

6.03.1 Exclusion of Disruptive Defendant

In a criminal proceeding, a defendant may be removed from the courtroom when the defendant acts in so disorderly and disruptive a manner that the proceeding may not be carried on with the defendant present. Before a defendant may be removed, the court must warn the defendant that the defendant will be removed if such conduct continues. Failure to provide the warning may be excused when exceptional circumstances demonstrate no practical value to, or opportunity for, a warning to the defendant to cease the disruptive conduct.

Note

This rule is derived from both CPL 260.20 (“a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct”) and decisional law, beginning with *Illinois v. Allen* (397 US 337, 338 [1970] [an accused cannot “claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial”]).

Following *Allen* and enactment of CPL 260.20, the Court of Appeals held that “[w]hile the right of an accused to be present at every stage of a trial is guaranteed by Constitution (U. S. Const., 6th, 14th, Amdts.; see *Illinois v. Allen*, 397 U. S. 337, 338) and statute (CPL 260.20), the right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom.” (*People v Byrnes*, 33 NY2d 343, 349 [1974] [“the Trial Judge acted well within his discretion in excluding the defendant from the courtroom during the testimony of the complaining witness. Four outbursts punctuated by profane and abusive language preceded defendant’s removal. Each related in some way to the prospect of the complainant testifying in court. On one of these occasions, it was necessary for the defendant to be restrained by Sheriff’s Deputies. The court was careful to admonish the defendant that further outbursts would be cause for removal” (*id.* at 349-350)]; accord *People v Johnson*, 37

NY2d 778, 779 [1975] [“The defendant’s behavior in turning over a table and lying on the floor during the testimony of the identification witness, coupled with the defendant’s clear and repeated requests to leave the courtroom and the Trial Judge’s admonitions and explanation of the consequences were sufficient to constitute a waiver of his right to be present at trial”].)

A defendant’s disruptive behavior in the presence of the jury does not necessarily require a mistrial. (*People v Cosby*, 271 AD2d 353, 354 [1st Dept 2000] [the court excluded the disruptive defendant from the courtroom and denied the “defendant’s motion for a mistrial or for individual questioning of the jurors concerning the effect of defendant’s courtroom disruptions. The court’s questioning of the jurors concerning their ability to remain impartial, during which the court solicited a show of hands to specific questions, and its prompt curative instructions, were appropriate, and the court properly declined to reward defendant’s violent and disruptive conduct with a mistrial”].)

It is advisable to give the requisite warning outside the presence of the jury. And the “requirement that the court issue a warning [to the defendant] must be satisfied by the court itself, and not by any inference drawn in the mind of the defendant that his directed removal from the courtroom [given by the court to court officers] is, in effect, a warning.” (*People v Antoine*, 189 AD3d 1445, 1447 [2d Dept 2020].)

The failure to adhere to the statutory requirement that the defendant be warned “by the court that he will be removed if he continues such conduct” will, absent an exceptional circumstance, warrant reversal. (*People v Brown*, 192 AD3d 1603, 1604 [4th Dept 2021] [“the court erred in removing defendant from the courtroom without first warning him that he would be removed if he continued his disruptive behavior”]; *People v Burton*, 138 AD3d 882, 884 [2d Dept 2016] [“the trial court erred in removing the defendant from the courtroom without first warning him that he would be removed if he continued his disruptive behavior”].)

Exceptional circumstances that may excuse the giving of the warning include, for example, conduct that is so violent and ongoing as to necessitate the defendant’s immediate removal and accordingly preclude the giving of a warning. (*E.g. People v Wilkins*, 33 AD3d 409, 410 [1st Dept 2006] [“Here, defendant’s violent behavior in the courtroom went far beyond mere disruption, and created an emergency necessitating his immediate removal. Under the circumstances, the court had no practical opportunity to issue a verbal warning that defendant would

be removed if he continued to engage in such conduct, and it appears that such a warning would have served no purpose”]; *People v Hendrix*, 63 AD3d 958, 958 [2d Dept 2009] [“the defendant suddenly leapt onto the defense table, and proceeded towards the bench”].) Other exceptional circumstances may excuse the failure to give the defendant the statutory warning. (E.g. *People v Baldwin*, 277 AD2d 134, 134-135 [1st Dept 2000] [“The court properly exercised its discretion in removing defendant from the courtroom during the suppression hearing. Defendant continually disrupted the hearing despite repeated warnings to cease his outbursts. Although the court did not specifically warn defendant that continued misconduct would result in removal (*see*, CPL 260.20), such a warning was unnecessary under the circumstances,” which included during the outbursts “an explicit demand to be removed”].)

As *Antoine* summarized the rule: “In *Wilkins*, the defendant needed to be restrained, because he physically charged across the floor to attack the prosecutor in close proximity to the jurors. In *Hendrix*, the defendant leapt onto the defense table and physically charged the bench. We agree that there may be emergency circumstances, such as those which occurred in *Wilkins* and *Hendrix*, where there is no practical value to, or opportunity for, the issuance of a warning that a defendant cease disruptive behavior.” (*Antoine* at 1447 [citations omitted].)

While not currently required, when a defendant is excluded from the courtroom, a court “that readily possesses the means to do so should generally permit a defendant who has been excluded from the courtroom to observe the proceedings from a remote location in order to minimize the possibly of prejudice.” (*People v Paige*, 134 AD3d 1048, 1053 [2d Dept 2015] [“under the particular circumstances of this case,” *Paige* held, “the court did not improvidently exercise its discretion in declining defense counsel’s request to permit the defendant to view the proceedings from a remote location”]; *see Allen*, 397 US at 351 [Brennan, J., concurring] [“the court should make reasonable efforts to enable (the defendant) to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances”].)

“Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.” (*Allen*, 397 US at 343; *cf. Paige*, 134 AD3d at 1052-1053 [the record “does not support the defendant’s contention that, after he was removed from the courtroom for his

profanity-ridden outburst, he was willing to ‘conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings’ ”].)