

Contempt

Judge Ed Spillane
Presiding Municipal Court Judge
College Station, TX

Sources of Contempt

1. Sec 21.002, Govt. Code – General Contempt = 3 days in jail and/or up to \$100 fine	2. Art. 2.16, C.C.P. – Neglecting Service of Process = \$10-\$200	3. Art. 45.027(c), C.C.P. – Juror Failure to Appear = up to \$100 (indirect)	4. Art. 36.06, C.C.P. – Violation of “The Rule” = direct contempt	5. Art. 24.05, C.C.P. – Disobeying Subpoena = up to \$100 in misdemeanors	6. Art. 45.050, C.C.P. - Juvenile Contempt = fine up to \$500 and/or DL lien
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Section 21.002, Govt. Code

General contempt provision for municipal court

(c) The punishment for contempt of a justice court or municipal court is a fine of not more than \$100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.

So What is Contempt?!

- Obstructs The Proper Administration Of JUSTICE
- Acts Constituting Disrespectful Conduct Toward The COURT
- BUT BEWARE

Contempt Power of Courts

- Regulating Trials
- Section 21.001 Govt. Code
- Jurisdiction of the subject matter, jurisdiction of the person, and authority to render the particular judgment
- Bail Hearing- **Ex parte Salfen**, 618 S.W.2d 766 (Tex. Crim. App. 1981)

Direct Contempt

- In the Court's Presence but...**In re Bell**, 894 S.W.2d 119 (Spec. Ct. App. 1995)

Constructive Contempt

- Outside the presence of the Court
- What do you need?
- Examples

Criminal and/or Civil Contempt

- Difference is not whether the offender has to spend time in jail but whether the offender holds the key to the jailhouse door
- Punishment vs. Coercion

Attorneys

- Officers of the Court
- Special Procedures
- Ex Parte Pink, 746 S.W.2d 758 (Tex. Crim. App. 1988)

Enforcement

- Notice
- Hearing: Direct Contempt and Constructive Contempt
- Contempt by Attorney
- Right to Counsel
- What about the right to Jury?
- Order, Written Judgment of Contempt and Order of Commitment
- Appeal???

Article 2.16, Code of Criminal Proc.

Neglecting to Execute Process

If any sheriff or other officer shall wilfully refuse or fail from neglect to execute any summons, subpoena or attachment for a witness, or any other legal process which it is made his duty by law to execute, he shall be liable to a fine for contempt not less than ten nor more than two hundred dollars, at the discretion of the court. The payment of such fine shall be enforced in the same manner as fines for contempt in civil cases.

Article 45.027(c), Code Crim. Proc.

Juror Failure to Appear (indirect)

(c) Any person so summoned who fails to attend may be fined an amount not to exceed \$100 for contempt.

Article 36.06, Code of Criminal Proc.

Violation of "The Rule"

Witnesses, when placed under rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case, except by permission of the court... . The officer who attends the witnesses shall report to the court at once any violation of its instructions, and the party violating the same shall be punished for contempt of court.

Art. 24.05, Code of Criminal Proc.

Disobeying a Subpoena

If a witness refuses to obey a subpoena, he may be fined at the discretion of the court, ... in a misdemeanor case, not exceeding one hundred dollars.

The contempt judgment is conditional; you must allow him or her to testify at a show cause hearing. (Article 24.07, CCP)

Art. 45.050, Code of Criminal Proc.

Juvenile Contempt

(c) If a child fails to obey an order...under circumstances that would constitute contempt of court, the...court, after providing notice and an opportunity to be heard, may: (1) refer the child to the appropriate juvenile court for delinquent conduct for contempt of the...court order; or (2) retain jurisdiction of the case, hold the child in contempt...and order...(A) that the contemnor pay a fine not to exceed \$500; and/or (B) that DPS suspend the contemnor's driver's license or permit, or ...deny the issuance of a license or permit to the contemnor until the contemnor fully complies with the orders of the court.

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CONTEMPT

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CHAPTER 5 CONTEMPT

Introduction

Courts are vested with inherent powers, so that proceedings will be conducted with dignity and in an expeditious manner, and so that justice is done.¹

Contempt is one of the inherent powers of the court intended to enable the court to enforce its lawful orders and to exercise its jurisdiction in an orderly manner. The power to punish for contempt is an essential element of judicial independence and authority, but one that should be exercised with caution.²

There are two types of contempt: civil contempt (sometimes referred to as coercive contempt, it is used to compel compliance from the contemnor) and criminal contempt (which is punitive in nature).³

For each type of contempt, there are two subtypes: direct and constructive. Direct contempt involves disobedience or disrespect of the court's authority committed in the presence of the court.⁴ Constructive contempt requires testimony or the production of evidence to establish that it exists, since it occurs outside the presence of the court.⁵

It is important to distinguish the authority of a municipal court to enforce its lawful orders (and punish those who violate such orders) via contempt from the punishment imposed by a municipal court upon finding a defendant guilty of a criminal offense (i.e., the imposition of a fine and court costs). Municipal judges have the statutory authority to hold persons in contempt of court. Such contempt is punishable by a fine of up to \$100, confinement in jail for up to three days, or both.⁶

Texas case law is clear that contempt is a strong punishment and should be used only as a last resort.⁷ Judges are reminded that as contempt is presumed not to exist; it is an authority that should be exercised cautiously.⁸ It is

¹ Section 21.001, Government Code.

² *Ex parte Jacobs*, 664 S.W.2d 360 (Tex. Crim. App. 1984).

³ In terms of civil contempt, the contemnor "holds the keys to his or her own jail" because the contemnor can secure release by submitting to the court's order. While it is conceivable that a municipal judge could have an appropriate instance to hold someone in civil contempt, it is far from clear that it was the Legislature's intent to extend such authority. See, Lois Wright, "Contemplating Contempt," *Municipal Court Recorder*, Vol. 15, No. 4 (August 2006).

⁴ *In re Johnson*, 996 S.W.2d 430, 433 (Tex. App.—Beaumont 1999).

⁵ *Ex parte Daniels*, 722 S.W.2d 707, 709 (Tex. Crim. App. 1987).

⁶ Section 21.002(c), Government Code.

⁷ *Ex parte Taylor*, 807 S.W.2d 746 (Tex. Crim. App. 1991).

⁸ *Ex parte Arnold*, 503 S.W.2d 529, 534 (Tex. Crim. App. 1974).

assumed that a court will temper the exercise of this authority with common sense and sound discretion.⁹

**Section 21.002, Government Code
Contempt of Court**

- (a) Except as provided by Subsection (g), a court may punish for contempt.
- (b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than \$500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.
- (c) The punishment for contempt of a justice court or municipal court is a fine of not more than \$100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.
- (d) An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. The presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign a judge who is subject to assignment by the presiding judge other than the judge of the offended court to determine the guilt or innocence of the officer of the court.
- (e) Except as provided by Subsection (h), this section does not affect a court's power to confine a contemner to compel the contemner to obey a court order.
- (f) Article 42.033, Code of Criminal Procedure, and Chapter 157, Family Code, apply when a person is punished by confinement for contempt of court for disobedience of a court order to make periodic payments for the support of a child. Subsection (h) does not apply to that person.
- (g) A court may not punish by contempt an employee or an agency or institution of this state for failure to initiate any program or to perform a statutory duty related to that program:
 - (1) if the legislature has not specifically and adequately funded the program; or
 - (2) until a reasonable time has passed to allow implementation of a program specifically and adequately funded by the legislature.
- (h) Notwithstanding any other law, a person may not be confined for contempt of court longer than:
 - (1) 18 months, including three or more periods of confinement for contempt arising out of the same matter that equal a cumulative total of 18 months, if the confinement is for criminal contempt; or
 - (2) the lesser of 18 months or the period from the date of confinement to the date the person complies with the court order that was the basis of the finding of contempt, if the confinement is for civil contempt.

⁹ *Daniels, Supra*, note 5.

I. Conduct for Which Contempt May Be Found

A. Generally

Contempt of court can happen in different ways. Contempt is not to be presumed. On the contrary, it is presumed not to exist.¹⁰

In general, contempt is conduct that obstructs the proper administration of justice. It may be conduct that tends to bring the authority and administration of the law into disrespect or disregard; interferes with or harms parties or witnesses during litigation; or otherwise tends to impede, embarrass, or obstruct the court in discharge of its duties.

The action or inaction leading to contempt has been divided into two categories. Direct contempt is committed in the presence of the judge; constructive or indirect contempt is committed outside the court. Likewise, the orders of the court fall into two categories: criminal, amounting to punitive sanction, or civil, being orders of the court giving the contemnor the keys to their own jail cell. Special rules are applied to persons who are employed to appear before the court—as officers of the court—largely due to their increased risk and relationship with the court.

- Some Common Examples of Contempt:
- Disturbing the court proceedings
 - Disobeying court orders
 - Presenting false documents in court
 - Improperly influencing witnesses or jurors
 - Refusing to testify when there is no privilege against self-incrimination or another legal privilege against compelled testimony

B. Direct Contempt

The court must be able to act instantly to suppress any disturbance, violence, or disrespect to the court that occurs in open court. In direct contempt, the behavior occurs in the court’s presence; the court observes the acts which constitute the contempt.

¹⁰ *Jacobs, Supra*, note 2.

If the contemptuous behavior presents exigent circumstances, i.e., disruption, violence, disrespect, or physical abuse, it is unnecessary for the judge to take evidence or to afford assistance of counsel to the contemnor who has acted contemptuously within the view of the judge.¹¹ The judge should warn the offender that the behavior is unacceptable, contemptuous, and subject to sanction. If the behavior persists, the judge can hold the offender in contempt and impose sanctions. The judge should also make every effort to prevent the jury from seeing or hearing both the contemptuous behavior and the court's finding of contempt.

In a case where a disruptive defendant, who was threatened with being taped to the chair and then scuffled with the bailiff, was removed from the courtroom, the conviction was affirmed by the U.S. Supreme Court.¹² A defendant's (mis)conduct can cost him or her the right to be present at trial. The court set out several constitutionally permissible ways for a trial judge to handle a disruptive defendant, including binding and gagging the defendant in court or citing the defendant for contempt and removing the person from the courtroom until he or she promises to behave properly. A trial judge does not necessarily abuse discretion by removing the defendant from the courtroom without then giving the defendant the chance to promise to behave if allowed to return.¹³

A defendant's right to self-representation is not violated by the trial court's threat of binding and gagging or removing after repeated disruptive behavior. The trial court has authority to maintain quiet and to conduct a peaceable trial.¹⁴ Physical restraints on a defendant before a jury were deemed permissible when the defendant had earlier assaulted his lawyer.¹⁵ Merely refusing to quit talking was held to be an insufficient reason to bind and gag a defendant before the jury.¹⁶

Ex parte Knable,¹⁷ decided by the Court of Criminal Appeals in 1991, discussed the necessity of notice and a hearing for direct contempt that occurred without exigent circumstances. In that case, a man was summarily punished for misrepresenting to the court that he represented clients. It was not discovered by the court until 20 days after his appearance before the court that he was not an attorney. The court found that even though the infraction

¹¹ *Daniels, Supra*, note 5.

¹² *Illinois v. Allen*, 397 U.S. 337 (1970).

¹³ *Dotson v. State*, 785 S.W.2d 848 (Tex. App.–Houston [14th Dist.] 1990).

¹⁴ *Foster v. State*, 713 S.W.2d 789 (Tex. App.–Houston [1st Dist.] 1986, rev. ref'd).

¹⁵ *Culverhouse v. State*, 755 S.W.2d 856 (Tex. Crim. App. 1988), cert. denied, 488 U.S. 863 (1988).

¹⁶ *Shaw v. State*, 846 S.W.2d 482 (Tex. App.–Houston [14th Dist.] 1993).

¹⁷ 818 S.W.2d 811 (Tex. Crim. App. 1991).

occurred directly in the court’s presence, the man should have been given notice and an opportunity to be heard. Once the exigency or immediacy of quelling the disruption ceased to exist, the trial court’s authority to punish without notice and opportunity to be heard also ceased to exist.

The court held that “the trial court’s authority to summarily punish contemptuous conduct does not automatically flow from being able to observe the conduct, it flows from observing the conduct *and* the exigency of the situation.”¹⁸

Judges should take special care to distinguish disruption of the court from conduct that is upsetting to the judge. A compelling example of this problem appears in the opinion of a Special Court of Review that sanctioned a justice of the peace in Harris County.¹⁹ There the judge summarily held a defendant’s family member in direct contempt for his criticism of her courtroom procedures in the hall before court. The special court found that direct contempt takes place only in the judge’s presence during trial proceedings. As in *Knable*, the court determined only the exigency created by the disruption of court proceedings justifies summary contempt findings without the protections of due process.²⁰

Special care should also be given in dealing with defiant witnesses. As the Court of Criminal Appeals explained in *Ex parte Thompson*,²¹ where a witness indicates outside the jury’s presence that he will not answer any questions and afterwards consistently maintains that position before the jury by refusing to answer any questions (except for introducing himself), as a matter of due process, only one contempt occurs. Consequently, the prosecution cannot make the witness liable for multiple contempts by putting the witness on the stand and getting him or her to refuse to answer multiple questions after the witness has previously indicated he or she will not testify. Due process allows only one conviction for contempt.

C. Constructive (Indirect) Contempt

Objectionable behavior that occurs outside the presence of the court is called constructive (or indirect) contempt. The judge has no personal knowledge of the act(s), and so it is necessary for the judge to conduct a hearing to consider evidence. The alleged contemnor—the person accused of contempt of court—is

¹⁸ *Id.*

¹⁹ *In re Bell*, 894 S.W.2d 119 (Spec. Ct. App. 1995).

²⁰ *Id.*

²¹ 273 S.W.3d 177, 183 (Tex. Crim. App. 2008).

entitled to formal notice of the allegation of contempt and must be afforded a hearing; oral notice is insufficient.²²

One typical form of constructive contempt is failing to attend a show cause hearing or other hearing set by the court.²³ It is important to note that service of notice is required, and so is the contemnor's presence at a subsequent contempt hearing. The court may not make a summary finding of contempt, but may attach the contemnor and have them brought before the court.²⁴ An individual may waive being present at a contempt hearing, but their voluntary absence is not an affirmative waiver.²⁵

Other cases demonstrate the limits of the power of contempt and judicial exercise of that power. One court found that a parent who failed to pay child support was voluntarily underemployed. A parent qualified for employment cannot evade court-ordered child support obligations by voluntarily remaining unemployed.²⁶ This case should be compared to those in Chapter 3 concerning indigence in this publication with regard to the difference between unwillingness and inability to comply with a court's order or judgment.

To enforce a court's order by means of contempt, the terms of that order must be specific and clear. The standard of review for such terms is whether a reasonable person would understand their obligations under the order.²⁷

During the course of a constructive contempt hearing, the court may not avoid the due process requirement of notice by converting the hearing into one for direct contempt.²⁸ In other words, the court may not orally convey the previous order and hold the defendant for failing to comply in the court's presence. A person cannot be held in constructive contempt for allegedly violating a verbal court order.

²² "Notice in the due process context of criminal contempt proceedings requires timely notice by personal service of the show cause hearing and full and unambiguous notice of the contempt accusations. The notice must state when, how, and by what means the person has been guilty of contempt. A contempt order rendered without such adequate notification is void." *Gonzalez v. State*, 187 S.W.3d 166, 170 (Tex. App.–Waco 2006) (internal citation omitted).

²³ *Ex parte Alloju*, 907 S.W.2d 486 (Tex. 1995).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Anderson v. Anderson*, 767 S.W.2d 163 (Tex. App.–Houston [14th Dist.] 1988).

²⁷ *Ex parte Johns*, 807 S.W.2d 768 (Tex. App.–Dallas 1991); *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967).

²⁸ *Ex parte Mouille*, 572 S.W.2d 60 (Tex. App.–Houston [1st Dist.] 1978).

D. Officers of the Court

An officer of the court is any person who has the responsibility for and on whom the court relies for its functioning and the enforcing of its orders. Therefore, officers of the court include clerks, bailiffs, warrant officers, or police assigned to the court. Defense attorneys and prosecutors, who practice before the court, are also officers of the court. Witnesses and defendants are not officers of the court.

Special procedures apply to officers of the court. An officer of the court who is held in contempt by a trial court must be released on personal recognizance upon filing a proper motion with the court. If the officer of the court is released, the presiding judge of the administrative district where the alleged contempt occurred should appoint a judge to conduct the hearing and determine the guilt or innocence of the officer of the court.²⁹ Summary punishment of an officer of the court is prohibited.

The case of *Ex parte Pink*³⁰ is a colorful illustration of behavior that bordered on contempt of court. The Court of Criminal Appeals reviewed the hotly contested battle between prosecutor and defendant, which included a running verbal sidebar battle between the lawyers about who “shot the finger” at each other in open court. At times, the prosecutor sang the national anthem while defense lawyer Pink spoke. The defense lawyer was held in contempt of court and punished. As explained in *Ex parte Jacobs*:

The power to punish for contempt should only be exercised with caution, and contempt is not to be presumed, but on the contrary, is presumed not to exist. . . . To establish contempt of court, it is not the purpose or intent to act which controls, but the act itself must be such as amounts to contempt of court. . . . The essence of “contempt” is that the conduct obstructs or tends to obstruct the proper administration of justice.³¹

The Court further found that the power of contempt is strong punishment and ruled that it should be used cautiously and only as a last resort. The criminal defense attorney’s conduct while cross-examining a witness did not support the order holding him in contempt of court. His conduct, though perhaps obnoxious, did not hinder the forward progress of the trial or obstruct the administration of justice. Contempt is not a way for the judge to control how

²⁹ Section 21.002(d), Government Code. See, Chapter 1 discussion of district courts: state trial court of general and special jurisdiction.

³⁰ 746 S.W.2d 758, 759, n. 2 (Tex. Crim. App. 1988).

³¹ *Jacobs, Supra*, note 2 at 363.

the case is tried, but rather to make sure that it is tried. The trial court had no right to remove the lawyer from the lawsuit.

In *Jacobs*, the counsel's conduct may not have been altogether commendable and may have irritated the trial judge, but it did not hinder the forward progress of the trial or obstruct or tend to obstruct the administration of justice. The trial judge had no authority to hold the attorney in contempt for failure to *voir dire* the jury panel and failure to strike the jury list, especially absent a court order to do so.³² If counsel pursues strategy different from what the court deems correct, but with no intended disrespect to the court and no disruption of proceedings, the court should not subject the lawyer to a penalty for contempt.

The statutory requirement that an officer of the court be released on personal recognizance pending a determination of guilt or innocence by another judge of a contempt charge precludes summary punishment for an officer of the court.³³ The attorney representing a client at trial is an officer of the court. An attorney and officer of the court, once the officer of the court has invoked the right to a personal bond and a hearing pursuant to Section 21.002(d), Government Code, is entitled to reasonable notice of the specific accusation and an opportunity to be heard.³⁴ Where an officer of the court is given no notice of the hearing or of the specific charges, any contempt judgment would be void.³⁵

There was a case involving a lawyer who was jailed for refusing to obey an order of the court to answer certain questions during the contempt proceedings against him. Termination of the contempt proceedings eliminated the lawyer's opportunity to clear himself of contempt by answering the questions. That also terminated the court's authority for confining him for refusing to answer.³⁶ It is important to note that judges may be held in contempt for failure to follow the lawful orders of a higher court.³⁷

³² *Id.*

³³ *Pink, Supra*, note 30.

³⁴ Once the offended judge has made a determination that an officer of the court is in contempt of court, and the contemnor invokes his mandatory right to a hearing before another judge, the statute requires that the guilt or innocence of the contemnor shall be determined by a judge other than the offended judge. *Ex parte Avila*, 659 S.W.2d 443 (Tex. Crim. App. 1983).

³⁵ *Ex parte Martin*, 656 S.W.2d 443 (Tex. Crim. App. 1982).

³⁶ *Howell v. Jones*, 516 F.2d 53 (5th Cir. 1975), cert. denied, 424 U.S. 916 (1976), rehearing denied, 425 U.S. 945 (1976).

³⁷ *In re Reed*, 901 S.W.2d 604 (Tex. App.—San Antonio 1995).

E. Special Contempt Provisions

Special provisions of the Code of Criminal Procedure apply to certain kinds of direct and indirect contempt. Many of these special provisions have limited sanctions. Not all of them are common, but the specific statute should be consulted in each of these situations because the rules are specific and control over the general provisions of Section 21.002 of the Government Code.

1. Children

As discussed in Chapter 6, when a child violates a municipal court order, special provisions govern the use of contempt.³⁸ Children may not be jailed for contempt in the manner authorized by Section 21.002 of the Government Code.

2. Service of Process

An officer that fails to execute summons, subpoenas, or attachments for witnesses issued by the court may be held in contempt.³⁹ This is a form of constructive contempt by an officer of the court. The sanction is limited to a fine of \$10-200.

3. Witnesses

Witnesses who fail to abide by “The Rule,” by discussing their testimony with persons other than the parties or watching other testimony after being placed under “The Rule” by the court, are guilty of direct contempt.⁴⁰ A witness in a misdemeanor case who refuses to obey a summons is limited by statute to the imposition of a fine not to exceed \$100.⁴¹ A witness that fails to appear for a court-ordered deposition in a criminal case is guilty of constructive contempt.⁴² The circumstances in which the deposition may be used in trial are very limited.⁴³

³⁸ Article 45.050, Code of Criminal Procedure.

³⁹ Article 2.16, Code of Criminal Procedure.

⁴⁰ Articles 36.05 and 36.06, Code of Criminal Procedure.

⁴¹ Article 24.05, Code of Criminal Procedure. The penalty for failure to answer a subpoena in a criminal case is limited to provisions of Article 24.05. Texas Rule of Civil Procedure 176.8 is inapplicable to criminal proceedings. *Ex parte Dotson*, 76 S.W.3d 393 (Tex. Crim. App. 2002).

⁴² Article 39.03, Code of Criminal Procedure.

⁴³ Article 39.12, Code of Criminal Procedure.

4. Jurors and Jury Deliberation

Potential jurors who have been summoned to municipal court, but fail to appear, commit constructive contempt, although they are subject to no more than a \$100 fine.⁴⁴ A potential juror who files a false claim of exemption from jury service commits constructive contempt punishable by the imposition of a fine ranging from \$100 to \$500.⁴⁵ Because this is constructive contempt, having taken place outside of court, the missing juror is entitled to notice and a hearing. Because no incarceration is authorized, there is most likely no right to appointed counsel in such a case.

No person can be in the jury room during deliberations, nor communicate with deliberating jurors without the court's permission and in the court's presence.⁴⁶ Any person, including a juror, who violates this provision may be held in direct contempt and fined up to \$100, incarcerated for three days or both.⁴⁷

II. Contempt Proceedings

As previously noted, to determine the proper procedure in a contempt action, the judge must first determine whether the alleged action by the person constitutes "direct" contempt or "constructive" contempt. It is also important at the outset for the court to determine whether the person who allegedly committed contempt is an officer of the court or not.

These determinations are very important because contempt procedures differ on the basis of these classifications. Direct contempt is summary in nature, "summary" meaning the judge could order the contemnor to jail without a hearing. But, even direct contempt has been modified to require a hearing, except where the contempt is exigent in nature. Because direct contempt takes place in front of the judge, due process protections, such as the right to counsel, the right to notice, and the right to be heard, are not applied.⁴⁸ Constructive contempt, on the other hand, requires application of constitutional and procedural safeguards. As discussed in Chapter 4, due process requires notice and a hearing before a neutral judge. If the judge's testimony regarding contempt will be necessary, the judge must be recused and another judge must hear and decide the contempt case.

⁴⁴ Article 45.027(c), Code of Criminal Procedure.

⁴⁵ Section 62.111(2), Government Code.

⁴⁶ Article 36.22, Code of Criminal Procedure.

⁴⁷ Article 36.23, Code of Criminal Procedure.

⁴⁸ *Daniels, Supra*, note 5.

Whether contempt is classified as civil or criminal, the possibility of incarceration as a sanction requires that proceedings in contempt cases should conform as nearly as practicable to those in criminal cases.⁴⁹ Contempt is quasi-criminal in nature. This does not mean that procedures utilized conform with the Code of Criminal Procedure, but rather that due process is provided to contemnors.⁵⁰ Imprisoning a contemnor without notice or hearing violates the requirements of due process.⁵¹ The right to counsel, and to appointed counsel if indigent, turns not on whether the proceedings are characterized as civil or criminal, but on whether the person may lose one's liberty as a result of the proceedings.⁵²

A. Notice

Due process of law demands that, before a court can punish acts or omissions not committed in its presence by contempt, the accused must have full and complete notification of the conduct subject to contempt.⁵³ The show cause order must state when, how, and by what means the defendant has committed the alleged contempt.⁵⁴ If a party other than the court files a motion to hold a party in contempt, the moving party must file a sworn complaint stating the facts alleged to constitute contempt, and the court must find those facts true at a hearing.⁵⁵ An accused not given the opportunity to confer with an attorney or to adequately prepare a defense is denied due process.⁵⁶

The accused must receive the notice given. Notice of a contempt hearing held on a show cause order given to the accused's attorney of record a mere hour or two before the hearing was found to be insufficient.⁵⁷ Notice sufficient under civil substituted service rules is also insufficient if no actual notice is given.⁵⁸ But actual notice is sufficient even if civil service of process rules are not complied with by the court.⁵⁹ The notice should state the grounds for contempt, the place of the hearing, the time of the hearing, and an order to appear.

⁴⁹ *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986)

⁵⁰ *Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App.—Dallas 1983).

⁵¹ *Ex parte Sauser*, 554 S.W.2d 239 (Tex. App.—Dallas 1977).

⁵² *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983).

⁵³ *Gonzalez, Supra*, note 22.

⁵⁴ *Ex parte Stanford*, 557 S.W.2d 346 (Tex. App.—Houston [1st Dist.] 1977).

⁵⁵ *Ex parte Turner*, 478 S.W.2d 256 (Tex. App.—Houston [1st Dist.] 1972).

⁵⁶ *Ex parte Standard*, 596 S.W.2d 218 (Tex. App.—Texarkana 1980).

⁵⁷ *Ex parte Lackey*, 522 S.W.2d 735 (Tex. App.—Dallas 1975).

⁵⁸ *Ex parte Moore*, 567 S.W.2d 523 (Tex. App.—Texarkana 1978).

⁵⁹ *Ex parte Swate*, 874 S.W.2d 831 (Tex. App.—Houston [14th Dist.] 1994).

At least one appellate court has concluded that for purposes of joinder, Article 21.24 of the Code of Criminal Procedure is applicable in contempt proceedings and that two or more counts or accusations of contempt may be contained in a single affidavit.⁶⁰

As previously stated in our description of constructive contempt, the fact that an individual is given notice of a contempt hearing does not mean that the individual can subsequently be found in contempt in absentia. When an individual is cited for criminal contempt and fails to appear at the specified place and time, the proper procedure is to bring the individual into court under a *capias* or writ of attachment.⁶¹ The same is also true when an individual is cited for civil contempt.⁶² In these cases, the distinction between direct and constructive contempt is significant because cases of constructive contempt are afforded greater procedural protection.

Notably, what case law exists on this point is from the Supreme Court of Texas, not the Court of Criminal Appeals. While such case law binds the courts of appeal, the Court of Criminal Appeals is not similarly bound. Court of Criminal Appeals' opinions like *Ex parte Krupps*⁶³ (courtroom spectators ordered to stand by bailiff, not judge, held in contempt) illustrate the potential difficulty in distinguishing between direct and constructive contempt. In *Ex parte Cooper*⁶⁴ the Court emphasized the critical importance of notice and an opportunity to show cause. The Court of Criminal Appeals, however, has yet to answer whether it is a violation of due process to proceed with a contempt hearing where the individual was notified to appear personally but failed to do so.⁶⁵

B. Right to Counsel and Appointment of Counsel

A person accused of contempt has the right to be represented by an attorney at the hearing. Because incarceration is a possible penalty under Section 21.002 of the Government Code, a person accused of contempt has a right to counsel and is entitled to court-appointed counsel if indigent. Again, because

⁶⁰ *Ex parte Gnesoulis*, 525 S.W.2d 205 (Tex. App.–Houston [14th Dist.] 1975).

⁶¹ *Ex parte Johnson*, 654 S.W.2d 415, 419 (Tex. 1983) (finding of contempt in absentia violates due process rights barring a finding that an individual voluntarily waives his or her right to appear).

⁶² *Alloju*, *Supra*, note 23.

⁶³ 712 S.W.2d 144, 147-148 (Tex. Crim. App. 1986).

⁶⁴ 657 S.W.2d 435 (Tex. Crim. App. 1983).

⁶⁵ Citing *Blackmer v. United States*, 284 U.S. 421, 440 (1932), Justice Zant, dissenting in *Ex parte Johnson*, asserted that in criminal contempt proceedings, due process does not require that an individual be present at the hearing and adjudication if the individual was duly notified and had adequate opportunity to appear and be heard. *Supra*, note 61 at 422.

confinement is a possible penalty, contempt proceedings are generally criminal in nature; and all the same rights, safeguards, and protections are given to the citizen accused of contempt as are given to the citizen accused of committing a crime.⁶⁶

The possibility of incarceration makes this conduct and these proceedings distinct from others in municipal court that generally result in the imposition of a fine. Accordingly, they should be thought of differently. A 1988 opinion by the Texas Attorney General regarding court-appointed counsel in justice (and municipal) courts, analogized contempt proceedings to peace bond hearings where there is the threat of a jail term.⁶⁷ The opinion held, like so many appellate court decisions and like federal constitutional case law, that a person who faces a jail term and loss of personal liberty must be informed of the right to be represented by counsel. If that person is also indigent, the court must appoint counsel. Such a person may waive the right to counsel, but that waiver must be intelligently made, and that can be done only if the individual accused of contempt is informed of the right to counsel and of the possible right to court appointed counsel. Otherwise, any purported waiver of the right to counsel is invalid, and any subsequent judgment may be challenged.⁶⁸ If the court appoints counsel, the municipality becomes obligated to compensate the appointed attorney.

The right of citizens accused of crime to counsel and to representation by counsel, as guaranteed by the U.S. Constitution and by Texas law, applies equally to citizens accused of constructive contempt of court even in civil proceedings.⁶⁹ If a citizen accused of contempt of court appears at contempt proceedings without counsel, the court has a duty to advise of the right to be represented by a lawyer and, if indigent, to request that the court appoint a lawyer.⁷⁰ If the court fails to give those warnings, violation of the accused's

⁶⁶ *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418 (1911), but also note Texas courts have clarified this proposition. In *Ex parte Jackman*, *Supra*, note 50, the court stated, "It is not necessary that the procedures in a contempt proceeding strictly conform to the rules of criminal procedure. Rather, the proper standard to apply in contempt proceedings is the standard of due process, which provides that the contemnor be accorded notice and a fair hearing."

⁶⁷ Attorney General Opinion No. JM-977 (1988).

⁶⁸ *Ex parte Linder*, 783 S.W.2d 754 (Tex. App.–Dallas 1990) (due process requirements in constructive contempt); *Ex parte Berryhill*, 750 S.W.2d 368 (Tex. App.–Beaumont 1988) (Due Process Clause of 14th Amendment, right to counsel); *Ex parte Walker*, 748 S.W.2d 21 (Tex. App.–Dallas 1988) (6th Amendment the and 14th Amendment guarantee indigents the right of court-appointed counsel in contempt proceedings).

⁶⁹ *Ex parte Gonzales*, 945 S.W.2d 830 (Tex. Crim. App. 1997).

⁷⁰ 6th and 14th Amendments, U.S. Constitution; Articles 1.051, 15.17, and 26.04, Code of Criminal Procedure.

rights is not the only important consequence. The court's orders could be challenged in the absence of warnings and defense counsel.

C. Jury

The contempt statute, Section 21.002 of the Government Code, does not violate due process or equal protection for failure to provide for trial by jury.⁷¹ There is a constitutional right to trial by jury in contempt proceedings where the permissible penalty is in excess of that permitted for punishment for a petty offense.⁷²

Some statutes prescribing penalties for contempt classify it as a petty offense; hence, the defendant is not entitled to trial by jury on a contempt charge.⁷³ Imprisonment for longer than six months is constitutionally impermissible without an opportunity for jury trial.⁷⁴

Even if there are two or more contemptible acts, the sentences may not be aggregated to run consecutively if the term to be served exceeds six months, unless the accused is afforded a jury trial in accordance with the 6th Amendment.⁷⁵

D. Other Trial Rights

Due process, required in cases of constructive contempt or direct contempt with no exigency, also requires that a hearing must be conducted before a person is imprisoned for contempt.⁷⁶ An order of contempt, following a hearing at which appellant was allowed to say anything he wanted, but was told that previously assessed punishment would be imposed regardless of anything he had to say, was void for failing to afford minimal due process of law.⁷⁷

Conflict can arise when the judge whose order has been violated outside the courtroom is called upon to decide whether or not that violation constitutes contempt of court. If the order is to an officer of the court, Section 21.002(d) of the Government Code, makes it clear that if the officer of the court moves for recusal, the case must be assigned to another judge by the presiding judge

⁷¹ *Howell, Supra*, note 36.

⁷² *Credit Bureau of Laredo, Inc. v. State*, 515 S.W.2d 706 (Tex. App.–San Antonio 1974), *aff'd*, 530 S.W.2d 288 (Tex. 1975).

⁷³ *Texas Pet Foods, Inc. v. State*, 529 S.W.2d 820 (Tex. App.–Waco 1975).

⁷⁴ *Ex parte Werblud*, 536 S.W.2d 542 (Tex. 1976).

⁷⁵ *Codispoti v. Pennsylvania*, 418 U.S. 506, 516-517 (1974); *Sanchez, Supra*, note 49.

⁷⁶ *Ex parte Hart*, 520 S.W.2d 952 (Tex. App.–Dallas 1975).

⁷⁷ *Avila, Supra*, note 34.

of the judicial region. In non-officer of the court cases, if the judge will be a witness and a motion is made, the same procedure should be followed.⁷⁸

A party alleged to be in contempt possesses all rights and privileges of one accused of crime, including the right against self-incrimination.⁷⁹ The contemnor has the right to be present and confront witnesses at the contempt hearings and, while these rights can be affirmatively waived, the court may not find a contemnor guilty of contempt in abstentia.⁸⁰ If a contemnor fails to appear at a hearing, they may be arrested but may not be committed to jail.⁸¹ In addition, the burden of proof on contempt is the same as in criminal cases: beyond a reasonable doubt.

Before a court can hold a witness in contempt, three things are necessary:

1. Jurisdiction over the subject matter;
2. Jurisdiction over the person; and
3. Authority to render the judgment.⁸²

On the rare occasions where it is necessary, the court may use its inherent contempt powers to enforce the testimonial duty of a defiant witness.⁸³ Testifying is considered a duty of citizens, not one that can be refused unless the law provides a privilege.

E. Right to a Timely Written Order of Confinement

A trial court has no authority to verbally order a person to be confined for contemptuous acts committed outside the presence of the court or to unduly delay signing a contempt judgment and commitment order.⁸⁴ The trial court may cause a short, reasonable detention while the judgment of contempt and the commitment order are being prepared for the judge's signature, but, a delay of three days or more is unacceptable.⁸⁵

Trial courts are mistaken in the belief that omissions can be remedied after the fact. A court which committed a contemnor to jail on verbal judgment could

⁷⁸ *Jamilah v. Bass*, 862 S.W.2d 201 (Tex. App.–Houston [14th Dist.] 1993).

⁷⁹ *Ex parte Harris*, 581 S.W.2d 545 (Tex. App.–Fort Worth 1979); *Werblud, Supra*, note 74.

⁸⁰ *Johnson, Supra*, note 61.

⁸¹ *Ex parte Cragg*, 109 S.W.2d 479 (Tex. Crim. App. 1937).

⁸² *Ex parte Duncan*, 95 S.W.2d 675 (Tex. 1936).

⁸³ *Ex parte Salfen*, 618 S.W.2d 766 (Tex. Crim. App. 1981); *Claveland v. State*, 507 S.W.2d 769 (Tex. Crim. App. 1974).

⁸⁴ *Ex parte Littleton*, 97 S.W.3d 840 (Tex. App.–Texarkana 2003).

⁸⁵ *Ex parte Calvillo Amaya*, 748 S.W.2d 224 (Tex. 1988) (five days too long); *Ex parte Seligman*, 9 S.W.3d 452 (Tex. App.–San Antonio 1999); *Ex parte Jordan*, 865 S.W.2d 459 (Tex. 1993) (three days–Friday until Monday–too long).

not, 80 days later and after a writ of habeas corpus had been issued, attempt to cure its denial of due process by entering a written judgment of contempt.⁸⁶

III. Judgments of Contempt

Unless contempt is committed in the presence of the court, no person may be held for contempt unless pursuant to a written judgment of contempt.⁸⁷ The judgment should be accompanied by a commitment order—preferably a separate document—if the contemnor is sent to jail.⁸⁸

The determination, however, of whether a contempt sentence is characterized as criminal or civil depends not on the underlying proceeding, but on the type of sentence imposed.

When the court finds that a person is in or has committed contempt, the judge must reduce that finding to a written judgment. The judgment should set out the facts that show the court’s jurisdiction and the acts that constituted the contempt, and state that the individual was in contempt. The judgment should also carefully outline the punishment assessed. The commitment should be directed to the proper peace officer and clearly set out the punishment assessed and be signed by the court. The bailiff should then take the contemnor, judgment, and commitment order and surrender them to the sheriff, or police chief if the city has a jail.

Remember, criminal contempt is punitive in nature and is issued for a certain period of time as punishment for the contemptible act. Civil contempt is more coercive or is issued for an indeterminate period of time. The order terminates when the judge’s order is complied with.⁸⁹

A judgment of contempt imposing coercive restraint or civil contempt is void if the condition for purging contempt is impossible to perform. The burden is on the contemnor to establish to the trial court that the act necessary to purge contempt cannot be performed.⁹⁰

Failure to give an evidentiary hearing at which the accused could offer evidence as to the impossibility of compliance, evidence of efforts to comply, or evidence in mitigation of punishment, renders an order and judgment of

⁸⁶ *Ex parte Barnett*, 600 S.W.2d 252 (Tex. 1980).

⁸⁷ *Ex parte Whitehead*, 908 S.W.2d 68 (Tex. App.—Houston [1st Dist.] 1995).

⁸⁸ *Barnett*, *Supra*, note 86.

⁸⁹ *Werblud*, *Supra*, note 74.

⁹⁰ *Ex parte Jones*, 602 S.W.2d 400 (Tex. App.—Waco 1980).

contempt void.⁹¹ This ability to establish the impossibility of performance is especially important where the conduct sanctioned is failure to pay a fine. Without this essential procedural step, the court risks incarcerating citizens for the offense of poverty.

A person may not be held in contempt for violating an order that the court had no power to enter. A person may not be imprisoned to compel obedience to an order that the court had no power to enter.⁹² A court has no power to punish by contempt a failure to obey a void order or an order the court has no power to make.⁹³

For a decree to be enforceable through contempt, it must delineate the requirements for compliance in clear, specific, and unambiguous terms.⁹⁴ Punishment should not rest upon implication or conjecture. Contempt orders must be clear enough to give contemnors the chance to purge the contempt charges and absolve themselves. The language imposing burdens should be clear, specific, and unequivocal so that the parties may not be misled.⁹⁵ Where a court seeks to punish a person by fine, arrest, or imprisonment for disobedience of its order or command, such order or command must carry with it no uncertainty. It must not be susceptible to different meanings or constructions. It must definitely speak its meaning and the purpose of the court in making the order.⁹⁶ The contempt order must clearly state in what respect the court's prior order has been violated.⁹⁷

To satisfy due process requirements, both a written judgment of contempt and a written order of commitment are necessary to jail a person for contempt of court. Neither the sheriff nor any other peace officer may confine a person for contempt without a written order of commitment. Written orders of commitment for contempt do not validate verbal orders of commitment rendered before the written orders were signed.⁹⁸

⁹¹ *Ex parte Carlile*, 783 S.W.2d 672 (Tex. App.—Houston [14th Dist.] 1989).

⁹² *Ex parte Helle*, 477 S.W.2d 379 (Tex. App.—Corpus Christi 1972).

⁹³ *Ex parte Mitchell*, 628 S.W.2d 499 (Tex. App.—Texarkana 1982); *Ex parte Balazik*, 631 S.W.2d 198 (Tex. App.—Fort Worth 1982).

⁹⁴ *Ex parte McManus*, 589 S.W.2d 790 (Tex. App.—Dallas 1979).

⁹⁵ *In re Cobble*, 592 S.W.2d 46 (Tex. App.—Tyler 1979, error dismissed).

⁹⁶ *Ex parte Smiley*, 626 S.W.2d 817 (Tex. App.—San Antonio 1981); *Ex parte Bahmani*, 760 S.W.2d 769 (Tex. App.—Houston [14th Dist.] 1988).

⁹⁷ *Ex parte McClain*, 762 S.W.2d 238 (Tex. App.—Beaumont 1988).

⁹⁸ *Ex parte Cadena*, 811 S.W.2d 725 (Tex. App.—Corpus Christi 1991); *Ex parte Perry*, 600 S.W.2d 357 (Tex. App.—Corpus Christi 1980); *Ex parte Spencer*, 508 S.W.2d 698 (Tex. App.—Texarkana 1974).

IV. Appeal

In a contempt hearing, there is no appeal provided and the court of appeals has no jurisdiction to correct errors allegedly committed by the trial court. The only review is by an original proceeding by habeas corpus⁹⁹ or mandamus if the contemnor is not incarcerated.¹⁰⁰ The appellate court gives deference to the trial court's findings of fact.¹⁰¹

V. Double Jeopardy

Reconciling double jeopardy and contempt has been an extremely difficult issue in varying jurisdictions.¹⁰² The U.S. Supreme Court has held that criminal contempt findings with the same elements as subsequent criminal prosecutions are barred by double jeopardy.¹⁰³ The Court of Criminal Appeals has found double jeopardy does apply to offenses punished as contempt and prosecuted as independent criminal cases.¹⁰⁴ But at least two courts of appeal have distinguished that case by noting that both the contempt proceeding and the criminal cases contained separate distinct elements.¹⁰⁵ The cases all have close votes and vehement dissents. This is an area of law that will likely receive much more federal and state attention. The caution to municipal courts is that a finding of contempt may very likely bar later criminal prosecutions for the exact same offenses. The safest interpretation is that an individual cannot be punished in a contempt proceeding if he or she has already been punished for the same act in a criminal proceeding.¹⁰⁶

Conclusion

One of the most difficult problems confronted by municipal judges is dealing with difficult defendants. Citizens are never happy about being ticketed for speeding or running a stop sign or violating the city ordinance prohibiting dogs running at large. They come into court irate and feeling humiliated. They

⁹⁹ *Ex parte Eureste*, 725 S.W.2d 214, 216 (Tex. Crim. App. 1986).

¹⁰⁰ *Kidd v. Lance*, 794 S.W.2d 586 (Tex. App.—Austin 1990).

¹⁰¹ Factual sufficiency of the evidence underlying a contempt order is viewed in the light most favorable to the order. *Ex parte Murphy*, 669 S.W.2d 320, 322 (Tex. Crim. App. 1984). However, an appellate court may set aside such an order if it determines that the issuing court had no reasonable basis for entering a contempt order. *Ex parte Butler*, 372 S.W.2d 686, 687 (Tex. Crim. App. 1963).

¹⁰² See, *Ex parte Williams*, 799 S.W.2d 304, 306 (Tex. Crim. App. 1990).

¹⁰³ *United States v. Dixon*, 509 U.S. 688 (1993).

¹⁰⁴ *Ex parte Rhodes*, 974 S.W.2d 735 (Tex. Crim. App. 1998).

¹⁰⁵ *Ex parte Arenivas*, 6 S.W.3d 631 (Tex. App.—El Paso 1999); *Ex parte Busby*, 921 S.W.2d 389 (Tex. App.—Austin 1996).

¹⁰⁶ *Ex parte Brown*, 574 S.W.2d 618, 620 (Tex. App.—Waco 1978).

may be frightened to be in court and intimidated by court procedures. They may not have anyone to speak for them, and they want to tell their side of the story. Judges listen to what defendants have to say and dispense justice with compassion. That does not mean judges should suffer abuse. While justice must be balanced with compassion, judges have to protect the dignity and decorum of the court. Courts are a proper arena where grievances can be redressed.

From the cases cited—and they represent only a fraction of the case law on contempt—it is clear that the court’s contempt power is often challenged. Because deprivation of liberty is so serious and can be accomplished legally only in compliance with the Constitution and constitutional case law, appellate court decisions repeatedly urge courts to exercise this power cautiously and judiciously.