Langnes, Pennsylvania*, 255 A.2d 131 (Pa. 1969), Mayberry received eleven separate one- to two-year convictions for contempt for acts or statements made during the course of trial. Specifically:

The contempt charges grew out of Mayberry's conduct during the course of the trial where he acted as his own counsel. An examination of the record reveals a course of conduct on Mayberry's part almost beyond belief and of an obviously and patently planned and determined attempt on Mayberry's part to interfere with the administration of justice and to make a farce and mockery of his trial. Mayberry accused the trial judge of denying him a fair trial, called him a “hatchet man for the State” and a “dirty S.O.B.,” stated he would not “be railroaded into any life sentence by any dirty tyrannical old dog like (the judge),” told the trial court “to keep (his) mouth shut,” referred to the court as a “bum” and a “stumbling dog,” accused the court of working for the prison authorities and of conducting a Spanish Inquisition. He further told the judge that he was in need of psychiatric treatment and was “some kind of nut.” These few examples are indicative of Mayberry's outrageous conduct during the course of the trial. Moreover, in open court, Mayberry stated his intention of disrupting the court's charge to the jury and carried out his intention to such an extent that the court was finally forced to have him gagged, placed in a strait jacket and removed to an adjoining court room to which the charge to the jury was broadcast through a public address system. The record further demonstrates beyond any question that Mayberry's behavior was calculated and planned with the aim of disrupting the orderly procedure of the trial and the administration of justice.

*Id.* at 133. While the Pennsylvania Supreme Court affirmed Mayberry's contempt convictions, the United States Supreme Court vacated and remanded for a new hearing before another judge “not bearing the sting of these slanderous remarks and having the impersonal authority of the law.” *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

<sup>153</sup> 274 A.2d 876 (N.H. 1971).

a kangaroo court." He was immediately found in contempt and sentenced to the House of Correction for six months and ordered committed."<sup>154</sup>

On appeal, the New Hampshire Supreme Court seems to have affirmed the conviction but vacated the unexpired portion of Benton's sentence, based upon "a consideration of the relative severity of the contempt sentence . . . as compared with the gravity of the contemptuous conduct."<sup>155</sup>

*Moorefield v. Garrison*<sup>156</sup> was a habeas corpus proceeding involving a claim of ineffective assistance of counsel. At trial, the petitioner, George Moorefield "accused Judge Ferrell of running a 'Kangaroo Court,'"<sup>157</sup> for which he was found in contempt and given a sentence of ten days.<sup>158</sup> In *Lazenby v. State*,<sup>159</sup> McArthur Lazenby appealed his conviction for armed robbery arguing, in part that "the trial court showed a preference for conviction and restrained him from speaking out on his own behalf."<sup>160</sup> The Georgia Court of Appeals reported: "At one point [Lazenby] advanced towards the judge in a threatening manner, he called the trial a 'kangaroo court,' and threatened to kill a witness who was a deputy sheriff."<sup>161</sup> For that, and other disruptive behavior, Lazenby was held in contempt and threatened with physical restraint.<sup>162</sup> Based upon its review of the record, the court of appeals found "the court exercised remarkable restraint in not actually using the drastic measures it threatened to use."<sup>163</sup>

Out-of-court accusations of kangaroo-ism can also give rise to contempt charges. For example, in *Hotel Martha Washington Management*

<sup>154</sup> *Id.* at 877.

<sup>155</sup> *Id.* at 878.

<sup>156</sup> 464 F. Supp. 892 (D.N.C. 1979).

<sup>157</sup> *Id.* at 899.

<sup>158</sup> *Id.* However, in the words of Judge McMillan, Moorefield's contempt citation was "simply a prelude to what was to come." *Id.* Among other things, Moorefield, who represented himself, "accused the judge of personal responsibility for the cancer which has apparently been discovered while he has been in prison." *Moorefield*, 464 F. Supp. at 899. In Judge McMillan's view:

[I]t must have been apparent to the [trial] court . . . that Moorefield was head-strong, cantankerous and disputatious, and would thoroughly exhaust the patience of court and jury during trial. He does not curry nor encourage favor; he stirs up animosity; he is a poor advocate and his own worst enemy; he solicits arbitrary action and he is the kind of litigant who most sorely tests the system.

*Id.* at 900. In granting habeas relief to Moorefield, because the trial court did not allow Moorefield's stand-by counsel to speak during trial, Judge McMillan noted: "The very thing in [Moorefield] which makes him think he is a better lawyer than the professional is illustrative of a personality which makes him most in need of counsel." *Id.*

<sup>159</sup> 354 S.E.2d 196 (Ga. Ct. App. 1987).

<sup>160</sup> *Id.* at 198.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

*Co. v. Swinick*,<sup>164</sup> Judge Goodell recommended that Frances Swinck be ordered to show cause as to why she should not be held in contempt of the New York City Civil Court for certain statements in a complaint she filed in the United States District Court for the Southern District of New York.<sup>165</sup> That complaint alleged, among other things, “the failure . . . of ‘the State Court by its Rules, Regulations, Statutes, Kangaroo Court practices, etc. \* \* \* to secure to the indigent and me the same due process of law, equal protection of the law, equal effective representation as afforded and available to the rich and those who can pay.’”<sup>166</sup> And, in *McCraw v. Adcox*,<sup>167</sup> James Ray McCraw was fined fifty dollars and sentenced to ten days in the county jail on a criminal contempt conviction – affirmed on appeal – for filing pleadings in which he asserted, in part: “Defendant is aware of the fact that Attorney Keith Harber and Judge James F. Morgan plan a star chamber court proceeding or kangaroo trial for the alleged writ of replevin.”<sup>168</sup>

#### b. Contempt Reversed

For all the cases in which an antipodal outburst has resulted in a conviction for contempt that was sustained on appeal, several other kangaroo-tinged contempt convictions have been struck down on appellate review. In *Commonwealth v. Fisher*,<sup>169</sup> the District Magistrate granted the prosecutor’s request to sequester the defendant’s witnesses during a hearing on various game-law violations.<sup>170</sup>

As the two defense witnesses began to leave the courtroom, defendant jumped to his feet shouting to them, “You sit your asses back down, you don’t have to leave.” He proceeded to begin to mention a Supreme Court ruling, but the district magistrate interrupted to caution him that he was out of order. Defendant by this time was in a highly excited state and was shouting at the magistrate such things as “This is a God-damn kangaroo court,” and “you’re all a bunch of sons of bitches,” and “you can go to hell.” The magistrate, during

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<sup>164</sup> 324 N.Y.S.2d 687 (N.Y.Civ. Ct. 1971).

<sup>165</sup> *Id.* at 702.

<sup>166</sup> *Id.* at 700.

<sup>167</sup> 399 S.W.2d 753 (Tenn. 1966).

<sup>168</sup> *Id.* at 754. The plaintiff in *McCraw* is not the only litigant to see a kangaroo in the star chamber, see Potter, *Antipodal Invective*, *supra* note 2, and any number of other characters have also been spotted in the star chamber, including Franz Kafka, see Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 207, 287-88 (2005).

<sup>169</sup> 73 Pa. D. & C.2d 583 (Pa. Ct. Com. Pl. 1976).

<sup>170</sup> *Id.* at 584-85.

this period, cautioned defendant that a contempt proceeding could follow and also told defendant that, if he persisted, he would be asked to leave the courtroom and the hearing would proceed in his absence and that the magistrate would have no choice but to base his opinion on the Game Commission testimony and find him guilty. Defendant obtained the impression that the hearing was over and that he had been found guilty, at which time he left the courtroom continuing to shout such things as, "This is a Goddamn kangaroo court." . . . This petition to hold defendant in contempt ensued.<sup>171</sup>

The appellate court dismissed the petition because the Court of Common Pleas did not have "jurisdiction to use its summary contempt power to punish defendant for his conduct before the magistrate."<sup>172</sup>

In Indiana, Michael Andrews was held in contempt on four occasions during his trial, including once for the following exchange:

"CO-DEFENDANT: May I ask, May I ask, this prohibition against me stating that I have, that I am receiving an unfair trial, is that a prohibition against me in general, in public or just stating to you personally that I believe I'm receiving . . .

"THE COURT: That's prohibition against all four of you stating that here in the Courtroom.

"CO-DEFENDANT: To never state this in the Courtroom?

"MR. ANDREWS: By what authority?

"CO-DEFENDANT: May I ask by what authority? By whose authority or what authority or my constitutional right for expression being denied?

"MR. ANDREWS: We've been asked to cite relevance, cite case law, to cite you law, Your Honor are you acting ministerial or arbitrary fashion, is there some citation that we might be guided by in our future conduct?

"THE COURT: How could it be less clear what I'm saying? How could it be more clear, how have I muddied that up?

"MR. ANDREWS: What's clear to me is that this is a kangaroo proceeding, with Your Honor presiding as a Republican potentate of the bar in order to screw us as to our . . .

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<sup>171</sup> *Id.* at 585.

<sup>172</sup> *Id.* at 586. However, Judge Raup's opinion did suggest three other forms of discipline that could have been used under the circumstances: (1) institution of a charge of disorderly conduct; (2) removal of the obstreperous defendant from the courtroom with trial continuing in his absence; and (3) application to the Court of Common Pleas for use of its civil, rather than criminal, contempt powers. *Fisher*, 73 Pa. D. & C.2d at 587.

“THE COURT: Okay, that just cost you five more days, and this hearing is now adjourned.”<sup>173</sup>

The Indiana Court of Appeals had “little doubt that Andrews’ obstreperous conduct was contemptuous,”<sup>174</sup> but reversed three of his contempt convictions, including the one based upon the foregoing exchange, for lack of specificity in the trial court’s contempt orders.<sup>175</sup>

Finally, there is a case that the People’s Court might call “The Case of the Contemptible Contempt Citation.” In *Robinson v. City Court*,<sup>176</sup> the facts unfolded as follows:

Petitioner had appeared in the City Court of Ogden City to answer a criminal charge of disturbing the peace. Defendant judge heard the matter, petitioner was found guilty, and ordered to pay a fine or in the alternative to serve a jail sentence. Petitioner then left the courthouse and about one-half hour later returned to the office of the city attorney to pay the fine. He was directed to go to the office of the desk sergeant, which was located on the ground floor of the same building. The defendant judge had recessed court and was preparing to leave the building. The judge and petitioner arrived at the elevator shaft on the fifth floor of the building about the same time, both waiting for the elevator and as they stepped on, the petitioner made the following statement: “That is the worst example of a Kangaroo Court I have ever seen.” The judge overheard it, took the petitioner by the arm, escorted him to the office of assistant city attorney and directed the assistant city attorney and the clerk of the court to accompany both himself and the petitioner to the courtroom. The judge then took off his hat and coat, convened the court, found the petitioner guilty of contempt for having made the remark, and imposed sentence.<sup>177</sup>

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<sup>173</sup> *Andrews v. State*, 505 N.E.2d 815, 828 (Ind. Ct. App. 1987) (quoting the trial judge’s Memorandum of Contempt). Andrews was on trial for recklessly remaining in a voting booth for longer than one minute, a misdemeanor in Indiana. *Id.* at 818. The conduct giving rise to Andrews’s charges was a forty-five minute stay in a voting booth, in protest against the lack of write-in ballots. *Id.*

<sup>174</sup> *Id.* at 830.

<sup>175</sup> *Id.* The Memorandum of Contempt pertaining to the exchange quoted above stated, in full: “Mr. Andrews continued like statements including labeling the proceedings as a ‘Kangaroo Court.’ The Court found Mr. Andrews to be in contempt a second time and ordered him held for five days, and not to leave the courtroom.” *Id.* at 828.

<sup>176</sup> 185 P.2d 256 (Utah 1947).

<sup>177</sup> *Id.* at 257.

The Utah Supreme Court granted Robinson a writ of prohibition to prevent enforcement of the contempt conviction because the judge who held Robinson in contempt had no "jurisdiction over either the person [of] the petitioner or of the offense claimed"<sup>178</sup> due to the timing of the offensive event (after court adjourned),<sup>179</sup> its location (outside the courtroom and chambers),<sup>180</sup> and the complete lack of any of the procedure incident to charges of indirect contempt.<sup>181</sup>

### c. Contempt with Another Sanction on the Side

Removal from the courtroom and citation for contempt are not mutually exclusive sanctions, as is demonstrated by the following scenario:

The first four grounds of error urge that the trial court abused its discretion when it directed the bailiff and other deputies to handcuff and gag the appellant in the presence of the jury panel and the jury. We overrule these grounds of error and hold that the trial court's actions were entirely proper under the circumstances of this case.

The appellant informed the trial judge before the selection of the jury that he did not want to be present during any of the trial proceedings. He also requested the court to allow him to inform the jury that he did not desire to participate in the trial. The judge denied this request and recessed the proceeding until after lunch.

After the recess, the bailiff was forced to handcuff the appellant in order to bring him into the courtroom. The judge informed the appellant that he would be restrained if he did not conduct himself in a proper manner. The court then told the appellant that the handcuffs would be removed if he promised not to cause any physical disturbance. The appellant agreed to this and his restraints were removed. The jury panel was then brought into the courtroom.

At this point, the appellant began asserting that he had been choked and assaulted by the officers. The jury panel was removed from the courtroom. . . .

. . . .

Upon the panel's return, the appellant stated that the repressive racism of the proceedings had made him ill and

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<sup>178</sup> *Id.* at 260.

<sup>179</sup> *Id.* at 258.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 258-59.

that he wanted [a] physician. The court asked the appellant to remain quiet. The appellant, however, continued his demands. The court instructed the bailiff to restrain the appellant's hands and silence him. The bailiff, with the help of other officers, placed some tissue paper in the appellant's mouth. The paper remained in his mouth only briefly. The jury panel was once again removed from the courtroom.

The court, at this stage in the proceedings, informed the appellant that he did not want to hurt him or restrain him in any manner. The judge implored the appellant to control himself and to conduct himself in an orderly manner. The proceedings were then recessed for the day.

During the evening, the court had another physician examine the appellant. This physician concluded that the appellant was physically capable of standing trial.

On the second day, the behavior of the appellant became even more unruly. In the presence of the jury panel, appellant called the judge a racist and demanded, on numerous occasions, that the judge disqualify himself. He repeatedly referred to the court as a "kangaroo court."

The record reflects that the judge once again asked the appellant to behave. The judge also warned him that he would be removed from the courtroom if his conduct continued. The court's requests went unheeded. The judge then held the appellant in contempt and removed him from the proceedings stating that the appellant could return if he would control himself.

Later, during the reading of the indictment to the jury, the appellant resumed his disruptive conduct. He demanded that he be tried by the United Nations. He called the court and the jury racists. He demanded the disqualification of the judge.

The judge asked the appellant to allow the trial to proceed. The appellant, however, continued his disruptions. He stated that his name was incorrect on the indictment. When inquiry was made into his proper name, he supplied two patently false answers: Garthamaumau and Rip Van Winkle. Finally, upon appellant's request, the name on the indictment was changed from Derrell Dwayne Smith to Dedan Kimithi.

The judge had the appellant gagged and handcuffed when the disruptions persisted. Finally, the appellant was removed from the courtroom. During the remainder of the trial he was brought back to the courtroom only for identifi-



cation purposes. He was handcuffed at these stages in the proceeding.<sup>182</sup>

A similar procedure was employed in *People v. Cohn*.<sup>183</sup> In that case, Douglas Cohn was on trial for attempting to set a razor-wire boobytrap across the Imperial River to prevent illegal border crossings from Mexico.<sup>184</sup> The State's motion for a mistrial was granted at Cohn's first trial "[b]ased on Cohn's outbursts in front of the jury pool."<sup>185</sup> Cohn then "responded with another outburst in which he stated that the court's 'unstated objective' was to 'gag any effective political economic criticism'; that the court 'want[ed] to be able to gut the U.S. Constitution' and the court '[did not] want violations of the Constitution brought up in front of [the] jury pool'; and that '[t]his is increasing to something out of a kangaroo court system. . . .'"<sup>186</sup> Cohn renewed his claims at his second trial:

On October 29, 2001, the court appointed counsel for Cohn over his objection. Jury trial proceedings commenced the following day. The court again admonished Cohn, outside the presence of the jury pool, that he would be permitted to speak to the jury if and when he chose to testify, but he would be removed from the courtroom if he spoke to the jury at any other time. The court also informed Cohn that he would be allowed to address the court outside the presence of the jury.

Cohn agreed to abide by the court's directions. After the jurors were sworn in, however, Cohn stood up and began to speak to them. The court immediately directed that the jury be taken out of the courtroom. As the jurors were leaving, Cohn stated that the court was excusing them and ordering him out of the courtroom "because this is how these kangaroo courts have tactics when anyone will effectively challenge their legal authority." Cohn also said, "He is ordering you out so he can have me strung-armed [*sic*] out without you present to see it. And that's how these kangaroo court tactics proceed."

The court then ordered that Cohn be remanded into custody for contempt and removed from the courtroom. The jury was brought back into the courtroom and the trial proceeded without Cohn's presence. The court properly in-

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<sup>182</sup> Kimithi v. State, 546 S.W.2d 323, 324-25 (Tex. Crim. App.1977) (footnote omitted).

<sup>183</sup> No. D039321, 2003 WL 1889966 (Cal. Ct. App. Apr. 17, 2003).

<sup>184</sup> *Id.* at \*2.

<sup>185</sup> *Id.* at \*7.

<sup>186</sup> *Id.*

structed the jury that it was not to consider or hold against Cohn the fact that he was not present.<sup>187</sup>

On appeal, the California Court of Appeal held that the trial court's actions "did not violate Cohn's constitutional and statutory rights to be present during the trial [because] Cohn forfeited them through what appears to be willful misconduct."<sup>188</sup>

Also of note is Ivey Sweezy, who argued to the North Carolina Supreme Court that "his removal from the courtroom during the course of the trial deprived him of his rights to a fair trial and to confront witnesses against him."<sup>189</sup> After recounting one particularly colorful episode that resulted in Sweezy's removal,<sup>190</sup> Justice Branch noted:

Defendant also broke in on the testimony of other witnesses, accusing one of lying and instructing another to step down before he had completed his testimony. He totally ignored the court's repeated admonitions. At one point, defendant disrupted the trial by turning and facing away from the proceedings. He continually talked back to the judge, addressing him in such disrespectful terms as "boy," "Fred," and "hypocrite." He accused the trial judge of conducting a "kangaroo court." Defendant's unruly and disruptive behavior interrupted the proceedings thirteen times and caused the trial judge to have him removed from the courtroom on six different occasions.<sup>191</sup>

After acknowledging the criminal defendant's right to be present at his trial, the court held that Sweezy's "removal was an appropriate and necessary measure to preserve the dignity of the judicial process and to promote the efficient administration of justice."<sup>192</sup>

In *Commonwealth v. Kenney*,<sup>193</sup> the trial court threatened the defendant with removal, but allowed him to stay in the courtroom, albeit after gagging him:

<sup>187</sup> *Cohn*, No. D039321, 2003 WL 1889966 at \*7-\*8 (footnote omitted).

<sup>188</sup> *Id.* at \*8.

<sup>189</sup> *State v. Sweezy*, 230 S.E.2d 524, 533 (N.C. 1976).

<sup>190</sup> *Id.* at 533. During the course of that episode, Sweezy was found in contempt no fewer than four times for failing to answer questions on cross-examination. *Id.*

<sup>191</sup> *Id.* at 533-34.

<sup>192</sup> *Id.* at 535. Sweezy's conviction also survived collateral attack. See *Sweezy v. Garrison*, 554 F. Supp. 481 (W.D.N.C. 1982). In the opinion arising out of Sweezy's habeas proceeding, Judge Jones directly quoted the following comments directed by Sweezy toward the trial judge: "Man, I don't like no Kangaroo Court," and "This is a Kangaroo Court." *Id.* at 485.

<sup>193</sup> 463 A.2d 1142 (Pa. Super. Ct. 1983).

During the jury selection process, appellant became obstreperous. During voir dire examination of prospective jurors, appellant constantly interrupted both counsel and the court to propound his own, irrelevant questions. Despite several warnings from the court, appellant adamantly refused to allow the selection of jurors to proceed in an orderly manner. No sanctions were imposed, however, and the court recessed. On the following day, appellant resumed his disruptive behavior. He openly accused the trial judge of prejudice and denounced his lawyers. Appellant received yet another warning. When the appellant was told that continued interruptions would result in his being gagged, he retorted:

THE DEFENDANT: If I have something to say,  
I'm going to say it.

THE COURT: You will keep quiet.

THE DEFENDANT: When I have something to  
say, I'll keep saying it.

THE COURT: If you don't keep quiet, we will  
gag you and we will remove you, if necessary, and you  
are to keep quiet.

THE DEFENDANT: If you're going to gag me,  
gag me.

THE COURT: You are to keep quiet.

THE DEFENDANT: I'm going to be heard.

THE COURT: And any other outburst, we will  
gag you. We will put something over his mouth.

THE DEFENDANT: And that's what you're go-  
ing to have to do because I'm not going to stop talking.

THE COURT: And, as I understand the law, we  
can even remove him from this courtroom.

THE DEFENDANT: You can do that, too.

THE COURT: And he will not talk. Now, that's  
an absolute and I am not going to say it again. Call the  
next prospective juror, please.

THE DEFENDANT: Nobody here being tried  
but me. It's my life in jeopardy, not yours. You tell me  
to keep quiet. This is a kangaroo court.

LORENZO S. OLIVERIO, residing at 704 Mon-  
trose Street, Philadelphia, Pennsylvania, having been  
duly sworn, testified as follows:

THE DEFENDANT: I say the hell with that  
Judge. The hell with the Judge.

(Whereupon the prospective juror, Lorenzo S. Oliverio  
was removed from the courtroom).

THE COURT: Now, I have heard twice “the hell with the Judge” and that’s in contempt of this Court and it must not and will not happen in this courtroom.

THE DEFENDANT: You can give me a thousand charges of contempt if you want to.

THE COURT: I want the proper, whatever is necessary, to be placed over the mouth of this man at this juncture.

THE DEFENDANT: Why don’t you just put me out of the courtroom?

THE COURT: And I want that done very promptly. Get whatever is a requisite to just do that at this juncture and we will take it from there. We will take a recess now of ten or fifteen minutes.

(N.T. 4/1/70, 151-54). Although defense counsel did not immediately object, a request was made later on the same day for removal of the gag. This request was granted.<sup>194</sup>

Because “[t]he exercise of the court’s discretion [in gagging the defendant] was consistent with a recognized means for dealing with obstreperous defendants,”<sup>195</sup> and because Kenney’s “trial counsel requested and received a jury instruction from the trial court that appellant’s behavior during trial, as well as his court ordered restraint, had no relevancy and should not be considered in determining the issue of guilt or innocence,”<sup>196</sup> the Pennsylvania Superior Court rejected Kenney’s claim of ineffective assistance of counsel, based upon his attorney’s failure to object to the gag.

In *Brady v. Samaha*,<sup>197</sup> however, an attempt at doling out a different double dose of sanctions did not work out so well for the trial court. *Brady* involved a habeas corpus proceeding arising from a New Hampshire prosecution of six protestors at the construction site of the Seabrook nuclear power plant who were arrested for criminal trespass.<sup>198</sup> During an exchange with the trial court, out of the presence of the jury, concerning a recently issued order on the inadmissibility of certain evidence pertaining to a competing harms defense that had been disallowed, one defendant, Robert Cushing, “accused the court of being ‘personally embroiled’ in the case, of setting the defendants up for ‘a kangaroo court type situation,’ called [an] order [concerning the admissibility of evidence pertaining to a

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<sup>194</sup> *Id.* at 1143-44 (footnote omitted).

<sup>195</sup> *Id.* at 1146. Kenney’s poor courtroom deportment went far beyond calling his trial a kangaroo court. See *id.* at 1145 (cataloging Kenney’s other courtroom misbehavior).

<sup>196</sup> *Id.*

<sup>197</sup> 667 F.2d 224 (1st Cir. 1981).

<sup>198</sup> *Id.* at 225.

competing harms defense] illegal and the trial a disgrace, and generally vented his anger and frustration at the judge.”<sup>199</sup> In response:

[T]he judge enumerated Cushing’s statements, said that he found them all contemptuous, and then declared a mistrial, stating:

Just a moment. The Court finds that those comments are contemptuous. The Court further finds that the actions of Mr. Cushing during the course of this trial would render the continuance of it unfair to the remaining defendants. The Court finds that the defendant Cushing is in contempt of Court and sentences him to fifteen days at the House of Corrections. And the remaining cases the Court orders a mistrial. Clear the courtroom.<sup>200</sup>

When the defendants were brought to trial a second time, they moved to dismiss, on double-jeopardy grounds.<sup>201</sup> The trial court denied the motion, and was affirmed on appeal to the New Hampshire Supreme Court.<sup>202</sup> After they were convicted, the defendants filed for habeas relief in the district court, which was denied.<sup>203</sup> The United States Court of Appeals for the First Circuit reversed, “conclud[ing] that the trial judge failed to engage in a scrupulous exercise of discretion in declaring a mistrial,”<sup>204</sup> and noting that “the court’s contempt power, a possible alternative [to declaring a mistrial] certainly less drastic, was used in conjunction with the mistrial order rather than in lieu of it.”<sup>205</sup>

### 3. Other Unhappy Endings

There have been other judicial responses to directly delivered charges of kangaroo-ism in addition to removal from the courtroom and citation for contempt. In *Williamson v. United States*,<sup>206</sup> John and Nancy Williamson were fined \$1,500 for filing a frivolous appeal from a Tax Court decision in which they contended, among other things, that “they are citizens of the sovereign state of New Mexico, they are not taxpayers, the

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<sup>199</sup> *Id.* at 227.

<sup>200</sup> *Id.* (footnote omitted).

<sup>201</sup> *Id.* at 225.

<sup>202</sup> *Id.* (citing *State v. Brady*, 424 A.2d 407 (N.H. 1980)).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 229.

<sup>205</sup> *Id.* at 230 n.8. In the interest of fairness, it should be reported that the trial judge vacated his contempt order several hours after declaring the mistrial. *Id.* at 227.

<sup>206</sup> 215 F.3d 1338 (unpublished table decision), No. 99-2294, 2000 WL 676053 (10th Cir. May 24, 2002).

Tax Court is a kangaroo court.”<sup>207</sup> In *State v. Glasure*,<sup>208</sup> a prosecution for speeding, the *pro se* defendant was not allowed to make a closing argument after telling the trial court that “he would not be testifying because he believed the proceedings were akin to a ‘kangaroo court.’”<sup>209</sup> The Ohio Court of Appeals affirmed, finding it “clear from the record that when it came time for appellant’s closing argument, he intended on testifying without the attendant responsibilities of taking an oath or subjecting himself to cross-examination.”<sup>210</sup>

In *Eddy v. Weber County*,<sup>211</sup> the United States Court of Appeals for the Tenth Circuit affirmed an unhappy ending that was more substantive than procedural; the trial court dismissed with prejudice, for failure to prosecute, after the plaintiff told the judge, in response to an unfavorable sequestration ruling: “I will not proceed in this type of kangaroo court, no, sir, your honor.”<sup>212</sup>

However, in *Martin v. Liberty Bank*,<sup>213</sup> the Connecticut Court of Appeals undid another unhappy ending imposed by a trial court. There, the plaintiff continually disrupted the proceedings, and made “derogatory references to the federal judiciary and . . . statements to the court that it ‘was playing games with the law’ and ‘conducting a kangaroo court.’”<sup>214</sup> In response, the trial court permanently enjoined the plaintiff “from, inter alia, representing himself in any manner, other than testifying as a witness or submitting affidavits, during the course of any action in which leave to file is granted and from intervening, appearing or participating in any capacity, without leave to do so, in any future action pending in the Superior Court.”<sup>215</sup> The court of appeals reversed, noting that the trial record, which would have supported a summary contempt proceeding, lacked the necessary evidentiary basis to support the trial court’s grant of injunctive relief.<sup>216</sup>

Finally, in *State v. Hansen*,<sup>217</sup> the Washington Supreme Court affirmed what must be the unhappiest ending ever to result from a litigant’s charge of kangaroo-ism. In that case, Michael Hansen was an ex-convict

<sup>207</sup> *Id.* at \*\*2.

<sup>208</sup> No. 724, 2000 WL 748137 (Ohio Ct. App. May 23, 2000).

<sup>209</sup> *Id.* at \*3.

<sup>210</sup> *Id.*

<sup>211</sup> 77 F.3d 492 (unpublished table decision), No. 95-4113, 1996 WL 82162 (10th Cir. Feb. 27, 1996).

<sup>212</sup> *Id.* at \*\*1. Specifically, in a civil action for false arrest against Weber County, the plaintiff asked the court to exclude all witnesses from the courtroom. *Id.* The court granted the plaintiff’s request, but allowed the county sheriff to remain in the courtroom, at counsel table, as he “was the designated representative of the county.” *Id.*

<sup>213</sup> 699 A.2d 305 (Conn. App. Ct 1997).

<sup>214</sup> *Id.* at 306.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> 862 P.2d 117 (Wash. 1993).

who, upon his release from prison, sought an attorney to represent him in a civil suit against various people involved in the criminal trial that had resulted in his conviction and incarceration:

On March 6, 1990, Hansen telephoned Chris Youtz, an attorney whose name he had obtained from the Seattle-King County Bar Association Lawyer Referral Service, with the stated desire that Youtz would take his case. Hansen explained to Youtz that he felt he had been conspired against, calling the trial a "kangaroo court". During this discussion, Hansen identified by name the prosecutor and public defender, but did not name the judge. Youtz explained to Hansen that he would not take the case and that Hansen might want to seek another attorney with more experience in criminal law. At this point in the conversation, Hansen became upset. Hansen explained that Youtz was the third lawyer he had talked to about the possible action, and he stated that the bar was not helping out with his cause. Hansen then stated:

When you say I am not going to get any help from the Bar, I am not going to get any help from anybody . . . What am I going to do . . . I am going to get a gun and blow them all away, the prosecutor, the judge and the public defender.<sup>218</sup>

After Youtz reported his conversation with Hansen to the state bar association, the prosecutor, and Judge Dixon, the Seattle Police Department investigated Hansen and charged him with intimidation of a judge.<sup>219</sup> Hansen was convicted and sentenced to twenty-four months in prison.<sup>220</sup> While it was his threat of violence that landed Hansen in prison rather than his marsupial name-calling, his case is certainly illustrative of the mental state to which some litigants can be moved when they feel – rightly or wrongly – that they have been kangarooed.<sup>221</sup>

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<sup>218</sup> *Id.* at 118 (citation to the record omitted).

<sup>219</sup> *Id.* at 119.

<sup>220</sup> *Id.*

<sup>221</sup> Equally illustrative of that mental state is the letter sent by John Oppenheimer to the judge who presided over a jury trial at which he was convicted of battery and fined \$100. *People v. Oppenheimer*, 26 Cal. Rptr. 18, 19 (Cal. Ct. App. 1963). Oppenheimer addressed his letter to "Harold C. Shepherd, Fascist, Nazi and Tyrant." *Id.* at 21 n.2. He began his letter with the following salutation: "TO: Dirty Bastard, Swindler, Asshole, Tyrant, Oppressor, Shyster, Fascist, Nazi, Crook, Scoundrel, Gangster, Harold C. Shepherd, Bandit, Rat, Devil, S.O.B." *Id.* The body of the letter began with a bill for "KIDNAPING AND VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS" and "RANSOM AND EXTORTION illegally COLLECTED (based on suppression of truth and fraud)." *Id.* It continued as follows:

#### 4. Happily Ever After

Despite all the unhappy endings chronicled above, some litigants have expressed their frustration antipodally and walked away unscathed. For example, in *United States v. Deitle*,<sup>222</sup> Robert Deitle told Judge Stone:

I don't wish to proceed. This is a kangaroo court. I want to go on record that I protest this proceeding, strenuously and vigorously, without my legal representation that I have retained through friends. He agreed to represent me, and expressed an interest in this case; and therefore I will be throwing away my right. I can't represent myself.<sup>223</sup>

Judge Stone let Deitle's comment pass, which appears to have required some forbearance on his part,<sup>224</sup> given the judge's low opinion of Deitle's moral character and chosen profession.<sup>225</sup>

You are forbidden to practice law.

REMIT FORTHWITH OR BE SUED AND OTHERWISE  
APPROPRIATELY DEALT WITH.

IT WILL COST YOU MORE NOT TO PAY, Much more.

Are all windows insured?

You used to be a good shepherd, but have become a dirty dog, bastard and rat. Watch out for the Israeli Underground secret agents; they got Eichmann, and they'll get you, too.

Your turn will come, too, you murderer of/right and/justice.

You are an un-American prick.

Half-Witnesses before half-judge.

BE DAMNED, CONDEMNED AND CURSED, FOREVER UNTIL AND  
UNLESS YOU PAY AND MAKE RESTITUTION AND GIVE  
SATISFACTION. The new German Government has done it and is doing it.

You better do so, too, or else.

You are a kangaroo artist, a distorter and perverter of law and justice, who rousts and railroads *innocent victims of crimes* at the hands of convicted and professional perjurers.

*Id.* (emphasis in the original). For sending the foregoing letter, and similar ones to three other judges, Oppenheimer was charged with sending threatening letters. *Id.* at 19. The trial court dismissed the charges for lack of probable cause, *id.*, but was reversed on appeal, *id.* at 26.

<sup>222</sup> 195 F. Supp. 365 (D. Wis. 1961).

<sup>223</sup> *Id.* at 379.

<sup>224</sup> On appeal, Judge Stone was given credit for "an unusual display of patience," *Deitle v. United States*, 302 F.2d 116, 119 (7th Cir. 1961), in response to a defendant who "was . . . contemptuous in his remarks to the court." *Id.*



Similarly, in *State v. Dalton*,<sup>226</sup> the trial court turned the other cheek when the defendant “objected to the proceeding and informed the court that he ‘did not intend to participate in this fraud in any manner whatsoever’ . . . generally answered all inquires with that statement . . . [and] charged the court with contempt and described the proceedings as a ‘kangaroo court.’”<sup>227</sup> And in *State v. Koser*,<sup>228</sup> Judge Foscue did not impose sanctions when James Koser told him, at his arraignment: “

I ask for a change of venue to move out of this state to the state of Washington so I can get a fair trial. I’ll never get one in this state here. This is just a kangaroo court anyway, run by kangaroo politicians, kangaroo persecuting attorneys, persecuting, prosecuting attorneys, and persecuting public defenders, pretenders.<sup>229</sup>

Perhaps Koser was not sanctioned for calling his trial a kangaroo court because that comment was substantially milder than several others for which he was sanctioned.<sup>230</sup>

<sup>225</sup> See *Deitle*, 195 F. Supp. at 366-67.

<sup>226</sup> 322 N.W.2d 700 (unpublished table decision), No. 81-1319-CR, 1982 WL 172046 (Wis. Ct. App. May 5, 1982).

<sup>227</sup> *Id.* at \*\*\*1. The cause of the defendant’s displeasure was the trial court’s ruling that he could not have the attorney of his choice paid for by the state, but, rather, could hire an attorney at his own expense, accept a court-appointed public defender, or represent himself. *Id.*

<sup>228</sup> 98 Wash. App. 1062 (unpublished table decision), No. 24335-1-II, 2000 WL 349755 (Wash. Ct. App. Mar. 31, 2000).

<sup>229</sup> *Id.* at \*2.

<sup>230</sup> For example,

At Koser’s preliminary appearance on November 17, 1998, Judge McCauley asked Koser if he wanted an attorney to defend the charge. Koser replied, “No. I’ll represent myself. I always represent myself in the Gestapo court. Sieg Heil.” Finding that Koser accompanied these remarks with a “straight arm Nazi salute,” the court held him in contempt and sentenced him to 30 days in jail.

*Id.* at \*1. Judge Foscue also had his chance to impose sanctions on Koser:

Court reconvened on December 28, Judge Foscue presiding. After Koser arrived, he shouted “Sieg Heil” and “Heil Hitler,” called the judge “My {Fuhrer},” and referred to Grays Harbor County as a Nazi state. The trial court imposed another 30-day sentence for contempt. The asserted reason for [Koser’s] distress was that “Gestapo” jailers allegedly took away the law books he needed to file a habeas corpus petition with the United States Supreme Court. When Koser resumed his harangue, accusing Judge Foscue of being a leading Grays Harbor Nazi, the judge announced that he would withdraw from the case . . . .

*Id.* at \*4. Judge Foscue was not the first judge to leave a case in the wake of an accusation of kangaroo-ism. In *United States v. Valenti*, 120 F. Supp. 80 (D.N.J. 1954), Judge Madden

### *B. Sanctions for Unconciliatory Counsel*

It is easy to see why a litigant, with limited understanding of the legal system and a chip on his or her shoulder, would freely share the opinion that the robed figure across the bench was running a kangaroo court. It is a good bit harder to imagine that someone who has gone to law school, passed a bar exam, and been admitted to practice would say such a thing, but it has happened, far more frequently than one might think, and often with unfortunate results, ranging from reprimand to fines and imprisonment to suspension and disbarment.

#### 1. Reprimand

Attorney Anthony Mezzacca faced disciplinary action following his representation of a Middlesex (New Jersey) County Sheriff's Officer accused of misconduct.<sup>231</sup> Apparently, the administrative review board conducting the departmental hearing was not to attorney Mezzacca's liking:

When [Mezzacca] appeared before the review board he challenged its right to hear the matter on the ground it was in no way legally constituted. He claimed the sheriff was biased against his client and was just looking for the opportunity to get rid of him. He asserted that the proceeding was a conspiracy to violate his client's civil rights and demanded that the hearing "stop right now." During the course of the hearing respondent referred to the board as a "Kangaroo Court." He said the hearing was "a waste of county money, perpetrated by a demented sheriff that thinks he is a King or a God." He characterized the members of the board as "Nazis, that's what you are." He told one of the members of the

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denied a criminal defendant's motion to disqualify him, *id.* at 89, but then went on to recuse himself, on his own motion, at least in small part as a result of

the extra-judicial statements of Union "Strike" bulletins, and "Defense" bulletins issued out of the Local of which defendant was then the Secretary, during the trial and in the immediate vicinity of this court characterizing the criminal prosecution against this defendant as a "witch hunt," a "red-herring trial," and the court itself as a "Kangaroo Court," [which] if not contemptuous per se, as bordering upon brazen intimidation of the court and the trial judge thereof, were reasonably calculated to incite disrespect for the trial judge, and manifested scandalous [sic] disregard and ridicule for the ordinary and proper functioning of the court in the administration of justice in the then pending criminal proceeding.

*Id.* at 91. Judge Madden couched his recusal order in language that bears more than a faint echo of the florid judicial writing of the nineteenth century. See *id.* at 89-90.

<sup>231</sup> *In re Mezzacca*, 340 A.2d 658 (N.J. 1975).

board that "You may have to answer to a higher tribunal than this before this is over, including the Grand Jury." He made numerous accusations as to lying and threatened several times to go to the prosecutor and have the person indicted. At one point respondent said: "If you want Mr. Jones to be indicted put him on the stand. Because I will see to it that he will be indicted. Believe me, he will be indicted."<sup>232</sup>

After noting that Mezzacca's "conduct, as demonstrated by the record, can best be described as rude, intimidating and disruptive [and] without provocation from the review board,"<sup>233</sup> the New Jersey Supreme Court reprimanded Mezzacca,<sup>234</sup> with the warning "that a repetition of such conduct on [his] part [would] not be dealt with lightly."<sup>235</sup>

*Kentucky Bar Ass'n v. Nall*<sup>236</sup> is another case in which an attorney was reprimanded for conduct involving an administrative hearing.<sup>237</sup> To earn his reprimand, Jerry Nall "gave an interview to a radio station in which he described the hearing as a 'mere farce' and as a 'kangaroo court' [and] also sent a letter to the Governor of Kentucky, Julian Carroll, in which he complained of the manner in which the hearing officer had conducted the hearing and accused him of 'atrocious, biased and prejudicial acts.'"<sup>238</sup>

## 2. Time and Money

In *Martin v. State*,<sup>239</sup> the trial judge imposed contempt sanctions against an attorney only to have the contempt order reversed and remanded by the Florida District Court of Appeal.<sup>240</sup> Factually, Attorney "Anthony Martin breezed tardily into a hearing on a motion for a restraining order, which had already been in progress for some time, [and] began to rail against the commencement of the hearing in his absence, referring to the proceedings as a 'kangaroo court.'"<sup>241</sup> He then turned his back on the judge and began to address the media cameras in the courtroom, stating:

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<sup>232</sup> *Id.* at 658-59.

<sup>233</sup> *Id.* at 659.

<sup>234</sup> *Id.* at 660.

<sup>235</sup> *Id.*

<sup>236</sup> 599 S.W.2d 899 (Ky. 1980).

<sup>237</sup> *Id.* at 899. Specifically, Nall was appearing "before a hearing officer acting on behalf of the Kentucky Department for Natural Resources and Environmental Protection." *Id.* He was representing "[s]everal hundred residents of Webster County, Kentucky, [who] protested the action of said agency in granting permission to a local industry to all pollution control equipment to its plant." *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> 711 So. 2d 1173 (Fla. Dist. Ct. App. 1998).

<sup>240</sup> *Id.* at 1175.

<sup>241</sup> *Id.* at 1174.

"I feel very uncomfortable being with a judge who – in 28 years in court I have never in my life seen a judge who would conduct an ex parte hearing when there was no necessity to do so. I feel it's scandalous. . . . There is a camera here. This is a circus proceeding. You are conducting a judicial circus for the law firm of Steel, Hector and Davis and Tom Barkdull, and we're going to the District Court of Appeals [sic]. We intend justice be done by a judge who's not bought lock, stock and barrel by Scripps Howard Broadcasting and the law firm of Steel, Hector and Davis. Your honor, I do not wish to be a party to –"<sup>242</sup>

At that point, the trial judge interrupted Martin, found him in direct criminal contempt, and sentenced him to thirty days, without giving him an opportunity to answer the contempt charge.<sup>243</sup> While the appellate court held that "Martin's comments [were] criminally contemptuous on their face and require[d] no explanation by the judge as to why they are deemed contemptuous,"<sup>244</sup> it remanded the matter because Martin was not permitted to speak in his defense.<sup>245</sup>

In *Ivanova v. Columbia Pictures Industries, Inc.*,<sup>246</sup> the sanctions seem to have stuck. *Ivanova* was a copyright infringement action in which the defendant moved for sanctions under Rule 11 of the Federal Rules of Civil Procedure against both the plaintiff and plaintiff's counsel.<sup>247</sup> In deciding to award sanctions against the plaintiff's counsel for bringing a new action in the district court raising claims previously adjudicated, as an alternative to filing an appeal, Judge Tevrizian made the following observation about a previous proceeding involving the same plaintiff and counsel, before one of his colleagues:

This Court is also aware of the record in the 1997 Action wherein Counsel has routinely violated Court Rules and Orders before Judge Rea. . . . As mentioned herein, Judge Rea recently found *Ivanova* in contempt because he licensed at least two of the Pictures for distribution on DVD. *Ivanova* defended his actions by arguing that Judge Rea presided over a "kangaroo court," conducting a "'Simple Simon' trial," and acting as "an agent of [Columbia] – its black-robed 'thug' in this case." Judge Rea fined *Ivanova's* counsel, Mr. Riley,

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 1174-75 (citing *In re Oliver*, 333 U.S. 257 (1948); *Ex Parte Terry* 128 U.S. 289 (1888)).

<sup>245</sup> *Id.* at 1175.

<sup>246</sup> 217 F.R.D. 501 (C.D. Cal. 2003).

<sup>247</sup> *Id.* at 504, 511-12.

\$1500, stating, among other things, that “[t]he number of violations that have been committed during the course of this litigation are too numerous to state here.”<sup>248</sup>

Clearly, Ivanova and his attorney cut a wide swath through the Central District of California.

Rule 11 and several forms of sanctions were also in play in *Ortman v. Thomas*,<sup>249</sup> an “epic litigation,”<sup>250</sup> pursued by an attorney acting *pro se*, that “began in 1978 as a dispute over the non-payment of a check for \$1,500 [and] escalated into a contemptible and baseless crusade to expose corruption and conspiracy at all levels of the state and federal government.”<sup>251</sup> According to Judge Gadula:

Perhaps the most persuasive arguments for the imposition of sanctions in this case come from Ortman himself. The court takes notice of a very small sampling of the claims asserted in Ortman’s March 15, 1995 Verified Amended Complaint:

All Defendants embarked on a conspiratorial plan to harass Plaintiff and intentionally and/or negligently inflict emotional distress and to persecute Plaintiff for insisting upon his legal rights in a permissible way to collect his legal award.

Defendants are guilty of fraud, deceit, abuse of process, malicious prosecution and deprivation of rights secured to Plaintiff under the Constitution.

Disciplinary proceedings in Michigan are a mob procedure before a kangaroo court.

The Michigan Attorney Discipline Board and Attorney Grievance Commission appear to be patterned upon masonic or other secret societies and are terroristic.<sup>252</sup>

For making a vexatious, seventeen-year, twenty-two defendant mountain out of a \$1,500 molehill – and for invoking the judicially disfavored marsupial – Ortman was “permanently enjoined from filing any civil lawsuit alleging or asserting factual or legal claims based upon or arising out of any of the legal or factual claims alleged in this action or any of the actions

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<sup>248</sup> *Id.* at 513 n.11 (citations to the record omitted).

<sup>249</sup> 906 F. Supp. 416 (E.D. Mich. 1995).

<sup>250</sup> *Id.* at 418.

<sup>251</sup> *Id.* at 424.

<sup>252</sup> *Id.* at 423 n.5.

underlying it”<sup>253</sup> and was ordered to pay the defendants’ attorneys’ fees and costs.<sup>254</sup>

### 3. Suspension and Disbarment

Attorney Myles Breiner was suspended from practicing law in Hawai’i for six months based upon four incidents – each leading to a citation for criminal contempt – during the course of a criminal trial in which Breiner was representing the defendant.<sup>255</sup>

Although the Disciplinary Board’s report and recommendation only address the incidents described above, the record that was before us in [State v.] Fukusaku, [946 P.2d 32 ([Haw. 1997),] of which we take judicial notice, reflects, *inter alia*, that Breiner also characterized the proceedings as a “kangaroo court” and then, pursuing the metaphor in a testy exchange with the trial court, explained that he was not a “marsupial.”<sup>256</sup>

Attorney Lester Vincenti was less fortunate; he was suspended for a full year for actions in a single case which resulted in “the filing of a 22 count ethics complaint.”<sup>257</sup> Among other things, attorney Vincenti

was frequently sarcastic, disrespectful and irrational, and accused the Court on numerous occasions of, *inter alia*, collusion with the prosecution, cronyism, racism, permitting the proceedings to have a “carnival nature”, conducting a kangaroo court, prejudging the case, conducting a “cockamamie charade of witnesses” and barring defense counsel from effectively participating in the proceedings, conducting a sham hearing, acting outside the law, being caught up in his “own little dream world”, and ex-parte communications with the prosecutor together with other equally outrageous, disrespectful and unsupported charges.<sup>258</sup>

In addition to the foregoing, Vincenti demonstrated an aptitude for verbal vulgarity that must be read to be fully appreciated.<sup>259</sup>

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<sup>253</sup> *Id.* at 424.

<sup>254</sup> *Id.*

<sup>255</sup> Office of Disciplinary Counsel v. Breiner, 969 P.2d 1285, 1294 (Haw. 1999).

<sup>256</sup> *Id.* at 1289.

<sup>257</sup> *In re Vincenti*, 458 A.2d 1268, 1269 (N.J. 1983).

<sup>258</sup> *Id.*

<sup>259</sup> *See id.* at 1272.

Sometimes, one year just isn't enough. *In re Woodward*,<sup>260</sup> the Bar Committee for the Eighth Judicial Circuit of Missouri filed a ten-count action seeking the disbarment of Robert Woodward.<sup>261</sup> "Count X charge[d] that in January and March, 1947, [Woodward] mailed to sundry persons in the City of St. Louis postal cards containing such statements as 'Republican City Court Ring – Nazi – Fascist Spirt'; '2nd Inquisition Corr(eg)idor'; 'Perjury – Duress – 100% Pure Kangaroo.'"<sup>262</sup> More specifically:

[R]espondent admitted sending out by mail in January and March, 1947, 25,000 to 30,000 post cards to persons whose names he got from the city directory, the telephone book, and registration lists of voters, as well as to persons of his acquaintance, including lawyers. These cards were sent out in 30 or 31 varying forms or "editions." Generally, some or all contained the following words and phrases, among others: "Republican City Court Ring"; "Perjury and Duress"; "2nd Inquisition of Corr(eg)idor"; "Stooges \* \* \* by armed power draw up false affidavits"; "100% Pure Kangaroo"; "Ring has \* \* \* coached witnesses in Perjury"; and "Nazi-Fascist-Spirit." . . . Some of these cards bore drawings of snakes and kangaroos (in realistic vein, if not artistic) and many bore drawings of the Nazi swastika, these usually appearing on the snakes. In many of the cards it was rather hazily indicated that the court or courts had hailed respondent in, informally, "without due process," and by "armed power," to question him on false accusations of solicitation; also, that the courts had in some devious manner released to a newspaper information of complaints against him (formal or informal) of solicitation.<sup>263</sup>

The Missouri Supreme Court found Woodward's postcards to be disrespectful within the meaning of the relevant ethical canon.<sup>264</sup> Based upon that determination, and Woodward's other ethical lapses, the court concluded that the Bar Committee's recommendation of a one-year suspension was too lenient, and instead suspended Woodward from practicing law for three years.<sup>265</sup>

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<sup>260</sup> 300 S.W.2d 385 (Mo. 1957).

<sup>261</sup> *Id.* at 386.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 393.

<sup>264</sup> *Id.* (citing Rule 4.01 of the rules of the Missouri Supreme Court).

<sup>265</sup> *Id.* at 394.

A three-year suspension was also the sanction in *United States v. Engstrom*,<sup>266</sup> “a criminal case involving federal tax laws.”<sup>267</sup> The defendant’s counsel, William Cohan, was instructed by Judge Tanner “to have [the defendant] stay seated during the government’s direct examination of witnesses.”<sup>268</sup> Cohan responded: “You are having delusions if you think he stood up.”<sup>269</sup> Subsequently, Cohan told the judge: “‘You are making a mockery of the judicial process’; and ‘This is a kangaroo court.’”<sup>270</sup> Cohan’s conduct also included the following:

Outside of the jury’s presence and in response to the court’s suggestion that he take another look at a particular case, Cohan told the court, “I have read it several times, Your Honor. I suggest you read it for the first time.” In a subsequent exchange, Cohan responded, “To the contrary, Your Honor. I don’t know what you are talking about, and I don’t think you do, either.”

During his closing argument, Cohan explained to the jury: “This Judge is going to instruct you on what the law is here, but even this Judge can make mistakes, and that’s why we have Appeals Courts. Nevertheless, you have to follow his instructions.”<sup>271</sup>

While the jury was deliberating, Judge Tanner conducted a summary contempt hearing, at the end of which he fined Cohan \$500 and sentenced him to twenty-four hours in the custody of the United States Marshal.<sup>272</sup> Subsequently, Judge Rothstein, chief judge of the Western District of Washington, held a hearing and suspended Cohan from practicing in the district for three years.<sup>273</sup> The United States Court of Appeals for the Ninth Circuit affirmed the suspension,<sup>274</sup> but reversed and remanded the contempt order because the Judge Tanner conducted the contempt hearing himself, in violation of “Rule 42(b) [of the Federal Rules of Criminal Procedure which] requires another judge to conduct the proceedings ‘[i]f the contempt charged involves disrespect to or criticism of a judge.’”<sup>275</sup>

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<sup>266</sup> 16 F.3d 1006 (9th Cir. 1994).

<sup>267</sup> *Id.* at 1007.

<sup>268</sup> *Id.* at 1008.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1009.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1012.

<sup>275</sup> *Id.* at 1012-13.



In *Matter of Paulsrude*,<sup>276</sup> attorney Luther A. Paulsrude faced disciplinary action on seven separate complaints, one of which charged that:

“That sometime during 1969 – 1970 Respondent appeared as attorney for a client before the Honorable Robert A. Neseth in Dodge County, Minnesota, and that the case involved a misdemeanor count against his client. The ruling by the Court was adverse to Respondent’s client.

“That subsequent to the ruling by the Court, Respondent slammed his books on the counsel table and made the remark that this was a ‘kangaroo court.’ Respondent was ordered to leave the court room but refused to leave and was escorted from the court room by a Deputy Sheriff.<sup>277</sup>

While the referee “recommended that Paulsrude be barred from trying cases in Minnesota district or county courts, but that he otherwise be allowed to carry on a general law office practice and a limited probate practice,”<sup>278</sup> the Minnesota Supreme Court disbarred Paulsrude completely.<sup>279</sup>

<sup>276</sup> 248 N.W.2d 747 (Minn. 1976).

<sup>277</sup> *Id.* at 748. It seems that attorney Paulsrude had a fondness for animal-based invective. The first complaint against him charged:

“That on October 21, 1973, Respondent appeared in Dodge County Court to present, on behalf of himself, a claim against the estate of one Virgil Louks, the Honorable Gerard W. Ring presiding. That at the conclusion of the presentation of evidence no ruling on Respondent’s claim was made by Judge Ring. However, Respondent’s claim was subsequently disallowed by Judge Ring.

“That after Court was adjourned and while Judge Ring was leaving the court room, and in the presence of persons remaining in the court room, Respondent said the following, according to the transcript taken by Deputy Clerk Twila Goodman (Petitioner’s Exhibit 5), and according to the testimony given by Twila Goodman:

““Court is adjourned.

““Mr. Paulsrude: It is adjourned now. It’s nothing but a God-damned horse’s ass.

““Judge Ring: I would suggest, Mr. Paulsrude, that you proceed with caution.

““Mr. Paulsrude: The Court is a horse’s ass. \* \* \* If the Court please –

““Judge Ring: I would suggest, Mr. Paulsrude, if you are dissatisfied, that you should file an appeal –

““Mr. Paulsrude: No, that isn’t necessary. There is no point in filing an appeal – against me. I want to find out from you.’

“That Respondent Paulsrude admitted calling Judge Ring at that time a ‘horse’s ass.’

*Id.*

<sup>278</sup> *Id.* at 747.

<sup>279</sup> *Id.* at 749.

#### 4. One that Got Away

*Matter of Hinds*,<sup>280</sup> yet another attorney discipline action involving charges of kangaroo-ism in the Garden State, is a remarkable case. It began innocently enough, in the context of Joanne Chesimard's murder trial.

Chesimard finally went on trial for murder in 1977 in the Superior Court, Law Division, in New Brunswick. After observing the initial phases of the trial and while the jury was still being impaneled, [attorney Lennox] Hinds called a press conference at his New Brunswick office on January 20, 1977. In an article appearing January 21, 1977, in the *New York Daily News* under the headline, "Joanne Loses 2 Rounds in Trial Transfer," it was reported that:

. . . Lenox [sic] Hinds, an attorney also representing Mrs. Chesimard, said the defense team wanted the case moved to another court because in New Brunswick "what we are seeing is legalized lynching."

He said he was speaking for the defense team because its members were "gagged" by [the trial judge] whom he accused of asking prospective jurors self-serving questions which he said were leading to "the creation of a hangman's court."

An article appearing in the *Newark Star-Ledger* on the same date reported that Hinds had referred to the Chesimard trial as "a travesty." The article further quoted Hinds as saying that the trial judge "does not have the judicial temperament or the racial sensitivity to sit as an impartial judge" in Chesimard's trial, and that "[i]t was only after the trial began that we began to have fears that what we are seeing is a legalized lynching."

Also, a television reporter covering the press conference for the New Jersey Public Broadcasting Authority (Channel 52) recorded the following exchange:

Hinds: "We feel that it is a kangaroo – it will be a kangaroo court unless the judge recluses [sic] himself and that will be the very minimum.

Reporter: "And a kangaroo court means a guilty verdict?"

Hinds: "That's correct."<sup>281</sup>

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<sup>280</sup> 449 A.2d 483 (N.J. 1982).

The New Jersey Supreme Court dismissed the disciplinary proceeding against Hinds, explaining that "the facts that have thus far been presented do not suggest that Hinds' statements created a 'clear and present danger' of prejudicing the administration of justice such that he could be found to have committed an ethical violation."<sup>282</sup> While it is of interest that attorney Hinds prevailed in his disciplinary proceeding – albeit over a dissent<sup>283</sup> – what is remarkable is the travel of the case. Shortly after Hinds made his remarks in the press, "[t]he Middlesex County Ethics Committee . . . authorized an investigation to determine whether Hinds' statements constituted a violation of any disciplinary rules."<sup>284</sup> That investigation was stayed until the conclusion of Chesimard's trial.<sup>285</sup> After the trial, Hinds was served with charges, and he then filed suit in federal court, "seeking to enjoin the State disciplinary proceedings and to obtain a judgment declaring these particular disciplinary rules unconstitutional."<sup>286</sup> The United States District Court for the District of New Jersey "denied the injunction and dismissed the complaint on grounds of abstention."<sup>287</sup> The United States Court of Appeals for the Third Circuit reversed the district court,<sup>288</sup> and the Supreme Court reversed the court of appeals.<sup>289</sup> No other charge of kangaroo-ism has been the subject of proceedings in as many different courts as the one made by Lennox Hinds.

### C. (*But One Judge Strikes Out*)

In one of the more remarkable cases I found while researching this article, Judge Joseph Grillo, presiding judge of the Los Angeles Municipal Court, sued the owner and publisher of the *Los Angeles Times* for defamation.<sup>290</sup> Judge Grillo's suit was based, in part, on a reporter's description of one his proceedings as "what legal observers likened to a kangaroo court."<sup>291</sup> According to the California Court of Appeal, the facts giving rise to the allegedly defamatory newspaper article are these:

The Article and Editorial [also alleged to be defamatory] both concerned an incident which occurred Friday, August 6, 1976. On that date Grillo's clerk, personally accom-

<sup>281</sup> *Id.* at 486-87.

<sup>282</sup> *Id.* at 499.

<sup>283</sup> *Id.* at 503 (Schreiber, J., dissenting).

<sup>284</sup> *Id.* at 487.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* (citing *Garden State Bar Ass'n v. Middlesex County Ethics Comm.*, No. 78-273 (D.N.J. June 6, 1978 and Dec. 13, 1979)).

<sup>288</sup> *Id.* (citing 643 F.2d 119 (3d Cir. 1981)).

<sup>289</sup> *Id.* at 488 (citing 457 U.S. 423 (1982)).

<sup>290</sup> *Grillo v. Smith*, 193 Cal. Rptr. 414, 416 (Cal. Ct. App. 1983).

<sup>291</sup> *Id.* at 419.

panied by the judge, served James Czarnecki, a transportation officer in the office of the Auditor of Los Angeles County, with an "Order for Issuance of Airline Transportation." The order directed Czarnecki to issue airline tickets to Grillo and two other judges who desired to travel to Sacramento to attend hearings concerning legislation related to the operation of the municipal court. When Czarnecki refused to issue the tickets under orders from his superior, Grillo personally placed him under arrest.

Czarnecki was then escorted to Grillo's courtroom, where a contempt proceeding was held despite the attempted personal intervention of the County Counsel of Los Angeles County. At the hearing itself, a deputy county counsel represented Czarnecki, who was convicted and ordered to serve two days in jail with execution stayed until the following Wednesday. Grillo said the sentence was both coercive and punitive, i.e., designed to achieve compliance with the order to provide air transportation, as well as punish Czarnecki. He indicated he would "mitigate" the punishment, provided the tickets were furnished to the other judges forthwith; he offered to buy his own.<sup>292</sup>

In his opposition to the defendants' motion for summary judgment, Judge Grillo "object[ed] to the 'kangaroo court' description of the August 6, 1976 proceeding."<sup>293</sup> The trial court granted the defendants' motion for summary judgment.<sup>294</sup> The California Court of Appeal affirmed, explaining that "[t]he words 'angry,' 'shouted,' 'stormed,' and 'kangaroo court' fall clearly on the opinion side of the line [between fact and opinion because] [t]hey are subjective words and phrases of the sort which have been found to be opinion as a matter of law frequently in the past."<sup>295</sup>

Despite the holding in *Grillo*, however, it is possible to defame a judge by accusing him of conducting a kangaroo court. In *Commonwealth v. Mason*,<sup>296</sup> the Pennsylvania Superior Court affirmed Benjamin Mason's conviction for "maliciously libeling two judges, a district attorney, an editor and chairman of a water authority, and a businessman and chairman of a sewer authority."<sup>297</sup> Regarding his judicial targets, Mason had this to say:

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<sup>292</sup> *Id.* at 416.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 417 (citing *Okun v. Superior Court*, 629 P.2d 1369 (Cal. 1981) (collecting examples)); *Gomes v. Fried*, 186 Cal. Rptr. 605 (Cal. Ct. App. 1982)).

<sup>296</sup> 295 A.2d 103 (Pa. Super. Ct. 1972), *aff'd in part, rev'd in part*, *Commonwealth v. Mason*, 322 A.2d 357 (Pa. 1974).

<sup>297</sup> *Id.* at 104.

"Maybe we should make Judge Lehman serve the sentences of those who he lets off illegally, Judge Lehman, Like that outlaw Lee Ziegler, took an oath to enforce the law, any more jokes? ? ? ?"

"The whores love Judge Lehman because he guarantees them a meal ticket, either by way of a relief check or nice support payments."

"Judge Lehman and Lee R. Ziegler will never give us our rights; we must take our rights from them."

"Lehman lets Dick Ruble get away with horrible (sic) crimes. Lehman doesn't know what an honest day's work is; that is why he lets the filthy relievers off so easy."

"Judge Lehman and Ziegler have treacherously ignored the law, committed horrible [sic] crimes and sinned in the most unforgivable ways."

....

"Lehman is our sad, bad, glad, and mad Judge's name; he refuses to display Old Glory in the Kangaroo Court Room."

"Our District Attorney Horace J. Culbertson, Paul S. Lehman, and Richard S. Ruble are all traitors; all three of these named men have sold America down the river."<sup>298</sup>

While the court had to do some fancy sidestepping to get around a pesky precedent that seemed to invalidate Pennsylvania's criminal libel statute, it did so, and affirmed Mason's conviction.<sup>299</sup>

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 104-06. Accusations of kangaroo-ism also played at least a tangential part in case involving a charge of disorderly conduct brought against Joseph McWilliams, self-described "anti-Jewish candidate from the 18th Congressional District," *People v. McWilliams*, 22 N.Y.S.2d 571, 578 (N.Y. City Mag.'s Ct. 1940), for a speech he delivered. At the hearing on McWilliams's motion to dismiss the charge, "the defendant admitted that the term 'Eskimo' used by him was a substitute for the word 'Jew,' following his conviction for use of the latter word by Magistrate Sweeney . . . a month before the occurrence here involved." *Id.* During the speech in question, McWilliams said:

"To make it impossible for me to reach you, they hailed me into a Kangaroo Court. They hailed me into the Mayor's Court. They hailed me into the Court of the Eskimos and after they got me there they did not have the guts to say six months in jail or \$500. fine. They got afraid of Christian opinion." (applause)

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The defendant then continued: "Because I know that even the Eskimos at long last are backing up when they find the rising tide of Christian opinion supporting Joseph McWilliams, the man who don't like the Eskimos." (applause)

The defendant further continued:

"They have not got the guts, and I say Mr. Costuma, and Costuma said, pick McWilliams up at the slightest opportunity.

"Now ladies and gentlemen, I want to tell you this. From time to time I have to take it a little easy tonight. I am not going to tell you what I think of the Eskimos and what I think of the Mayor, because I would scorch and singe the very top of that building."

By reference to the "Court of the Eskimos" the defendant obviously intended to indicate and the crowd so understood that the Magistrate's Court was largely, if not exclusively, composed of Jews. Despite that this may have been an erroneous statement of fact on the defendant's part, and despite that the presiding magistrate in his own case was Magistrate Sweeney, the defendant was nevertheless imputing cowardice and lack of courage to persons of the Jewish religion, based upon their religious persuasion alone, and imputing to them such cowardice and lack of courage in the administration of their official offices solely because they were Jews, or, as he termed them, "Eskimos."

At a later portion of his speech, the defendant continued: "I want to tell you what certain people are doing about a certain problem. I am going to read to you from the press. Bucharest, capitol of Rumania, July 8th" – (and here the defendant stated in his testimony that he was quoting – "Today any Jews would be excluded from press activities in Rumania." (applause)

The defendant then continued: "He said that the Rumanian press would now be conducted along nationalistic lines and under a new regime. The right to address the Rumanian people through the press belongs to Rumanians of Rumanian origin, and to Rumanians alone, and ladies and gentleman, if only Americans of Aryan origin were able to use the press in America there would not be any problems here. Ladies and gentlemen, I address to you this beautiful thought; Rumanians of Rumanian origin alone will have the right to address through the press the Rumanian people. Take that to your hearts. It is a wonderful idea."

*Id.* at 578-79. According to Judge Bromberger,

The selection of Rumania as an illustration, subsequent to the announcement by its Government, as the speech discloses, of its anti-Semitic policy, was not accidental. The defendant admitted in his testimony that his speeches were prepared and well-planned in advance.

This reference paralleled the selection of Russia in the Dunn case, *supra*, and emphasized the defendant's anti-Semitic policy and public utterances attacking, abusing, vilifying and humiliating those of Jewish persuasion merely upon the basis of their religious beliefs, and not upon the bases of any personal or human attributes or failings.

Incidentally, also, the use of the term "Aryan" under existing conditions and with its present well-established connotation, further emphasized the intended offensive character of the defendant's address and the understanding of it on the part of the assembled crowds.

*Id.* at 579 (citing *People v. Dunn*, 170 N.Y.S. 1102 (N.Y.App. Div. 1918)). The trial judge denied McWilliams's motion to dismiss. *Id.* at 580. He went to trial, and was convicted, but his conviction was overturned on appeal, due to the trial court's reliance upon materials not in evidence. *People v. McWilliams*, 31 N.Y.S.2d 37 (N.Y. Spec. Sess. 1941).

*Grillo* and *Mason* are the only two defamation actions brought as a result of actual judges being accused of kangaroo-ism, but there are several more defamation actions involving charges of kangaroo-ism directed toward non-judicial tribunals. In *Panhandle Publishing Co. v. Fitzjarrald*,<sup>300</sup> the plaintiff, County Attorney of Hall County, Texas,<sup>301</sup> sued Panhandle Publishing for printing a newspaper article in the *Amarillo Times* headlined "Memphis 'Political Clique' Accused of Kangaroo Court."<sup>302</sup> However, the phrase "kangaroo court" does not appear to have played a part in either the plaintiff's claim or the resolution of the case.

But in *Lins v. Evening News Ass'n*,<sup>303</sup> in which the president and secretary-treasurer of a local labor union<sup>304</sup> brought a libel action against several defendants, including newspaper reporter Fred Girard,<sup>305</sup> the accusation of kangaroo-ism was the work of the author of the news story, not just an anonymous headline writer. According to the Michigan Court of Appeals:

In his column, defendant Girard, more pamphleteer than professional reporter, writes of "thieves who run the Teamster Union", "thugs who run Local 299", "stupid men" who make "stupid moves", "crooked officials", "animals", and "Union hoods". By reference, he speaks of "arrogant criminality", "kangaroo court[s]" and "arrogant abuses".<sup>306</sup>

The appellate court affirmed the trial court's grant of summary judgment to the defendants, on grounds that the plaintiffs were "special or limited public figures"<sup>307</sup> and had failed to produce any evidence of actual malice on the part of the defendants.<sup>308</sup>

Finally, in *Williams v. Gleason*,<sup>309</sup> the plaintiffs sued the elders of the Covenant Presbyterian Church, and others, for libel, slander, and other

<sup>300</sup> 223 S.W.2d 635 (Tex. Civ. App. 1949), *rev'd*, 228 S.W.2d 499 (Tex. 1950). In *Panhandle Publishing*, the plaintiff won his libel action, lost on the first appeal, and then won a partial victory before the Texas Supreme Court, which remanded with instructions concerning the manner in which each allegedly libelous statement was to be submitted to the jury. See 228 S.W.2d at 506.

<sup>301</sup> 223 S.W.2d at 636.

<sup>302</sup> *Id.* at 638.

<sup>303</sup> 342 N.W.2d 573 (Mich. Ct. App. 1983).

<sup>304</sup> *Id.* at 575.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 580.

<sup>308</sup> *Id.* at 582.

<sup>309</sup> 26 S.W.3d 54 (Tex. Ct. App. 2000).

torts, based upon disciplinary action the elders took against them.<sup>310</sup> In their complaint, the plaintiffs stated that

[t]he entire ecclesiastical “kangaroo court, KKK or KGB type of Salem witch hunt trial” process unmistakably and undeniably created out of malice by the Defendants . . . was and is further proof not only that the entire normal ecclesiastical process was subverted by Defendants . . . for the purpose of subverting the entire process to a commission of libel and other torts they committed with impunity . . .<sup>311</sup>

Ultimately, the Texas Court of Appeals declined to reach the merits of the plaintiffs’ libel claim because it lacked jurisdiction to decide ecclesiastical disputes.<sup>312</sup>

## V. OUT OF THE FRYING PAN AND INTO THE FIRE

Even more remarkable than the attorney who tosses out a charge of kangaroo-ism while litigating someone else’s case, or while litigating a garden-variety criminal or civil case *pro se*, is the attorney who thinks that it is a good idea to drop a K-bomb when the subject of litigation is his or her own license to practice. In a disciplinary proceeding conducted under its original jurisdiction, the Nebraska Supreme Court was faced with a licensed attorney who:

by personal acts, conduct, and attitude, repeatedly exhibited a pronounced disrespect for the courts of Nebraska, to wit: a. On January 11, 1960, while being arraigned on a criminal complaint, respondent assumed a full-length, reclining position on a spectator’s bench in the courtroom, and advised the district judge it would be necessary for the court to have the sheriff drag him before the bench if the court wanted him there; b. that in the early morning hours of the day after district judge R. M. Van Steenberg retired from the district bench, respondent called him by long distance, addressed him as an “Old Kangaroo” and subjected him to a tirade of abuse; and, c. that on September 7, 1962, and at various

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<sup>310</sup> *Id.* at 58. This dispute began when certain church elders questioned the interpretation of Romans 7:14-25 that Robert Williams presented to his Sunday school class. *Id.* at 56. Subsequently, the elders brought a “disciplinary action against Robert and Melissa [Williams] for breaking their membership vows and other misconduct, including making false, libelous, and misleading statements against the church Elders.” *Id.* at 57.

<sup>311</sup> *Id.* at 58 n.5.

<sup>312</sup> *Id.* at 60.



other times, respondent has referred to the courts of Nebraska as "Kangaroo Courts."<sup>313</sup>

Furthermore, in his answer to the disbarment action brought against him, Rhodes referred "in 12 separate instances . . . to the district court of Morrill County as 'Kangaroo Court' and the justices thereof as 'Kangaroos.'"<sup>314</sup> The Nebraska Supreme Court disbarred Rhodes,<sup>315</sup> noting that "[t]he fact that an attorney believes a characterization of a court as a 'Kangaroo Court' to be correct is no defense to a disbarment action, because a lawyer is presumed to know the proper method of seeking redress if he feels aggrieved by the actions of a court."<sup>316</sup>

In *Weber v. State Bar*,<sup>317</sup> the Review Department of the (California) State Bar subjected Sherman Weber to disciplinary proceedings for his malfeasance in the course of executing a will.<sup>318</sup> In determining the proper form of discipline, the State Bar Court considered various aggravating factors including Weber's absence of remorse, as demonstrated by his "filing of actions against every judge on the Ventura Superior Court and every attorney who opposed him in the probate of John's estate,"<sup>319</sup> and his "con-

<sup>313</sup> State *ex rel.* Neb. State Bar Ass'n v. Rhodes, 131 N.W.2d 118, 122 (Neb. 1964).

<sup>314</sup> *Id.* at 128. In one of the more adroit passages in his answer, Rhodes used the word kangaroo as both an adjective and a verb, alleging "that Albert W. Crites was an imported 'Kangaroo judge,' imported by the State of Nebraska through its agents, representatives . . . 'to Kangaroo this respondent, and prevent this respondent from having a fair trial.'" *Id.* at 123. In response to Rhodes's antipodal outbursts, the court referred to *Webster's New International Dictionary* (2d ed.), which defined kangaroo court as "[a]n irresponsible, unauthorized, or irregular tribunal, or one in which, although conducted under some authorization, the principles of law and justice are disregarded or perverted." *Id.* Accordingly, the court concluded: "It is obvious that the term is one of contempt and utter disrespect. There is no doubt that it was so intended by respondent. Its continued use at the hearing before the referee is conclusive proof of the intent of respondent." *Id.* In *Marquess v. State*, 721 S.W.2d 173 (Mo. Ct. App. 1986), the court of appeals reported that the appellant, at trial, told the presiding judge: "I want no part of your kangaroo court. You can kangaroo me once you ain't going to do it twice." *Id.* at 175.

Litigants are not the only participants in the judicial process to use "kangaroo" as a verb. In *Hale v. State*, 47 S.W.2d 834 (Tex. Crim. App. 1932), spectators at an outdoor trial were reported to have said, within earshot of the jury: "They have been kangarooing people at the City Hall; they have kangarooed the wrong man this time." And: "They just pick a man up and kangaroo him in the City Hall." *Id.* at 834-35. And, most remarkably, in a characterization of the theory on which a motion for rehearing was based, Judge Neill of the Texas Court of Civil Appeals observed: ". . . the insistence is that the indignities [the plaintiff] received from being kangarooed by the other prisoners naturally flowed from his wrongful imprisonment." *Southwestern Portland Cement Co. v. Reitzer*, 135 S.W. 237, 241 (Tex. Civ. App. 1911).

<sup>315</sup> 131 N.W.2d at 129.

<sup>316</sup> *Id.* at 120.

<sup>317</sup> 764 P.2d 701 (Cal. 1988).

<sup>318</sup> *Id.* at 702-04.

<sup>319</sup> *Id.* at 709.

temptuous attitude toward the disciplinary proceedings”<sup>320</sup> as demonstrated by his filing of an “action against the State Bar and its officials, and against the hearing examiner and referee,”<sup>321</sup> which “alleged a conspiracy among the various defendants to deny him his rights, accused the referee and hearing examiner of improper conduct, and characterized the disciplinary process as ‘kangaroo court proceedings.’”<sup>322</sup> Based at least in small part on Weber’s improvident invocation of the kangaroo, the California Supreme Court disbarred him.

*In re Jones*<sup>323</sup> involved a disciplinary proceeding against an attorney who continued to practice law after losing his license for failing to comply with continuing legal education requirements and failing to pay his membership dues to the state bar association.<sup>324</sup> When notified of the charges against him, Attorney Adair Jones responded by writing: “See record. And shove it up your goddam ass.”<sup>325</sup> In his objection to the findings and recommendation of disbarment by the Office of Disciplinary Counsel, Jones responded:

Adair D. Jones does not make it a practice to admit to wrong when he honestly believes he has not done anything wrong. That means that the bar association can conduct as many kangaroo hearings, impose as many fraudulent charges and penalties as it has the power to impose, respondent will not admit to wrongdoing or humble himself to you. In order for you to understand the strength of respondent’s conviction, Adair D. Jones vehemently states that “I don’t care if you are the bar association, supreme court (state or federal), any other court, God, Jesus Christ, father, mother, church, religion, devil, angel, lost soul, found soul, child, parent, homeless, sick, psycho, ‘I did not do anything wrong.’”

The bar association has continued to refer to respondent’s “attitude” to justify disbarment. Yet, the bar association has displayed an “attitude” in prosecuting these fraudulent claims against respondent. . . . The bar association brought these fraudulent charges against respondent specifically to cause respondent financial and emotional hardship. It is ri-

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<sup>320</sup> *Id.* at 710.

<sup>321</sup> *Id.* at 709.

<sup>322</sup> *Id.* at 710. The charge of kangaroo-ism was, in fact, one of Weber’s lower-level insults. Among other things, he “referred to the hearing examiner as a ‘misfit and a lunatic,’” *id.* at 710 n.18, and closed a letter to the chief trial counsel of the state bar by stating: “I shall pray the Lord to smite you and destroy you from the face of the earth . . . ,” *id.*

<sup>323</sup> 747 So. 2d 1081 (La. 1999).

<sup>324</sup> *Id.* at 1082.

<sup>325</sup> *Id.* at 1083 n.2.

diculous and even sick for the bar association to think respondent should only respond with glee to the bar association's fraudulent actions and sick intentions.

For the record, regarding the committee report, "Shove it up your ass." For the record, regarding the costs statement, "Shove it up your ass." For the record, if I forgot something, "Shove it up your ass."<sup>326</sup>

Rather unremarkably, in an order of disbarment in which it found Jones "not fit to practice law in this state,"<sup>327</sup> the Louisiana Supreme Court was "disturbed by the language respondent used in his pleadings,"<sup>328</sup> finding it to "display a shocking lack of respect."<sup>329</sup>

Not only have attorneys leveled charges of kangaroo-ism while fighting disbarment, some applicants have done so while seeking to gain admission to the bar. In 1954, J. Norman Stone was refused reciprocal admission to the Wyoming bar.<sup>330</sup> In response, he engaged in a campaign

<sup>326</sup> *Id.* at 1083 n.3. Given Attorney Jones's affinity for the marsupial metaphor, one would think that a simple "put it in your pouch" would have served nicely in place of his gratuitous gastrointestinal insertion suggestion.

<sup>327</sup> *Id.* at 1085.

<sup>328</sup> *Id.* at 1084.

<sup>329</sup> *Id.* at 1085.

<sup>330</sup> *In re Stone*, 305 P.2d 777 (Wyo. 1957). Stone's application was denied for the following reasons:

The applicant instituted numerous cases for the recovery of fees. This in itself is not wrong, but it shows the unduly contentious spirit of the applicant, and that he does not get along with his clients. He has been censured several times by the proper authorities for his professional conduct. The board has been advised that the applicant "is a discredit to his profession and that any enlargement of his field of activity would be a misfortune."

*In re Stone*, 288 P.2d 767, 771 (Wyo.1955). The Wyoming Supreme Court continued:

We have, among other matters, noted that in the first letter received by this court from the applicant he wanted to prove "execrable practices of certain Sheridan lawyers living and deceased." We are unable to see what that has to do with the fitness of the applicant to practice law. He has threatened to sue the members of the board, presumably because they performed their duties as required by law. By the letterheads of the applicant, received by this court, the applicant holds himself out as an attorney at law in this state, which he has no right to do. He has written a letter to the Secretary of the Board of Law Examiners, sending a copy thereof to this court, and noting thereon that he has also sent a copy to Tracy McCracken, publisher of the Wyoming Eagle and Wyoming State Tribune, newspapers of this state; to Drew Pearson, a national news commentator; to one member of our congressional delegation; to the governor of this state and to several others. He evidently is disposed to improperly try the matter pending in this court before the public. The letter is too long to set out. It was obviously written to unduly influence and perhaps intimidate this court. In this letter he quotes page after page of scriptures, and the undue excess thereof cannot help but make anyone

of litigation and public statements putatively aimed toward gaining admission to the state bar but which resulted in charges of contempt against him.<sup>331</sup> While those charges were pending, Stone published the following statement:

There is no doubt that the minds of the judges are poisoned and that I have been found guilty of contempt long ago. This trial is a mere formality as was the trial when Judge Stanton removed my name from the ballot in kangaroo fashion. The Attorney General and the judges of the Wyoming Supreme Court are dangerous men and so long as they remain in power the freedom and even the lives of Wyoming citizens are not safe from jeopardy. They do not respect the Bill of Rights of the U. S. Constitution and the Wyoming Constitution and are ignorant of God's natural laws. They are a disgrace to our way of life and their swift removal from office is recommended if democracy in Wyoming is to survive.

History will record their infamous deeds which have blotted the shining pages of the Equality State. If, by sitting in a prison cell, I can arouse the American people to the realization that we in Wyoming have lost our liberty, then I

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wonder as to the applicant's mental operations. He has sent a copy of a letter written to a United States Senator to the Pope and many other persons, the contents of which were evidently partially written to show his religious fervor. He undertook to admonish judges of the District Court of Columbia not to open court in the manner usual in this country, but by a prayer composed by himself. On September 18, 1955, he made a radio address at Sheridan, Wyoming, for half an hour, concerning the matter pending before us. In that address he directed his main shafts at the president of the Board of Law Examiners who lives at Sheridan, and challenged him to a debate. He informed his audience that he did not need a lawyer for the reason that Jesus was his senior partner in his efforts to have his application granted. It may be that applicant is devoutly religious, which is highly commendable, but his excessive reference to religion and to the scriptures, when submitted as evidence of his qualifications to be admitted to the practice of law, does give some cause to suspect that his religious fervor partakes of a fanaticism, the presence of which does not make for that mental balance and equipoise which every lawyer should possess in order that his client's interest be not endangered, for after all, no matter how devoutly religious a lawyer may be, he must, when he comes into a court of justice and law, rely upon the legal principles of our jurisprudence, which does take cognizance of the moral law as far as we humans have found that to be practicable.

*Id.* at 771-72.

<sup>331</sup> *Id.* at 779-80.

shall consider this tyranny as a martyred sacrifice upon the alter of freedom.<sup>332</sup>

That statement, and host of other misdeeds, earned Stone admission to the hoosgow for six months plus a fine of \$1,000.<sup>333</sup>

In *In re Kellar*,<sup>334</sup> the Nevada Supreme Court rejected the Board of Bar Examiners' recommendation to deny Charles Kellar admission to the Nevada bar.<sup>335</sup> Justice Badt dissented, noting that after Kellar was initially denied admission, he gave a television interview in which he accused the Nevada bar of refusing to admit him based solely upon his race.<sup>336</sup> In Justice Badt's view, Kellar's statement was "far worse that simply 'in poor taste,'"<sup>337</sup> but rather, was "misleading with reference to the facts."<sup>338</sup> Moreover, it was "not in effect directed simply to the Board of Bar Examiners [but] was a broad wave of his arm which took in the Board of Bar Examiners, the state bar, and [the Nevada Supreme] [C]ourt,"<sup>339</sup> with the "purpose [of] raising . . . social pressure on this court to reverse the action of the board."<sup>340</sup> In explaining his objection to Kellar's public statement, Justice Badt referred to an article about the character investigation component of the bar admission process which stated:

Those of you who are in the unfortunate position of constantly being designated as respondents in the petitions

<sup>332</sup> *Id.* at 798-99.

<sup>333</sup> *Id.* at 799.

<sup>334</sup> 401 P.2d 616 (Nev. 1965).

<sup>335</sup> *Id.* at 620. Kellar's application was denied, based upon

information that the petitioner had associated with subversive organizations and persons in New York, in several instances practiced law in this state, was guilty of impropriety in a real estate transaction, had attempted submission of spurious items to an adjuster of an insurance claim, and had drafted a letter for another person's signature addressed to Robert Kennedy, Attorney General, charging discrimination in the matter of his application.

*In re Kellar*, 401 P.2d 616, 617 (Nev.1965).

<sup>336</sup> *Id.* at 620-21.

<sup>337</sup> *Id.* at 621.

<sup>338</sup> *Id.* According to Justice Badt, it was misleading for Kellar to state that "[i]n the 98 years that the State of Nevada has been in existence and so far as I have been able to gather, no Negro has ever been admitted to practice law in its courts," *id.* at 621, because:

Only one other Negro had sought admission in Nevada and he failed to pass the bar examination. Since the Kellar application, two Negroes have been admitted in Nevada after passing the 1964 bar examination. No other Negroes, except in the cases mentioned, have ever applied for permission to practice in this state. The same applies to applicants of any other race than Caucasians [sic].

*Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

filed by the disgruntled applicants are not unfamiliar, I am sure, with the applicants' glossary which invariably includes such terms as "Kangaroo Court," "star chamber," "inquisition," "persecution," "oppression," "rumor," and "innuendo."<sup>341</sup>

It would be interesting to know how many times a charge of kangaroo-ism directed toward the character and fitness committee has resulted in bar admission. I would bet a pouch full of brand new boomerangs that the number could be counted on the digits of one paw.

### CONCLUSION

I close with a bit of practical advice. The next time you find yourself in court with a K-bomb assembling itself in your lungs and preparing to work its way up your wind pipe to the launching pad, here is a simple three-step procedure to follow, guaranteed to lead to a happy ending. First, take a good hard look at the nameplate on the bench, and if it happens to say "Hearing Officer West," and you happen to be appearing before the Wabash Valley (Indiana) Correctional Institution Conduct Adjustment Board, do not hesitate; you may drop your K-bomb with impunity. If, however, you happen to be in some other forum, pat your pockets and peek into your brief case. If you've got your checkbook and toothbrush, let fly with your antipodal invective, secure in the knowledge that you're equipped with the proper tools to handle the contempt citation that's likely to come your way. Finally, if you absolutely must fortify your oral advocacy with a little dose of Vitamin K, but you left your toothbrush behind the paisley pocket square in your other suit, and you can't stand the thought of waking up in a holding cell with no way to properly perform your daily abultion, you can either forbear or tell the judge you're unhappy with his or her koala court. The judge won't know what you're talking about, so he or she is unlikely to be offended, but you will have the satisfaction of invoking an exotic Australian animal in open court. The fact that you meant to say "kangaroo" instead of "koala" can be our little secret. G'day mates!

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<sup>341</sup> *Id.*

