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People v. Simac: How Much is too Much Advocacy?

I. INTRODUCTION

In *People v. Simac*,¹ the Illinois Supreme Court drew a line between an attorney's interest in zealously representing a client, and a trial court's concern in maintaining control of the courtroom. Illinois courts, as well as the American Bar Association's ("ABA's") Model Code of Professional Responsibility, require an attorney to represent zealously a client within the bounds of the law.² Courts, on the other hand, have long used the contempt power to preserve proper order in a courtroom.³ These two interests collided in *Simac* when criminal defense attorney David Sotomayor substituted his law clerk for the defendant at the defense trial table without the trial court's permission or knowledge.⁴ Sotomayor's tactic succeeded, because the trial court dropped the charges against defendant Simac after two subsequent misidentifications; however, the Illinois Supreme Court upheld the trial court's finding that defense attorney Sotomayor was guilty of direct criminal contempt.⁵

This Note first examines the interaction between attorney advocacy and court discipline,⁶ specifically, the court's use of the contempt power⁷ and the attorney's professional responsibility.⁸ Next, this Note discusses the historical use and legitimacy of in-court identifications, first focusing on attorney tactics to combat the suggestiveness of such identifications,⁹ then focusing on the court's treatment of such tactics.¹⁰ This Note then examines the facts and opinions of *Simac*.¹¹

1. 641 N.E.2d 416 (Ill. 1994) [hereinafter *Simac I*].

2. *People v. Dread*, 327 N.E.2d 175, 179 (Ill. App. 3d Dist. 1975); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981); see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3.1, at 579 (1986) (explaining that the ABA Model Rules of Professional Conduct state the same principle in its comment to Model Rule 1.3).

3. See *Ex parte Terry*, 128 U.S. 289, 307-09 (1888); *People v. Siegel*, 445 N.E.2d 762, 763 (Ill. 1983); *People v. Loughran*, 118 N.E.2d 310, 311 (Ill. 1954); WOLFRAM, *supra* note 2, § 12.1.3, at 625.

4. *Simac II*, 641 N.E.2d at 417. The trial took place in DuPage County. *Id.*

5. *Id.* at 424.

6. See *infra* part II.A.

7. See *infra* part II.A.1.

8. See *infra* part II.A.2.

9. See *infra* part II.B.

10. See *infra* part II.C.

11. See *infra* part III.

Next, it analyzes the *Simac* decision critically, pointing out several weaknesses in the court's opinion.¹² This Note then predicts how the *Simac* decision will impact future attorney behavior in Illinois and other jurisdictions grappling with similar issues.¹³ Finally, this Note concludes that the *Simac* court correctly upheld the judgment against Sotomayor for direct criminal contempt, despite the opinion's shortcomings.¹⁴

II. BACKGROUND

A. Attorney Advocacy and Court Discipline

The ABA Model Code of Professional Responsibility charges an attorney with the duty "to represent his client zealously within the bounds of the law."¹⁵ The very language of the rule, therefore, creates a tension between the attorney's duty to his or her client, and the attorney's duty to stay within the parameters of the law.¹⁶ Because an attorney must represent his or her client zealously for the adversarial legal system to function properly,¹⁷ an attorney will encounter confrontations with a trial judge when the judge believes that the attorney has crossed the bounds of the law.¹⁸ Consequently, an attorney must strike a proper balance between client advocacy and judicial respect.¹⁹

Illinois courts have grappled with the issue of how much advocacy is too much.²⁰ Courts draw the line when an attorney seeks "to secure from a court an order or judgment without a full and frank disclosure of all matters and facts which the court ought to know."²¹ An attorney who crosses this line is subject to both judicial and professional

12. See *infra* part IV.

13. See *infra* part V.

14. See *infra* part VI.

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981); see also WOLFRAM, *supra* note 2, § 10.3.1, at 579 (explaining that the ABA Model Rules of Professional Conduct set forth the same principle in its comment to Model Rule 1.3).

16. See *supra* note 15 and accompanying text.

17. See WOLFRAM, *supra* note 2, § 10.3.2, at 581-82.

18. *Id.* § 11.3.1, at 600.

19. *Id.*

20. See *People ex rel. Kunc v. Hogan*, 364 N.E.2d 50, 52 (Ill. 1977), *cert. denied*, 434 U.S. 1023 (1978); *People ex rel. Fahey v. Burr*, 147 N.E. 47, 52 (Ill.), *cert. dismissed*, 147 N.E. 53 (Ill. 1925). See generally Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743 (1990) (discussing and analyzing the competing interests between permissible advocacy and contempt of court).

21. *Burr*, 147 N.E. at 52.

control.²² A judge may regulate the attorney through evidentiary and procedural rulings, or may punish the attorney through the power of contempt.²³ Additionally, the legal profession may control the attorney through professional discipline.²⁴

1. Contempt Law

Judicial use of the contempt power can be traced to at least the seventeenth century.²⁵ Generally speaking, a court's contempt power can be subdivided into two categories: civil contempt and criminal contempt.²⁶ Courts utilize civil contempt powers to enforce the rights of private litigants and to force compliance with orders or decrees for the good of other litigants.²⁷ In contrast, courts exercise criminal contempt powers to punish and to preserve the dignity and authority of the court.²⁸

Although some jurisdictions have enacted legislation specifically making contempt of court a crime,²⁹ others have labeled contempt of court a crime through judicial decision.³⁰ Still other jurisdictions, including Illinois, have declined to label contempt a specific "crime,"

22. See WOLFRAM, *supra* note 2, § 12.1.1, at 620.

23. *Id.* Wolfram advises that a court may, among other options, give a curative instruction or may reverse a verdict. *Id.* Judicial control through these types of methods limits a trial court's ability to handle an erring attorney. *Id.* Courts do not often use the contempt power in cases of overzealous advocacy because of its potential for arbitrariness and its status as a "blunderbuss" of last resort. *Id.* Evidentiary and procedural regulation is beyond the scope of this Note.

24. *Id.* (stating that professional discipline often is not imposed because judges and adversaries are reluctant to report violations).

25. WAYNE R. LAFAYE & AUSTIN W. SCOTT, CRIMINAL LAW § 1.7, at 43 & n.54 (2d ed. 1986) (citing Anonymous, 73 Eng. Rep. 416 (1631)). One of the first recorded cases of criminal contempt concerned a criminal defendant who threw a brickbat at the judge. *Id.* After the court held the defendant in contempt, the defendant's right hand was cut off and he was executed in the presence of the court. *Id.*

26. See *Estate of Hader*, 449 N.E.2d 540, 546 (Ill. App. 1st Dist. 1983) (citing 47th & State Currency Exchange, Inc. v. Coleman Corp., 371 N.E.2d 294, 297-98 (Ill. App. 1st Dist. 1978)). See generally Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981) (discussing the need for jurisdictions to adopt a contempt statute to eliminate the confusion between civil and criminal contempt).

27. *People ex rel. Chicago Bar Ass'n v. Barasch*, 173 N.E.2d 417, 418 (Ill. 1961) (citing *People v. McDonald*, 145 N.E. 636, 637 (Ill. 1924)). For an example of a civil contempt case, see *Hader*, 449 N.E.2d at 546-47 (reversing a trial court's finding of civil contempt against a bank failing to comply with a discovery order).

28. *People v. L.A.S.*, 490 N.E.2d 1271, 1273 (Ill. 1986) (citing *People v. Javaras*, 281 N.E.2d 670, 673 (Ill. 1972)); *People v. Siegel*, 445 N.E.2d 762, 764 (Ill. 1983).

29. See, e.g., 18 U.S.C. § 401 (1988); LAFAYE & SCOTT, *supra* note 25, § 1.7(e), at 46 & n.86.

30. See LAFAYE & SCOTT, *supra* note 25, § 1.7(e), at 46 n.84.

but nevertheless have labeled certain conduct as "criminal contempt" and have imposed penal sanctions for criminal contempt through the exercise of judicial power.³¹ Regardless of the basis for the criminal contempt power, most courts utilize this power only when all other methods of judicial control have failed.³²

The Illinois Supreme Court divides the law of contempt into direct contempt and indirect contempt.³³ Direct contempt is contemptuous conduct which occurs in the presence of a judge.³⁴ Because the judge observes the contemptuous conduct, all of the elements of the offense are within the judge's personal knowledge.³⁵ Although the United States Supreme Court has held that a judge may proceed directly to the punishment phase without violating the Due Process Clause,³⁶ the Illinois Supreme Court has qualified this holding, reasoning that the lack of procedural guarantees requires that the direct contempt power "be exercised with utmost caution and strictly restricted to acts and facts seen and known by the court"³⁷

31. See, e.g., *Barasch*, 173 N.E.2d at 418-19 (explaining that while the Illinois Supreme Court has "repeatedly held that contempt is not a crime . . . the proceeding is [nevertheless] in the nature of criminal contempt."); see also *People v. Brown*, 601 N.E.2d 1380, 1383 (Ill. App. 4th Dist. 1992) (explaining "that the inherent authority of the Illinois judiciary to punish contemnors derives from article VI of the Constitution of 1970, which establishes the Illinois judiciary.").

32. See *WOLFRAM*, *supra* note 2, § 12.1.3, at 626. Wolfram also notes that out of all attorneys, criminal defense attorneys are most often cited for contempt. *Id.* In addition, Wolfram discusses the ramifications of the contempt finding on an attorney. *Id.*

33. *People v. Jashunsky*, 282 N.E.2d 1, 3 (Ill.) (citing *People v. Howarth*, 114 N.E.2d 785, 790 (Ill. 1953)), *cert. denied*, 409 U.S. 989 (1972).

34. *Loughran*, 118 N.E.2d at 313 (citing *Terry*, 128 U.S. at 308-09). But see *Jashunsky*, 282 N.E.2d at 3 (explaining that direct criminal contempt also "includes acts committed in an integral part of the court although out of the physical presence of the judge.").

For an example of direct criminal contempt, see *People v. Carr*, 278 N.E.2d 839 (Ill. App. 1st Dist. 1971) (upholding a direct criminal contempt finding as appropriate where a criminal defendant punched a State's Attorney in open court). See generally Ronald J. Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power*, 14 AM. J. TRIAL ADVOC. 243 (1990) (discussing direct criminal contempt and proposing guidelines to provide practitioners with general information about contempt).

35. *Jashunsky*, 282 N.E.2d at 4 (citing *People ex rel. Owens v. Hogan*, 100 N.E. 177 (Ill. 1912)).

36. *Cooke v. United States*, 267 U.S. 517, 535 (1925) (citing *Terry*, 128 U.S. at 309). Thus, no need exists for an indictment or information, a plea, a trial, advice of counsel for the contemnor, or any other regular procedural guarantee. *Id.* Such an action by the judge does not violate the Due Process Clause because the judge directly observed the behavior that prompted the contempt finding. *Id.*

37. *Loughran*, 118 N.E.2d at 313. In fact, the court instructed that "no matter resting upon opinions, conclusions, presumptions or inferences should be considered." *Id.* The court further explained that the lack of procedural guarantees mandates these constraints.

Indirect contempt, on the other hand, is defined as "contemptuous conduct 'which in whole or in an essential part occurred out of the presence of the court . . .'"³⁸ Because a judge has not witnessed the contemptuous conduct at issue, due process concerns are greater than in cases of direct contempt.³⁹ The court need not, however, conduct a full jury trial.⁴⁰ Thus, the Illinois Supreme Court allows a trial judge to find an attorney guilty of indirect contempt after giving the attorney notice, giving the attorney an opportunity to answer, and holding a hearing concerning the matter.⁴¹

Proof of criminal contempt requires a showing that the particular "conduct was calculated to embarrass, hinder or obstruct a court in its administration of justice, to derogate from its authority or dignity or bring the administration of law into disrepute."⁴² Although the elements of contempt require an intent and an act,⁴³ intent may be inferred from the individual's actions.⁴⁴ The requisite intent, therefore, is a voluntary act by an individual who knows or reasonably should know that his or her conduct is wrongful.⁴⁵ Thus, Illinois courts do not require that an individual intentionally act contemptuous in order for the actor to be held in contempt of court.⁴⁶

Id.

38. *L.A.S.*, 490 N.E.2d at 1273 (quoting *People v. Harrison*, 86 N.E.2d 208, 212 (Ill. 1949)). For an example of indirect contempt, see *People v. Winchell*, 359 N.E.2d 487 (Ill. App. 3d Dist. 1977) (upholding an indirect criminal contempt finding against a criminal defendant who failed to appear for a court appearance).

39. See *Cooke*, 267 U.S. at 537; *L.A.S.*, 490 N.E.2d at 1273 (citing *People v. Javaras*, 281 N.E.2d 670, 674 (Ill. 1972)).

40. *United States v. Barnett*, 376 U.S. 681, 692-700 (1964) (rejecting the argument that those charged with criminal contempt have a constitutional right to a jury trial and allowing courts to proceed without delay in contempt cases). Nevertheless, the Court has subsequently held that a jury trial is required for criminal contempt convictions which result in more than six months imprisonment. *Bloom v. Illinois*, 391 U.S. 194, 210-11 (1968); see *LAFAVE & SCOTT*, *supra* note 25, § 1.7, at 47-48.

41. *L.A.S.*, 490 N.E.2d at 1273 (citing *Javaras*, 281 N.E.2d at 671).

42. *Siegel*, 445 N.E.2d at 764.

43. *People v. Bertelle*, 518 N.E.2d 332, 334 (Ill. App. 1st Dist. 1987).

44. See, e.g., *Siegel*, 445 N.E.2d at 764; *People ex rel. Kunce v. Hogan*, 364 N.E.2d 50, 52 (Ill. 1977), *cert. denied*, 434 U.S. 1023 (1978).

45. *Bertelle*, 518 N.E.2d at 334 (defining the requisite action and intent necessary for a direct contempt finding as "a voluntary act by one who knows or who should reasonably be aware that his conduct is wrongful."); see *People v. Ernest*, 566 N.E.2d 231, 236 (Ill. 1990) (citing *L.A.S.*, 490 N.E.2d at 1273-74), *cert. denied*, 502 U.S. 808 (1991).

46. *Hogan*, 364 N.E.2d at 52.

Three Illinois Supreme Court cases illustrate the requisite intent for a contempt conviction. First, in *People ex rel. Kunce v. Hogan*,⁴⁷ the court upheld a criminal contempt conviction against defense attorney Dennis Hogan.⁴⁸ Hogan, while representing a client in a criminal case, filed a civil suit against the presiding judge after the client was found guilty, but before the client's sentencing.⁴⁹ Hogan insisted that he filed the suit based on his good faith belief that he would have lost standing to contest the bail practices in the county had he not filed his suit before sentencing.⁵⁰ Hogan argued that the State had to prove that he had intended to obstruct or impede the court, or to embarrass it in the administration of justice.⁵¹ The court disagreed, and held that intent may be inferred from proof of the surrounding circumstances and from the character of the action of the defendant.⁵² The court found that even if Hogan correctly filed the suit, Hogan could have avoided including the judge as a defendant.⁵³ Thus, the filing of the suit "lends itself to the reasonable inference that the suit was calculated to affect the outcome of the case or to embarrass, hinder, or obstruct the court or derogate from the court's authority or dignity or to bring the administration of law into disrepute."⁵⁴

Next, in *People ex rel. Fahey v. Burr*,⁵⁵ the Illinois Supreme Court upheld a finding of contempt against two attorneys who failed to disclose certain information to the trial court in a writ for habeas corpus.⁵⁶ The trial court discovered the information that the attorneys failed to disclose after granting the writ.⁵⁷ The trial court subsequently vacated the writ and found the attorneys to be in contempt of court.⁵⁸ The Illinois Supreme Court rejected the contemnors' argument that they believed in good faith that they were not required to disclose the information to the trial court, explaining that:

An attorney's zeal to serve his client should never be carried to the extent of causing him to seek to accomplish his purpose by

47. 364 N.E.2d 50 (Ill. 1977), *cert. denied*, 434 U.S. 1023 (1978).

48. *Id.* at 54. The court reversed Hogan's jail sentence, but affirmed a \$750 fine against him. *Id.*

49. *Id.* at 51, 54.

50. *Id.* at 52.

51. *Id.*

52. *Id.* (citing *People v. Johnson*, 192 N.E.2d 864, 866 (Ill. 1968)); *see also* *People v. Coolidge*, 187 N.E.2d 694, 696 (Ill. 1963).

53. *Hogan*, 364 N.E.2d at 52-53.

54. *Id.* at 53 (citing *People v. Goss*, 141 N.E.2d 385, 387-88 (Ill. 1957)).

55. 147 N.E. 47 (Ill. 1925).

56. *Id.* at 52.

57. *Id.* at 50.

58. *Id.*

a disregard of the authority of the court or by seeking to secure from a court an order or judgment without a full and frank disclosure of all matters and facts which the court ought to know.⁵⁹

Lastly, in *People v. Miller*,⁶⁰ the Illinois Supreme Court reversed a direct contempt conviction of defense attorney William Cain.⁶¹ The trial court convicted Cain of contempt after he had made “[g]ratuitous comments which had a tendency to reflect upon the entire proceedings of this [Circuit] Court.”⁶² In reversing the trial court, the Illinois Supreme Court cautioned that because a court’s power of direct contempt is an extraordinary one, the record must clearly demonstrate the conduct upon which the contempt conviction is based.⁶³ The supreme court found that, although Cain may have been overzealous, or improperly sarcastic at times, his conduct constituted a good faith attempt to represent his clients without hindering the court’s functions or dignity, thus warranting a reversal of his contempt conviction.⁶⁴

Although the Illinois Supreme Court has declined to specifically label contempt of court a crime,⁶⁵ criminal contempt must nevertheless be proven beyond a reasonable doubt.⁶⁶ An alleged contemnor has four defenses available to overcome a contempt charge. First, the inability of an attorney to obey a trial court’s order, through no fault of the attorney’s own, will excuse a charge of contempt.⁶⁷ Second, a contempt charge against an attorney who mistakenly or unintentionally files a document with the court will not stand.⁶⁸ Third, an attorney may overcome a contempt finding if a trial court fails to confer the due respect and consideration to which the attorney is entitled as an officer

59. *Id.* at 52.

60. 281 N.E.2d 292 (Ill. 1972).

61. *Id.* at 294.

62. *Id.* at 293 (quoting the trial court’s contempt order). The Illinois Supreme Court failed to state the substance of Cain’s “[g]ratuitous comments.” *Id.*

63. *Id.* The court stated: “The power to punish for direct contempt is an extraordinary one, and the court must set forth fully and specifically in its order, or the record must clearly show, the conduct upon which the finding of contempt is based.” *Id.* (citing *People v. Tomashevsky*, 273 N.E.2d 398, 401 (Ill. 1971); *People ex rel. Andrews v. Hassakis*, 129 N.E.2d 9, 10-11 (Ill. 1955); *People v. Loughran*, 118 N.E.2d 310, 313 (Ill. 1954)).

64. *Miller*, 281 N.E.2d at 294.

65. See *supra* notes 29-31 and accompanying text.

66. *People ex rel. Chicago Bar Ass’n v. Barasch*, 173 N.E.2d 417, 420 (Ill. 1961).

67. See *County of Cook v. Lloyd A. Fry Roofing Co.*, 319 N.E.2d 472, 476 (Ill. 1974); JANET L. BASSETT, ILLINOIS INST. FOR CONTINUING LEGAL EDUC., ATTORNEY CONDUCT (1985).

68. See *People v. Howarth*, 114 N.E.2d 785, 790-91 (Ill. 1953).

of the court.⁶⁹ Lastly, a finding of contempt will not stand if it is shown that the attorney acted in good faith to serve his or her client's interests.⁷⁰ The good faith defense, however, does not allow an attorney to deceive the court.⁷¹

Punishment for criminal contempt may be by fine, imprisonment, or both.⁷² After a court orders contempt punishment, it may also refer the matter to the appropriate disciplinary committee for further review.⁷³ Due process concerns, however, limit the severity of sentences where there has been no notice, hearing, or other procedural guarantees.⁷⁴ Furthermore, a trial court's contempt order must be in writing,⁷⁵ written contemporaneously with its oral order, and based upon the court's recollections as to what occurred earlier.⁷⁶ An appellate court's standard of review for a direct criminal contempt finding is whether there is adequate evidence to support the finding of contempt, and whether the trial court considered any facts outside of the court's personal knowledge.⁷⁷

2. Professional Responsibility and Court Discipline

The Illinois Rules of Professional Conduct (the "Illinois Rules") guide attorney conduct in Illinois.⁷⁸ The Illinois Rules, which became effective on August 1, 1990,⁷⁹ replaced the Illinois Code of Professional Responsibility (the "Illinois Code").⁸⁰ The Illinois Supreme Court modeled the Illinois Rules after the 1983 American Bar Association Model Rules of Professional Conduct (the "ABA Rules").⁸¹ Although the ABA Rules included comments, the Illinois Supreme Court

69. *People v. Rongetti*, 176 N.E. 292, 297 (Ill. 1931).

70. *People v. Siegel*, 445 N.E.2d 762, 764 (Ill. 1983).

71. *People v. Sleezer*, 139 N.E.2d 259, 262 (Ill. 1957).

72. *People v. Harrison*, 86 N.E.2d 208, 212 (Ill. 1949).

73. See WOLFRAM, *supra* note 2, § 12.1.3, at 626.

74. See LAFAYE & SCOTT, *supra* note 25, § 1.7(e), at 66 (citing *Cheff v. Schnakenberg*, 384 U.S. 373 (1966)); *supra* note 41 and accompanying text.

75. *People v. Jashunsky*, 282 N.E.2d 1, 4 (Ill.), *cert. denied*, 409 U.S. 989 (1972).

76. *People v. Wilcox*, 125 N.E.2d 453, 456 (Ill. 1955).

77. *People v. Graves*, 384 N.E.2d 1311, 1314 (Ill. 1979).

78. ILLINOIS RULES OF PROFESSIONAL CONDUCT (1989).

79. *Id.*

80. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, ILL. REV. STAT. ch. 110A (repealed 1990).

81. See Timothy L. Donaho, Jr. & Maureen A. Lesicko, *Survey of Illinois Law—Professional Responsibility*, 15 S. ILL. U. L.J. 1055, 1056 (1991); Ronald D. Rotunda, *The New Illinois Rules of Professional Conduct: A Brief Introduction and Comment*, 78 ILL. B.J. 386, 386 (1990).

enacted no formal comments when it adopted the Illinois Rules.⁸²

Nevertheless, the Preamble to the Illinois Rules provides some instruction when considering the interaction of professional responsibilities and contemptuous conduct.⁸³ The Preamble states that a “[v]iolation of these rules is grounds for discipline.”⁸⁴ It then advises that confidence is an integral part of an attorney-client relationship,⁸⁵ and that maintaining confidence requires the attorney to “competently and zealously” pursue the client’s concerns within the bounds of the law.⁸⁶ The Preamble cautions, however, that “zealously” does not indicate “mindlessly[,] or unfairly[,] or oppressively.”⁸⁷

Several Illinois Rules delineate the parameters of an attorney’s conduct before a tribunal. Among other rules, an attorney may not make statements or participate in the creation of evidence which the attorney knows is false.⁸⁸ The Illinois Rules also forbid an attorney from engaging in conduct which involves misrepresentation or which is prejudicial to the administration of justice.⁸⁹ An attorney is obligated to keep the confidences of his or her clients,⁹⁰ although an attorney has a duty to disclose “that which the lawyer is required by law to reveal.”⁹¹ Furthermore, the Illinois Rules forbid *ex parte* communications with the trial judge.⁹²

In the spirit of the Preamble, the Illinois Rules guide Illinois courts in disciplining attorneys, just as the Illinois Code had done previously.⁹³ Under the Illinois Code, a violation did not necessarily constitute contempt of court.⁹⁴ Although there has not yet been a

82. See Rotunda, *supra* note 81, at 386.

83. ILLINOIS RULES OF PROFESSIONAL CONDUCT pmb1.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* Rules 3.3(a)(1), 3.3(a)(5).

89. *Id.* Rules 8.4(a)(4), 8.4(a)(5).

90. *Id.* Rule 1.6(a); see also Appellant’s Opening Brief at 16, *Simac II*, 641 N.E.2d 416 (No. 74843) [hereinafter Appellant’s Brief].

91. ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.2(f)(3). The Illinois Rules also allow attorneys to withhold the identity of their clients only if “such information is privileged or irrelevant.” *Id.* Rule 3.3(a)(8); see Appellant’s Brief, *supra* note 90, at 17.

92. ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 3.5(i); see Appellant’s Brief, *supra* note 90, at 18.

93. *In re Kutner*, 399 N.E.2d 963, 965 (Ill. 1979); *In re Taylor*, 363 N.E.2d 845, 847 (Ill. 1977) (stating that although the Illinois Code is not binding on courts, it does “constitute a safe guide for professional conduct and an attorney may be disciplined for not observing [the Code]”).

94. *People v. Wolf*, 514 N.E.2d 1218, 1220 (Ill. App. 3d Dist. 1987), *cert. denied*, 520 N.E.2d 392 (Ill. 1988).

reported case with the same holding under the Illinois Rules, one may presume that such a decision would be similar. Even though an Illinois Rules violation probably does not constitute contempt, several disciplinary rules overlap with a court's contempt power to punish conduct that hinders, embarrasses, or obstructs a court in the administration of justice.⁹⁵

B. *In-Court Identifications and Zealous Advocacy*

Illinois courts permit in-court identifications of defendants,⁹⁶ despite charges that the practice is inherently suggestive,⁹⁷ as long as they are based on personal knowledge and observation, and the defendant is present in the courtroom.⁹⁸ The United States Supreme Court has outlined a totality of circumstances test to be utilized in evaluating suggestive identification procedures.⁹⁹

Factors that Illinois courts consider in assessing the reliability of in-court identifications include: (1) the witness' opportunity to view the accused at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the witness' level of certainty at the confrontation; and (5) the period of time between the encounter and the trial.¹⁰⁰ Under Illinois law, however, in-court identifications are admissible even if the witness is not positive or certain of the identification,¹⁰¹ whether or not there has been a prior proper identification,¹⁰² and whether or not there has been a prior failed iden-

95. See *supra* notes 42-46 and accompanying text.

96. See *People v. Finch*, 266 N.E.2d 97, 100 (Ill. 1970), *cert. denied*, 404 U.S. 836 (1971).

97. See, e.g., WAYNE R. LAFAYE & JERALD H. ISRAEL, CRIMINAL PROCEDURE § 7.4(g), at 372 (1992); THOMAS R. LEEDHAM, LEEDHAM'S NOTES ON THE DEFENSE OF PERSONAL MISIDENTIFICATION 196-205 (1984); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 6.19, at 158-59 (1992).

98. See *People v. Smith*, 576 N.E.2d 186, 190 (Ill. App. 1st Dist.), *appeal denied*, 580 N.E.2d 130 (Ill. 1991); 22A C.J.S. *Criminal Law* § 809 (1988 & Supp. 1994).

99. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

100. *Id.*; *People v. London*, 628 N.E.2d 621, 625 (Ill. App. 1st Dist. 1993), *appeal denied*, 631 N.E.2d 714 (Ill. 1994); *Smith*, 576 N.E.2d at 190. In *Smith*, the court held that the in-court identification of the defendant was properly admitted into evidence because the victim had a clear opportunity to view the defendant during a sexual assault and had reason to scrutinize the offender's face with care and attention. *Id.* at 190-91.

101. *People v. Kubat*, 447 N.E.2d 247, 263 (Ill.), *cert. denied*, 464 U.S. 865 (1983). In *Kubat*, a witness was asked whether she saw anybody in the courtroom "who looks like" the man she had previously observed in her bar. *Id.* The witness identified the defendant. *Id.* The Illinois Supreme Court held that "[t]he fact that she did not make a positive identification did not render her testimony inadmissible." *Id.*

102. *People v. Grady*, 438 N.E.2d 608, 612 (Ill. App. 1st Dist. 1982). In *Grady*, the defendant claimed that an improper lineup had tainted the subsequent in-court identifications. *Id.* at 611. The Illinois Supreme Court asserted that even if the lineup

tification.¹⁰³

A defense attorney may attempt to counter the suggestiveness of an in-court identification in several ways, but allowing or disallowing any defense tactic falls within the trial court's discretion.¹⁰⁴ Among other tactics, the attorney may request an in-court lineup.¹⁰⁵ Although a defense attorney may move for a courtroom lineup, there is no guarantee that a court will grant the motion because the Illinois Supreme Court has held that a criminal defendant does not necessarily have a right to an in-court lineup.¹⁰⁶ Furthermore, a defense attorney may attempt to seat the defendant at the defense table with a similar looking person.¹⁰⁷ The Illinois Supreme Court, however, has never held that a defendant has a right to such a tactic.¹⁰⁸ The attorney may also try to seat the defendant in the courtroom gallery, with no person taking his place at the defense table.¹⁰⁹ Illinois courts, however, have previously upheld trial court decisions denying such defense counsel requests.¹¹⁰

was improperly suggestive, the identifications were nonetheless reliable. *Id.* at 612. The court noted that the witnesses had a good opportunity to view the defendant during the commission of the crime, each witness described an assailant similar to the defendant and "only four hours elapsed between the shooting and the identifications." *Id.*

103. *People v. Flint*, 490 N.E.2d 1025, 1029 (Ill. App. 2d Dist. 1986). In *Flint*, a witness failed to identify a photograph of the defendant on the same day of the robbery and murder. *Id.* at 1027-28. The witness subsequently identified the defendant as the perpetrator in a lineup and in court. *Id.* at 1028. The Illinois Supreme Court held that the lineup and in-court identification were admissible, reasoning that "[t]he photograph may not have accurately portrayed [the] defendant. Moreover, an identification ordinarily is based upon animate observation of a defendant in his entirety, rather than an inanimate portrayal of his face." *Id.* at 1029 (quoting *People v. Woods*, 252 N.E.2d 717, 720 (Ill. App. 1st Dist. 1969)).

104. *Moore v. Illinois*, 434 U.S. 220, 230 & n.5 (1977). In *Moore*, a rape victim identified the defendant as the perpetrator at a preliminary hearing, during which the defendant was not represented by counsel. *Id.* at 223. The Supreme Court reversed the subsequent conviction, reasoning that had an attorney been present, the suggestiveness of the in-court identification could have been avoided. *Id.* at 230-32. Possibilities suggested by the Court included an in-court lineup, excusing the defendant from the courtroom, and placing the defendant with the courtroom audience. *Id.* at 230 n.5.

105. See *People v. Clark*, 288 N.E.2d 363, 370 (Ill. 1972); *Finch*, 266 N.E.2d at 100.

106. *Clark*, 288 N.E.2d at 370 (holding that the trial court was not obliged to conduct an in-court lineup using several men with similar characteristics as the defendant); *Finch*, 266 N.E.2d at 100.

107. See, e.g., *Duke v. State*, 298 N.E.2d 453 (Ind. Ct. App. 1973) (stating that seating others with a defendant at the defense table is a valid means to challenge the State's identification).

108. There are no reported Illinois Supreme Court cases holding that the defense has a right to seat the defendant at the defense table with a similar looking person.

109. See *People v. Gregory*, 357 N.E.2d 1251, 1254-55 (Ill. App. 1st Dist. 1976).

110. See *Gregory*, 357 N.E.2d at 1255 (rejecting the argument that the trial court

C. *The Contempt Power, Attorney Advocacy, and In-Court Identifications*

A trial court's use of the contempt power and an attorney's zealous advocacy have collided previously on the issue of in-court identifications. The Ninth Circuit, in *United States v. Thoreen*,¹¹¹ upheld a criminal contempt conviction against a defense attorney who switched his client with another individual at the defense table without the court's permission.¹¹² In *Thoreen*, the defense attorney had represented a defendant who was on trial for illegal salmon fishing.¹¹³ Without the court's permission, the defense attorney placed the defendant, dressed in a business suit, in the courtroom gallery, and placed another man, dressed in outdoor-type clothing, at the defense table.¹¹⁴ During the trial, the defense attorney gestured to the man at the defense table as if he were the defendant, and also failed to correct the trial court after it erroneously identified the man at the defense table as the defendant for the record.¹¹⁵ Following the close of the prosecution's case-in-chief, the defense attorney called the impostor as a witness and disclosed the misidentification.¹¹⁶ The prosecutor subsequently reopened his case and the defendant was ultimately convicted.¹¹⁷ Upon discovering the attorney's switch, the trial court cited the defense attorney with criminal contempt.¹¹⁸

The Ninth Circuit upheld the criminal contempt conviction, reasoning that defense attorney Thoreen crossed the line between zealous advocacy and actual obstruction.¹¹⁹ The *Thoreen* court stated that the attorney's behavior hindered the court's search for the truth, caused delays, and breached a court custom and rule.¹²⁰ The Ninth Circuit

mistakenly denied the defendant's request to be allowed to sit somewhere in the courtroom other than at the defense table).

111. 653 F.2d 1332 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

112. *Id.* at 1342-43.

113. *Id.* at 1336.

114. *Id.* The defendant "wore a business suit, large round glasses, and sat behind the rail in a row normally reserved for the press." *Id.*

115. *Id.*

116. *Id.* at 1336-37.

117. *Id.* at 1337.

118. *Id.* The trial court found the attorney in criminal contempt because the attorney conducted the switch without the court's permission or knowledge, because identification was not an issue, because the behavior disrupted and deceived the court, and because the behavior violated a court custom. *Id.* at 1338. The trial court also noted that attorney Thoreen's conduct conflicted with several provisions of the Washington Code of Professional Responsibility. *Id.*

119. *Id.* at 1338-39.

120. *Id.* at 1339.

also upheld the trial court's finding that the defense attorney's behavior conflicted with several provisions of the Washington Code of Professional Responsibility.¹²¹ The court advised that identification of the defendant was not at issue, thus refuting the need to attack the credibility of the in-court identification.¹²² Finally, the court stated that the defense attorney possessed the requisite intent for a contempt conviction because "he should have been aware that his conduct exceeded reasonable limits and hindered the search for truth."¹²³

Similarly, in *Miskovsky v. State ex rel. Jones*,¹²⁴ the Oklahoma Court of Criminal Appeals upheld a direct criminal contempt conviction against an attorney who seated another person at the defense table in place of the defendant without the court's permission.¹²⁵ In *Miskovsky*, the defense attorney substituted another woman for the female defendant at the defense table during a preliminary hearing.¹²⁶ A witness then misidentified the woman at the defense table as the defendant and the court subsequently dismissed the case.¹²⁷ The trial court then held defense attorney Miskovsky in direct contempt of court and fined him \$500.¹²⁸

The appellate court upheld the contempt finding, reasoning that the attorney "knowingly implement[ed] a plan of deception" affecting the court, the witnesses, and the prosecutor.¹²⁹ That court found that attorney Miskovsky's conduct undermined the trial court's integrity and authority.¹³⁰ The appellate court relied on the Oklahoma Code of Professional Responsibility as a guide in determining that the attorney's conduct constituted misrepresentation.¹³¹

121. *Id.* at 1341.

122. *Id.* at 1342.

123. *Id.*

124. 586 P.2d 1104 (Okla. Crim. App. 1978).

125. *Id.* at 1110.

126. *Id.* at 1106.

127. *Id.* at 1106 & n.1.

128. *Id.* Five attorneys testified at the contempt hearing, all stating that they were unaware of any rule preventing an attorney from substituting a replacement for the defendant at the defense table; most considering this to be a valid trial tactic. *Id.*

129. *Id.* at 1108.

130. *Id.*

131. *Id.*

III. DISCUSSION

A. *The Facts and the Lower Courts' Opinions*

During a traffic offense trial in Illinois, a DuPage County court found criminal defense attorney David Sotomayor to be in direct criminal contempt of court.¹³² Sotomayor represented Christopher Simac, who the State had charged with failing to yield while making a left turn and with driving with a revoked license.¹³³ The State's only witness was Ronald H. LaMorte, a police officer for the City of Wood Dale, Illinois.¹³⁴

Prior to Simac's trial, Sotomayor seated a clerk from his office, David P. Armanentos, next to him at the defense attorney's table.¹³⁵ Sotomayor seated Simac in the back row of the courtroom.¹³⁶ Six people, not including the courtroom personnel and the attorneys, were seated in the courtroom.¹³⁷ Two of these six people were police officers sitting in the jury box, and three of the remaining four people (including Armanentos and Simac) matched Simac's general appearance.¹³⁸ The defendant and Armanentos bore similar physical characteristics:¹³⁹ both men were tall, thin, dark blond-haired, and wore glasses.¹⁴⁰ On the day of the trial, Armanentos was dressed casually in jeans and a white shirt with blue stripes.¹⁴¹ The defendant, Simac, was also dressed casually, wearing a white shirt with red stripes.¹⁴²

Attorney Sotomayor substituted Armanentos for the defendant without the court's knowledge or permission.¹⁴³ Sotomayor also failed to inform the prosecutor of the substitution.¹⁴⁴ At the beginning of the trial, when the court instructed all testifying witnesses to come forward, Sotomayor advised the court that the defendant would not

132. *Simac II*, 641 N.E.2d at 417.

133. *Id.*

134. *People v. Simac*, 603 N.E.2d 97, 98 (Ill. App. 2d Dist. 1992), *aff'd*, 641 N.E.2d 416 (Ill. 1994) [hereinafter *Simac I*]. The complaining witness, Beth Nelson, did not appear at trial. *Simac II*, 641 N.E.2d at 418.

135. *Simac I*, 603 N.E.2d at 100.

136. *Id.*

137. *Id.*; Appellant's Brief, *supra* note 90, at 4.

138. *Simac I*, 603 N.E.2d at 100; Appellant's Brief, *supra* note 90, at 4.

139. *Simac II*, 641 N.E.2d at 418.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

testify.¹⁴⁵

During the trial, Officer LaMorte testified about the traffic accident allegedly involving Simac.¹⁴⁶ During his testimony, Officer LaMorte identified Armanentos as the driver of the car involved in the accident.¹⁴⁷ The court then noted the identification of Armanentos as the defendant for the record.¹⁴⁸ Still, Sotomayor did not notify the court of the misidentification, nor did he disclose that the actual defendant, Simac, sat elsewhere in the courtroom.¹⁴⁹

Officer LaMorte further testified that during his investigation of the accident, he asked the defendant for identification.¹⁵⁰ The police officer believed, however, that Simac was unable to produce a driver's license.¹⁵¹ Officer LaMorte also informed the court that he subsequently arrested the defendant for driving on a revoked license and for failure to yield while making a left turn.¹⁵²

Sotomayor then cross-examined Officer LaMorte.¹⁵³ The police officer admitted that he had never seen the defendant driving and that he did not witness the accident.¹⁵⁴ Sotomayor then moved to exclude the witnesses, a motion which the trial court granted.¹⁵⁵ After Officer LaMorte subsequently left the courtroom,¹⁵⁶ Sotomayor then called as a witness Armanentos, the person whom Officer LaMorte previously identified as the driver he had arrested.¹⁵⁷ After being sworn,¹⁵⁸ Armanentos testified that he was not the driver of the car involved in the crash on March 20, 1990.¹⁵⁹

145. *Id.* The clerk of the court asked Sotomayor, "Is your defendant [going to be sworn]?" *Id.* (alteration in original). Sotomayor replied, "No." *Id.*

146. *Id.* The police officer arrived at the scene after the accident. *Simac I*, 603 N.E.2d at 98. Upon questioning by Officer LaMorte, the driver of one of the cars "admitted that he had attempted to make a left-hand turn and proceed westbound on Irving Park Road and he was struck by a Chevrolet Nova." *Id.*

147. *Simac II*, 641 N.E.2d at 418.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Simac I*, 603 N.E.2d at 98. LaMorte also "testified regarding the certified driving abstract of defendant which was admitted into evidence." *Id.*

153. *Id.*

154. *Id.*

155. *Simac II*, 641 N.E.2d at 418.

156. *Id.*

157. *Id.*

158. *Id.* Armanentos had to be sworn at this time because "he did not come forward to be sworn when the court called for witnesses at the beginning of the trial." *Id.*

159. *Id.*

The prosecutor then cross-examined Armanentos.¹⁶⁰ Armanentos stated that he did not know defendant Simac and advised the court that he worked as a clerical employee in Sotomayor's law office.¹⁶¹ Armanentos explained that it was his understanding that Sotomayor had instructed him to sit at the defense counsel table in order to determine if the police officer would identify him as defendant Simac.¹⁶² Armanentos further stated that he had been told that defendant Simac looked like him.¹⁶³

Armanentos asserted that he did not know anything about the car accident on March 20, 1990.¹⁶⁴ He then identified Simac, who was still sitting in the back row of the courtroom, as the man with whom he had seen defense attorney Sotomayor speaking before the trial.¹⁶⁵ Armanentos conceded that he resembled Simac.¹⁶⁶ Armanentos also admitted, in response to the court's inquiry, that he did not approach the clerk to be sworn as a witness before the trial began.¹⁶⁷

Attorney Sotomayor next requested a directed finding in favor of defendant Simac.¹⁶⁸ In support of his motion, Sotomayor argued that Officer LaMorte misidentified the defendant and that, as required, Simac was in open court.¹⁶⁹ Prior to the court ruling on the motion, the prosecutor called Officer LaMorte back to the stand to allow him another opportunity to identify the defendant.¹⁷⁰ The prosecutor asked Officer LaMorte to "take a good look around the courtroom right now."¹⁷¹ The police officer again misidentified Armanentos as the defendant Simac.¹⁷²

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* Armanentos stated that he and Simac were both tall, thin, and Caucasian. *Id.*

164. *Simac I*, 603 N.E.2d at 99.

165. *Id.*

166. *Simac II*, 641 N.E.2d at 418.

167. *Id.* Following Armanentos' testimony, the court allowed Sotomayor to state for the record that Armanentos never approached the bench, that he was seated where he was instructed and, therefore, was not sworn when the witnesses were called. *Id.*

168. *Id.*

169. *Id.* Thus, Sotomayor argued that there was no fraud perpetrated upon the court. *Id.*

170. *Id.* Prior to Officer LaMorte's testimony, the prosecutor called the defendant Simac to testify. *Id.* Simac subsequently invoked his Fifth Amendment privilege and was excused. *Id.* The court then rejected the prosecutor's attempt to call attorney Sotomayor as a witness. *Id.* Next, the prosecutor asked that defendant Simac take his position next to his attorney at the defense table. *Id.* The trial court replied: "[H]e can sit any place he wants to in the courtroom. He is here." *Id.* (alteration in original).

171. *Simac I*, 603 N.E.2d at 99.

172. *Simac II*, 641 N.E.2d at 418.

Because of Officer LaMorte's misidentifications, the trial court granted Sotomayor's motion for a directed finding of not guilty.¹⁷³ The trial judge also found Sotomayor in direct criminal contempt of court,¹⁷⁴ explaining that the contempt finding was appropriate because of Sotomayor's misleading conduct toward the court, the State's Attorney, and Officer LaMorte in placing Armanentos at the defense table without notifying the court.¹⁷⁵ As punishment, the trial court imposed a \$500 fine.¹⁷⁶

The following day, after the trial court made supplemental findings involving the direct criminal contempt finding,¹⁷⁷ Sotomayor moved

173. *Id.*

174. *Id.* at 418-19.

175. *See id.* at 419. The trial court advised that Sotomayor's placing of Armanentos at the defense table was "purposely done" to "mislead the Court." *Simac I*, 603 N.E.2d at 99. The trial court further stated that Sotomayor was held in direct criminal contempt of court "for having a person bearing the likeness" of the defendant Simac "sit at the counsel table with him in the location usually occupied by the [defendant]." *Id.*

176. *Simac II*, 641 N.E.2d at 419.

177. The trial court stated:

"The court finds that it was the totality of the conduct of [defense] attorney in court in connection with this case that is the basis for the court[s] finding of criminal contempt for misrepresentation by inference including the following findings:

1. That a person with the likeness of the defendant, a young, white male, was the only person with defense attorney at the counsel table when defense attorney came to the bench and said, 'Here is my jury waiver.'

2. That person was dressed in jeans and a shirt with no tie that is not the courtroom attire of an attorney or co-counsel, yet that person sat in the customary location of a defendant throughout the State's case.

3. That person was asked by the clerk to be sworn with other witnesses at the start of the trial, to which defense attorney said that said person was not going to testify. The obvious inference of this comment to the court and clerk was that the person was the defendant because witnesses were excluded except for defendant.

4. That person was identified as the defendant by the State witness police officer, and all of the foregoing resulted in the court's comment that the record could show that the defendant was identified for the record; there was no defense attorney response to this court's comment that advised of the court's impression and finding based on all that had occurred and that the court was misled as to the identity of the defendant.

5. That person's only apparent purpose in the courtroom, in a defendant's customary location with defense attorney, was to create an inference to the court that he was the defendant, and this was done with the knowledge of defense attorney.

6. That while there was no express misrepresentation by words, there was a misrepresentation by inference by the totality of the conduct of the defense attorney, and that was the basis of the criminal contempt of court finding."

Id. (alteration in original).

for reconsideration his conviction.¹⁷⁸ The trial court denied the motion, and Sotomayor appealed his conviction to the Appellate Court of the Second District of Illinois.¹⁷⁹

With one justice dissenting, the Second District Appellate Court affirmed the trial court's finding of direct criminal contempt against Sotomayor.¹⁸⁰ The appellate court reasoned that the substitution "was calculated to mislead the State and the court" because Sotomayor conducted the experiment without the trial court's permission or knowledge.¹⁸¹ The court also found that Sotomayor violated several provisions of the Illinois Rules of Professional Conduct.¹⁸² Specifically, the appellate court found that Sotomayor engaged in conduct which was prejudicial to the administration of justice,¹⁸³ and that he misrepresented material facts and evidence to the tribunal.¹⁸⁴ Although the court recognized that a violation of the Illinois Rules does not necessarily constitute criminal contempt of court, it found that Sotomayor surpassed "the outermost limits of acceptable conduct before a tribunal."¹⁸⁵

The appellate court, however, reduced the \$500 fine to \$100.¹⁸⁶ The dissenting opinion stated that Sotomayor's "action here was one taken in the interest of his client, in good faith, and with respect for the court."¹⁸⁷ The Illinois Supreme Court subsequently granted Sotomayor's leave to appeal the appellate court's decision.¹⁸⁸

178. *Id.*

179. *Simac I*, 603 N.E.2d at 100.

180. *Id.* at 104.

181. *Id.* at 103.

182. *Id.* at 102-03. The appellate court found that the attorney had violated Rules 3.3(a)(1), 3.3(a)(5), 8.4(a)(4) and 8.4(a)(5) of the Illinois Rules of Professional Conduct. *Id.*

183. *Id.* The appellate court found that Sotomayor violated Rules 8.4(a)(4) and 8.4(a)(5) of the Illinois Rules of Professional Conduct by "engaging in conduct involving dishonesty, fraud, deceit, or misrepresentations, [and] engaging in conduct prejudicial to the administration of justice." *Id.*

184. *Id.* at 103. The court held that attorney Sotomayor violated Rules 3.3(a)(1) and 3.3(a)(5) of the Illinois Rules of Professional Conduct by misrepresenting "material facts or law to a tribunal or participating in the creation or preservation of evidence when the lawyer knows or reasonably should know the evidence is false." *Id.*

185. *Id.*

186. *Id.* at 104. The court stated: "In view of the fact that this is the first case in Illinois that deals with the conduct described herein, it is our opinion that the fine of \$500 imposed by the circuit court should be reduced to \$100." *Id.* The court modified the fine under Illinois Supreme Court Rule 615(b). *Id.*

187. *Id.* at 105 (Geiger, J., dissenting).

188. *Simac II*, 641 N.E.2d at 417.

B. The Illinois Supreme Court's Opinion

Simac was a case of first impression for the Illinois Supreme Court.¹⁸⁹ In a four-to-three decision, the court upheld the appellate court's direct criminal contempt conviction of trial attorney David Sotomayor.¹⁹⁰ Specifically, the court held that a contempt conviction is appropriate when a defense attorney substitutes another person for the defendant at the defense counsel table without the trial court's permission or knowledge.¹⁹¹

The supreme court affirmed the Second District Appellate Court's judgment, including the reduction of Sotomayor's fine to \$100.¹⁹² The court's opinion, written by Chief Justice Bilandic,¹⁹³ focused on Sotomayor's argument that he lacked the requisite intent for a criminal contempt conviction.¹⁹⁴ The court dismissed Sotomayor's argument that his intent was to test the State's identification testimony by reasoning that the state of mind of an alleged contemnor need not be proven affirmatively.¹⁹⁵ The court explained that intent may be inferred from the circumstances surrounding the actor's behavior and from the character of the actor's conduct.¹⁹⁶ Consequently, the court ruled that Sotomayor's conduct revealed that his intent was not simply to test the State's identification testimony.¹⁹⁷ Instead, the supreme court found that Sotomayor intended to cause a misidentification, thereby deceiving not only the State and its witness, but also the court itself.¹⁹⁸ The most telling fact for the court, concerning Sotomayor's intent to deceive, was Sotomayor's failure to correct the trial judge's erroneous statement for the record that Officer LaMorte had identified defendant Simac.¹⁹⁹

Rather than accepting Sotomayor's claim that he simply intended in good faith to test the veracity of the State's identification,²⁰⁰ the court reasoned that Sotomayor had at least three alternative methods avail-

189. See *Simac I*, 603 N.E.2d at 101.

190. *Simac II*, 641 N.E.2d at 424, 427.

191. See *id.* at 424.

192. *Id.*

193. *Id.* at 417. After reciting the facts of the case, the court began by tracing the law of the contempt power in Illinois courts. *Id.* at 420.

194. *Id.* at 420-22.

195. *Id.* at 421.

196. *Id.* Specifically, the court advised that "[t]he intent may be inferred from the surrounding circumstances and the character of the party's conduct." *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 422.

200. *Id.*

able to test the State's identification testimony: (1) conduct an in-court lineup; (2) seat the defendant in the courtroom gallery without placing a substitute at the defense table; and (3) place more than one person at the defense table.²⁰¹ The court concluded that because Sotomayor had these options available, he could have realized his objective as an advocate without misleading the State, the witness, and the trial court.²⁰²

Next, the supreme court rejected Sotomayor's argument that requiring a defense attorney to give the court notice and secure its permission prior to placing a replacement at the defense table would violate principles of professional responsibility.²⁰³ Sotomayor maintained that in a bench trial such as *Simac*'s, prior disclosure to the trial judge of his concern regarding the validity of the identification testimony would sway the trial court's ability to render a just opinion.²⁰⁴

Sotomayor further contended that prior disclosure of his trial strategy to the judge would have necessarily required disclosure to the prosecutor due to the ban on *ex parte* communications, and that such disclosure would have violated Sotomayor's ethical obligations to his client.²⁰⁵ Additionally, Sotomayor argued that revealing his strategy would have created an ethical dilemma for the State's Attorney, who, according to Sotomayor, would have been forced to decide whether to inform the identification witness what to expect, or to seek a just result by remaining silent.²⁰⁶

Without referring to the Illinois Rules of Professional Conduct, the court rejected Sotomayor's professional responsibility arguments.²⁰⁷ The supreme court stated that a trial judge in a bench trial is presumed to consider only competent evidence in making a finding.²⁰⁸ For an appellant to overcome this presumption, the supreme court noted, the record must establish that the trial court's judgment relies on a private analysis of the evidence or other private information about the facts in

201. *Id.*

202. *Id.* By using these alternative methods, Sotomayor could possibly have shown that Officer LaMorte could not identify the defendant as the driver of the car. If LaMorte would have been unable to identify the defendant using these other means, a finding would probably have been directed in favor of the defendant.

203. *Id.*

204. *Id.* Sotomayor argued that "in a bench trial such as this where the court also functions as the trier of fact, prior disclosure to the court of his concern regarding an identification issue would somehow influence the court's ability to render a just verdict based solely on evidence presented during the proceedings." *Id.*

205. *Id.*; see Appellant's Brief, *supra* note 90, at 18.

206. *Simac II*, 641 N.E.2d at 422; see Appellant's Brief, *supra* note 90, at 18.

207. *Simac II*, 641 N.E.2d at 422-23.

208. *Id.* at 422 (citing *People v. Tye*, 565 N.E.2d 931, 943 (Ill. 1990)).

the case.²⁰⁹

The *Simac* court also rebuffed Sotomayor's contention that prior disclosure would violate his ethical obligations, explaining that trial courts and prosecutors are frequently made aware of defense strategies and concerns when arguing motions *in limine*.²¹⁰ Furthermore, the court observed that a prosecutor is not placed in an ethical dilemma with such prior disclosures by defense counsel.²¹¹ The court analogized the situation where a prosecutor is made aware of the defense attorney's plan to place a substitute at the defense table to situations where a court has granted a defense's motion *in limine* and the prosecution is aware of evidence which it cannot use at trial.²¹² After the granting of such motions *in limine*, the court stated, the prosecution has been able to continue without violating its ethical duties.²¹³

Lastly, the court noted that its decision was supported by two cases decided outside of Illinois: *United States v. Thoreen*²¹⁴ and *Miskovsky v. State ex rel. Jones*.²¹⁵ The supreme court explained that both of these cases involved fact patterns similar to *Simac*.²¹⁶ The court explained that the Ninth Circuit in *Thoreen* upheld the finding of contempt because the defense attorney's subversive tactics impeded the court's ability to ascertain the truth.²¹⁷ The court also noted that the Ninth Circuit found that the defense attorney violated the state's code of professional responsibility, and that the substitution crossed over the line from zealous advocacy to obstruction because it delayed the proceedings.²¹⁸

209. *Id.* at 422-23 (citing *Tye*, 565 N.E.2d at 943). The court advised that "[i]n order to overcome this presumption, the record must affirmatively demonstrate that the court's finding rests on a private investigation of the evidence or other private knowledge about the facts in the case." *Id.* (citing *Tye*, 565 N.E.2d at 943).

210. *Id.* at 423. The court advised that such motions occur on a daily basis and those attorneys "who utilize this pretrial procedure do not violate their ethical obligations to their clients." *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* (citing *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982)); *see supra* notes 111-23 and accompanying text.

215. *Simac II*, 641 N.E.2d at 423-24 (citing *Miskovsky v. State ex rel. Jones*, 586 P.2d 1104 (Okla. Crim. App. 1978)); *see supra* notes 124-31 and accompanying text.

216. *Simac II*, 641 N.E.2d at 423-24 (citing *Thoreen*, 653 F.2d at 1336-37; *Miskovsky*, 586 P.2d at 1106); *see supra* part II.C.

217. *Simac II*, 641 N.E.2d at 423 (citing *Thoreen*, 653 F.2d at 1341-42).

218. *Id.* (citing *Thoreen*, 653 F.2d at 1339-40).

Similarly, the Illinois Supreme Court noted that in *Miskovsky*, the Oklahoma appellate court found that the substitution of the defendant for another individual at the defense table, without the court's knowledge or permission, constituted contumacious conduct.²¹⁹ The *Simac* court also noted that the Oklahoma appellate court found that the defense attorney violated Oklahoma's Code of Professional Responsibility.²²⁰

C. *The Dissenting Opinion*

In his dissenting opinion, Justice Nickels²²¹ asserted that defense attorney Sotomayor acted in good faith to protect defendant Simac from a suggestive in-court identification.²²² He argued that Sotomayor's conduct was not calculated to embarrass, hinder, or obstruct the court; instead Sotomayor was requiring the State to prove its case.²²³ Justice Nickels relied on *People v. Miller*²²⁴ to demonstrate that a good faith representation of one's client will not constitute contemptuous conduct.²²⁵

Justice Nickels' dissenting opinion further argued that the surrounding circumstances demonstrated a good faith reason to challenge the State's identification.²²⁶ Justice Nickels explained that it was reasonable to challenge the State's identification because the State had delayed the trial, the case rested on the testimony of Officer LaMorte, and the State had no complaining witness.²²⁷ Additionally, he argued that at no time during the trial did Sotomayor show disrespect for the court's authority or attempt to hinder the proceedings.²²⁸ These fac-

219. *Id.* at 423-24 (citing *Miskovsky*, 586 P.2d at 1109).

220. *Id.* at 424 (citing *Miskovsky*, 586 P.2d at 1108). Interestingly, the *Simac* court discussed the finding that the Oklahoma attorney had violated the Oklahoma Code of Professional Responsibility, while not referring to the Illinois Rules of Professional Conduct in its own opinion. *Id.*; see *supra* note 207 and accompanying text.

221. Justices Harrison and McMorro joined in the dissent. *Id.* at 427 (Nickels, J., dissenting).

222. *Id.* at 424 (Nickels, J., dissenting).

223. *Id.* at 425 (Nickels, J., dissenting). Justice Nickels also argued that there is no "duty imposed upon a defense attorney to assist an eyewitness or the State by providing a suggestive identification setting." *Id.* (Nickels, J., dissenting).

224. 281 N.E.2d 292 (Ill. 1972); see *supra* notes 60-64 and accompanying text.

225. *Simac II*, 641 N.E.2d at 425 (Nickels, J., dissenting).

226. *Id.* (Nickels, J., dissenting). Justice Nickels asserted: "Given the unreliability of an identification based only upon the placement of defendant at counsel's table, defense counsel acted in good faith and on behalf of his client." *Id.* (Nickels, J., dissenting).

227. *Id.* (Nickels, J., dissenting).

228. *Id.* (Nickels, J., dissenting).

tors, he stated, did not evidence a contumacious design.²²⁹

Justice Nickels then went on to distinguish *Thoreen*,²³⁰ arguing that the attorney in *Thoreen* showed an intent to mislead the court because he actually disguised the man sitting at the defense table to resemble a person who had been arrested for illegal fishing.²³¹ Justice Nickels also observed that the defense attorney in *Thoreen* gestured to the impostor at the defense table and consulted with him during the proceedings.²³² Furthermore, Justice Nickels stated that, unlike *Simac*, identification was not an issue in *Thoreen*.²³³

Lastly, Justice Nickels' conceded that there were a variety of better methods to protect a defendant from a suggestive in-court identification.²³⁴ He explained, however, that the issue is not whether the attorney made the best choice, "but whether his specific conduct showed disregard for the court's authority and the administration of justice."²³⁵ On this question, Justice Nickels concluded that Sotomayor's conduct was a good faith attempt to test the accuracy of the State's identification.²³⁶

IV. ANALYSIS

In *Simac*, the Illinois Supreme Court appropriately upheld defense attorney David Sotomayor's direct criminal contempt conviction. The court, however, neglected to thoroughly confront several important issues that its decision may create.

The *Simac* court correctly held that a direct criminal contempt finding is appropriate when a criminal defense attorney switches the defendant with another individual at the defense table, without the court's permission or knowledge.²³⁷ Specifically, the court properly found that Sotomayor possessed the requisite intent,²³⁸ as clearly indicated by the surrounding circumstances and the character of his

229. *Id.* (Nickels, J., dissenting).

230. *Id.* at 426 (Nickels, J., dissenting) (citing *Thoreen*, 653 F.2d 1332); *see supra* notes 111-23, 214-18, and accompanying text.

231. *Simac II*, 641 N.E.2d at 425 (Nickels, J., dissenting) (citing *Thoreen*, 653 F.2d at 1336).

232. *Id.* (Nickels, J., dissenting) (citing *Thoreen*, 653 F.2d at 1336).

233. *Id.* (Nickels, J., dissenting) (citing *Thoreen*, 653 F.2d at 1338).

234. *Id.* at 427 (Nickels, J., dissenting).

235. *Id.* (Nickels, J., dissenting).

236. *Id.* (Nickels, J., dissenting). Justice Nickels argued that "[c]ounsel did not misrepresent the identity of defendant in any way and attempted in good faith to test the veracity of the State's case." *Id.* (Nickels, J., dissenting).

237. *See id.* at 424.

238. *See id.* at 421.

action.²³⁹ In fact, because Sotomayor undoubtedly knew that the trial court would assume that the man sitting next to him was the defendant, the substitution was clearly an act of deception. As the Illinois Supreme Court indicated, the "true identity of the defendant is clearly a fact 'which the court ought to know.'"²⁴⁰ Defense attorney Sotomayor crossed the line between advocacy and contemptuous conduct even further when he did not correct the trial court when it noted the mis-identification for the record.²⁴¹ From these facts, the court correctly inferred that Sotomayor intended to deceive the court,²⁴² thereby warranting a criminal contempt conviction.

While upholding the contempt finding was appropriate, the court opinion still failed to fully address three issues that its decision may create: first, whether the alternative tests the court set forth for testing in-court identifications were realistic alternatives for attorneys;²⁴³ second, whether requiring an attorney to inform the prosecution of a plan to test an identification creates an ethical dilemma for the prosecutor;²⁴⁴ and last, whether this decision should take into account the Illinois Rules of Professional Conduct.²⁴⁵

A. *In-Court Identifications: Are Options Really Available?*

The first issue that the majority opinion failed to fully address was the issue Sotomayor was attempting to expose through his substitution plan: courtroom identifications are inherently suggestive.²⁴⁶ Commentators have argued that in-court identifications are even more

239. See *supra* notes 42-46, 194-99, and accompanying text.

240. *Simac II*, 641 N.E.2d at 422 (quoting *People ex rel. Fahey v. Burr*, 147 N.E. 47, 52 (Ill. 1925)); see *supra* notes 55-59 and accompanying text.

241. See *Simac II*, 641 N.E.2d at 422; see *supra* notes 143-49 and accompanying text.

242. See *Simac II*, 641 N.E.2d at 422; *supra* notes 42-64 and accompanying text.

243. See *infra* part IV.A.

244. See *infra* part IV.B.

245. See *infra* part IV.C.

246. See generally LAFAVE & ISRAEL, *supra* note 97, § 7.4(e), at 372 (stating that in-court identifications are even more suggestive than one-on-one confrontations at the police station); Cindy J. O'Hagan, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741 (1993) (discussing the weaknesses of eyewitness identifications and suggesting that courts should allow eyewitness expert testimony); Wallace W. Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOW. L.J. 731 (1987) (examining various identification procedures and arguing that recent Supreme Court cases have eviscerated a defendant's due process protections); Lawrence E. Taylor, *Reliability of Eyewitness Identification*, 15/3 TRIAL LAW. Q. 10 (1983) (criticizing eyewitness identifications as unreliable).

suggestive than police show-ups.²⁴⁷ While the United States Supreme Court has restricted police show-ups to special circumstances, the Court allows prosecutors to utilize in-court identifications in many situations.²⁴⁸ Despite the suggestiveness of in-court identifications, the Illinois Supreme Court has recognized the importance of the procedure.²⁴⁹

In *Simac*, the supreme court suggested that Sotomayor had options other than placing an impostor at the defense table to test the State's identification testimony.²⁵⁰ These options included conducting an in-court lineup, seating the defendant in the gallery without someone taking his place at the defense table, and seating the defendant at the defense table with another non-attorney, next to the defendant.²⁵¹ The viability of these options, however, were questionable given the facts of the case. Before a trial court will allow a defense attorney to utilize one of these alternatives, it must first find that identification is an issue and then determine whether there exists a reasonable likelihood of a mistaken identification.²⁵² In *Simac*, however, there was no indication prior to trial that identification would be an issue.²⁵³

First, the witness making the identification was a police officer.²⁵⁴ Although courts do not presume that police officers are more likely to tell the truth than other witnesses,²⁵⁵ in the case of a traffic dispute, a court will view the officer's testimony as more credible than most witnesses, based on an assumption that police officers pay greater attention to details than casual observers.²⁵⁶ Second, Officer LaMorte

247. See LAFAYE & ISRAEL, *supra* note 97, § 7.4(g), at 372. A police show-up is essentially a one-man lineup; the police will present a single person to a witness shortly after the crime has been committed to determine if the suspect is the perpetrator of the crime. *Id.* § 7.4(f), at 372.

248. See *id.*

249. *Simac I*, 603 N.E.2d at 104 (Geiger, J., dissenting) (citing *People v. Morgan*, 568 N.E.2d 755, 772-73 (Ill. 1991)). The appellate court stated that in *Morgan*, the Illinois Supreme Court "found no error in the trial court's decision not to hold a hearing on suppression of an in-court identification because the identification's reliability was supported by an unchallenged, independent basis." *Id.* (Geiger, J., dissenting) (citing *Morgan*, 568 N.E.2d at 773).

250. *Simac II*, 641 N.E.2d at 422.

251. *Id.*; see *supra* notes 201-02 and accompanying text.

252. See *People v. Clark*, 288 N.E.2d 363, 370 (Ill. 1972) (explaining the necessity of there being an issue surrounding the identification before allowing the techniques listed above to test the identification). See generally LAFAYE & ISRAEL, *supra* note 97, § 7.4(c), at 370 (discussing the risk of misidentification).

253. *Simac II*, 641 N.E.2d at 417-18.

254. *Id.* at 417.

255. *Crook v. Crook*, 70 N.E.2d 209, 213 (Ill. App. 1st Dist. 1946).

256. See generally *Manson v. Brathwaite*, 432 U.S. 98, 115 (1976) (explaining that

observed defendant Simac at the scene of the accident while conducting the interview, which presumably lasted several minutes.²⁵⁷ Thus, a trial court would give substantial weight to the officer's testimony because the officer, a trained observer, had several minutes to observe and pay attention to the defendant. Third, Officer LaMorte demonstrated no apparent hesitation in identifying the law clerk, Armanentos, as the defendant in court,²⁵⁸ thereby indicating reliability.²⁵⁹ Finally, although the accident had occurred nine months before the trial,²⁶⁰ Illinois courts have upheld identifications made over two years after the occurrence.²⁶¹

Because it is unlikely that the trial court would have found identification to be an issue, the court most likely would have disallowed any defense request to challenge the identification testimony, including the tactic that Sotomayor actually used. Thus, the *Simac* court inappropriately concluded that Sotomayor's action was not a good faith attempt to test the State's identification because other options were available.²⁶² In reality, there was only a slight chance that the trial court would have allowed Sotomayor to employ the types of identification challenges mentioned by the *Simac* court.

Alternatively, even if the trial court had found that identification was at issue, an in-court lineup, although seemingly the best solution, is not always available.²⁶³ Specifically, the Illinois Supreme Court has held that a trial court need not grant a defendant's request to stage an in-court lineup.²⁶⁴ Similarly, although a defense request to sit the

a police officer may be a more credible witness because he is more likely to pay a higher degree of attention due to the fact he has the job of looking for criminal activity).

257. *Simac II*, 641 N.E.2d at 418.

258. *Id.*

259. *See Manson*, 432 U.S. at 114 (stating that the certainty of the identification at the time of the confrontation is one of several factors to be considered).

260. *Simac II*, 641 N.E.2d at 417.

261. *See People v. Rodgers*, 290 N.E.2d 251, 254-55 (Ill. 1972) (upholding a conviction based on eyewitness identification that was three years old); *People v. Dean*, 509 N.E.2d 618, 622-23 (Ill. App. 1st Dist. 1987) (upholding a conviction based on eyewitness identification which was two-and-one-half years old), *overruled on other grounds* by *People v. Jackson*, 599 N.E.2d 926 (Ill. 1992).

262. *See supra* notes 201-02 and accompanying text.

263. *See supra* notes 105-06 and accompanying text.

264. *People v. Clark*, 288 N.E.2d 363, 370 (Ill. 1972). In *Clark*, the defendant, Clark, was the only African-American man at the counsel table when he was identified as the offender. *Id.* Clark argued on appeal that the trial court should have held an in-court lineup, using other similar-looking African-American men. *Id.* The Illinois Supreme Court relied on a Washington Supreme Court case in rejecting Clark's argument:

'Defendant's racial attributes were a mere identifying characteristic. We can envision white defendants who could well be the only one [sic] in the room

defendant in the courtroom gallery without a substitute at the defense table would sufficiently test the State's identification, prior Illinois decisions have upheld trial court rulings denying requests by defendants to sit in the courtroom gallery without anybody taking their place at the defense table.²⁶⁵ Lastly, the Illinois Supreme Court suggested that Sotomayor could have moved the trial court for permission to seat a similar-looking person next to the defendant at the defense table.²⁶⁶ Although this also would have tested the State's identification witness, there is no reported Illinois case holding that a defendant has a right to such a tactic; thus, trial courts are presumably free to deny such requests.

Although the trial court most likely would have rejected Sotomayor's request to challenge Officer LaMorte's identification of the defendant, Sotomayor should not have taken the action he did.²⁶⁷ Instead, he could have attacked the credibility of Officer LaMorte on cross-examination if Officer LaMorte correctly identified the defendant.²⁶⁸ Sotomayor could have questioned the witness on various issues, including: the length of the interview; the lighting conditions during the interview; the length of time since the accident; how many other accidents the police officer had investigated since the one at issue; what else was going on when the police officer was interviewing the defendant; any inconsistent descriptions; the age of the police officer; and how long he had been on duty the day of the incident.²⁶⁹ Officer LaMorte's answers to some of these questions might have weakened the impact of the in-court identification.

Moreover, if Sotomayor's cross-examination of Officer LaMorte was unsuccessful, and the court subsequently convicted Simac, Soto-

with red hair, a crew cut, or a beard. The prosecution is not required to pack a courtroom with blacks or people who resemble a defendant, in order to insure a proper identification.'

Id. (alteration in original) (quoting *State v. Brown*, 458 P.2d 165, 166 (Wash. 1969)).

265. *E.g.*, *People v. Gregory*, 357 N.E.2d 1251, 1255 (Ill. App. 1st Dist. 1976). In *Gregory*, the trial court rejected the criminal defendant's pretrial motion requesting that he be allowed to sit somewhere other than at the defense counsel table during the in-court identification. *Id.* The appellate court upheld the ruling, stating that the witness "had an excellent opportunity to view [the defendant] during the entire duration of the crime." *Id.*

266. *Simac II*, 641 N.E.2d at 422.

267. *See supra* notes 135-45 and accompanying text.

268. *See LEEDHAM, supra* note 97, at 204; LOFTUS & DOYLE, *supra* note 97, § 10.01-26, at 251-304.

269. *See Manson*, 432 U.S. at 114-16; *People v. London*, 628 N.E.2d 621, 625 (Ill. App. 1st Dist. 1993); *see also* LEEDHAM, *supra* note 97, at 204; LOFTUS & DOYLE, *supra* note 97, § 10.01-26, at 251-304; *supra* note 100 and accompanying text.

mayor could still have appealed the conviction. The basis for the appeal would have been the trial court's rejection of other available methods, such as an in-court lineup, to combat the suggestiveness of the in-court identification.²⁷⁰ Although an appeal in a traffic court case is unlikely, if a client is willing to contest the conviction based on the in-court identification, then the matter should be brought up with the appellate court.

B. The Prosecutor's Ethical Dilemma

Although the *Simac* court determined that Sotomayor should have informed the court and the State of his desire to test the in-court identification, it did not thoroughly confront the ethical dilemma the prosecutor may have faced if he were aware of the information. As Sotomayor argued, the State's Attorney would have to decide whether to inform the police officer of what to expect, or to seek a just result by refraining from influencing the identification witness' testimony.²⁷¹

In short, the issue is how far the prosecutor could have gone in preparing the identification witness without violating any ethical obligations. The prosecutor most likely would have violated legal ethics had he told the witness about Sotomayor's switch because he would be tainting Officer LaMorte's testimony.²⁷² It is not clear, however, whether it would have been unethical for the prosecutor to advise the witness to "be careful," or to "take your time" with the courtroom identification.²⁷³ The *Simac* court failed to delineate what the prosecutor could have told the witness, had he known of the substitution plan, and still stay within ethical limits.

Even if the prosecutor had been too suggestive in questioning the police officer, the trial court would have most likely allowed the identification to stand. The Illinois Supreme Court has held that where an identification procedure is unduly suggestive, the identification will

270. See *supra* notes 104-10 and accompanying text.

271. *Simac II*, 641 N.E.2d at 422-23; see Appellant's Brief, *supra* note 90, at 18.

272. See generally JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 10.01-32, at 470-522 (1985) (discussing various instances of prosecutorial misconduct and violations of the American Bar Association's standards).

273. See *Simac I*, 603 N.E.2d at 99. In *Simac*, the prosecutor tried a similar tactic. Prior to the police officer's second attempted identification of the defendant, the prosecutor advised the witness to "take a good look around the courtroom right now." *Id.* The trial court sustained Sotomayor's objection to the prosecutor's phrasing of the question. Appellant's Brief, *supra* note 90, at 5. Nevertheless, the police officer still mistakenly identified the clerical worker, Armanentos, as the defendant. *Simac I*, 603 N.E.2d at 99.

nevertheless be admitted if it is independently reliable.²⁷⁴ In other words, if there is enough independent evidence that a witness' identification of a defendant was reliable, then the identification will be admitted.²⁷⁵ Factors which would indicate that Officer LaMorte's identification of Simac was independently reliable include the length of the interview with Simac, Officer LaMorte being more than a casual observer, and Officer LaMorte's lack of hesitation when identifying Armanentos as the defendant.²⁷⁶ Because Officer LaMorte had interviewed Simac for some time, because he was more than a mere casual observer, and because he made his identification without hesitation, the trial court probably would have found Officer LaMorte's identification reliable, notwithstanding unduly suggestive questioning by the prosecutor.

Again, however, the Illinois Supreme Court correctly rejected Sotomayor's argument that the prosecutor's ethical dilemma excused Sotomayor's behavior. The defense attorney should first advise the court and the prosecutor of the concerns regarding the in-court identification.²⁷⁷ Then, if the defense attorney believes the prosecutor tainted the identification, the defense attorney should object, thereby preserving the issue for appeal. If the witness' identification testimony could not be shaken on cross-examination, then an appeal based on the tainted identification may become necessary.

C. Rules of Professional Conduct: Violated?

Despite the correctness of the court's narrow holding in *Simac*, the Illinois Supreme Court also failed to address the relevance of the Illinois Rules of Professional Conduct in drawing the line between attorney advocacy and court discipline. Although the Second District Appellate Court found that Sotomayor had violated two of the Illinois Rules,²⁷⁸ the Illinois Supreme Court did not even comment on this aspect of the lower court's opinion. Furthermore, the court did not

274. See *People v. Williams*, 515 N.E.2d 1230, 1233 (Ill. 1987). For factors that courts consider in assessing the reliability of in-court identifications see *supra* note 100 and accompanying text; *Manson*, 432 U.S. at 114; *supra* notes 96-98, 100-03, and accompanying text.

275. See *supra* notes 96-103 and accompanying text.

276. See *supra* notes 254-61 and accompanying text.

277. See *Simac II*, 641 N.E.2d at 422 (stating that the defense attorney could have requested, prior to the in-court identification, other methods to test the witness' identification of the defendant).

278. *Simac I*, 603 N.E.2d at 102-03 (finding that Sotomayor violated Rules 3.3(a)(1), 3.3(a)(5), 8.4(a)(4), and 8.4(a)(5) of the Illinois Rules of Professional Conduct); see *supra* part III.A.

employ the Illinois Rules when addressing Sotomayor's specific argument that the ethics of professional responsibility compelled him to act in the way he did.²⁷⁹ Thus, the Illinois Supreme Court's decision suggests that, although Sotomayor's conduct was contemptuous, he did not violate the Illinois Rules and did not deserve disciplinary action by the bar.

Had the court employed the Illinois Rules in evaluating Sotomayor's conduct, it would have concluded that Sotomayor violated at least two of the Rules: Rule 3.3 - Conduct Before a Tribunal, and Rule 8.4 - Misconduct.²⁸⁰ Sotomayor substituted his law clerk for the defendant without the court's knowledge or permission.²⁸¹ Sotomayor must have realized, or at least should have known, that this substitution would create the false impression for the judge that the man sitting next to the attorney was the defendant.²⁸² Rule 3.3(a) requires an attorney to act with candor before the court and avoid misrepresentation.²⁸³ Thus, because Sotomayor knew, or should have known that his behavior created a false impression, he violated this rule.²⁸⁴

Similarly, Rule 8.4 forbids an attorney from engaging in conduct which involves misrepresentation or is prejudicial to the administration of justice.²⁸⁵ Therefore, by misrepresenting to the trial court that the man sitting next to him was the defendant, Sotomayor also violated this rule.²⁸⁶ Furthermore, Sotomayor misrepresented to the court that Simac was sitting beside him when he did not correct the trial court's

279. *Simac II*, 641 N.E.2d at 422-23; see *supra* part III.B.

280. ILLINOIS RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(1), 3.3(a)(5), 8.4(a)(4), 8.4(a)(5) (1989). Illinois Rules 3.3(a)(1) and 3.3(a)(5) advise that:

(a) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(1) make a statement of material fact or law to a tribunal which the lawyer knows or reasonably should know is false; [or]

....

(5) participate in the creation or preservation of evidence when the lawyer knows or reasonably should know the evidence is false.

Id. Rule 3.3(a)(1), (5).

Furthermore, Illinois Rule 8.4(a)(4), (5) states that "[a] lawyer shall not: (4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (5) engage in conduct that is prejudicial to the administration of justice." *Id.* Rule 8.4(a)(4), (5).

281. *Simac II*, 641 N.E.2d at 418.

282. The Illinois Supreme Court advised that Sotomayor "was aware that the only inference the court could draw . . . was that the person sitting next to appellant at counsel's table was the defendant." *Id.* at 421.

283. ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 3.3(a).

284. See *id.* Rule 3.3(a)(1), (5).

285. *Id.* Rule 8.4(a)(1), (5).

286. See *id.*

notation of the defendant for the record, thus further violating the rule.²⁸⁷

Conversely, Sotomayor incorrectly argued that he would have violated principles of professional responsibility had he obtained the court's permission before carrying out his plan.²⁸⁸ The Illinois Rules allow an attorney to zealously represent a client only if such representation is within the bounds of the law.²⁸⁹ Thus, Sotomayor was not entitled to deceive the court in order to further his zealous representation of his client.²⁹⁰

V. IMPACT

Because the issue is rarely litigated, *Simac* will influence future attorney behavior throughout the country.²⁹¹ Prior to this decision, the practice of substituting another person for the defendant at the defense table without the court's knowledge may have been a tacitly accepted practice in some areas.²⁹² Now, however, trial judges and attorneys know that such an act could result in a criminal contempt conviction for the attorney. Illinois attorneys should now know that to challenge these practices, they had better have the court's permission. To proceed without such permission, attorneys risk a contempt of court conviction or other disciplinary measures.²⁹³ Furthermore, *Simac*'s impact most likely will not be limited to Illinois attorneys. Just as the Illinois Supreme Court looked to other jurisdictions for guidance in *Simac*,²⁹⁴ other courts may depend on *Simac* in deciding this rarely

287. *Simac II*, 641 N.E.2d at 418.

288. Sotomayor argued that prior disclosure to the trial judge would have to include the prosecutor because of the ban on *ex parte* communications. *Id.* at 422. Such communications with the prosecutor, Sotomayor argued, would reveal the defense attorney's strategy, thus violating his professional responsibility. *Id.*; see ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.2(a), (b); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101, DR 7-110 (1981). See *supra* notes 203-06 and accompanying text for a discussion of Sotomayor's complete argument.

289. *Simac I*, 603 N.E.2d at 103; ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, ILL. REV. STAT. ch. 110A (repealed 1990).

290. See *Simac I*, 603 N.E.2d at 103 (citing *People v. Buckley*, 517 N.E.2d 1114, 1118 (Ill. App. 2d Dist. 1987)).

291. See Patrick A. Tuite, *Courtroom Experiments Can Be Hazardous to Your Pocketbook*, CHI. DAILY L. BULL., Jan. 20, 1993, at 6. Tuite cautioned that the contempt finding against defense attorney Sotomayor is an example of attorneys who suffer financially from attempting courtroom experiments. *Id.*

292. See generally *Miskovsky v. State ex rel. Jones*, 586 P.2d 1104, 1106 (Okla. Crim. App. 1978) (advising that five attorneys testified at a contempt hearing stating that the tactic utilized by the defense attorney was a valid trial tactic).

293. See *supra* parts III.B and IV.C.

294. See *supra* notes 214-20 and accompanying text.

litigated issue.²⁹⁵

On the other hand, *Simac* demonstrates the suggestiveness of in-court identifications.²⁹⁶ Officer LaMorte twice misidentified Armanentos as the defendant Simac.²⁹⁷ These misidentifications illustrate the highly suggestive nature of in-court identifications.²⁹⁸ Thus, an attorney still may be willing to risk discipline from the court, and possible professional discipline, to challenge an in-court identification. If an in-court identification results in a misidentification, the court may drop the charges against the client.

Although *Simac* will widely impact attorney conduct, the court could have strengthened its effect on Illinois attorneys by examining the Illinois Rules for guidance in evaluating Sotomayor's conduct. Because Illinois enacted the Illinois Rules less than five years ago,²⁹⁹ the supreme court has had little opportunity to interpret them. Although the court's affirmation of the criminal contempt conviction demonstrates to Illinois attorneys one specific type of conduct that is contemptuous, contempt convictions are still within the discretion of a particular trial court.³⁰⁰

The Illinois Rules, on the other hand, guide all Illinois attorneys' behavior.³⁰¹ Therefore, a discussion by the court applying the Illinois Rules to Sotomayor's conduct, and answering whether he was subject to professional discipline, would have greatly benefited Illinois attorneys. Had the court found that attorney Sotomayor had violated the Illinois Rules, thus supporting the contempt conviction, Sotomayor could also have been exposed to professional discipline.³⁰² Sanctions for violation of the Illinois Rules vary from a private informal admonition to disbarment.³⁰³ Illinois attorneys, observing that the Illinois Supreme Court upheld Sotomayor's contempt of court conviction without referring to the Illinois Rules,³⁰⁴ may be willing to

295. The author was able to find only two reported cases, other than *Simac*, involving this precise issue: *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) and *Miskovsky v. State ex rel. Jones*, 586 P.2d 1104 (Okla. Crim. App. 1978). See *supra* notes 111-31 and accompanying text.

296. See *supra* notes 246-49 and accompanying text.

297. *Simac II*, 641 N.E.2d at 418.

298. See *supra* note 97.

299. ILLINOIS RULES OF PROFESSIONAL CONDUCT (1989).

300. See *supra* part II.A.1; see also WOLFRAM, *supra* note 2, § 12.1.3, at 625.

301. See *In re Taylor*, 363 N.E.2d 845, 847 (Ill. 1977).

302. ILLINOIS RULES OF PROFESSIONAL CONDUCT pmbl. (advising that a "[v]iolation of these rules is grounds for discipline").

303. See WOLFRAM, *supra* note 2, § 3.5.1, at 118.

304. *Simac II*, 641 N.E.2d at 424.

attribute the contempt conviction to a hard-line trial judge. With a finding that Sotomayor had violated the Illinois Rules, however, attorneys would have realized that professional disciplinary action is still possible, even without a contempt conviction.³⁰⁵ Therefore, a discussion of the Illinois Rules by the Illinois Supreme Court, rather than merely a discussion of the law of contempt, would have had a more sobering effect on Illinois attorneys.

Simac answers many questions but yet leaves several unanswered. Certainly, attorneys in Illinois now have a better idea of the Illinois Supreme Court's view of courtroom chicanery. Considering that the case was only a four-to-three decision, however, the court's position could easily change in the future.

VI. CONCLUSION

In *Simac*, the Illinois Supreme Court properly affirmed defense attorney David Sotomayor's direct criminal contempt conviction.³⁰⁶ With this decision, the court sent a message: before a defense attorney attempts to employ a device that is out of the ordinary courtroom procedures, the attorney had better obtain the court's permission. Nevertheless, Sotomayor, through his courtroom experiment, sent a message of his own: in-court identifications are inherently unreliable.³⁰⁷ Thus, as long as defense attorneys receive permission before conducting the experiment, trial courts in the future should be more receptive to ideas put forth by attorneys to test in-court identifications.

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305. See ILLINOIS RULES OF PROFESSIONAL CONDUCT pmb1. (explaining that a violation of the Illinois Rules is grounds for discipline, thus a contempt finding is not necessary).

306. See *supra* part IV.

307. See *supra* note 97 and accompanying text.

