

# CHAPTER XV. - CONTEMPT OF COURT

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## **CHAPTER XV CONTEMPT OF COURT**

### **15.1 INTRODUCTION**

This chapter is not intended to be a complete treatise on the subject of contempt of court. Its purpose is to give a general understanding and background of the court's contempt powers. The reader should not let this chapter be a substitute for independent legal research, but rather should consider it a starting point for further study and research on this topic. In this spirit, the author suggests that a thorough reading of the case of McMillian v. Rennau, 619 S.W.2d 848 (Mo.App. W.D. 1981), which contains an excellent discussion of the law of contempt, is an appropriate starting place for research in the area of contempt.

Contempt of court is defined in Black's Law Dictionary, 4<sup>th</sup> Revised Edition, (1968), page 390 as "Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or dignity. Ex parte Holbrook, 133 Me. 276, 177 A. 418, 420. Committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to proceeding therein, willfully disobeys or fails to comply with an undertaking which he has given. Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621, 623, 23 A.L.R. 183."

The author believes that because of the nature of the court's contempt power, the court should, at all times, take extreme care in imposing and using the power of contempt of court, and that this power should be used extremely rarely and with great restraint.

See affiliated forms following this chapter:

MBB 15-02 Motion for Contempt

MBB 15-01 Show Cause Order

MBB 15-03 Judgment of Contempt

MBB 15-04 Warrant of Commitment for Contempt of Court

### **15.2 AUTHORITY OF MUNICIPAL COURTS**

The authority for the judge of a municipal division of a circuit court in the state of Missouri to punish for criminal contempt of court is found in Rule 37.75 that was amended on December 23, 2003, eff. July 1, 2004. Rule 37.75 reads as follows:

#### **Criminal Contempt**

- (a) A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the judge's presence. The judgment of contempt and the order of commitment shall recite the facts and shall be signed by the judge and entered of record.

- (b) All other instances of contempt shall be prosecuted on notice. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt, the judge shall recite, in the judgment of contempt and in the order of commitment, the essential facts constituting the criminal contempt and fixing the punishment.

Courts of common law general jurisdiction have the inherent power to punish for contempt. However, since a municipal division of the circuit court is not a common law court of general jurisdiction, it is this author's opinion that the contempt power of a municipal judge of a municipal division is limited to the criminal contempt power expressly provided for in Rule 37.75, quoted above.

A municipal division does not have civil contempt powers. McMillian v. Rennau, 619 S.W.2d 848 (Mo.App. W.D. 1981); White v. Held, 269 S.W.2d 125 (Mo.App. E.D. 1954).

## **DIRECT CRIMINAL CONTEMPT**

### **15.3 DEFINED AND CONTRASTED WITH CIVIL CONTEMPT**

Direct criminal contempt deals with conduct or actions that are committed in the actual presence of the court while court is in session and that were actually seen or heard by the judge presiding. Generally speaking, "criminal contempt" results from actions directed against the dignity of the court that brings the court into disrepute by ignoring its judgments, by challenging its authority, or by affronting its majesty as an agent of government. Such contempt consequently affects all the people of the municipality and state.

Identifying the underlying concepts and purposes of civil and criminal contempt powers helps to understand how they differ. Civil contempt is generally intended to protect a party to the litigation, the party for whose benefit the judgment or decree was entered. Civil contempt provides a means to compel one party to the civil litigation to comply with the judgment entered in favor of the other party.

Criminal contempt, on the other hand, does not serve the function of aiding a litigant in achieving the relief granted, but instead protects the dignity of the court and the authority of the court's orders and decrees. The basis of criminal contempt is the intentional interference with the judicial process and the refusal to be bound by judicial orders. Criminal contempt springs not from the need to protect the litigant, but from the necessary power of the court to protect the judicial system established by the people. It has been said that without this power the courts are no more than advisory bodies to be heeded or not at the whim of the individual.

The following cases involve discussions regarding the criminal contempt. Teefey v. Teefey, 533 S.W.2d 563 (Mo. 1976); Saab v. Saab, 637 S.W.2d 790 (Mo.App. E.D. 1982); State, on Inf. of McKittrick v. Koon, 201 S.W.2d 446 (Mo. 1947); International Motor Company, Inc. v. Boghasian Motor Company, Inc., 870 S.W.2d. 843(Mo.App.E.D.1993); State ex rel. Tennenbaum v. Clark, 838 S.W.2d 26 (Mo.App.W.D.1992); Happy v. Happy, 941 S.W.2d 539

(Mo.App.W.D.1997); State ex rel. Picerno v. Mauer, 920 S.W.2d 904 (Mo.App. W.D.1996); State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994).

Direct criminal contempt must consist of conduct that the judge certifies that he or she saw or heard and that was committed in his or her presence during a session of court. Conduct occurring at the clerk's office or in the hallway that does not actually disrupt the judicial proceeding or that occurs during a recess of the court is not an instance of direct criminal contempt. Rule 37.75(a).

Direct criminal contempt may be punished summarily; that is, the judge may hold the contemnor in contempt immediately and without the notice and hearing required for indirect criminal contempt, as will be discussed later in this chapter. Rule 37.75(a).

Direct criminal contempt generally consists of acts done in the presence of the court that tend to obstruct or interfere with the peaceful and orderly functioning of the court. A judge should not summarily punish for contempt a trivial act that does not actually tend to interfere with the peaceful and orderly functioning of the court or impede or embarrass the administration of justice. McMillian v. Rennau, *supra*.

But, false statements made by a witness, under oath, are not subject to summary punishment as indirect criminal contempt, although they may lead to a conviction on a criminal charge of perjury. State, ex.rel. Shepherd v. Steeb, 734 S.W.2d. 610 (Mo.App.W.D.1987).

The refusal of a defendant to give permission to the judge to use the defendant's name is not direct criminal contempt. The refusal of defendant was inconsequential. The court exceeded its jurisdiction by holding defendant in criminal contempt. In re Lomax v. Merritt, S.W.3d (Mo.App.S.D. 2005). This case also gives a lengthy discussion of the types of contempt and the requirements for a proper finding of contempt.

#### **15.4 INTENT REQUIREMENT**

The conduct of the contemnor must be intentional or at least demonstrate that the contemnor should reasonably be aware that the conduct is wrongful. Obviously, conduct such as cursing the judge constitutes direct criminal contempt and may be punished summarily and without giving the individual involved any advance warning because people should know that such conduct is wrong. However, it is generally a good practice, where possible, to warn an individual that his or her conduct is contemptuous, and that if the conduct continues, he or she will be held in contempt of court and punished for that contempt. If the conduct continues after warning, the judge is justified in summarily holding the individual in contempt and punishing immediately for that contemptuous behavior, as intentional contempt of the court's authority is then evident. McMullin v. Sulgrove, 459 S.W.2d 383, 388 (Mo. 1970); State ex rel. Wendt v. Journey, 492 S.W.2d 861, 864 (Mo.App. E.D. 1973); In Re Blankenship, 553 S.W.2d 307, 309 (Mo.App. W.D. 1977); U.S. v. Dowdy, 960 F.2d 78 (8th Circuit 1992).

## **15.5 PROCEDURE FOR IMPOSING PUNISHMENT**

After determining that summary contempt is necessary, the court should advise the contemnor as to exactly what act or conduct is contemptuous, and the court should ask the contemnor whether he or she knows the act is contemptuous and if there is any reason or excuse for the act or conduct. If the court is satisfied that the act or conduct is contemptuous and that there is no reasonable excuse for the conduct, and once the order of contempt and order of commitment have been prepared, the court should read the account of the facts and circumstances constituting the contempt to the contemnor, afford the contemnor allocution if he or she is to be imprisoned, find him or her in contempt, and pronounce and impose the punishment. State ex rel. Burrell-El v. Autrey, 752 S.W.2d 895, 899 (Mo.App. E.D. 1988).

It is the opinion of this author, that the right to appointment of counsel in indigency situations, right to trial by jury, right to change of judge and right to change of venue, that generally apply in the indirect criminal contempt cases, do not apply in the context of direct criminal contempt. Because direct criminal contempt occurs in the immediate presence and hearing of the court, the court must take immediate action to protect the dignity and functioning of the court.

## **15.6 CONDUCT PROTECTED BY FIRST AMENDMENT**

Where conduct occurs that is alleged to be contemptuous and a claim is made that the conduct is protected under the First Amendment to the United States Constitution, Freedom of Religion Clause, a balance must be struck between the court's power to preserve its dignity and the orderly functioning of the court and the individual's protection of First Amendment Freedom of Religion Rights. In such a case, a person claiming an infringement of the right to free exercise of religion has the burden initially, to show that there is a "religion" within the constitutional meaning of religion and that the conduct infringed is truly "religious" in nature. Although it is inappropriate to question the verity of a religious belief, the sincerity of the religious belief may be examined.

To demonstrate that there is a religion in the constitutional sense, that the conduct in question is truly religious, and that the religious belief is sincere, a person claiming the free exercise of religion is entitled to a "Threshold Hearing" to offer testimony and evidence. If a person claiming free exercise of religion develops and proves (or if judicial notice may be taken) that the religion is truly a religion within the meaning of constitutional principles, and the act or conduct in the courtroom is an essential tenet or an essential part of that religion, then the state or city bears a heavy burden to establish that the state's interest in maintaining dignity and decorum would override the interest of the free exercise of religion that might threaten public peace, order and safety. State ex rel. Burrell-El v. Autrey, 752 S.W.2d 895, 900-901 (Mo.App. E.D. 1988).

## **INDIRECT CRIMINAL CONTEMPT**

### **15.7 DEFINED AND CONTRASTED WITH DIRECT CONTEMPT**

As stated previously in this chapter, direct criminal contempt generally consists of acts done in the presence of the court that obstruct or interfere with the peaceful and orderly function of the

tribunal or constitute an open insult to the presiding judge's person in the court's presence. Indirect criminal contempt generally takes place outside of the actual presence and hearing of the court. It is an act, done at a distance that tends to degrade, obstruct, interfere, belittle, prevent, or embarrass the administration of justice. As with direct criminal contempt, a judge dealing with indirect criminal contempt must be mindful of the purpose of the court's contempt power, and not attempt to punish for contempt matters of a trivial nature or acts that merely irritate a judge but do not pose any threat to the functioning of the judiciary in general or to the particular court involved. Ryan v. Moreland, 653 S.W.2d 244 (Mo.App. E.D. 1983).

Contempt power should be used only when the judicial function is integrally threatened. The power to punish for contempt should be used sparingly, wisely, and with judicial restraint, and only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. In Re Estate of Dothage, 727 S.W.2d 925, 927 (Mo.App. W.D. 1987); Fulton v. Fulton, 528 S.W.2d 146, 157 (Mo.App. S.D. 1975); McMillian v. Rennau, *supra*.

See In Re: Frank A. Conard, Respondent, 944 S.W.2d 191 (Mo. 1997). Although this is an original disciplinary proceeding before the Supreme Court of Missouri, there is a lengthy discussion of criminal contempt and the problems which might result if the judge exceeds his jurisdiction and becomes personally involved in the dispute. This case deals with civil vs. criminal contempt, disqualification of judge, and direct vs. indirect contempt. This judge was found guilty of misconduct in his official duties and was suspended without pay for thirty days.

## **15.8 SUMMARY PUNISHMENT PROHIBITED**

Unlike direct contempt, indirect criminal contempt may not be punished summarily. The alleged contemnor is entitled to a hearing at which he or she can present evidence, be represented by counsel, and cross-examine witnesses. If there is a reasonable likelihood of jail time being imposed, the contemnor who is indigent and consequently unable to retain counsel should be provided with appointed counsel. Hunt v. Moreland, 697 S.W.2d 326, 329-330 (Mo.App. E.D. 1985). "Notice must be given to the alleged contemnor specifying the alleged acts of contempt that were supposed to be committed." See City of Pagedale v. Taylor, 831 S.W.2d 723 (Mo.App. E.D. 1992) and In Re Conard, *Supra*.

## **15.9 BURDEN OF PROOF**

The burden of proof in an indirect criminal contempt proceeding is on the municipality. The alleged contemnor must be found guilty of the alleged contemptuous conduct beyond a reasonable doubt. The contemnor cannot be required to testify against himself or herself. Chemical Fireproofing v. Bronska, 553 S.W.2d 710, 714 (Mo.App. E.D. 1977); State ex rel. Pini v. Moreland, 686 S.W.2d 499, 501 (Mo.App. E.D. 1984); Osborne v. Purdome, 244 S.W.2d 1005 (Mo. 1952); State, ex.rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.1994); Ramsey v. Grayland, 567 S.W.2d 682, 686 (Mo.App. E.D. 1978). There is no constitutional right to a jury trial so long as the jail sentence handed down by the judge does not exceed six months. Ryan v. Moreland, 653 S.W.2d 244, 248 (Mo.App. E.D. 1983).

## 15.10 GOOD FAITH AS MITIGATING FACTOR

In determining whether a person is guilty of contempt, the court can and should consider that person's good faith or lack of it. Although it is not a defense that the contemnor acted on the advice of counsel, or acted in good faith and on the advice of counsel, the court should consider such facts in mitigation of both the offense and the punishment. State on Inf. of McKittrick v. Koon, supra; Hoffmeister v. Tod, 349 S.W.2d 5, 18 (Mo. 1961).

## 15.11 DISQUALIFICATION OF JUDGE

If the indirect criminal contempt charged involves disrespect or criticism of the judge, the judge is disqualified to hear the matter except with the defendant's consent. Rule 37.75(b); State ex rel. Wendt v. Journey, supra. However, the mere fact that the judge is the instigator of the proceedings does not disqualify him or her to sit; also, a change of venue generally does not lie. The rules of criminal law generally do not apply because a proceeding for criminal contempt is sui generis and is controlled by its own rules. State ex rel. Wendt v. Journey, supra; Mechanic v. Gruensfelder, 461 S.W.2d 298, 309 (Mo.App. E.D. 1970). It has also been held that although the judge who issues an order might be expected to have some interest in insuring compliance with it and would have more knowledge of the circumstances that form the basis of the contempt, this interest does not in and of itself disqualify the judge from hearing the contempt proceeding. Ramsey v. Grayland, supra.

## JUDGMENT

### 15.12 ORDERS TO BE IN WRITING

The order of contempt, as well as the order of commitment for contempt, should be in writing and should recite the actual facts constituting the contempt. Although, there is some authority for the proposition that a Warrant of Commitment that does not contain the specific facts constituting the contempt can be validated by specifically incorporating by reference the Order of Contempt (containing the proper recitation of facts) in the Order or Warrant of Commitment, this author believes the more prudent approach is to recite, in full, the facts constituting the contempt in BOTH orders as per the specific language of Supreme Court Rule 37.75. Bewig v. Bewig, 784 S.W.2d 823 (Mo. App.E.D.1990). In any event, a commitment is invalid where not supported by a valid Judgment of Contempt, since it is the judgment, not the commitment order, that provides the legal basis to detain an individual. Nesser v. Pennoyer, 887 S.W.2d 394 (Mo.1994). A judge should take care to recite, in detail, the facts and circumstances constituting the offense. Mere legal conclusions are not sufficient and would result in an invalid order that could be successfully attacked. Rule 37.75; Ex parte Brown, 530 S.W.2d 228, 231 (Mo. 1975), State ex.rel. Barth v. Corrigan, 870 S.W.2d 458 (Mo.App.E.D.1994); Burton v. Everett, 845 S.W.2d 710 (Mo.App.W.D.1993).

In Re: Steven W. Brown, Petitioner, 12 S.W.3d 398 (Mo.App. 2000). In this Eastern District case, petitioner was held in contempt and incarcerated for failing to obey a court order for paying child support. He petitioned the court of appeals for a writ of habeas corpus arguing that the judgment of contempt and order of commitment are invalid because the trial court failed to

specifically find that he had the present ability to purge himself of contempt by paying the amounts due per the order in the dissolution. He further alleged that the judgment and order of contempt are invalid because they did not set forth the facts and circumstances that constitute the contempt on his part. The court of appeals granted the habeas corpus and ordered petitioner discharged from custody. It found that the failure of the trial court to set forth the facts and circumstances of his conduct which constitute contempt renders the court's findings mere conclusions insufficient to support the order of commitment. It further found that to require him to make a lump sum payment of over \$13,000.00 without finding specific facts to support the conclusion that he had the present ability to do so was legally insufficient.

## **AFFILIATED FORMS**

See MBB 15-03 Judgment of Contempt and MBB 15-04 Warrant of Commitment for Contempt of Court following this chapter.

### **15.13 PROCEDURE FOR REVIEW**

A finding of criminal contempt, whether direct or indirect, is not reviewable by a trial de novo or on a direct appeal, but may be tested for its legality only by a writ of habeas corpus, or if a fine is imposed, then by a writ of prohibition. Ramsey v. Grayland, supra; State ex rel. Burrell-El v. Autrey, supra; International Motor Company, Inc. v. Boghasian, Inc., 870 S.W.2d 843 (Mo.App.E.D.1993).

The initial determination of whether a writ should be granted is based on the contents of the order of contempt and the order of commitment. Therefore, a judge should take care to fully recite the facts and conversation as nearly verbatim as possible in both orders. Recitation of the proper facts in one order does not cure the defect of the other order not containing the proper recitals. Ex Parte Ryan, 607 S.W.2d 888, 891 (Mo.App. S.D. 1980); Rule 37.75. A judge should also make certain that the orders recite the facts needed to show that all essential elements of Rule 37.75 have been satisfied. This is true whether direct or indirect contempt is involved.

State of Missouri ex rel., Euclid Plaza Associates, L.L.C., Relator v. Honorable David C. Mason, ED80801, May 14, 2002. In this action, relator filed a petition for a writ of prohibition seeking to prohibit the enforcement of a contempt order entered by respondent. The Eastern District found that since Judge Mason's order did not specifically prohibit relator's actions, no action for contempt could lie. The judge exceeded his authority by finding relator in contempt. The preliminary order in prohibition was made absolute.

State of Missouri, ex rel., Rebecca Lepper, Relator v. Hon. Byron L. Kinder and Thomas J. Brown, III, Respondents, 14 S.W.3d 674 (Mo.App. 2000). In this Western District case, the wife claimed that she did not receive dissolution papers including parenting plan prior to signing the custody stipulation agreement. Following a hearing on the enforcement issue, her husband filed a motion for contempt. Trial court held a hearing and found her guilty of perjury and issued an order for contempt, fining her \$5,000.00. Relator sought a writ of prohibition. The court of appeals found that the trial court did not have authority to hold relator in contempt for perjury.

An untruthful witness may be charged with perjury, but not contempt. The trial court's judgment of contempt and fine exceeded its jurisdiction.

#### **15.14 PUNISHMENT**

The punishment entered by the judge for contempt should reflect the nature of the conduct involved. Criminal contempt may be punished by a fixed jail term or by the imposition of a set fine. The court may grant probation and thereby suspend execution of sentence entered by the court on such conditions as the judge deems appropriate under the circumstances of the case.