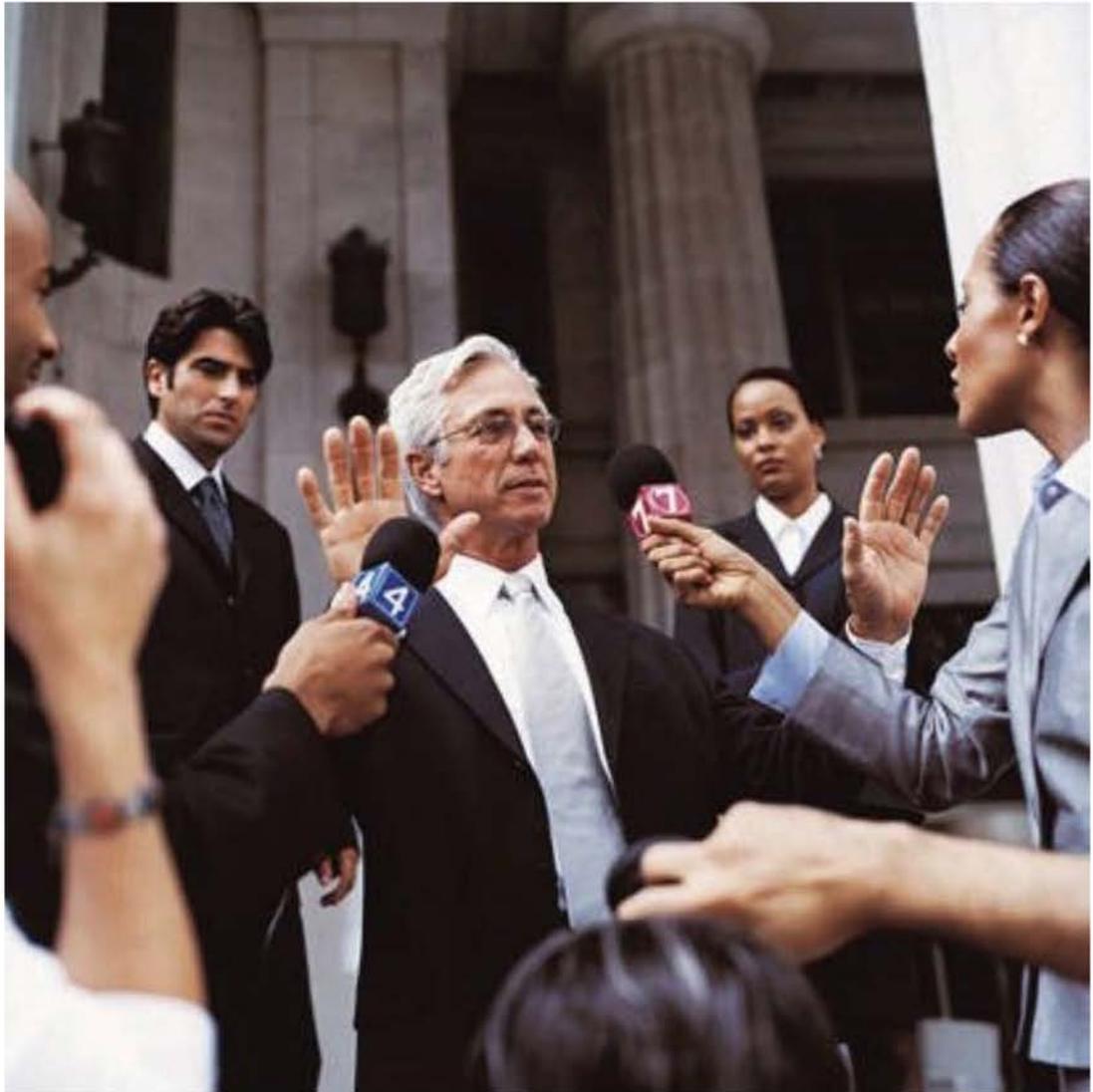


Behavior Inside and Outside the **Courtroom**

The Court's Highest Power: Contempt



Recently, U.S. District Court Judge Robert Gettleman sentenced TV pitchman Kevin Trudeau to 30 days in jail and fined him \$5,000 for direct criminal contempt. Trudeau was found to have bombarded the judge's e-mail account with messages from supporters. The 7th Circuit is considering Trudeau's appeal and specifically: the nature of Trudeau's "speech", whether Judge Gettleman exceeded his authority and whether Trudeau's actions that resulted in a barrage of 300 emails to the judge's blackberry should be considered "criminal." These questions provide a backdrop to discuss the fundamental concept of contempt—civil and criminal—and the circumstances where such findings could be appropriate.

WHEN SHOULD A JUDGE WIELD THE BRUTE FORCE hammer of contempt and what protections—Constitutional and otherwise—should be available to litigants and counsel if a criminal judgment looms? When an alleged felon is given a fair trial before a jury of his peers, allowed to confront witnesses and protected against self-incrimination, our notion of justice (and basic fairness) is sustained. Should these—and similar Constitutional protections—be provided to alleged criminal contemnors where the conduct at issue occurs outside the court room? If so, how do we educate the bar—including those on the bench—to ensure we adhere to, and sustain, those Constitutional principles upon which our country was founded.

Contempt Generally

Contempt can be verbal or non-verbal conduct that: embarrasses or obstructs the court, derogates from the court's authority or dignity; brings the administration of justice into disrepute or constitutes disobedience of a court order.

Court's Inherent Power

The powers of a court to make a finding of contempt and punish litigants, spectators and counsel stem from the common law. The Appellate Court recently reaffirmed this principle in *Thomas v. Koe*, 395 Ill.App.3d 570 (4th Dist. 2009):

"It is well established law that all courts have the inherent power to punish contempt; such power is essential to the maintenance of their authority and the administration of judicial powers."

Civil and Criminal Contempt Distinguished

The difference between civil and criminal contempt has nothing to do with the conduct of the contemnor. Rather, counter intuitively, it is the result sought by the punishment that determines whether the conduct in question is a civil or criminal wrong. If the purpose of the contempt proceeding is to *compel* performance, the proceedings are civil. On the other hand, as the Court in *In re Marriage of Betts*, 200 Ill.App.3d 26, 43 (4th Dist. 1990) made clear, if the contempt proceeding is to *punish* past conduct, the nature of the proceeding is criminal. In short, a civil contemnor can simply take

the action sought to be coerced, and if he does so, no further sanctions are imposed.

The punishment for civil contempt can include a fine or incarceration. However, in selecting contempt sanctions, a court is obliged to use the least possible power to serve its purposes. It is unlikely that the Eighth Amendment applies to civil contempt sanctions imposed to obtain compliance with court orders; although the due process clause of the Fifth Amendment may apply.

It is not uncommon for courts to jail journalists who do not comply with subpoenas issued in conjunction with criminal investigations. Judith Miller, for example, was jailed while employed by the *New York Times* for refusing to reveal information about a leak from Vice President Cheney's Chief of Staff concerning CIA operative Valerie Plame. Ms. Miller had been found in civil contempt but "held the keys to the jail" because when she determined to comply with the subpoena (her source released her from her promise of confidentiality), she was freed. The Special Prosecutor had threatened criminal contempt (in addition to her civil confinement) in an effort to punish Ms. Miller for her refusal to comply with the subpoena.

Criminal Contempt

As the *Betts* court made clear, criminal contempt may be found following any of the following conduct: disrespectful, disruptive, deceitful, and disobedient acts (or failures to act) which affect judicial proceedings; the filing of a spurious will and application for its probate, inappropriate communications with jurors, disobedience of a court order, and failure by an attorney to abide by an injunction.

Criminal contempt may be direct (an act committed in the presence of a judge) or indirect (all contempts which do not occur in proximity to a court). However, acts not seen directly by the judge, but which occur within the court's "constructive" presence, can be deemed to be direct contempt also.

In the Trudeau case, Trudeau's lawyer argued that direct contempt could come only when the misbehavior occurs inside the courtroom, directly in front of the judge and affects the administration of justice. Since Trudeau had successfully urged his supporters to send emails to the Court, Gary Feinerman, appointed to argue on behalf of Judge Gettleman, argued that the Judge's computer should be considered

part of his courtroom. The Court was thus “under attack.” The appellate court vacated the district court’s finding of contempt and remanded the case. It has since been assigned to the Honorable Ronald. A. Guzman.

The procedures in direct criminal contempt are far different than those in cases where the conduct occurs outside the presence of the court, i.e. in indirect contempt cases. As laid down in *Betts*, “In direct criminal contempt proceedings in which a judge has personal knowledge of all of the facts establishing contemptuous conduct, no formal charge is filed and no plea, issue or trial is required.” The presentation of evidence is unnecessary; intent may be inferred and the finding may be made in summary fashion without a trial. Only when the punishment for contemptuous conduct exceeds the punishment normally imposed for misdemeanors and the punishment is not imposed immediately, the contemnor is entitled to a jury trial.

The constitutional protections cannot, as a practical matter, be afforded to *direct* criminal contemnors because the authority, dignity and efficiency of the court would be compromised if a judge could not recognize, adjudicate and punish a contemnor for conduct that occurs in the judge’s presence.

Indirect Criminal Contempt

Indirect criminal contempt—distinguished from *direct* criminal contempt—is a separate and distinct proceeding and is not part of the original case being tried when the contemptuous act occurred, as the appellate court ruled in *People v. Budzynski*, 333 Ill.App.3d 433, 438 (4th Dist. 2002). Importantly, the constitutional protections applicable to criminal defendants are required in an indirect criminal contempt proceeding. Thus, various cases have explicitly held that the contemnor:

- must be formally served for the court to have personal jurisdiction,
- has the right to counsel,
- is presumed to be innocent,
- must be found guilty ‘beyond a reasonable doubt’,
- has a right to the privilege against self-incrimination,
- has a right to a trial by jury in “serious” cases, and
- has the right to appeal.

A criminal charge of contempt can be commenced by a criminal complaint or a petition for adjudication of indirect criminal contempt. A motion for rule to show cause is inapplicable to indirect criminal contempt proceedings because it unconstitutionally shifts the burden of proof to the defendant to prove his innocence.

Because a jury trial is available for cases of “serious” criminal contempt (*People v. Lindsey*, 199 Ill.2d 460, 471 (2002)), the Court must determine whether the indirect contempt will be treated as minor or serious. In *Budzynski*, the Court stressed the procedures to be followed at the defendant’s first appearance. The defendant should be advised of the charges and of his rights. Counsel should be appointed if appropriate.

Importantly, *City of Rockford v. Suski*, 307 Ill.App.3d 233, 247 (2nd Dist. 1999) holds that a contempt charge is serious if the sentence exceeds six months or the fine exceeds \$500. Note that the right to a jury is determined by what sentence is imposed. Accordingly, it is incumbent on the Court to determine at the outset whether the punishment might exceed six months in prison or \$500. As the *Lindsey* Court made clear, without such a determination, the defendant will not know whether he has a right to a jury trial and thus, his constitutional due process rights under the Fourteenth Amendment would be jeopardized.

Defenses To In

Defenses to a charge of indirect criminal contempt include the constitutional guarantees to traditional criminal defendants, i.e. a fair trial, the presumption of innocence, the right to counsel, a public trial, proof of guilt beyond a reasonable doubt, protection against double jeopardy and the privilege against self incrimination.

Less obvious defenses exist and have been sustained. The lack of any order prohibiting the act in question may be a complete defense to criminal contempt. For example, an alleged *oral* order of the court may not be enforced in a criminal proceeding if the oral order was not received and understood.

If the violation was not willful, criminal contempt is unavailable.

If the Court does not have jurisdiction over the contemnor, a judgment will be

reversed. As noted *supra*, indirect criminal contempt is a separate proceeding from the underlying matter, and service is required on the defendant.

If the charge of contempt was not sufficiently set forth, the defendant’s due process rights would trump the otherwise questionable conduct of the defendant. As such, the order of contempt can be vacated.

A direct criminal contemnor should be appropriately punished summarily; for indirect criminal contempt—where the contumacious conduct occurs outside the judge’s presence, our due process requires substantially more. In short, an alleged *indirect* criminal contemnor should be treated by the court no differently than a more traditional criminal defendant and afforded those rights which this country’s founding fathers thought fundamental.

Conclusion

People v. Mowery, 116 Ill.App.3d 695 (4th Dist. 1983) perhaps best sums up indirect criminal contempt and the necessary procedural safeguards:

“the inherent power of contempt is a powerful one; it is not to be used lightly nor when other adequate remedies are available; if it is used, it must conform strictly to the dictates of the law. It is a matter of deep concern to us that . . . the mechanics of the matter were so mishandled that the proceedings must be vacated. The record falls short of the due process and fundamental fairness to which defendant was entitled.”

While the power of a court to punish is inherent and an essential element of its duty and power, the rights of parties and their counsel must not be given short shrift in the good faith—yet mistaken—belief that criminal contemnors should be treated any differently than any other citizen facing a criminal conviction.

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