CONTEMPT BENCHGUIDE



2018 Edition

*[minor revisions were made to pp. 16 and 57 on 04/19/22]

ACKNOWLEDGMENTS

The 2012 edition of this benchguide was based on materials prepared for the 2012 Florida Judicial College by Judges Jacqueline Hogan Scola of Eleventh Judicial Circuit and Robert N. Scola, Jr., formerly of the Eleventh Judicial Circuit, now of the Southern District Court of Florida. The Florida Court Education Council's Publications Committee acknowledges and thanks these judges for permission to adapt their materials for this benchguide. This is the 2018 edition of the benchguide.

PURPOSE

The Publications Committee hopes the *Contempt Benchguide* will serve as an educational resource and user-friendly reference for Florida judges. Readers should always check cited legal authorities before relying on them.

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*04/19/22 revisions:

1. In Chapter 2.I.E.2 Incarceration: ". . . . The maximum punishment that can be imposed for direct criminal contempt is one year. § 775.02, Fla. Stat. However, any punishment of ~~six months~~ ~~or~~ more than six months requires a jury trial before imposition. Aaron v. State, 345 So. 2d 641 (Fla. 1977)
Tips, Caveats, and Problems
• A sentence of six months or less ~~under~~ may be properly imposed upon conviction without a trial by jury. McCrimager v. State, 919 So. 2d 673 (Fla. 1st DCA 2006); Martinez v. State, 339 So. 2d 1133 (Fla. 2d DCA 1976), approved, 346 So. 2d 68.
* In an abundance of caution, it is recommended that any sentence imposed without a jury trial be for no more than 179 days."

2. In Chapter 3.G Sample Indirect Civil Contempt Form: Language was added warning of consequences of failure to appeal.

TABLE OF CONTENTS

Place your cursor over the topic you would like to view and press Control+Click to go directly to that item.

To open links to citations, place your cursor over the citation and press Control+Click, or right click on the item and choose "open hyperlink". Most of the legal citations are hyperlinked to the Westlaw database. When you click on a link, you will be asked for your Westlaw sign on information. Once you are signed on, you should be able to retrieve all of the Westlaw hyperlinks you select. Some rules of court and statutes are linked directly to the primary source.

Chapter One: Introduction to Contempt 1
I. Overview of Contempt 1
A. Definition of Contempt 1
B. Purpose of Contempt Power 1
C. Test for Contempt 1
II. Types of Contempt 2
A. Indirect Contempt and Direct Contempt 2
B. Criminal Contempt and Civil Contempt 2

Chapter Two: Criminal Contempt 5
I. Direct Criminal Contempt 5
A. Definition 5
B. Process and Burden of Proof Overview 5
C. Elements of Direct Contempt and Due Process 6
1. In General 6
2. Conduct Requirements and Presence of the Court 6
3. Opportunity to Show Cause 8
4. Written Order 10
D. Specific Examples of Direct Criminal Contempt 11
1. Erroneous Orders 11
2. Failure to Appear or Testify 11
3. Perjury 13
4. Drug Use 13
5. Profanity or Disrespectful Conduct 13
6. Questioning by Attorney in Violation of Court Order 15
E. Punishments 15
1. Fines and Sanctions 15
2. Incarceration 16

F. Sample Direct Criminal Contempt Colloquy 16
II. Indirect Criminal Contempt....17
A. Definition....17
B. Process and Burden of Proof Overview 18
C. Elements and Due Process....19
1. In General 19
2. Conduct....20
3. Order to Show Cause and Opportunity to Show Cause 21
4. Written Order....24
5. Disqualification of Judge....24
6. Double Jeopardy....24
7. Purge Provisions....25
D. Specific Examples of Indirect Criminal Contempt 25
1. Threat....25
2. Support Obligations....25
3. Unclear or Erroneous Orders....25
4. Contacting Juror 26
E. Punishments....26
1. Fines....26
2. Incarceration 26
3. Order of Contempt....27
F. Right to Counsel 27
G. Sample Forms 28
1. Motion for Order to Show Cause 28
2. Order to Show Cause....30
3. Writ of Bodily Attachment....32
4. Order Adjudging Respondent in Indirect Criminal Contempt of Court and Order of Commitment....35

Chapter Three: Civil Contempt....37
I. Indirect Civil Contempt....37
A. Definition....37
B. Process and Burden of Proof Overview 37
C. Elements of Civil Contempt and Due Process 39
1. Clear Violation 39
2. Opportunity to Be Heard 40
3. Ability to Comply with Court Order 43
4. Right to Counsel....44

5. Deliberate Divestment 44
6. Arrest 44
7. Order and Purge Provision 45
8. Order Not Excessive 47
D. Specific Examples of Indirect Civil Contempt 47
1. Parental Relationships and Visitation 47
2. Property and Debt Settlement 48
3. Support Obligations 49
4. Erroneous, Vague, and Ambiguous Orders 50
E. Performance of an Act Ordered by Court 51
F. Punishments 52
1. In General 52
2. Fines 53
3. Incarceration 54
4. Attorney's Fees 55
G. Sample Indirect Civil Contempt Form 56
II. Direct Civil Contempt 57

Chapter Four: Juvenile Contempt and Traffic Contempt 59
I. Juvenile Contempt 59
II. Traffic Contempt 61

Chapter One

Introduction to Contempt

I. Overview of Contempt

A. Definition of Contempt

A refusal to obey a legal order, mandate, or decree constitutes an act of contempt. § 38.23, Fla. Stat.; *A.A. v. Rolle*, 604 So. 2d 813, 815 (Fla. 1992); *Richey v. McLeod*, 188 So. 228 (Fla. 1939); *Ex parte Earman*, 95 So. 755 (Fla. 1923); *Murrell v. State*, 595 So. 2d 1049 (Fla. 4th DCA 1992). "Contempt is an act tending to embarrass, hinder, or obstruct the court in the administration of justice, or to lessen the court's authority or dignity." *Richey*, 188 So. 2d at 229.

Contempt "must be used only rarely and with circumspection. The provocation must never be slight, doubtful, or of shifting interpretations. The occasion should be real and necessary, not murky, and not ameliorated in some less formal manner." *Woods v. State*, 987 So. 2d 669, 676 (Fla. 2d DCA 2007), quoting *Schenck v. State*, 645 So. 2d 71, 74 (Fla. 4th DCA 1994).

There are four types of contempt: direct criminal contempt, indirect criminal contempt, direct civil contempt, and indirect civil contempt.

B. Purpose of Contempt Power

Judicial contempt power is to protect a court against those who disregard its dignity and authority or disobey its orders. *In re Inquiry Concerning Perry*, 641 So. 2d 366 (Fla. 1994); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608–609 (Fla. 1994). Orderly government demands respect for and compliance with court orders. *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2000).

C. Test for Contempt

Contempt exists if conduct interferes with or impugns judicial function. *Via v. State*, 633 So. 2d 1198 (Fla. 2d DCA 1994).

Tips, Caveats, and Problems

- "Contempt does not exist just because a judge feels aggrieved or vexed." *McRoy v. State*, 31 So. 3d 273, 274 (Fla. 5th DCA 2010), citing *Via v. State*, 633 So. 2d 1198 (Fla. 2d DCA 1994).

- The exercise of the contempt power must "never be used by a judge in a fit of anger, in an arbitrary manner, or for the judge's own sense of justice." *In re Inquiry Concerning Perry*, 641 So. 2d 366, 368 (Fla. 1994); *Forbes v. State*, 933 So. 2d 706, 715 (Fla. 4th DCA 2006).

- Even an improper threat to hold someone in contempt, without actually issuing a contempt order, has been held to be an abuse of authority sufficient to justify discipline against the judge. *In re Aleman*, 995 So. 2d 395 (Fla. 2008); *In re Inquiry Concerning a Judge re Wright*, 694 So. 2d 734 (Fla. 1997).

- The offender's due process rights must be protected in contempt proceedings. *In re Inquiry Concerning Perry*, 641 So. 2d 366 (Fla. 1994).

II. Types of Contempt

A. Indirect Contempt and Direct Contempt

Direct contempt is a contemptuous act that is committed in the immediate presence of the court.

Indirect contempt is an act committed outside the court's presence. *Pugliese v. Pugliese*, 347 So. 2d 422 (Fla. 1977).

When there is doubt as to whether the contempt is indirect or direct, it should be resolved in favor of the contemnor's due process rights. *Fox v. State*, 490 So. 2d 1288 (Fla. 5th DCA 1986).

B. Criminal Contempt and Civil Contempt

Criminal contempt is designed to punish the contemnor. Civil contempt is remedial. *Creative Choice Homes, II, Ltd. v. Keystone Guard Services, Inc.*, 137 So. 3d 1144 (Fla. 3d DCA 2014); *Alves v. Barnett Mortg. Co.*, 688 So. 2d 459 (Fla. 4th DCA 1997). Criminal contempt involves conduct calculated to embarrass, hinder, or obstruct the administration of justice. Punishment is used to vindicate the authority of the court and to punish the contemnor. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Johnson v. State*, 584 So. 2d 95 (Fla. 1st DCA 1991).

Civil contempt is used to coerce an offending party into complying with a court order, but not to punish the contemnor for a failure to comply with a court order. *The Florida Bar v. Taylor*, 648 So. 2d 709 (Fla. 1995); *Johnson v. Bednar*, 573 So. 2d 822 (Fla. 1991), *receded from in part on other grounds*, 769 So. 2d 359 (Fla. 2000).

Tips, Caveats, and Problems

- Civil and criminal contempt are available in both civil and criminal cases. *Grant v. State*, 464 So. 2d 650 (Fla. 4th DCA 1985); Fla. R. Civ. P. 1.380, 1.410, 1.510, 1.560, 1.570, Form 1.982; *see also* Fla. R. Crim. P. 3.830, 3.840. Whether contempt is civil or criminal is not determined by the nature of the cause from which the contempt citation arose. *Deter v. Deter*, 353 So. 2d 614 (Fla. 4th DCA 1977); *see also Shook v. Alter*, 729 So. 2d 527 (Fla. 4th DCA 1999); *Tschapek v. Frailing*, 699 So. 2d 851 (Fla. 4th DCA 1997).

- The same conduct may result in both civil and criminal contempt charges. *Hope v. State*, 449 So. 2d 1315 (Fla. 2d DCA 1984).

- Imposition of a sanction without a purge clause renders the contempt criminal as opposed to civil. Because criminal due process was not afforded, the monetary sanction was reversed in *Price v. Hannahs*, 954 So. 2d 97 (Fla. 2d DCA 2007). *See also De Castro v. De Castro*, 957 So. 2d 1258 (Fla. 3d DCA 2007).

- The quanta of proof necessary to prove contempt, as well as the punishments available upon an adjudication of guilt, differ for criminal and civil contempt. *Demetree v. State ex rel. Marsh*, 89 So. 2d 498, 501 (Fla. 1956).

- Where the fine imposed is not related to any damages suffered by the aggrieved party, but rather is intended as punishment, the contempt is criminal. Potential criminal contemnors are entitled to the same constitutional due process protections afforded criminal defendants in more typical criminal proceedings. *Shook v. Alter*, 729 So. 2d 527 (Fla. 4th DCA 1999).

- The trial court's failure to follow the procedural requirements imposed by the Florida Rules of Criminal Procedure (failure to determine indigency, failure to allow contemnor to respond before judgment, and failure to include recital of facts in judgment) required reversal of its judgment holding in direct contempt of court a member of the public who caused a

courtroom disturbance at a hearing in a family member's criminal case. *Al-Hakim v. State*, 53 So. 3d 1171 (Fla. 2d DCA 2011), *disapproved on other grounds*, *Plank v. State*, 190 So. 3d 594 (Fla. 2016). *See also Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011).

- Jurors may be subject to contempt for using electronic devices such as cell phones, tablets, or the like, to find out information about a case or communicate with anyone outside the jury about the case. *In re Standard Jury Instructions in Civil, Criminal, and Contract & Business Cases — Jurors' Use of Electronic Devices*, 152 So. 3d 529 (Fla. 2014).

Chapter Two

Criminal Contempt

I. Direct Criminal Contempt

A. Definition

Direct criminal contempt is summary punishment for conduct that occurs in the presence of the court. Fla. R. Crim. P. 3.830.

Circuit and county courts have jurisdiction to hear criminal contempts. *Schaab v. State*, 33 So. 3d 763 (Fla. 4th DCA 2010), citing *Graves v. State*, 821 So. 2d 459, 460 (Fla. 2d DCA 2002) ("[c]ontempt is a common law crime in Florida, which, although recognized by statute, is not specifically classified by statute as either a felony or a misdemeanor").

B. Process and Burden of Proof Overview

Direct criminal contempt must be proven beyond a reasonable doubt. *Hicks on behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988); *Braisted v. State*, 614 So. 2d 639 (Fla. 4th DCA 1993). The contemnor must be present for the criminal contempt hearing to proceed.

The due process rights of the contemnor must be protected in the adjudication process, and rule 3.830 must be scrupulously followed. *Shook v. Alter*, 729 So. 2d 527 (Fla. 4th DCA 1999).

Checklist

— The requisite conduct occurred in the presence of the court.

— Prior to adjudication, the defendant was informed of the accusation.

— Prior to adjudication, the defendant was given an opportunity to show cause why he or she should not be found guilty of contempt.

— The defendant was present at the start of the contempt hearing in compliance with rule 3.180.

— If contempt was found by the court, the defendant was given the opportunity to present evidence of excusing or mitigating circumstances prior to

sentencing.

— If the punishment included six months or more imprisonment, a jury was empanelled to try the facts.

— The judgment was signed, entered of record, and pronounced in open court.

— The written judgment of guilt included a recital of the facts.

C. Elements of Direct Contempt and Due Process

1. In General

Direct criminal contempt involves conduct that occurs in the presence of the court that is calculated to embarrass, hinder, or obstruct the administration of justice. Punishment is used to vindicate the authority of the court and to punish the contemnor.

In all cases, the due process rights of contemnors must be protected, even for those that are the most resistant to the authority of the court.

"Scrupulous compliance with rule 3.830 is required because its provisions constitute the essence of due process." *Peters v. State*, 626 So. 2d 1048, 1050 (Fla. 4th DCA 1993); *see also J.A.H. v. State*, 20 So. 3d 425 (Fla. 1st DCA 2009).

"The purpose of these requirements is to assure the liberty interests of even the most refractory are protected." *Cook v. State*, 636 So. 2d 895, 896 (Fla. 3d DCA 1994).

Contempt was a deprivation of due process and erroneous based on in-court misconduct, where the attorney failed to notify the other party of bankruptcy. *Gopman v. Washington Mut. Bank, F.A.*, 885 So. 2d 1037 (Fla. 4th DCA 2004).

2. Conduct Requirements and Presence of the Court

Direct criminal contempt requires two elements: (1) the requisite conduct, and (2) in the presence of the court.

Requisite Conduct – To be criminal contempt, an action must be calculated to embarrass, hinder, or obstruct the administration of justice or to lessen the court's authority or dignity.

Presence of the Court – Direct contempt occurs when the misconduct was committed in the immediate presence of the court. *J.M. v. Gargett*, 101 So. 3d 352 (Fla. 2012). All of the misconduct must have taken place under the eye of the court and have been actually observed by the court. *Hash v. State*, 135 So. 3d 350 (Fla. 1st DCA 2013); *Roundtree v. State*, 651 So. 2d 1286 (Fla. 3d DCA 1995).

Tips, Caveats, and Problems

- It was error to hold the defendant in direct criminal contempt for being intoxicated, when the court did not see him drink alcohol or behave inappropriately in court. *Brown v. State*, 226 So. 3d 369 (Fla. 2d DCA 2017).

- A defendant who has a competency evaluation and/or hearing pending cannot be held in contempt. *Elwell v. State*, 61 So. 3d 1292 (Fla. 4th DCA 2011).

- Conduct that occurred before a different judge at an earlier time is not direct criminal contempt. *E.T. v. State*, 587 So. 2d 615 (Fla. 1st DCA 1991).

- A failure to return to court with ordered documents, which the court observed, may constitute criminal contempt. *Young v. Wood-Cohan*, 727 So. 2d 322 (Fla. 4th DCA 1999).

- A mother could not be found in direct criminal contempt for failing to execute and return her children's completed passport applications to their father because her actions did not occur in the "actual presence of the court." Additionally, the mother could not be found in indirect criminal contempt without following the procedures in rule 3.840, Florida Rules of Criminal Procedure. *Fiore v. Athineos*, 9 So. 3d 1291 (Fla. 4th DCA 2009).

- Even if the individual knows he or she is speaking to a judge, an insult is direct contempt only if it is made in the presence of a judge acting in the capacity as a judge or "so near to the court or judge acting judicially as to interrupt or hinder judicial proceedings." *Kress v. State*, 790 So. 2d 1207 (Fla. 2d DCA 2001) (rude comment in elevator to judge was not contemptuous because judge was not acting in judicial capacity).

- Use of foul language in a hallway outside a courtroom was not direct criminal contempt since there was no evidence it was directed at the court or intended to interrupt or hinder judicial proceedings, and because it was

outside the actual presence of the judge. *Bryant v. State*, 851 So. 2d 823 (Fla. 2d DCA 2003).

- On the way into the courtroom for his delinquency hearing, a juvenile kicked the courtroom door and, after being told not to do so by the bailiff, told the bailiff to "Go f--k yourself." The trial court found him guilty of direct criminal contempt, and the appellate court affirmed. *R.C. v. State*, 648 So. 2d 1258 (Fla. 3d DCA1995).

- The "entire state attorney's office" was improperly held in contempt for the actions of three assistant state attorneys who misrepresented to the court the readiness of the state to proceed to trial. Any potential contemptuous actions of the other members of the office would have occurred outside the presence of the court. *In re Broward County State Attorney's Office*, 577 So. 2d 967 (Fla. 4th DCA 1991).

3. Opportunity to Show Cause

Before any adjudication of guilt, the contemnor must first be provided an opportunity to be heard. *Toby v. State*, 917 So. 2d 309 (Fla. 1st DCA 2005); *Tejada v. State*, 729 So. 2d 965 (Fla. 3d DCA 1999). At the hearing, the contemnor must be given the opportunity to show cause why he or she should not be held in contempt and to present evidence of excusing or mitigating circumstances. *Wiggs v. State*, 981 So. 2d 576 (Fla. 5th DCA 2008); *Bonet v. State*, 937 So. 2d 209 (Fla. 3d DCA 2006); *McCrimager v. State*, 919 So. 2d 673 (Fla. 1st DCA 2006); *Bauder v. Florida*, 923 So. 2d 1223 (Fla. 3d DCA 2006); *Telfair v. State*, 903 So. 2d 257 (Fla. 1st DCA 2005).

The defendant must be provided an opportunity to present evidence of excusing or mitigating circumstance as required by rule 3.830, Florida Rules of Criminal Procedure. Failure to provide the opportunity will result in reversal and remand for re-sentencing. *Phelps v. State*, 236 So. 3d 1162 (Fla. 2d DCA 2018); *Searcy v. State*, 971 So. 2d 1008 (Fla. 3d DCA 2008); *Hibbert v. State*, 929 So. 2d 622 (Fla. 3d DCA 2006); *Honig v. Cigna Ins. Co.*, 687 So. 2d 922 (Fla. 2d DCA 1997).

A defendant cannot be held in direct criminal contempt for coming to court intoxicated if he is not afforded the opportunity to present excusing or mitigating circumstances. *Garrett v. Florida*, 876 So. 2d 24 (Fla. 1st DCA 2004).

The defendant must be given an opportunity to explain why there should be no adjudication of guilt before punishment is imposed. *Martin v. State*, 711 So. 2d 1173 (Fla. 4th DCA 1998).

The court should avoid any comments or conduct indicating a bias or predisposition to hold the alleged contemnor in contempt. For example, taking an attorney into custody prior to commencement of a contempt hearing was held to display a predisposition of the court prior to offering an opportunity to show cause. *McNamee v. State*, 915 So. 2d 276 (Fla. 4th DCA 2005).

The opportunity to show cause must be full. For example, denying a contemnor the chance to explain allegedly perjured testimony that conflicted with a prior written statement was inappropriate. *Hutcheson v. State*, 903 So. 2d 1060 (Fla. 5th DCA 2005).

In the contempt proceedings, cross-examination may be required. For example, courts should not rely on the unsworn testimony of a witness and should allow cross-examination of that witness. *Lewis v. State*, 653 So. 2d 1107, 1108 (Fla. 3d DCA 1995).

Because rule 3.830 allows the court to punish direct contempt summarily, some courts held that appointed counsel was not required. *Williams v. State*, 698 So. 2d 1350 (Fla. 1st DCA 1997); *but see Al-Hakim v. State*, 53 So. 3d 1171 (Fla. 2d DCA 2011); *Woods v. State*, 987 So. 2d 669 (Fla. 2d DCA 2007). In *Plank v. State*, 130 So. 3d 289 (Fla. 1st DCA 2014), the First District Court of Appeal certified conflict on the issue. In *Plank v. State*, 190 So. 3d 594 (Fla. 2016), the supreme court addressed the conflict, stating, in a per curiam opinion in which three justices joined, "in accordance with the First District [in *Plank*] that a trial court has the discretion, but is not required, to appoint counsel or give the individual an opportunity to seek counsel in a direct criminal contempt proceeding, even if incarceration is imposed as punishment, as long as the period of incarceration does not exceed six months." But it held that because the allegedly contemptuous conduct "did not involve conduct that occurred only in the presence of the court, the trial court erred in classifying the conduct as direct criminal contempt. Plank was therefore entitled to the benefit of counsel and to the procedures set forth in the Florida Rule of Criminal Procedure 3.840 governing indirect criminal contempt." For direct criminal contempt, all of the contemptuous acts must be committed in open court and actually observed by the court. "If the judge needs to rely on statements and testimony from others regarding their knowledge about the contemptuous acts, the misconduct is no longer considered direct criminal

contempt because additional testimony or explanation is necessary." *In re Oliver*, 333 U.S. 257, 275–276, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Although the opinion in *Plank v. State*, 190 So. 3d 594 (Fla. 2016), stated that the conflict was resolved, see *Pole v. State*, 198 So. 3d 961 (Fla. 2d DCA 2016), in which the court stated: "Because *Plank* was a three-three decision on the right to counsel in a direct contempt proceeding, the supreme court, apparently, did not resolve the certified conflict between the First District in *Plank* and the Second and Fourth Districts in *Al–Hakim*, 53 So.3d 1171; *Woods*, 987 So.2d 669; and *Hayes*, 592 So.2d 327. Because six justices concurred in an opinion concluding that Mr. Plank's conduct did not amount to direct criminal contempt, *Plank* does not require us to dwell much longer on the conflict issue."

4. Written Order

Because contemptuous conduct may include statements or actions that are not part of the court proceeding and are not recorded, rule 3.830 requires that the judgment of guilt of contempt include a recital of facts on which the adjudication of guilt is based. *Gidden v. State*, 613 So. 2d 457 (Fla. 1993); *Ward v. State*, 908 So. 2d 1138 (Fla. 3d DCA 2005); *Fetzer v. State*, 723 So. 2d 907 (Fla. 1st DCA 1999). "This requirement cannot be dismissed as merely a technical requirement." *McRoy v. State*, 31 So. 3d 273, 274 (Fla. 5th DCA 2010).

Tips, Caveats, and Problems

- Attaching transcripts of the trial is not sufficient to comply with the requirement of rule 3.830 that the order contains a written recital of the facts. *Johnson v. State*, 584 So. 2d 95, 96 (Fla. 1st DCA 1991).

- The requirement of a recitation of the facts is satisfied when the trial judge orally states on the record the underlying facts constituting the contempt. *Gidden v. State*, 613 So. 2d 457 (Fla. 1993); *Neal v. State*, 891 So. 2d 607 (Fla. 1st DCA 2005); *Barnhill v. State*, 438 So. 2d 175 (Fla. 1st DCA 1983).

- The court's order finding the defendant in contempt "based on his statements, demeanor, and behavior during [the] hearing, all of which was captured on the CourtSmart audio and video system" was not a legally sufficient order. *J.A.H. v. State*, 20 So. 3d 425, 427 (Fla. 1st DCA 2009).

- Purely conclusory statements will not meet the requirement of a recitation of facts. For example, citing the contemnor's "unjudicious, unethical and

intemperate conduct before the court" was insufficient. *Ray v. State*, 352 So. 2d 110, 111 (Fla. 1st DCA 1977).

- The court's announced holding that the defendant was in contempt for being "generally uncooperative and disrespectful" was insufficient to support a finding of contempt. *Jensen v. Jensen*, 21 So. 3d 150 (Fla. 5th DCA 2009).

D. Specific Examples of Direct Criminal Contempt

1. Erroneous Orders

A defendant may be held in criminal contempt for failing to comply with an erroneous order if the order is entered in a matter over which the court has jurisdiction. *Robbie v. Robbie*, 726 So. 2d 817 (Fla. 4th DCA 1999); *Rubin v. State*, 490 So. 2d 1001 (Fla. 3d DCA 1986); *Vizzi v. State*, 501 So. 2d 613 (Fla. 3d DCA 1986). "Only if an order is entered in a matter concerning which the court has no jurisdiction may such an order be safely ignored." *Jamason v. State*, 447 So. 2d 892, 893 (Fla. 4th DCA 1983), *approved*, 455 So. 2d 380 (Fla. 1984), *cert. denied*, 469 U.S. 1100, 105 S.Ct. 768, 83 L.Ed.2d 766 (1985).

2. Failure to Appear or Testify

Formerly, a properly subpoenaed witness who failed to appear at trial could be held in either indirect or direct criminal contempt. *Aron v. Huttoe*, 258 So. 2d. 272 (Fla. 3d DCA), *aff'd*, 265 So. 2d 699 (Fla. 1972) (witness's inadequately explained absence held direct criminal contempt); *Studnick v. State*, 341 So. 2d 808 (Fla. 3d DCA), *cert. denied*, 348 So. 2d 954 (Fla. 1977) (witness's failure to appear held indirect criminal contempt). *But see Kelley v. Rice*, 800 So. 2d 247, 253 (Fla. 2d DCA 2001), in which the court held:

> [W]e decline to follow the holdings of *Speer*[*v. State*, 742 So. 2d 373 (Fla. 1st DCA 1999),] and *Woods*[*v. State*, 600 So. 2d 27 (Fla. 4th DCA 1992),] that a witness's failure to appear in response to a subpoena constitutes direct criminal contempt. We hold instead that if a witness in a criminal case fails to appear in court in response to a subpoena, that conduct may be punished, if at all, as indirect criminal contempt in accordance with the procedures outlined in rule 3.840. We believe that this holding is consistent with the constitutional requirements expressed in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 [1948], and with our supreme court's more recent precedent

> addressing contempt proceedings. See *Pugliese* [*v. Pugliese*], 347 So. 2d 422 [(Fla. 1977)].

See also *Smith v. State*, 144 So. 3d 651, 654–655 (Fla. 2d DCA 2014), citing *Kelley* and stating that contempt for failure of a subpoenaed witness to appear could only be indirect "because the witness is not present in the courtroom to allow for a summary proceeding and the acts that may or may not make the nonappearance a willful contempt necessarily occurred outside the courtroom."

In *Diaz de la Portilla v. State*, 142 So. 3d 928 (Fla. 1st DCA 2014), the First District Court of Appeal stated that "in light of the . . . uncertainty that exists regarding *Aron*'s application in cases such as this one, we certify the following question of great public importance: Whether a party who is ordered by a trial court to appear at a scheduled hearing, but fails to do so, may be found in direct criminal contempt under Florida Rules of Criminal Procedure 3.830; or whether such conduct should be addressed as indirect criminal contempt under Florida Rules of Criminal Procedure 3.840." The supreme court answered the certified question, stating that "the failure to appear pursuant to an order should be treated as *indirect* criminal contempt under rule 3.840." *State v. Diaz de la Portilla*, 177 So. 3d 965 (Fla. 2015).

Tips, Caveats, and Problems

- Failure to appear pursuant to court order may be only indirect criminal contempt. *Id.*

- The defendant's unrebutted testimony that his attorney told him he need not attend the hearing rendered insufficient the evidence that his failure to appear was willful. *Carter v. State*, 954 So. 2d 1185 (Fla. 4th DCA 2007).

- Failure to appear at a mediation hearing can only constitute indirect criminal contempt, since a mediation hearing is outside the presence of the court. *Fredericks v. Sturgis*, 598 So. 2d 94 (Fla. 5th DCA 1992).

- Refusal to testify in a trial on the ground that the contemnor's attorney told him his testimony could be used in federal charges against him was still contempt. A post-conviction motion is the proper vehicle to assert that misadvice by a former attorney, advising the witness not to testify, constituted ineffective assistance of counsel. *Hagen v. State*, 898 So. 2d 977 (Fla. 5th DCA 2005).

- It is appropriate in sentencing to consider that the contemnor was acting under the erroneous advice of counsel. *Studnick v. State*, 341 So. 2d 808 (Fla. 3d DCA), *cert. denied*, 348 So. 2d 954 (Fla. 1977) (punishment was reduced on appeal from 10 days in county jail to one day).

3. Perjury

A defendant may be held in direct criminal contempt for perjury when his or her testimony is diametrically opposite to the testimony the defendant gave at the time of plea. *Roberts v. State*, 515 So. 2d 434 (Fla. 5th DCA 1987).

Tips, Caveats, and Problems

- A court may not hold a person in criminal contempt simply because the judge believes one witness over another. More is needed to establish judicial knowledge that a witness's testimony is false for the purpose of direct criminal contempt for perjury. *Rhoads v. State*, 817 So. 2d 1089 (Fla. 2d DCA 2002), citing *Emanuel v. State*, 601 So. 2d 1273 (Fla. 4th DCA 1992).

- A prospective juror may be held in direct criminal contempt for failing to disclose criminal history during jury selection. *Forbes v. State*, 933 So. 2d 706 (Fla. 4th DCA 2006).

4. Drug Use

To be held in direct criminal contempt, the contemnor should be under the influence of the substance in the presence of the court. For example, merely admitting to having smoked marijuana earlier in the week, without evidence that the defendant was under the influence in court "such that his conduct was disruptive of court proceedings or that his faculties were impaired," was held not to be direct criminal contempt in *M.W. v. Lofthiem*, 855 So. 2d 683, 685 (Fla. 2d DCA 2003).

A defendant who passed out in court because he "had a little coke" that morning was properly held in direct criminal contempt. *See Miller v. State*, 672 So. 2d 95 (Fla. 3d DCA 1996).

5. Profanity or Disrespectful Conduct

Use of profanity to a judge justifies direct criminal contempt. Other verbal conduct may or may not, depending on the circumstances. *Saunders v. State*, 319 So. 2d 118 (Fla. 1st DCA 1975).

Tips, Caveats, and Problems

- One continuous outburst has been held to be punishable as only one contempt. *Williams v. State*, 222 So. 3d 596 (Fla. 4th DCA 2017); *Williams v. State*, 599 So. 2d 255 (Fla. 1st DCA 1992); *Ricci v. State*, 549 So. 2d 1186 (Fla. 2d DCA 1989).

- The trial court's admonishment to an attorney not to be "dramatic" was not sufficiently specific to apprise the attorney of the behavior to be enjoined. *Braisted v. State*, 614 So. 2d 639 (Fla. 4th DCA 1993).

- Where the court had given no prior warnings or explicit directions not to display reaction to verdict, an attorney who pounded his fist and yelled "yes" upon receiving a favorable verdict could not be held in contempt. *Berman v. State*, 751 So. 2d 612 (Fla. 4th DCA 1999).

- A juror may be held in direct criminal contempt if there is competent evidence to suggest the juror has purposefully changed his or her answer to reflect bias and prejudice in order to manipulate jury selection. *Gruss v. State*, 869 So. 2d 770 (Fla. 4th DCA 2004).

- Use of the single word "sh--" uttered in frustration while the defendant was leaving the courtroom, without further developed record, did not constitute contempt. *Woods v. State*, 987 So. 2d 669 (Fla. 2d DCA 2007), *disapproved on other grounds*, *Plank v. State*, 190 So. 3d 594 (Fla. 2016) (isolated remark will be considered contemptuous only if it constitutes imminent threat to administration of justice).

- A cellular phone ringing during a courtroom proceeding is direct criminal contempt only if tends to "embarrass, hinder, or obstruct the court in the administration of justice or lessen the court's authority or dignity." *McRoy v. State*, 31 So. 3d 273, 274 (Fla. 5th DCA 2010).

- The court in *Davila v. State*, 100 So. 3d 262 (Fla. 3d DCA 2012), reversed a six-month sentence for direct criminal contempt where the defendant spoke a profanity under his breath that was not audible to the court. The administration of justice was not hindered, nor had the defendant intended to hinder it.

- In *Michaels v. Loftus*, 139 So. 3d 324 (Fla. 3d DCA 2014), the attorney, who had had prior warnings from the judge about his behavior, was held in direct

criminal contempt for mumbling to opposing counsel what he said were obscene words in Romanian.

6. Questioning by Attorney in Violation of Court Order

An attorney may be held in direct criminal contempt for violating a court order in the court's presence. For example, questioning a witness in violation of a court order was properly held as contempt. *Vizzi v. State*, 501 So. 2d 613 (Fla. 3d DCA 1986).

Making continuous speaking objections despite judicial admonishment was held to be contempt. *Michaels v. State*, 773 So. 2d 1230 (Fla. 3d DCA 2000).

An attorney was found in contempt when he asked the defendant's expert witness a question he was specifically told by the court not to ask. *Botwinick v. State*, 793 So. 2d 56 (Fla. 3d DCA 2001).

E. Punishments

1. Fines and Sanctions

A fine for direct criminal contempt cannot exceed $500. § 775.02, Fla. Stat. Awarding attorney's fees for another party or the court's wasted time is improper. *Fredericks v. Sturgis*, 598 So. 2d 94 (Fla. 5th DCA 1992).

Tips, Caveats, and Problems

- While imposing a fine on an attorney held in contempt is permissible, requiring that the attorney have co-counsel when representing clients in criminal cases, thereby restricting the attorney's practice of law, is improper. *Gifford v. Payne*, 432 So. 2d 38 (Fla. 1983).

- Not all conceivable punishments are permissible. For example, requiring an attorney to write 1,000 times "I will not disobey the direct order of a judge" as a direct criminal contempt sanction is improper. *Ward v. State*, 354 So. 2d 438 (Fla. 3d DCA 1978).

- Florida law does not contain a provision for a sentence "at hard labor," and it was error to include this language in a sentencing order. *McCrimager v. State*, 919 So. 2d 673 (Fla. 1st DCA 2006).

- A sentence of six months in jail with a special condition of "no phone, family or contact visits, exercise, television, library or commissary" was error. The trial court lacks the authority to regulate the treatment of inmates, including inmates at county jail. *Cuesta v. State*, 929 So. 2d 648, 649 (Fla. 3d DCA 2006).

2. Incarceration

Criminal contempt is a crime in the ordinary sense, *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2000); however, it is neither a felony nor a misdemeanor. *Giordano v. State*, 32 So. 3d 96 (Fla. 2d DCA 2009); *Saridakis v. State*, 936 So. 2d 33 (Fla. 4th DCA 2006); *Pompey v. Cochran*, 685 So. 2d 1007 (Fla. 4th DCA 1997). The maximum punishment that can be imposed for direct criminal contempt is one year. § 775.02, Fla. Stat. However, any punishment of more than six months requires a jury trial before imposition. *Aaron v. State*, 345 So. 2d 641 (Fla. 1977), *cert. denied*, 434 U.S. 868, 985 S.Ct. 208, 54 L.Ed.2d 146.

Tips, Caveats, and Problems

- A sentence of six months or less may be properly imposed upon conviction without a trial by jury. *McCrimager v. State*, 919 So. 2d 673 (Fla. 1st DCA 2006); *Martinez v. State*, 339 So. 2d 1133 (Fla. 2d DCA 1976), *approved*, 346 So. 2d 68.*

  * *In an abundance of caution, it is recommended that any sentence imposed without a jury trial be for no more than 179 days.*

- A sentence of contempt is illegal if entered consecutively to a sentence that is yet to be imposed. *Ward v. State*, 908 So. 2d 1138 (Fla. 3d DCA 2005).

F. Sample Direct Criminal Contempt Colloquy

TO THE CONTEMNOR:

THE COURT: (a) I have ordered you not to ..... (state specifically what the contemnor has been ordered not to do); or

(b) You have been ordered to ..... (state specifically what the contemnor has been ordered to do); or

(c) You have done the following in my presence: ..... (state specifically what the contemnor has done).

THE COURT: Despite this order, you ..... (state specifically what was done or not done in violation of the order).

THE COURT: Do you have any cause to show why you should not be adjudicated guilty of contempt by the court and sentenced therefore?

IF THE EXPLANATION IS UNSATISFACTORY:

THE COURT: The court hereby finds you in contempt and adjudicates you guilty of direct criminal contempt.

THE COURT: Prior to sentencing, do you have any evidence of excusing or mitigating circumstances which you would like to present to the court?

IF NOTHING IS PRESENTED WHICH AFFECTS YOUR SENTENCING:

THE COURT: You are hereby sentenced to (less than six months) and/or (up to $500) fine and/or other sanctions, including probation.

Pronounce sentence in open court, **write** order with specific findings of fact, **sign** order, and enter of **record**.

II. Indirect Criminal Contempt

A. Definition

Indirect criminal contempt is conduct that occurs outside the presence of the judge, and that is intended to constitute "a clear and present danger to the orderly administration of justice. . . . [W]hether speech constitutes a clear and present danger is measured not by the content of the remark but by the impact on judicial action." *Wasserman v. State*, 671 So. 2d 846, 848 (Fla. 2d DCA 1996). *See also Gidden v. State*, 613 So. 2d 457 (Fla. 1993); *Pugliese v. Pugliese*, 347 So. 2d 422 (Fla. 1977); *Via v. State*, 633 So. 2d 1198 (Fla. 2d DCA 1994).

Tips, Caveats, and Problems

- "[T]he substantive evil" constituting the contemptuous act "must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Wasserman v. State*, 671 So. 2d 846, 848 (Fla.

2d DCA 1996), quoting *Bridges v. State of Cal.*, 314 U.S. 252, 263, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

- For example, after losing a civil case, the defendant, in the hallway outside the court, called counsel for the plaintiff a "f-cking c--t" and threatened her by saying he would "see her later." The profane name-calling was not indirect criminal contempt, but the threatening of the attorney, an officer of the court, justified a finding of contempt. *Hoeffer v. State*, 696 So. 2d 1265 (Fla. 4th DCA 1997).

B. Process and Burden of Proof Overview

Indirect criminal contempt, like direct criminal contempt, must be proved beyond a reasonable doubt. *Brown v. Smith*, 705 So. 2d 682 (Fla. 4th DCA 1998).

Because the conduct occurs outside the presence of the court, summary disposition is not available in indirect criminal contempt proceedings. *Fredericks v. Sturgis*, 598 So. 2d 94 (Fla. 5th DCA 1992). A defendant must be present in order for a criminal contempt proceeding to take place. *May v. South Florida Water Management Dist.*, 866 So. 2d 205 (Fla. 4th DCA 2004).

Tips, Caveats, and Problems

- Placing the burden to move forward on the defendant and not requiring proof beyond a reasonable doubt violates a defendant's due process rights. *Tide v. State*, 804 So. 2d 412 (Fla. 4th DCA 2001).

- Where the contemnor claims an inability to comply with a court order, however, the burden of proving the inability is on the contemnor and must be proven by a preponderance of the evidence. *Florida Dept. of Health and Rehabilitative Services v. State*, 616 So. 2d 66 (Fla. 1st DCA 1993).

- A parent cannot be held in civil contempt for failure to abide by a rotating custody arrangement when the child becomes a legal adult, unless the child is legally declared incapacitated or incompetent. *Gamache v. Gamache*, 14 So. 3d 1236 (Fla. 2d DCA 2009).

- Where the mother and father lived 500 miles from each other and weekend visitation as ordered by the court was impractical, the proper course was for the parties to seek a modification of the judgment. An order of the court must be followed. However, the evidence was insufficient to establish that

the father was in contempt of court. *Doherty v. Padgett*, 942 So. 2d 464 (Fla. 2d DCA 2006).

- If the judge has good reason to believe the defendant will not attend the contempt hearing, the proper procedure is to issue a warrant for the defendant's arrest or a writ of bodily attachment. Fla. R. Crim. P. 3.840(c).

- The defendant must be given a reasonable time to prepare a defense. Two days' notice of the hearing is insufficient. *Woolf v. Woolf*, 901 So. 2d 905 (Fla. 4th DCA 2005); *Goral v. State*, 553 So. 2d 1282 (Fla. 3d DCA 1989).

Checklist

— The conduct occurred outside the presence of the court.

— The conduct, through its impact on judicial action, was a clear and present danger to the orderly administration of justice.

— The defendant was given notice of the hearing prior to its occurring and given more than two days to prepare a defense.

— The order to show cause contained specific allegations as to the alleged contempt.

— The defendant was actually present at the start of the hearing or an exception in rule 3.180(c) existed.

— The defendant was given an opportunity to present mitigating evidence.

— The defendant was not sentenced to more than one year, and if six months or more were imposed, a jury was empanelled to try the facts.

— The defendant was not fined more than $500.

— The proceedings were reported like any other criminal proceeding and the order contained a written recital of facts constituting the underlying contempt.

C. Elements and Due Process

1. In General

Proceedings for indirect criminal contempt are effectively criminal in nature and, therefore, an accused contemnor is entitled to the same basic constitutional due process protections afforded to criminal defendants. *Andrews v. Walton*, 428 So. 2d 663, 666 (Fla. 1983) (citing *Aaron v. State*, 284 So. 2d 673, 675 (Fla. 1973)); *De Castro v. De Castro*, 957 So. 2d 1258 (Fla. 3d DCA 2007); *Van Hare v. Van Hare*, 870 So. 2d 125 (Fla. 4th DCA 2003).

A contemnor has a constitutional right not to incriminate himself or herself. It was reversible error for the court to require the contemnor to explain why he had failed to comply with a court order. *Harvey v. State*, 32 So. 3d 61 (Fla. 2d DCA 2008).

2. Conduct

Outside the Presence of Court – The conduct must have occurred outside the presence of the court to constitute indirect criminal contempt. *Wasserman v. State*, 671 So. 2d 846 (Fla. 2d DCA 1996).

Clear and Present Danger – To constitute indirect criminal contempt, the conduct must pose a "clear and present danger to the orderly administration of justice." *Id.* at 848. Whether the speech meets this standard is measured by the impact on the judicial action, not the content of the speech.

Intent – Intent is an essential element of indirect criminal contempt. *Power Line Components, Inc. v. Mil-Spec Components, Inc.*, 720 So. 2d 546 (Fla. 4th DCA 1998). The intent to commit contempt may be inferred from the actions of the contemnor. Intent necessary for indirect criminal contempt could be inferred from the assistant state attorney's act of engaging in an altercation with opposing counsel in the courthouse hallway in the presence of several people, including a juror. *Milian v. State*, 764 So. 2d 860 (Fla. 4th DCA 2000).

Tips, Caveats, and Problems

- Mere utterances are not generally punishable unless the "substantive evil" is "extremely serious and the degree of imminence extremely high." *Wasserman v. State*, 671 So. 2d 846, 848 (Fla. 2d DCA 1996), quoting *Bridges v. State of Cal.*, 314 U.S. 252, 263, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

- Defendants cannot be found in contempt for late appearance caused by the breakdown of their automobile, because intent is lacking. *Werner v. State*, 740 So. 2d 591 (Fla. 5th DCA 1999).

- Where a finding of intent is supported by the facts, the court may conclude that the offensive behavior was "willful" and "calculated to hinder the orderly functions of the court." *Mann v. State*, 476 So. 2d 1369, 1374 (Fla. 2d DCA 1985).

- Merely stating that he or she did not mean to be contemptuous when violating the court's direct order does not change the result. *Vizzi v. State*, 501 So. 2d 613, 619 (Fla. 3d DCA 1986).

- The judge's underlying order that the sheriff was to permanently assign three competent bailiffs to his courtroom could not be the basis for holding the chief court deputy in contempt where, due to insufficient personnel, the chief had to borrow detention deputies to help out in the courtroom. There was insufficient evidence of intent to violate the court order. *Dougherty v. State*, 550 So. 2d 542 (Fla. 4th DCA 1989).

- Indirect criminal contempt conviction reversed where there was no evidence that the prisoner's signing of the judge's name to an order was done with the intent to embarrass, hinder, or obstruct the court in the administration of justice or was calculated to lessen the court's authority or dignity. *McCoy v. State*, 930 So. 2d 811 (Fla. 4th DCA 2006).

- It was not error for the trial court to find the defendant guilty of indirect criminal contempt for filing false documents in his dissolution of marriage case after he intentionally underrepresented his income in sworn documents filed with the court. *Haeussler v. State*, 100 So. 3d 732 (Fla. 2d DCA 2012).

- A juvenile who was 15 minutes late to court could not be held in contempt, as he "lacked control over his arrival time" and the evidence did not show willfulness. *K.D.K. v. State*, 120 So. 3d 229 (Fla. 4th DCA 2013).

3. Order to Show Cause and Opportunity to Show Cause

"An order to show cause is the charging document in a criminal contempt proceeding, just as an information is the charging document in a criminal case." *Martin v. Pinellas County*, 483 So. 2d 445, 447 (Fla. 2d DCA 1986).

"[T]he indirect criminal contempt process requires that all procedural aspects of the criminal justice process be accorded a defendant, including an appropriate charging document, an answer, an order of arrest, the right to bail, an arraignment, and a hearing." *Gidden v. State*, 613 So. 2d 457, 460 (Fla. 1993). *See also* Fla. R.

Crim. P. 3.840(g); *Ensign v. State*, 67 So. 3d 353 (Fla. 2d DCA 2011); *Martinez v. State*, 976 So. 2d 1222 (Fla. 4th DCA 2008).

The order to show cause must be based on a sworn motion. It can be initiated by the judge sua sponte or on an affidavit of any person having knowledge of the facts. Fla. R. Crim. P. 3.840(a); *Cone v. Gillson*, 861 So. 2d 1210 (Fla. 2d DCA 2003); *Paris v. Paris*, 427 So. 2d 1080 (Fla. 1st DCA 1983).

An order to show cause must contain specific allegations for which the defendant must answer. Fla. R. Crim. P. 3.840(a); *Mendana v. Mendana*, 911 So. 2d 130 (Fla. 3d DCA 2005).

The accused must be advised of the charge and then afforded an opportunity to defend himself or herself. *Dykes v. Dyke*s, 104 So. 2d 598, 599 (Fla. 3d DCA 1958).

"The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order." Fla. R. Crim. P. 3.840(a). *See also Woolf v. Woolf*, 901 So. 2d 905 (Fla. 4th DCA 2005) (two days insufficient); *Fox v. State*, 490 So. 2d 1288 (Fla. 5th DCA 1986) (six hours insufficient).

In *Walker v. State*, 946 So. 2d 130 (Fla. 5th DCA 2007), the evidence was insufficient to establish that the defendant sent text messages to the victim in violation of an injunction. Thus, the contempt conviction was reversed.

Tips, Caveats, and Problems

- An opportunity to show cause includes "the opportunity to be represented by counsel and to testify and present relevant evidence of witnesses, going not only to the facts of the charge itself but to matters of excuse therefrom and of extenuation and mitigation." *Dykes v. Dykes*, 104 So. 2d 598, 599 (Fla. 3d DCA 1958).

- The defendant may be entitled to court-appointed counsel. Fla. R. Crim. P. 3.111(b)(1); *Gidden v. State*, 613 So. 2d 457 (Fla. 1993). However, counsel need not be provided if the judge, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned in the event of conviction. *See* § 27.512, Fla. Stat.

- Due process also requires that the defendant be allowed to make a closing argument. *Feltner v. Columbia Pictures Television, Inc.*, 789 So. 2d 453 (Fla. 4th DCA 2001).

- A procedure whereby the court determined the defense would be heard first, since the court already had a sworn affidavit upon which it issued an order to show cause, impermissibly shifted the burden of proof to the defendant and constituted denial of due process. *McAtee v. State*, 899 So. 2d 1245 (Fla. 4th DCA 2005).

- In *Luzenberg v. Forand*, 929 So. 2d 546 (Fla. 2d DCA 2006), the court found the defendant in indirect criminal contempt but sentenced him to jail with a purge provision. After realizing the purge provision actually made the contempt order one of indirect civil contempt, the court entered an amended judgment deleting the purge provision and sentencing the defendant to jail. Since changing the complete nature of the judgment falls outside a scrivener's error or clerical mistake, the contempt conviction was reversed.

- No objection is required when an order to show cause is not based on a sworn affidavit that contains the essential facts constituting the charged criminal contempt. Such an order is legally insufficient. *Mix v. State*, 827 So. 2d 397 (Fla. 2d DCA 2002); *see also Cone v. Gillson*, 861 So. 2d 1210 (Fla. 2d DCA 2003).

- An order to show cause provides the required notice so long as the order is sufficiently clear and precise to inform the party of its command and direction, including advising the defendant of the possibility of criminal penalties. *J.M.P.U. v. State*, 858 So. 2d 389 (Fla. 3d DCA 2003); *Hagerman v. Hagerman*, 751 So. 2d 152 (Fla. 2d DCA 2000); *Zelman v. State*, 666 So. 2d 188, 190 (Fla. 2d DCA 1995); *Amerivend Corp. v. West Dade Ltd.*, 627 So. 2d 1258 (Fla. 3d DCA 1994).

- Rule 3.840(a), Florida Rules of Criminal Procedure, mandates that a reasonable time be allowed for preparation of the defense after service of the show cause order on the defendant. *Russ v. State*, 622 So. 2d 501 (Fla. 5th DCA 1993).

- Failure to issue an order to show cause apprising the defendant of the charges against him or her is fundamental error. *Corneal v. KW Palms Ltd. Partnership*, 673 So. 2d 193 (Fla. 3d DCA 1996).

4. Written Order

A criminal contempt proceeding must be reported like any other criminal proceeding. Adjudication of contempt must be reversed where "the final hearing was not reported and [the defendant] has presented a facially sufficient claim of error that cannot be refuted by the record." *Schmidt v. Hunter*, 788 So. 2d 322 (Fla. 2d DCA 2001); *see also Conley v. Cannon*, 708 So. 2d 306 (Fla. 2d DCA 1998). The order reporting the contempt must contain written findings of fact underlying the charged contempt. *Ward v. State*, 908 So. 2d 1138 (Fla. 3d DCA 2005); *Fetzer v. State*, 723 So. 2d 907 (Fla. 1st DCA 1999). Orally reciting these facts on the record satisfies the recital of facts requirement. *Gidden v. State*, 613 So. 2d 457 (Fla. 1993).

Tips, Caveats, and Problems

- A scrivener's error that mislabels the type of contempt the judge imposed should be remanded to the trial court to be corrected. *Graves v. State*, 872 So. 2d 298 (Fla. 2d DCA 2004).

5. Disqualification of Judge

A judge must disqualify himself or herself if the contempt charged involved disrespect to or criticism of that judge. *Bumgarner v. State*, 245 So. 2d 635 (Fla. 4th DCA 1971). However, it must be personal disrespect for that judge, not just obstruction of the court in its administration of justice, to trigger disqualification. *Lowe v. State*, 468 So. 2d 258 (Fla. 2d DCA 1985). Additionally, a judge need not recuse simply because the contempt was committed against that judge or against a court of which he or she is a member. *Bryant v. State*, 363 So. 2d 1141 (Fla. 1st DCA 1978). Neither is a judge generally disqualified merely because he or she initiated the contempt proceedings. *Id.*

6. Double Jeopardy

"[A] later criminal prosecution for the same conduct which gave rise to a criminal contempt prosecution can violate a defendant's double jeopardy rights." *McCray v. State*, 640 So. 2d 1215, 1217 (Fla. 5th DCA 1994) (citing *U.S. v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)).

However, a defendant held in contempt for violating a domestic violence injunction may be prosecuted later for a substantive offense stemming from the

same conduct. *Williams v. State*, 658 So. 2d 665 (Fla. 4th DCA 1995), *approved*, 673 So. 2d 486 (Fla. 1996).

The sole test to be applied is the "same elements" test under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which provides that "[i]f each offense requires proof of an element that the other does not, the offenses are separate and double jeopardy does not apply." *State v. Miranda*, 644 So. 2d 342, 344 (Fla. 2d DCA 1994).

"Double jeopardy protections pertain upon [criminal] contempt. . . . However, double jeopardy does not necessarily preclude a separate criminal prosecution for felony battery. . . . Because the contempt adjudication did not require a prior battery conviction, and the felony battery does not require the existence or knowledge of an injunction order, the contempt and the felony battery each require proof of an element the other does not and neither offense is entirely subsumed within the other." *State v. Rothwell*, 981 So. 2d 1279, 1280–1281 (Fla. 1st DCA 2008).

7. Purge Provisions

A purge provision is not required in a proceeding for indirect criminal contempt. *Contella v. Contella*, 589 So. 2d 325, 326 (Fla. 5th DCA 1991).

D. Specific Examples of Indirect Criminal Contempt

1. Threat

Profane name-calling is not indirect criminal contempt, but a threat to or intimidation of an attorney who is an officer of the court justifies a finding of contempt. *Hoeffer v. State*, 696 So. 2d 1265 (Fla. 4th DCA 1997).

2. Support Obligations

"Criminal contempt proceedings are appropriate when . . . the party in default has continually and willfully neglected his support obligations, or has affirmatively acted to divest himself of assets and property." *Bowen v. Bowen*, 471 So. 2d 1274, 1279 (Fla. 1985). It is improper to find a party in contempt for failure to pay an equitable distribution obligation. *Williams v. Williams*, 958 So. 2d 992 (Fla. 5th DCA 2007).

3. Unclear or Erroneous Orders

Failure to comply with even an erroneous order constitutes contempt so long as the court has jurisdiction over the matter. *Soven v. State*, 622 So. 2d 1123 (Fla. 3d DCA 1993); *McQueen v. State*, 531 So. 2d 1030 (Fla. 1st DCA 1988).

However, a party cannot be held in contempt for violating an order that does not sufficiently apprise the party of what he or she is required to do. *Marcus v. Marcus*, 902 So. 2d 259 (Fla. 4th DCA 2005); *Rouse v. Rouse*, 595 So. 2d 1013 (Fla. 2d DCA 1992).

4. Contacting Juror

An attorney who contacted a juror to obtain her medical records, after the juror was excused due to a medical condition and the court denied the attorney's request to obtain the records, willfully undermined the court's order and thus was in indirect criminal contempt. *Alan v. State*, 39 So. 3d 343 (Fla. 1st DCA 2010).

Tips, Caveats, and Problems

- An order to return "jewelry" was too vague. *Lubin v. Schumer*, 593 So. 2d 599 (Fla. 3d DCA 1992).

- "[I]f a court order . . . is too general and appears too burdensome and uncertain in its scope the aggrieved parties should petition the court for modification, clarification or construction of the order, and if they fail to do so, they act at their own peril." *Zelman v. State*, 666 So. 2d 188, 190 (Fla. 2d DCA 1995) (quoting *Kranis v. Kranis*, 313 So. 2d 135, 139 (Fla. 3d DCA 1975)).

E. Punishments

1. Fines

Fines for indirect criminal contempt are distinct from fines for indirect civil contempt in that there is no opportunity to reduce or avoid the amount of a fine through compliance for indirect criminal contempt. *Kimball v. Yaratch*, 787 So. 2d 97 (Fla. 2d DCA 2001).

Indirect criminal contempt fines must not exceed $500. *Kramer v. State*, 800 So. 2d 319 (Fla. 2d DCA 2001); § 775.02, Fla. Stat.

2. Incarceration

Indirect criminal contempt is punishable by up to one year of imprisonment under section 775.02, Florida Statutes. However, if six months or more are imposed, the accused is entitled to a jury trial. *Wells v. State*, 654 So. 2d 146 (Fla. 3d DCA 1995).

A defendant may be denied a jury trial for contempt only if the punishment is limited to less than six months of incarceration upon conviction. *Aaron v. State*, 284 So. 2d 673 (Fla. 1973). The sanction of house arrest for a runaway minor who refused to comply with court orders is criminal, not civil, contempt because the sanction is for a definite period of time and there is no purge provision. *D.L. by and through Reid v. Parents of D.L.*, 29 So. 3d 461 (Fla. 4th DCA 2010).

3. Order of Contempt

"There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty." Fla. R. Crim. P. 3.840(f); *Martinez v. State*, 976 So. 2d 1222, 1232 (Fla. 4th DCA 2008).

An order that finds a factual basis for indirect criminal contempt but does not grant or deny the motion for contempt is a non-final order which is not subject to appeal. *Sutton v. Amerson*, 922 So. 2d 391 (Fla. 1st DCA 2006).

It is error to enter "a hybrid order which had some characteristics of criminal contempt and some characteristics of a civil contempt order." *Montello v. Montello*, 937 So. 2d 1154, 1155 (Fla. 3d DCA 2006), *approved*, 961 So. 2d 257 (Fla. 2007).

An order to show cause must state "the essential facts constituting the criminal contempt charged and requir[e] the defendant to appear before the court to show cause why the defendant should not be held in contempt of court." Fla. R. Crim. P. 3.840(a); *see also Hill v. State*, 643 So. 2d 1178 (Fla. 2d DCA 1994).

Written findings of fact are not required for indirect criminal contempt where sufficient oral findings are on the record. *Gidden v. State*, 613 So. 2d 457 (Fla. 1993); *Neal v. State*, 891 So. 2d 607 (Fla. 1st DCA 2005).

F. Right to Counsel

An indirect criminal contempt proceeding must fully comply with rule 3.840, Florida Rules of Criminal Procedure, and the defendant may be entitled to court-

appointed counsel. *Gregory v. Rice*, 727 So. 2d 251 (Fla. 1999); *Zelman v. State*, 666 So. 2d 188 (Fla. 2d DCA 1995).

The trial court may allow opposing counsel to assist the court in presenting a contempt case, but counsel must not abuse the position. *Gordon v. State*, 967 So. 2d 357 (Fla. 4th DCA 2007).

G. Sample Forms

1. Motion for Order to Show Cause

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT
IN AND FOR _____
COUNTY, FLORIDA

DIVISION
CASE NO.:

IN RE:

Petitioner/Plaintiff,

vs.

Respondent/Defendant.

_____/

MOTION FOR ORDER TO SHOW CAUSE

Petitioner, _____, shows to the Court:

1. On the ____ day of _____, 20___, this Honorable Court entered its Order requiring Respondent to perform/not perform the following acts:

_____

_____

A copy of that Order is attached as Exhibit A.

2. Said Order has been in full force and effect since its entry and a copy thereof was served upon Respondent on the ____ day of _____, 20___, who at all times has had knowledge of its terms.

3. Respondent has failed and refused to comply with and has disobeyed and disregarded the provisions of said Order by the following acts of conduct:

_____

_____

_____

This conduct as more particularly described and attested to by the sworn Affidavit[s] of _____, which are attached as Exhibit B [C].

4. By reason of Respondent's failure to comply with the aforesaid provisions of this Court's Order, Respondent has committed an indirect criminal contempt of the authority of this court.

WHEREFORE Petitioner moves this Court for an Order requiring Respondent to appear and show cause why he/she should not be judged in Indirect Criminal Contempt of this Court and for an Order adjudging Respondent to be in Indirect Criminal Contempt of Court for violation of the terms of said Order and for such punishment as this Court may deem to be just and proper.

_____

Petitioner

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF _____

BEFORE ME, the undersigned authority, personally appeared Petitioner, _____, who after being duly sworn on oath deposes and says:

1. That Affiant is the Petitioner in _____ County Circuit Court, Case No. _____ CA ( ).

2. That Respondent has willfully failed and refused to comply with this Court's Order [Injunction] and has willfully refused and failed to comply with said Order by the following acts of conduct:

_____

_____

_____

_____

_____

Affiant/Petitioner

SWORN TO and subscribed before me this ____ day of _____, 20___, by _____.

NOTARY PUBLIC or DEPUTY CLERK

_____

{Print, type, or stamp commissioned name of notary or clerk.}

_____ Personally known
_____ Produced identification
Type of identification produced _____

I certify that a copy of this document was ( ) mailed ( ) faxed and mailed ( ) e-mailed ( ) hand delivered to the person(s) listed below on *{date}*_____.

Other party or his/her attorney:
Name: _____
Address: _____
City, State, Zip: _____
Fax Number: _____
Designated E-mail Address(es): _____
_____

2. Order to Show Cause

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT IN
AND FOR _____
COUNTY, FLORIDA

DIVISION
CASE NO.:

IN RE:

Petitioner/Plaintiff,

vs.

Respondent/Defendant.

_____/

ORDER TO SHOW CAUSE

Upon consideration of the attached sworn affidavit filed with the Court by the Petitioner/Plaintiff in this cause and upon review of this Court's Order, entered on the ____ day of _____, 20___, this Court finds:

That the attached Order enjoined Respondent/Defendant from performing any of the following acts:

(Specify what acts)
_____
_____
_____

Furthermore, said Order affirmatively ordered Respondent/Defendant to perform the following acts:

(Specify what acts)
_____
_____
_____

Said Order was served upon Respondent/Defendant on the ____ day of _____, 20___, return being made to this Court on the ____ day of _____, 20___.

Petitioner has petitioned this Court for an Order adjudging Respondent/ Defendant to be in Indirect Criminal Contempt of Court for the willful disregard and disobedience of the provisions of this Court's Order by engaging in the following acts of conduct:

(Specify what acts)
_____
_____

Now, therefore, it is ORDERED AND ADJUDGED that said Respondent/ Defendant shall appear before this Court on the ____ day of _____, 20___, at _____m., in Room _____, at the following location: (allow at least ten (10) days for service after order is signed) to be arraigned and then and there show cause why he/she should not be held in and punished for indirect criminal contempt of Court, pursuant to rule 3.840, Florida Rules of Criminal Procedure, for his/her willful failure to comply with the terms of the above Order. Such punishment, if imposed, may include a fine and/or incarceration or probation.

Should the Court determine, based on the evidence presented at the hearing, that Respondent's conduct warrants sanctions for civil contempt in addition to or instead of indirect criminal contempt, the Court reserves the right to find Respondent guilty of civil contempt and impose appropriate civil sanctions.

As the Respondent/Defendant, you have a right to be represented by an attorney.

FAILURE TO APPEAR AT THE HEARING MAY RESULT IN THE COURT ISSUING A WRIT OF BODILY ATTACHMENT FOR YOUR ARREST. IF YOU ARE ARRESTED, YOU MAY BE HELD IN JAIL UP TO 48 HOURS BEFORE A HEARING IS HELD.

The Sheriff of _____ County, Florida, is hereby ordered to serve a copy of this Order on the Respondent/Defendant, _____, and to make a return showing such service.

DONE AND ORDERED at _____, _____ County, Florida, this ____ day of _____, 20___.

_____
CIRCUIT COURT JUDGE

3. Writ of Bodily Attachment

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT
IN AND FOR _____
COUNTY, FLORIDA

DIVISION
CASE NO.:

IN RE:

Petitioner/Plaintiff,

vs.

Respondent/Defendant.

_____/

WRIT OF BODILY ATTACHMENT

STATE OF FLORIDA
TO EACH SHERIFF OF THE STATE

YOU ARE HEREBY COMMANDED to attach and take into custody the body of the Respondent, _____, and bring said Respondent personally before the Honorable _____, or, in his/her absence, before any of the other Judges of the Circuit Court, in Chambers, Room No. _____, _____ County Courthouse, (address), instanter, for the following reason(s): (check appropriate box)

[ ] To answer Respondent's failure to appear at a hearing for contempt on the ____ day of _____, 20___, of which Respondent was duly noticed; and/or

[ ] (Other) _____

_____

_____

DIRECTIONS TO SHERIFF

This Writ shall be promptly served and executed between the hours of 8:00 a.m. and 3:00 p.m., Monday through Friday (legal holidays excluded), and shall expire and terminate if not served sixty (60) days from the date of this Order. In rare instances when the Respondent is taken into custody during normal court hours but cannot, after diligent effort, be brought before a Judge of the Court on the same date this Writ is served, said Respondent may be confined in the _____ County Jail until the earliest possible time that he/she can be brought before the court. However, Respondent may secure release pursuant to the conditions specified below.

(Check if applicable)

[ ] There is reason to believe that Respondent is not subject to attachment during the above hours. Accordingly, Respondent may be confined in the _____ County Jail until the earliest possible time that Respondent can be brought before the aforesaid Judge, or, in his/her absence, before any of the other Judges of the Circuit Court, for the reasons specified herein. However, Respondent may secure release pursuant to the conditions specified below.

Upon execution of this Writ, the sheriff shall promptly notify, by telephone, the following:_____

(Specify name and telephone number of person to be notified).

[ ] Respondent shall be released by depositing a cash or security bond with the Clerk of Court in the sum of $_____ to ensure his/her physical presence in court when required, and/or _____.

(Specify other conditions of recognizance).

INFORMATION SHEET TO BE COMPLETED BY COUNSEL

Address of Respondent:

_____ Race: _____

_____ Sex: _____
(Home address)

_____ DOB: _____

_____ SS#: _____
(Business address)

_____ Hair: _____
(Telephone number) Eyes: _____
Height: _____
Weight: _____
Nicknames: _____

_____ _____
(Attach photo if available)

ORDERED at _____ County, Florida, on the ____ day of _____, 20 ___.

_____
CIRCUIT COURT JUDGE

4. Order Adjudging Respondent in Indirect Criminal Contempt of Court and Order of Commitment

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT
IN AND FOR _____
COUNTY, FLORIDA

DIVISION
CASE NO.:

IN RE:

Petitioner/Plaintiff,

vs.

Respondent/Defendant.

_____/

ORDER ADJUDGING RESPONDENT IN INDIRECT CRIMINAL CONTEMPT OF COURT AND ORDER OF COMMITMENT

On the ____ day of _____, 20___, this Court issued an Order to Show Cause directed to Respondent, _____ ordering Respondent to appear and show cause why he/she should not be adjudged guilty of, and punished for, criminal contempt of court for his/her willful violation of said Order issued by this Court on _____, 20___.

The Order to Show Cause was served upon Respondent on the ____ day of _____, 20___. _____ (give details of service).

A hearing was held on this matter on the _____ day of _____, 20___. Upon due deliberation, advice of counsel, and evaluation of the evidence presented, this Court FINDS:

That pursuant to the above Order Respondent was ordered to:

_____
_____
_____
_____
_____

(give details of Order). Respondent has violated the terms of said Order issued by this Court by the following act of conduct:

_____
_____
_____
_____
_____

It is therefore ORDERED and ADJUDGED that Respondent is guilty of indirect criminal contempt of this Court because of his/her violation of said Order issued by this Court on _____, 20____.

For such contempt Respondent is

a. _____ hereby fined the sum of $_____.

b. _____ committed to the Sheriff of _____ County to the county jail for a period of _____ months _____ days and after being confined for such period he/she shall be duly discharged from imprisonment according to law.

c. _____ hereby sentenced to a term of probation subject to the following terms and conditions: _____

_____
_____

DONE AND ORDERED at _____ County, Florida, this _____ day of _____, 20___.

_____
CIRCUIT COURT JUDGE

Chapter Three

Civil Contempt

I. Indirect Civil Contempt

A. Definition

Civil contempt "is used to coerce an offending party into complying with a court order rather than to punish the offending party for a failure to comply with a court order." *The Florida Bar v. Taylor*, 648 So. 2d 709, 711 n.2 (Fla. 1995) (citing *Johnson v. Bednar*, 573 So. 2d 822 (Fla. 1991), *receded from on other grounds*, *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2000)); *Keitel v. Keitel*, 716 So. 2d 842 (Fla. 4th DCA 1998). The contempt is remedied by imprisonment or a fine unless and until the act ordered is performed. It is this freedom of the contemnor to end the sentence immediately by doing what he/she was ordered to do that makes the relief civil in nature. It is for this reason that the contemnor must be actually able to do the ordered act for refusal to comply to constitute contempt. *See* Fla. R. Civ. P. 1.570(c); Fla. Fam. L. R. P. 12.615.

Tips, Caveats, and Problems

- Non-parties cannot be held in civil contempt. *DeMello v. Buckman*, 914 So. 2d 1090 (Fla. 4th DCA 2005).

- A contempt order imposing sanctions and a warrant for failure to comply with a court order were quashed when the underlying orders had been reversed, in *O'Neal v. Blackerby*, 973 So. 2d 1160 (Fla. 1st DCA 2006).

B. Process and Burden of Proof Overview

Rule 12.615(d)(1), Florida Family Law Rules of Procedure, requires that the alleged contemnor have the present ability to pay child support and willfully failed to comply with the prior court order. *Shelton v. Shelton*, 965 So. 2d 179 (Fla. 2d DCA 2007); *Larsen v. Larsen*, 949 So. 2d 278 (Fla. 4th DCA 2007). The contempt order must contain the factual findings required by rule 12.615(d). *Napoli v. Napoli*, 142 So. 3d 953 (Fla. 4th DCA 2014).

Before finding contempt, the court must first actually identify the sources from which the contemnor could obtain funds to comply with a prior court order. *Aburos v. Aburos*, 34 So. 3d 131 (Fla. 3d DCA 2010); *Vazquez v. Vazquez*, 827 So. 2d 384

(Fla. 4th DCA 2002). In other words, the contemnor must actually have the ability to comply with an order to be held in civil contempt. To prove contempt, the petitioner must show by a preponderance of the evidence that the respondent has willfully disobeyed an order of the court and that he or she has the present ability to comply with that order. *Aburos*; *Picurro v. Picurro*, 734 So. 2d 527 (Fla. 4th DCA 1999). The petitioner enjoys a presumption that the respondent has the ability to comply if a prior valid court order exists. *Id*. The burden shifts then to the respondent to show that he or she has lost that ability to comply. *Id*.

It is error to hold a defendant in contempt for failure to pay child support and shortly thereafter find him or her indigent for purposes of appeal. *Anderson v. Department of Revenue ex rel. Hamilton*, 11 So. 3d 424 (Fla. 4th DCA 2009).

The Department of Children and Families cannot be held in contempt for failure to comply with a court order to place a child in a therapeutic foster home where the department attempted to find a placement but none was available. *Department of Children and Families v. M.M.*, 855 So. 2d 1250 (Fla. 4th DCA 2003).

"Trial courts considering probate matters lack the power to use civil contempt to incarcerate a former personal representative for failing to return estate property, absent an express finding that the contemnor has the present ability to comply." *Jensen v. Estate of Gambidilla*, 896 So. 2d 917, 920 (Fla. 4th DCA 2005).

Evidence must be sufficient to justify a finding that the respondent has willfully violated the court order. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Knowles v. Knowles*, 522 So. 2d 477 (Fla. 5th DCA 1988).

To constitute contempt for failure to obey a previous order, the contemnor's behavior must clearly violate the order. *Pearson v. Pearson*, 932 So. 2d 601 (Fla. 2d DCA 2006); *Curry v. Robbins*, 744 So. 2d 527 (Fla. 3d DCA 1999); *Knorr v. Knorr*, 751 So. 2d 64 (Fla. 2d DCA 1999).

Checklist

— The purpose of the civil contempt order is to coerce compliance, not to punish noncompliance.

— The contemnor has clearly violated the prior court order.

— The court has provided adequate notice and a full and fair opportunity to be heard.

— An affirmative finding that the respondent willfully violated the court order was made, and the facts establishing the violation or that the respondent has the present ability to comply with the court order are included in the contempt order.

— A separate affirmative finding that the contemnor has the present ability to comply with the purge provisions was made.

— The order states the respondent has been adjudicated guilty of civil contempt of court.

— The contempt order sets forth the date of the original order (it is also recommended that the original order be attached as an exhibit to the order of contempt).

— The number of days the respondent is to be confined is clearly set forth, along with a purge provision stating exactly what the respondent must do to purge him or herself.

Amendments to the Florida Family Law Rules of Procedure, 723 So. 2d 208 (Fla. 1998); *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983); *Lazzara v. Lazzara*, 785 So. 2d 716 (Fla. 4th DCA 2001).

C. Elements of Civil Contempt and Due Process

1. Clear Violation

In order to find contempt for failure to obey a previous order, the contemnor's behavior must clearly violate an order. *Menke v. Wendell*, 188 So. 3d 869 (Fla. 2d DCA 2015); *Curry v. Robbins*, 744 So. 2d 527 (Fla. 3d DCA 1999).

As part of this requirement, a person "may not be held in contempt of court for violation of an order or a provision of a judgment which is not clear and definite, so as to make a party aware of its command and direction." *Cooley v. Moody*, 884 So. 2d 143, 145 (Fla. 2d DCA 2004).

A trial court's oral pronouncement regarding a contempt order must control over a later written order. *Glick v. Glick*, 874 So. 2d 1238 (Fla. 4th DCA 2004).

It was error for the court to order a former husband's incarceration until payment of the purge amount without first following the procedure set forth in rule

12.615(c)(2)(B), Florida Family Law Rules of Procedure. *Bruseau v. Bruseau*, 955 So. 2d 615 (Fla. 5th DCA 2007).

Tips, Caveats, and Problems

- The failure to give the former husband adequate notice of the severe potential consequences of a finding of contempt, along with the trial court's failure to make written findings of his present ability to pay, required the vacation of the order holding the former husband in civil contempt. *Patrick v. Patrick*, 950 So. 2d 517 (Fla. 2d DCA 2007).

- Pursuant to rule 1.100(b), Florida Rules of Civil Procedure, an aggrieved party, upon motion to the court, may initiate an action for an order of civil contempt. The necessity of a rule to show cause to institute civil contempt proceedings has been abolished. *Smith v. Smith*, 464 So. 2d 1287, 1288 n.1 (Fla. 5th DCA 1985).

- Contempt should not be used as a basis for a change of custody. The purpose of civil contempt is to compel compliance. The sanction of changing custody penalizes children and does not coerce compliance. *Hunter v. Hunter*, 65 So. 3d 1213 (Fla. 2d DCA 2011); *Burckle v. Burckle*, 915 So. 2d 747 (Fla. 2d DCA 2005); *Berger v. Berger*, 795 So. 2d 113 (Fla. 5th DCA 2001); *LaLoggia-VonHegel v. VonHegel*, 732 So. 2d 1131 (Fla. 2d DCA 1999); *Moody v. Moody*, 721 So. 2d 731 (Fla. 1st DCA 1998).

- In *Opatz v. Opatz*, 67 So. 3d 446 (Fla. 4th DCA 2011), the court denied the former wife's contempt petition that was based on the former husband's failure to pay child support, but modified the child support without a petition or notice of hearing. The district court reversed and remanded, finding that the wife's due process rights had been violated.

- The imposition of a $500 fine for indirect civil contempt for violation of an injunction is improper where there was no purge provision and no indication that the fine was meant to be coercive or compensatory. *Politz v. Booth*, 910 So. 2d 397 (Fla. 4th DCA 2005).

2. Opportunity to Be Heard

The failure to provide the contemnor with a hearing on his exceptions to the general magistrate's report prior to the entry of the order ratifying the report and recommendation is reversible error. *Silver v. Silver*, 35 So. 3d 1012 (Fla. 5th DCA 2010).

"While a person facing civil contempt is not entitled to all of the due process rights afforded to a person facing indirect criminal contempt, he or she is nonetheless entitled to a proceeding that meets the fundamental fairness requirements of the due process clause of the Fourteenth Amendment. . . . This requires that the alleged contemnor be provided with adequate notice and an opportunity to be heard." *Woolf v. Woolf*, 901 So. 2d 905, 911 (Fla. 4th DCA 2005).

Observing the required due process of law — providing an opportunity to be heard and providing notice — must be more than "merely colorable or illusive." *Tomayko v. Thomas*, 143 So. 2d 227, 230 (Fla. 3d DCA 1962). It must be full and fair, and notice must afford a reasonable time to prepare a defense (at least more than three days). *Woolf*; *Harreld v. Harreld*, 682 So. 2d 635 (Fla. 2d DCA 1996).

In accordance with rule 12.615(b), Florida Family Law Rules of Procedure, notice of a hearing may be served as provided under rule 2.516, Florida Rules of Judicial Administration (service by e-mail or other means) if it is "reasonably calculated to apprise the alleged contemnor of the pendency of the proceedings." Where a cause is pending or is not yet concluded, it is the attorney of record, not the respondent, who must be served. *See* Fla. R. Jud. Admin. 2.516. The notice must inform the person to be served that the aggrieved party seeks an order to hold him or her in contempt of court for the violation of a specific prior court order. The motion/notice must also inform the respondent of the date and manner in which the prior court order has been violated. *See Allman v. Johnson*, 488 So. 2d 884, 885 (Fla. 5th DCA 1986); Fla. R. Civ. P. Form 1.982; Fla. Fam. L. R. P. Form 12.960.

The motion for contempt must contain the following language: "FAILURE TO APPEAR AT THE HEARING MAY RESULT IN THE COURT ISSUING A WRIT OF BODILY ATTACHMENT FOR YOUR ARREST. IF YOU ARE ARRESTED, YOU MAY BE HELD IN JAIL UP TO 48 HOURS BEFORE A HEARING IS HELD." *Martyak v. Martyak*, 881 So. 2d 48, 49 (Fla. 4th DCA 2004), citing Fla. Fam. L. R. P. 12.615(b). In *Carter v. Hart*, 240 So. 3d 863 (Fla. 5th DCA 2018), the former wife's pro se motion for contempt and notice of hearing lacked that language, and the former husband argued that his due process rights were therefore violated. However, the appellate court affirmed, stating that the former husband,

> unlike Mr. Martyak, was present with counsel at the contempt hearing and was provided with his due process right to present evidence as to his present ability to pay and whether his failure to pay alimony was willful. Thus, the failure, if any, to include the above language from

> rule 12.615 in Former Wife's motion for contempt did not adversely affect Former Husband's due process rights to notice and an opportunity to be heard and present evidence. Finally, at the start of the contempt hearing, the trial court unequivocally placed Former Husband on notice that he was facing potential incarceration as a sanction for contempt. At no point during the hearing did Former Husband object or otherwise argue that this sanction or remedy for his potential contempt was unavailable because Former Wife did not request it in her motion.

If the alleged contemnor appears, the court must make a finding of a present ability to pay the purge amount in order to incarcerate the alleged contemnor. If the alleged contemnor fails to appear, the court shall set a reasonable purge amount and issue a writ of bodily attachment. Fla. Fam. L. R. P. 12.615(c).

Tips, Caveats, and Problems

- The court's statement "So he's going to tell me one more time he has no money when I haven't believed him anytime before that. . . . I don't need his testimony" deprived the defendant of the due process right to put on evidence that he had no ability to pay the required fees. *Peterson v. Asklipious*, 855 So. 2d 704, 705 (Fla. 4th DCA 2003).

- Failure to comply with the requirements of law may often result in reversal. For example, a civil contempt judgment with a six-month jail sentence was reversed when proceedings were not "conducted in scrupulous conformance with the requirements of the law, including a sufficient charging document, trial and post trial orders," and appropriate purge provisions. *Vereen v. Spears*, 819 So. 2d 923 (Fla. 3d DCA 2002).

- Three days' notice has been held insufficient to prepare for a civil contempt proceeding. *Apfelbaum v. Lord & Lady Originals, Inc.*, 317 So. 2d 128 (Fla. 3d DCA 1975) (respondent suffered from heart ailment); *see also Dileo v. Dileo*, 939 So. 2d 181 (Fla. 5th DCA 2006) (faxed copy of motion two days before hearing insufficient).

- When a trial court had previously ordered a respondent to keep his address current with the court clerk, notice of the contempt motion and hearing was sufficient when sent by mail to the contemnor. *Department of Revenue ex rel. Northern v. Coley*, 834 So. 2d 418 (Fla. 2d DCA 2003).

3. Ability to Comply with Court Order

"The inability of an alleged contemnor to obey a court order is a good defense to a charge of contempt for violating the order unless the alleged contemnor voluntarily created the inability." *Florida Dept. of Health and Rehabilitative Services v. State*, 616 So. 2d 66, 68 (Fla. 1st DCA 1993).

The alleged contemnor has the burden of proving by a preponderance of the evidence why he or she was unable to obey the court order. *Id.*

Tips, Caveats, and Problems

- The Department of Health and Rehabilitative Services could not be found in contempt for failing to move an incompetent defendant from a county jail to a state licensed facility within 15 days when the department presented unrebutted evidence that it could not comply with the order because no bed space was available due to inadequate funding. *State, Dept. of Health and Rehabilitative Services v. Maxwell*, 667 So. 2d 980 (Fla. 4th DCA 1996).

- It was error to place "the burden of proof on the former wife to demonstrate that the former husband had the present ability to satisfy the arrearage" of attorney's fees when a previous order existed directing the husband to pay support. "Contempt was an available remedy for the attorney's fees," and "[i]n the contempt proceeding, the former wife was entitled to the same presumption of the former husband's ability to pay attorney's fees that she enjoyed with regard to child support." *Lamar v. Lamar*, 889 So. 2d 983, 985 (Fla. 4th DCA 2004).

- Contempt for failure to pay child support was not warranted when the trial court had found the former husband indigent for purposes of the trial proceedings and appeal, and when no hearing was ever held on the former husband's petitions for downward modification of child support. "When the trial court found that the former husband was capable of at least making a minimum wage, the appropriate action was to order him to seek proper employment through Florida State Employment Services and to report weekly until employment is secured." *Herrera v. Sanchez*, 885 So. 2d 480, 482 (Fla. 5th DCA 2004).

- Sanctions could not be imposed on a party that failed to file a fact information sheet as ordered by the court, because the court gave the party "no grace period in which to comply with the order before sanctions would

be imposed and because it completely failed to consider [the party's] financial resources." *Creative Choice Homes, II, Ltd. v. Keystone Guard Services, Inc.*, 137 So. 3d 1144 (Fla. 3d DCA 2014).

4. Right to Counsel

Due process of law requires that an alleged contemnor be advised of the charge and be accorded an opportunity to defend himself or herself, including the opportunity to be represented by counsel. *Dykes v. Dykes*, 104 So. 2d 598 (Fla. 3d DCA 1958). However, the Fourteenth Amendment does not require the court to appoint counsel for an alleged contemnor in civil contempt proceedings, because a finding that a parent has the ability to pay precludes a finding that the party is indigent. *Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983).

In civil contempt proceedings, the right to counsel for indigent parties exists only where possible incarceration is involved. But where certain procedural safeguards are provided, the right to counsel may not be required. *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011).

5. Deliberate Divestment

If the alleged contemnor has willfully divested himself or herself of the ability to comply with the court order, the court cannot find the respondent in civil contempt because compliance is no longer possible. *Walker v. Edel*, 727 So. 2d 359 (Fla. 5th DCA 1999). However, if the alleged contemnor is still able to fulfill the purge provision, the court may hold that person in indirect civil contempt. *Brown v. Smith*, 705 So. 2d 682 (Fla. 4th DCA 1998).

6. Arrest

If the respondent fails to attend the hearing after being properly served with notice, the court may hold him or her in contempt and/or issue a writ of bodily attachment. *Spencer v. Spencer*, 311 So. 2d 822 (Fla. 3d DCA), *cert. denied*, 328 So. 2d 845 (Fla. 1975); *Dykes v. Dykes*, 104 So. 2d 598 (Fla. 3d DCA 1958).

Tips, Caveats, and Problems

- A circuit court may not issue a writ of bodily attachment with nationwide applicability in order to apprehend a civil contemnor. *Sanders v. Laird*, 865 So. 2d 649 (Fla. 2d DCA 2004).

- Form 12.962, Florida Family Law Rules of Procedure (Writ of Bodily Attachment (Child Support)), was adopted by the supreme court on December 2, 2010, *see In re Amendments to the Supreme Court Approved Family Law Forms*, 50 So. 3d 595 (Fla. 2010), and amended on August 25, 2011, *see In re Amendments to Florida Supreme Court Approved Family Law Forms*, 70 So. 3d 553 (Fla. 2011), and March 26, 2015, *see In re Amendments to Florida Supreme Court Approved Family Law Forms*, 173 So. 3d 19 (Fla. 2015).

7. Order and Purge Provision

Every civil contempt sentence of confinement must contain a purge provision giving the respondent the "key to the jail-house cell." *Neiman v. Naseer*, 31 So. 3d 231, 233 (Fla. 4th DCA 2010); *see also Pierce v. Pierce*, 18 So. 3d 1074 (Fla. 2d DCA 2009); *Jones v. Ryan*, 967 So. 2d 342 (Fla. 3d DCA 2007); *Allman v. Johnson*, 488 So. 2d 884, 885 (Fla. 5th DCA 1986). It must clearly state the conditions by which the contemnor can free himself or herself from the penalty imposed. *Neiman*. The contempt order must include a recitation of the factual basis for finding the present ability to pay the purge amount. *Miller v. Murrah*, 14 So. 3d 1019 (Fla. 5th DCA 2009); *Pope v. Quattelbaum*, 884 So. 2d 301 (Fla. 2d DCA 2004); *Hayden v. Bieluch*, 878 So. 2d 1270 (Fla. 4th DCA 2004). The purge provision contained in the written order must also be consistent with the purge provision orally pronounced. *Hampton Manor, Inc. v. Fortner*, 141 So. 3d 1260 (Fla. 5th DCA 2014), citing *Romero v. Romero*, 916 So. 2d 952 (Fla. 3d DCA 2005).

Rule 12.615(c)(2)(B), Florida Family Law Rules of Procedure, provides that in any civil contempt hearing where the alleged contemnor fails to appear, the trial court must "set a reasonable purge amount based on the individual circumstances of the parties." The trial court may not issue a writ of bodily attachment unless it first establishes that the alleged contemnor has the present ability to pay the purge amount. *Janeski v. Janeska*, 974 So. 2d 1220 (Fla. 2d DCA 2008).

When a trial court's finding of a respondent's ability to pay the purge amount conflicted with an order of her insolvency made two weeks earlier in a separate pending appeal, the appellate court reversed so the trial court could make specific findings as to the respondent's ability to pay. *Downey v. Downey*, 874 So. 2d 734 (Fla. 4th DCA 2004).

The trial court must make separate affirmative findings of the ability to pay the purge and the basis for that ability. *Carbonell v. Capella*, 30 So. 3d 664 (Fla. 5th DCA 2010); *Martyak v. Martyak*, 873 So. 2d 405 (Fla. 4th DCA 2004).

Tips, Caveats, and Problems

- The court is not limited to the amount of cash the respondent has immediately available as a purge amount but may look to any and all available assets in determining the respondent's ability to pay. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Harris v. Millett-Harris*, 900 So. 2d 712 (Fla. 3d DCA 2005).

- A contempt order that contains a purge provision that is too broad or indefinite is not enforceable. "[T]he purge provision must be clear and definite, making the party aware of what is required in any given circumstance. . . . The conduct that may land the appellant in jail should not be subject to question." *Lanza v. Lanza*, 804 So. 2d 408, 410 (Fla. 4th DCA 2001).

- The purge provision in the written order must be consistent with the trial court's purge oral pronouncement. Where the court orally set a purge provision of $4,000 or surrender of a vehicle, and the written order set forth a purge provision of $4,000 and surrender of the vehicle, the contempt order was reversed. *Romero v. Romero*, 916 So. 2d 952 (Fla. 3d DCA 2005).

- The order of incarceration must contain a finding that the petitioner has the present ability to pay the purge amount. *Burbage v. Burbage*, 24 So. 3d 684 (Fla. 5th DCA 2009); *Chetram v. Singh*, 937 So. 2d 716 (Fla. 5th DCA 2006); *Cooper v. Spears*, 741 So. 2d 1160 (Fla. 3d DCA 1999); *Palma v. Jenne*, 763 So. 2d 359 (Fla. 4th DCA 1998).

- A sentence of six months in jail with a purge provision that the contemnor would be released in 60 days upon completing a domestic violence course was a criminal contempt. Even though a purge provision was included, the contemnor was still required to serve 60 days in jail before release. Therefore, the court's failure to comply with due process requirements involving criminal contempt led to reversal. *Sando v. State*, 972 So. 2d 271 (Fla. 4th DCA 2008).

- A civil contemnor is entitled to a hearing to demonstrate the inability to comply with the purge provision even after the contempt adjudication,

particularly when the contempt order was entered a substantial period of time before the contemnor's arrest. *Cook v. Navarro*, 611 So. 2d 47 (Fla. 4th DCA 1992).

- It was error to set a $10,000 purge amount based on a finding that the contemnor had $9,200 in corporate stock. The tax return relied on by the court showed total liabilities and equity of shareholders was $9,200, but the value of the stock was only $1,000. *Buchanan v. Buchanan*, 932 So. 2d 270 (Fla. 2d DCA 2005).

- In *Wilbur v. Wilbur*, 981 So. 2d 1252 (Fla. 2d DCA 2008), the former husband was held in civil contempt for willful failure to pay support payments to his former wife. He appealed, on the basis that the real estate from which he might obtain an equity loan to satisfy the support obligation was homestead. The appellate court affirmed, stating that the homestead nature of the property does not protect a party as a matter of law from the obligation. Accordingly, the trial court properly determined that the former husband owned real estate with sufficient accessible equity to give him the ability to pay the purge amount.

- A civil contempt order of incarceration with a purge of "the simple act of complying with the entirely reasonable duly entered [sanctions order]" was proper. *Kwiecinski v. Renke*, 916 So. 2d 1, 2 (Fla. 2d DCA 2005) (order required compliance with discovery requests or posting of bond).

- The sanction of a driver's license suspension must be considered a contempt sanction for which the court must find a present ability to pay any purge amount set. *Porush v. Porush*, 23 So. 3d 1284 (Fla. 4th DCA 2010).

8. Order Not Excessive

The contempt order should not be excessive. *Rescigno v. Annino*, 869 So. 2d 741 (Fla. 4th DCA 2004) (appellate court reversed trial court order requiring parties' children to undergo six-month regimen of allergy shots).

D. Specific Examples of Indirect Civil Contempt

1. Parental Relationships and Visitation

A parent may be held in contempt for failing to encourage a relationship between another parent and the children. *Levy v. Levy*, 861 So. 2d 1211 (Fla. 3d DCA

2003). However, an order used to enforce parental visitation may not be excessive or contrary to the best interests of the children. *Rescigno v. Annino*, 869 So. 2d 741 (Fla. 4th DCA 2004).

2. Property and Debt Settlement

A defendant cannot be held in contempt for non-payment of a debt that does not involve a support obligation. *Byrne v. Byrne*, 133 So. 3d 1082 (Fla. 4th DCA 2014); *Randall v. Randall*, 948 So. 2d 71 (Fla. 3d DCA 2007); *Vassell v. Vassell*, 912 So. 2d 1254 (Fla. 1st DCA 2005); *Fisher v. Fisher*, 787 So. 2d 926 (Fla. 2d DCA 2001); *Knorr v. Knorr*, 751 So. 2d (Fla. 2d DCA 1999). Neither may property division awards be enforced by contempt; the remedies available are those of a creditor against a debtor. *La Roche v. La Roche*, 662 So. 2d 1018 (Fla. 5th DCA 1995); *but see Roth v. Roth*, 973 So. 2d 580 (Fla. 2d DCA 2008) (when act at issue does not involve payment of money, property division award may be enforced by contempt; certifying conflict to that extent).

Tips, Caveats, and Problems

- Default interest payments on installment payments of equitable distribution awards are non-support related debts that cannot be enforced by contempt. *Braswell v. Braswell*, 881 So. 2d 1193 (Fla. 3d DCA 2004).

- The court erred in holding the former husband in contempt for failure to comply with a provision of the final judgment requiring him to pay the former wife for professional football tickets, because debts not involving support cannot be enforced by contempt. *Montanez v. Montanez*, 697 So. 2d 184 (Fla. 2d DCA 1997).

- Contempt is an available tool to enforce payment into a children's college fund when the parties' settlement agreement indicates that the provision concerning the children's college fund was intended as a child support provision. *East v. Lague*, 893 So. 2d 706 (Fla. 1st DCA 2005).

- Where the intent of a lump sum alimony award is to provide support for a spouse, the contempt power of the court is an available tool to enforce payment. *Bongiorno v. Yule*, 920 So. 2d 1209 (Fla. 1st DCA 2006).

- In *Oglesby v. Oglesby*, 921 So. 2d 849 (Fla. 2d DCA 2006), the former husband was ordered to pay a portion of his military pension to his former wife. The judgment provided that "[t]he payment shall continue until the

death of either party and shall be enforceable by contempt power of the Court," and "[t]he husband shall remain an active member of the military until such time as his retirement benefits are fully vested." *Id*. at 850. The appellate court remanded as to those two provisions, stating that "a pension is an asset subject to equitable distribution. . . . Consequently, the award to the Former Wife of her share of the pension is not enforceable by contempt," and "a trial court does not have authority to order a party . . . to remain in a certain job." *Id.*

- The trial court held the wife in civil contempt when it learned she had disposed of stock options in violation of a court order. The appellate court held the wife could not be held in contempt for violation of the freeze order. First, the court could not enter a freeze order to protect the wife's attorney's fees claim. Second, the contempt power of the court could not be used for settlement of property rights as opposed to alimony or child support. *Pineiro v. Pineiro*, 988 So. 2d 686 (Fla. 4th DCA 2008).

- Contempt is not a proper method to enforce equitable distribution of a pension benefit. *Russo v. Russo*, 129 So. 3d 507 (Fla. 2d DCA 2014).

3. Support Obligations

Support obligations, when not followed, potentially give rise to contempt sanctions. When an order holds a parent in contempt for failure to pay child support, the court must find: (1) a prior valid order of support; (2) a failure to pay all or part of the ordered support; (3) the parent's present ability to pay the support; and (4) the parent's willful refusal to comply with the prior court order. Furthermore, the order must contain specific facts on which the allegations are based. *Ross v. Botha*, 867 So. 2d 567, 570 (Fla. 4th DCA 2004) (citing *Bowen v. Bowen*, 471 So. 2d 1274, 1278–1279 (Fla. 1985)); Fla. Fam. L. R. P. 12.615(d)(1).

In *Naples v. Naples*, 967 So. 2d 944 (Fla. 2d DCA 2007), the court erred in dismissing the former wife's motion for contempt for lack of subject matter jurisdiction. The parties had agreed that the former husband would pay $1,000 alimony per month through his VA benefits. Citing federal preemption, the judge dismissed the motion. The appellate court reversed, finding no conflict between state and federal law.

Tips, Caveats, and Problems

- The initial determination directing the support obligation creates a presumption of ability to pay. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

- A contractual duty to pay for a child's college expenses cannot be enforced by contempt when the child is over 18. *Nicoletti v. Nicoletti*, 901 So. 2d 290 (Fla. 2d DCA 2005).

4. Erroneous, Vague, and Ambiguous Orders

To form the basis of a contempt action, the prior court order must be "clear and definite, so as to make the party aware of its command and direction." *Friedman v. Carr*, 777 So. 2d 1012, 1013 (Fla. 2d DCA 2000). When an order is not explicit or precise enough to put a party on notice about what the party may or may not do, it cannot be the basis for an order for contempt. *Hokenstrom v. Environ Towers I Condominium Ass'n, Inc.*, 127 So. 3d 798 (Fla. 4th DCA 2013); *Simpson v. Young*, 884 So. 2d 186 (Fla. 2d DCA 2004) (both citing *Keitel v. Keitel*, 716 So. 2d 842, 844 (Fla. 4th DCA 1998)).

Tips, Caveats, and Problems

- Before a party may be held in contempt for violating an injunction, the injunction must describe "in reasonable detail" the conduct that is prohibited. *Osmo Tec SACV Co. v. Crane Environmental, Inc.*, 884 So. 2d 324, 326 (Fla. 2d DCA 2004).

- Although the former husband could be held in contempt for failing to pay alimony, it was error to impose an equitable lien on property he owned jointly with his present wife when the present wife was not a party to the proceedings. *Lowe v. Lowe*, 948 So. 2d 836 (Fla. 4th DCA 2007).

- A parent may not be held in contempt for failing to pay child support when the order for child support was previously reversed. *Savery v. Savery*, 870 So. 2d 920 (Fla. 4th DCA 2004).

- "A court cannot base contempt upon noncompliance with something an order does not say," and it was improper for the court to hold the former wife in contempt based on her current husband's conduct. *Wilcoxon v. Moller*, 132 So. 3d 281, 284, 286 (Fla. 4th DCA 2014) (order stated "Former Wife's current husband shall not be present anywhere that the Former Husband is, particularly in the presence of the children").

E. Performance of an Act Ordered by Court

Rule 1.570, Florida Rules of Civil Procedure, and rule 12.570, Florida Family Law Rules of Procedure, specifically authorize contempt to enforce performance of an act if the evidence is sufficient. However, a husband could not be held in civil contempt for failure to return a ring pursuant to a marital settlement agreement when there was no evidence presented that he currently had the ring in his possession. *Morse v. Morse*, 796 So. 2d 1200 (Fla. 3d DCA 2001).

A trial court may enforce a judgment requiring performance of a specific act during a specific time period by holding the noncompliant party in contempt, or by appointing someone to perform the act. Fla. R. Civ. P. 1.570(c). The trial court may not hold a party in contempt and also obtain performance of the act by other means. *Dawson v. Dawson*, 33 So. 3d 809 (Fla. 1st DCA 2010). The relief granted must be the relief requested. *Hill v. Hill*, 65 So. 3d 143 (Fla. 5th DCA 2011).

In *Roth v. Roth*, 973 So. 2d 580 (Fla. 2d DCA 2008), the husband was ordered to sign a mortgage and promissory note to secure the wife's equitable distribution. The husband refused to sign and was sentenced to six months in jail, with a purge provision that he sign the document. This part of the order was upheld on appeal since the act of signing was distinct from the act of paying (failure to pay equitable distribution cannot be enforced by court's contempt power).

The former husband properly could be held in contempt for allowing health insurance for the former wife to lapse where the final judgment required him to maintain health coverage for her. However, sanctions of payment of all medical expenses were reversed. The former husband could be required to pay for only reasonable and necessary medical expenses and the court must find present ability to pay those expenses. *Granell v. Granell*, 940 So. 2d 513 (Fla. 2d DCA 2006).

The former husband's contempt conviction was reversed where the court punished him for his efforts to ensure that medical expenses were reasonable and necessary before paying them. The fact that they were ultimately found to be reasonable and necessary did not validate a wrongly entered contempt conviction. *Lustgarten v. Lustgarten*, 65 So. 3d 85 (Fla. 4th DCA 2011).

F. Punishments

1. In General

Sanctions in civil contempt proceedings may be used for either or both of two purposes: (1) to compensate the injured party for losses sustained (compensatory) and (2) to coerce the offending party into compliance with a previously issued court order (coercive). *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2000); *Creative Choice Homes, II, Ltd. v. Keystone Guard Services, Inc.*, 137 So. 3d 1144 (Fla. 3d DCA 2014).

"[T]he court may compel performance of a required act by coercive imprisonment" or by compensatory fines when "violation of the decree has resulted in damages to the injured party." *South Dade Farms, Inc. v. Peters*, 88 So. 2d 891, 899 (Fla. 1956). Coercive civil contempt sanctions available to a trial court include incarceration, garnishment of wages, additional employment, the filing of reports, additional fines, delivery of assets, and revocation of a driver's license. *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2000). The contempt order must include a purge provision. *Id*.

Tips, Caveats, and Problems

- A respondent who does not have the financial means to pay support cannot be held in contempt. Therefore, the court should consider non-incarceration options, such as: (a) directing the contemnor to seek employment through the state employment services and ordering weekly reports on the status of the job search; (b) issuing a writ of garnishment; and (c) entering an income deduction order for payment of child support or alimony pursuant to section 61.1301, Florida Statutes. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Brown v. Smith*, 705 So. 2d 682 (Fla. 4th DCA 1998).

- A hybrid "bonded fine" is an invalid civil contempt sanction. *Rylander v. Teschouva*, 877 So. 2d 7 (Fla. 3d DCA 2004) (citing *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2000)). The trial court had imposed a $1,400 fine as sanction for contempt of an injunction, with the fine suspended pending future compliance with the court's prior orders.

- A fine of $2,500 per day for a total of 30 days for failure to provide court-ordered discovery, plus attorney's fees of $4,282, was a valid sanction given the seriousness of the discovery violation and purge condition of compliance

with court-ordered production of documents. *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So. 2d 1278 (Fla. 2d DCA 2005).

- When a court found that a former wife had repeatedly, intentionally, and maliciously interfered with the former husband's visitation, it was proper to hold her in contempt and impose over $12,000 in attorney's fees as a sanction, even though there was a great disparity in incomes. *Robinson-Wilson v. Wilson*, 932 So. 2d 330 (Fla. 4th DCA 2006).

- A fine of more than $300,000 was upheld on appeal in *J-II Investments, Inc. v. Leon County*, 21 S So. 3d 86 (Fla. 1st DCA 2009). The court entered an order finding the contemnors in contempt and requiring them to obtain an environmental management permit by a certain date and imposing a fine of $1,000 per day for each day after that date that a permit had not been obtained. The contemnors did not obtain the permit. The fine was upheld on appeal because the judge made further findings of the reasonableness of the amount of the fine in relation to the damages caused by noncompliance as well as the contemnors' ability to pay.

2. Fines

"A fine for civil contempt is proper if it either coerces a defendant into compliance with the court's order or compensates the plaintiff for losses sustained; if the fine is coercive in nature, it must provide for its avoidance through obedience; if the fine is compensatory in nature, the amount must reasonably relate to the complainant's losses shown by the record." *Boca Raton Towing, Inc. v. Boca Raton Towing and Recovery, Inc.*, 729 So. 2d 531 (Fla. 4th DCA 1999). A fine of $1,000 per day against a non-party for failure to appear for deposition and provide records was reversed where the court made no finding as to the harm caused by the failure to appear and/or produce. *Boby Express Co. v. Guerin*, 930 So. 2d 842 (Fla. 3d DCA 2006).

Tips, Caveats, and Problems

- A fine is an unconstitutional criminal penalty if a contemnor has no opportunity to reduce or avoid it through compliance. *Condren v. Bell*, 792 So. 2d 578 (Fla. 4th DCA 2001).

- When a fine imposed in an indirect civil contempt proceeding is not compensatory, it is civil only if the contemnor is given an opportunity to

purge. *Nical of Palm Beach, Inc. v. Lewis*, 815 So. 2d 647 (Fla. 4th DCA 2002).

- The court erred in ordering DCF to pay $350 per day for every day appropriate placement was not provided to a juvenile to "offset the damages he suffered," when there was no evidence of any alleged damage to the juvenile. *Department of Children and Families v. M.M.*, 855 So. 2d 1250 (Fla. 4th DCA 2003).

- "[F]ixed fines also may be considered purgable [sic] and civil when imposed and suspended pending future compliance. . . . [A] 'fixed fine that is "imposed and suspended pending future compliance" with the court's prior orders is considered a purgeable sanction.'" *Nical of Palm Beach, Inc. v. Lewis*, 981 So. 2d 502, 505 (Fla. 4th DCA 2008), quoting *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829–830, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994).

- "[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Nical of Palm Beach, Inc. v. Lewis*, 981 So. 2d 502, 505 (Fla. 4th DCA 2008).

- "[A] coercive civil sanction that is suspended *ad infinitum* provides the contemnor with the requisite ability to purge." *Id.* at 506.

- When a court imposes a retroactive fine for failure to follow a court order, without a purge provision, the fine becomes a criminal penalty rather than a civil contempt sanction. *Berlow v. Berlow*, 21 So. 3d 81 (Fla. 3d DCA 2009); *In re Steffens*, 988 So. 2d 142 (Fla. 5th DCA 2008).

3. Incarceration

Incarceration was a proper tool to enforce compliance with a civil contempt fine that the contemnor had the financial ability to pay. *Whitby v. Infinity Radio, Inc.*, 961 So. 2d 349 (Fla. 4th DCA 2007). The sentence may be for a fixed period; however, it must allow for release from confinement upon compliance with the order. *Alves v. Barnett Mortg. Co.*, 688 So. 2d 459 (Fla. 4th DCA 1997).

An administrative order that allows for incarceration of contemnors who have failed to pay court costs until a hearing before a court that convenes only Wednesdays, without a determination of ability to pay the costs, violates the constitution. *Akridge v. Crow*, 903 So. 2d 346 (Fla. 2d DCA 2005).

"In a civil contempt proceeding, the trial court cannot incarcerate, even if only coercively, without providing the contemnor the opportunity to prove his inability to comply. That means the court cannot use discovery sanctions [striking the husband's pleadings in response to a contempt motion] as a basis for finding an inability to comply." *Miller v. Miller*, 891 So. 2d 1201 (Fla. 4th DCA 2005).

The three-step process for contempt is as follows:

1. The initial burden is on the movant in a contempt proceeding to show a prior court order and failure to pay.

2. The burden then shifts to the defaulting party to show inability to pay.

3. If the court finds a willful violation and that incarceration is appropriate, "the court must make a *separate, affirmative finding* that the contemnor possesses the present ability to comply with the purge conditions." *Albright v. Albright*, 788 So. 2d 1125, 1127 (Fla. 4th DCA 2001).

Tips, Caveats, and Problems

- "A finding of civil contempt without incarceration may be a useful tool in obtaining compliance with a child support order." The court can use other means than incarceration to obtain compliance. *Brown v. Smith*, 705 So. 2d 682, 685 (Fla. 4th DCA 1998).

- If the court finds that the contemnor has continually and willfully neglected his or her obligation, the court may find either civil or criminal contempt. *Lascaibar v. Lascaibar*, 715 So. 2d 1042 (Fla. 3d DCA 1998).

4. Attorney's Fees

"As a general rule, attorney's fees may be awarded as a sanction in civil contempt proceedings without findings as to the parties' respective need and ability to pay." *Worthington v. Harty*, 677 So. 2d 1371 (Fla. 4th DCA 1996). However, in an action instituted under chapter 61, Florida Statutes, "ability to pay and need must be considered by the court before ordering payment of attorney's fees in contempt

proceedings incident to enforcing orders relating to support or custody." *Worthington*, 677 So. 2d at 1372.

Tips, Caveats, and Problems

- Attorney's "fees in contempt proceedings arising from dissolution of marriage lawsuits [under chapter 61, Florida Statutes,] are decided under the same standards as the underlying dissolution: need and ability to pay." *Hunt v. Hunt*, 855 So. 2d 1181, 1182 (Fla. 1st DCA 2003); *see also Sobel v. Sobel*, 873 So. 2d 449 (Fla. 4th DCA 2004); *Keitel v. Keitel*, 716 So. 2d 842, 844 (Fla. 4th DCA 1998).

- Attorney's fees for the contempt proceeding may be awarded to compensate the injured party. *Alpha 2001, Inc./Omega 2011, L.L.C. v. Bookstein*, 933 So. 2d 731 (Fla. 4th DCA 2006).

- Where there was minimal noncompliance with support obligation, the evidence failed to establish the failure to pay was willful, and the contempt order was reversed. However, because the former husband breached the marital settlement agreement by not paying, he was responsible for the former wife's attorney's fees and costs as provided by the agreement. *Griffith v. Griffith*, 941 So. 2d 1285 (Fla. 4th DCA 2006).

- "'[I]f a party is found in contempt, it is proper for the court to compensate the injured party by assessing attorney's fees for the contempt proceedings,' which compensation 'must be based upon evidence of an injured party's actual loss'" relating to the prosecution of the contempt motion. *Nical of Palm Beach, Inc. v. Lewis*, 981 So. 2d 502, 507 (Fla. 4th DCA 2008), quoting *Levine v. Keaster*, 862 So. 2d 876, 880 (Fla. 4th DCA 2003).

G. Sample Indirect Civil Contempt Form

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT IN
AND FOR _____
COUNTY, FLORIDA

DIVISION
CASE NO.:

IN RE:

Petitioner/Plaintiff,

vs.

Respondent/Defendant.

_____/

CIVIL CONTEMPT MOTION AND NOTICE OF HEARING

TO: (name of attorney for party, or party if not represented)

YOU ARE NOTIFIED that plaintiff will apply to the Honorable ....., Circuit Judge, on .....(date)....., at .....m., in the ..... County Courthouse at ....., Florida, for an order adjudging .....(defendant's name)..... in contempt of court for violation of the terms of the order or judgment entered by this court on .....(date)....., by failing to ....., and I certify that a copy hereof has been furnished to ..... by mail on .....(date).....

FAILURE TO APPEAR AT THE HEARING MAY RESULT IN THE COURT ISSUING A WRIT OF BODILY ATTACHMENT FOR YOUR ARREST. IF YOU ARE ARRESTED, YOU MAY BE HELD IN JAIL UP TO 48 HOURS BEFORE A HEARING IS HELD.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before your scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

II. Direct Civil Contempt

Direct civil contempt must occur in the court's actual presence, the conduct must intentionally obstruct the court's administration of justice, and the punishment must be coercive in nature. Contempt may be commenced on the court's own motion or the motion of a person with standing.

The proceedings are summary in nature and may be invoked forthwith upon the happening of the contemptuous conduct. A motion and notice of hearing are not

necessary. The remaining procedures and requirements are the same as for direct criminal contempt.

Tips, Caveats, and Problems

- Direct civil contempt involves conduct that both occurs in the presence of the court and is remedied or compensated by a coercive order. Only three cases in Florida have actually used the phrase "direct civil contempt," and one was later withdrawn and a different result reached. *Baitty v. Weaver*, 734 So. 2d 582 (Fla. 4th DCA 1999) (stating prior opinion withdrawn). *Baitty* involved an attorney's misrepresentation to the court that amounted to direct civil contempt because "the statement was made wilfully and deliberately for the purpose of obstructing the court's administration of justice." *Id*. at 584.

- The second case, *Pendley v. State*, 392 So. 2d 321 (Fla. 1st DCA 1981), involved a witness who would not testify before a grand jury. When brought before a judge, the witness said he would not testify and was held "in direct civil contempt and ordered . . . incarcerated until he answered the questions propounded by the grand jury. When asked if this would cause him to answer the questions, [he] stated it would not." *Id*. at 322. He was then held in direct criminal contempt. On appeal, the contempt was reversed because it did not occur in the actual presence of the court, and thus the summary punishment employed was a violation of due process.

- In the third case, *Napoli v. Napoli*, 142 So. 3d 953, 955 (Fla. 4th DCA 2014), the husband did not comply with the payment schedule for spousal support in the temporary relief order. The trial court found him in direct civil contempt, but the appellate court reversed because the order did "not contain an express finding that [he] willfully failed to comply with the court's temporary relief order. Second, [it did] not articulate the facts supporting the court's conclusion that [he] had the ability to comply with the court's prior order. Finally, the contempt order sanctions [him] with incarceration but does not contain a separate, affirmative finding that he had the present ability to comply with the purge."

- There was no basis for a civil contempt finding when the petitioner "was not a party to the proceedings below, had not been subpoenaed to testify, but voluntarily appeared at the hearing, and was not violating any previous court order." *Daniel v. Garrison*, 894 So. 2d 308 (Fla. 3d DCA 2005).

Chapter Four

Juvenile Contempt and Traffic Contempt

I. Juvenile Contempt

The procedures for juvenile contempt are similar to those described in the prior chapters. However, certain important differences exist and must be carefully followed. These differences include:

The order to show cause must be served in the same manner as a summons. Fla. R. Juv. P. 8.150(c)(2).

For a direct contempt hearing, the child has a right to legal counsel, and to have legal counsel appointed if the child is indigent. For indirect contempt, "counsel must be appointed for all contempt hearings if the child qualifies for such appointment, or the child has the right to retain counsel, unless the child waives counsel in writing as required by rule 8.165." Fla. R. Juv. P. 8.150(b), (c)(1).

Juveniles are entitled to the due process rights afforded to them by rules 8.150(c), 8.285(b), and 8.286, Florida Rules of Juvenile Procedure, and sections 984.09(4)(b) and 985.216(4)(b) (now 985.037(4)(b)), Florida Statutes, including a hearing within 24 hours for indirect criminal contempt. *W.C. v. Smith*, 898 So. 2d 1137 (Fla. 1st DCA 2005).

Under rule 8.150, Florida Rules of Juvenile Procedure, to hold a party in contempt, the order to show cause issued by the court must state the facts constituting the contempt and provide the contemnor with a reasonable time for preparation of a defense after providing the statement of particulars of the acts constituting the contempt. *G.C. v. State*, 901 So. 2d 1021 (Fla. 4th DCA 2005).

Section 985.037, Florida Statutes, does not prohibit the trial court from imposing consecutive sentences of secure detention for each separate instance of contempt. *J.M. v. Gargett*, 101 So. 3d 352 (Fla. 2012) (resolving conflict among districts, disapproving *M.P. v. State*, 988 So. 2d 1266 (Fla. 5th DCA 2008)).

A delinquent child may be placed in secure detention for up to five days for a first offense and 15 days for a second or subsequent offense. § 985.037(2), Fla. Stat. Placement in a secure facility is appropriate only if the court first determines that an alternative sanction is inappropriate or unavailable, or was previously ordered and not followed. *See* § 985.037(3), Fla. Stat. If a child found in contempt is

sentenced to secure detention, on motion of any party the court must review the placement to determine whether it is appropriate for the child to remain detained. Fla. R. Juv. P. 8.150(a).

For example, secure detention may be ordered as a sanction for indirect contempt for violating community control. *G.S. v. State*, 709 So. 2d 122 (Fla. 5th DCA 1998).

Effective January 1, 2016, the supreme court added new subpart C (Truancy Proceedings) to Part V of the Florida Rules of Juvenile Procedure, allowing enforcement through the court's contempt power. *In re Amendments to Florida Rules of Juvenile Procedure*, 175 So. 3d 263 (Fla. 2015).

Tips, Caveats, and Problems

- For indirect contempt, the trial court must follow the mandatory procedures set forth in Florida Rule of Juvenile Procedure 8.150 and section 985.037, Florida Statutes. *J.H. v. State*, 216 So. 3d 761 (Fla. 5th DCA 2017).

- "[I]ndirect criminal contempt is the procedure a trial court must use to enforce violations of a juvenile pretrial diversion program or conditions of pretrial release." *A.P. v. State*, 215 So. 3d 662 (Fla. 5th DCA 2017).

- An adult cannot be sentenced as an adult for contempt for failing to complete court-ordered juvenile placement that was ordered when she was under the age of 18. *N.M.R. v. State*, 711 So. 2d 145 (Fla. 5th DCA 1998).

- The court may not order that a child be placed in a secure facility as punishment for contempt unless the court determines that an alternative sanction is inappropriate or unavailable or that the child was initially ordered to an alternative sanction and did not comply with the alternative sanction. § 985.037, Fla. Stat.

- Courts are encouraged to order a child to perform community service up to the maximum number of hours when appropriate before ordering secure facility as punishment for contempt. The court may request the alternative sanctions coordinator to recommend the most appropriate sanction. *See* § 985.037(3), Fla. Stat.

- Section 985.037(4)(a), Florida Statutes, was amended in 2014 to add that if a child is charged with direct contempt of court, including traffic court, "[t]he

court must hold a hearing to determine if the child committed direct contempt. Due process must be afforded to the child during this hearing."

- In addition to any other sanction, the court may direct the DMV to withhold issuance of or suspend a child's driver license or driving privileges for up to one year for a first offense and two years for a second or subsequent offense. § 985.037(4)(d), Fla. Stat.

- To find a juvenile witness in criminal contempt for perjury, the record must support a finding that the juvenile has testified untruthfully or that there is a conflict between the juvenile's written statement and his or her actual testimony. *B.B. v. State*, 872 So. 2d 456 (Fla. 3d DCA 2004).

II. Traffic Contempt

Direct and indirect criminal contempt are available in traffic court and "shall be proceeded upon in the same manner as in the Criminal Rules of Procedure." Fla. R. Traf. Ct. 6.090.

However, traffic hearing officers lack the authority to preside over contempt proceedings. Hearing officers may file a verified motion for an order of contempt before any state trial court judge in the same county in which the alleged contempt occurred. Fla. R. Traf. Ct. 6.080.