

# TRUSTS & ESTATES



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## Contemplating Contempt

*A working guide for T&E litigators*

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Contempt sanctions are a common feature of trust and estate litigation, typically in the discovery context. Often, a party's failure to comply with a discovery order in a

timely fashion triggers the threat or imposition of contempt sanctions. Unfortunately, even skilled attorneys (and judges) struggle with categorizing those sanctions and combining the elusive terms “direct,” “indirect,” “criminal” and “civil” into meaningful labels. More than mere academic semantics, those terms trigger procedural technicalities *and tactical possibilities* and offer distinct advantages to the litigator aware of their nuances. A working understanding of contempt basics is in the best interest of every T&E litigator – both in terms of effectively arguing for contempt sanctions to be imposed on the other party and neutralizing threatened contempt sanctions.

For example, in *Bank One Trust Co., N.A. v. Scherer*, a beneficiary failed to comply with court-ordered discovery while litigating a final accounting.<sup>1</sup> In response, the trustee sought to compel discovery, and the probate court ordered that continued non-compliance past a set date would result in civil contempt and a \$250 daily fine. The beneficiary’s non-cooperativeness continued, and the court imposed sanctions of \$74,750 in past daily accrued fines in favor of the trustee, as well as a continued \$250 fine for each day the judgment remained unpaid.

On appeal, the appellate division upheld the sanctions as indirect criminal contempt sanctions, seemingly glossing over the distinction between civil and criminal contempt and the differing requirements (“Nevertheless, it is not necessary for this court to determine conclusively whether the contempt was civil or criminal... In the situation before us, while the trial court's judgment is not entirely clear, the purpose appears to be punitive.... As indicated above, a trial court's decision to impose discovery sanctions will not be disturbed on appeal absent an abuse of discretion.”)

Theoretically, if the beneficiary’s attorney had been well-versed in contempt protocol, he could have argued more effectively that the beneficiary was deprived of the heightened due process requirements of criminal contempt, and the court may not have upheld the contempt charges.<sup>2</sup>

## Categories of Contempt

Contempt sanctions can be subdivided in two ways. First, contempt proceedings can be categorized as criminal or civil, depending on whether the sanction imposed is intended to retrospectively punish or prospectively coerce. In criminal contempt proceedings, the proceedings are intended to punish the contemnor for past misdeeds; therefore, once imposed, the contemnor can do nothing but bear the consequences. In contrast, because civil contempt proceedings seek to coerce compliance with a previous court order, the civil contemnor can avoid the imposition of further sanctions by simply taking the required action.

Second, contempt sanctions can be categorized as direct, if the contemptuous act occurred in the actual or constructive presence of the judge, or indirect, if the contemptuous act occurred outside court. Accordingly, civil contempt may be direct or indirect and, likewise, criminal contempt may be direct or indirect.

### **Direct Criminal Contempt**

Due process rights are curtailed in direct criminal contempt cases because the judge has personal knowledge of all the elements of the contumacious conduct, and immediate punishment is necessary to maintain either public respect for the judiciary or the efficient administration of justice. Direct criminal contempt proceedings are summary in nature: the trial judge is the trier of fact, no formal charge is required and the court isn't required to state that the contemnor is guilty beyond a reasonable doubt. Immediate punishment may be imposed; and unlike other criminal cases, indigent defendants aren't entitled to state-appointed counsel. If the sanction is incarceration, it must be finite. Direct criminal contempt is always a last resort because summary punishment is regarded with disfavor.

### **Indirect Criminal Contempt**

Contempt proceedings intended to retrospectively punish contemptuous conduct outside of the court's presence are categorized as indirect criminal contempt.

Because judges don't have personal knowledge of all the relevant facts in these cases, evidence must be presented to prove the facts necessary to support a finding

of indirect contempt. The state's attorney, court-appointed amicus curie or a litigant's counsel can prosecute indirect criminal contempt. The alleged contemnor can be required to bear the reasonable costs and attorneys' fees of the contempt proceeding as part of the criminal contempt penalties. No statutes of limitations apply to contempt proceedings.

Indirect criminal contempt requires willful conduct by the defendant. Therefore, failing to comply with a court decree due to misfortune (beyond the defendant's control) is insufficient for to support a finding of indirect contempt.

In addition, the court's dignity, efficiency, and authority aren't at stake to the same degree when the contemptuous act is committed outside of the court's presence. Therefore, defendants in indirect criminal contempt proceedings, like defendants in any criminal prosecution (other than direct criminal contempt), are entitled to the constitutional safeguard of due process rights.

Indirect criminal contemnors are entitled to due process rights including:

- The right to counsel and to have counsel appointed if indigent;
- The right to introduce evidence on his own behalf;
- The right to be presumed innocent;
- The privilege against self-incrimination;
- The right to a public trial;
- The right to confront witnesses and cross-examine them;
- The right to appeal;
- In "serious" cases, the right to a trial by jury. Therefore, before the defendant's first appearance, the court must determine whether the indirect criminal contempt is "minor" or "serious."

## **Friendly Contempt**

In general, discovery orders aren't final and consequently aren't appealable before final judgment is issued. However, unlike discovery orders, contempt sanctions for violating a discovery order are final and therefore appealable. Thus, contempt proceedings can be used to test the propriety of discovery orders, as a court reviewing contempt sanctions can review the propriety of the underlying discovery order. Intentionally incurring contempt to secure review of a discovery order is known as "friendly contempt." If the reviewing court finds the discovery order incorrect and the non-compliance a good faith effort to secure review of the discovery order, the court can vacate the penalty.

## **Civil Contempt**

Civil contempt is inherently a coercive sanction; therefore, the sentencing order of every civil contempt proceeding must include a purging provision specifying what the contemnor is required to do to purge himself of the contempt order.

Furthermore, a contemnor must be capable of doing what the court ordered and thus capable of purging the civil contempt. This notion, referred to as the "key to the jail" concept, requires a civil contempt order be vacated once the coercive purpose of the sanction expires. Therefore, civil contempt sanctions can theoretically remain active indefinitely, as long as the contemnor retains the ability to purge the order.

In a civil contempt matter, the Fourteenth Amendment's due process clause allows a state to provide fewer procedural protections than in a criminal case. For example, a civil contemnor doesn't have a constitutional right to a jury, and the burden of proving inability to pay may be placed on the defendant (hence, petition for indirect contempt is entitled, "Petition for Rule to Show Cause").

## **Endnotes**

1. *Bank One Trust Co., N.A. v. Scherer*, 176 Ohio App. 3d 694 (Ohio Ct. App., Franklin County 2008).

2. *See ibid.*, at 702 (noting that, “as part of [beneficiary]’s argument” beneficiary asserted he was entitled to “heightened procedural due process protection;” however, assignment of error overruled because beneficiary did not “specifically assert that he was not given adequate and timely notice, but only asserts that he was entitled to a written charge entered on the journal”).

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