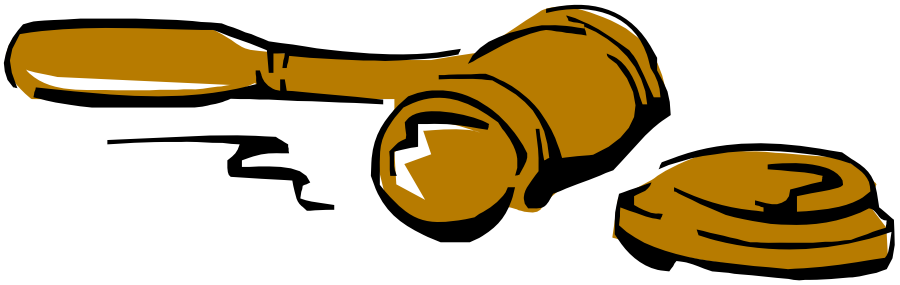
CONTEMPT OF COURT BENCHBOOK—FOURTH EDITION



Michigan Supreme Court

- The Honorable Robert P. Young, Jr., *Chief Justice*
- The Honorable David F. Viviano, *MJI Supervising Justice*
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This fourth edition was initially published in 2009, and the text has been revised, reordered, and updated through September 1, 2013. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Acknowledgments

This benchbook is the fourth edition of the *Contempt of Court Benchguide* produced by the Michigan Judicial Institute's Publications Team and published in 1987. This publication is intended for use by judges and quasi-judicial personnel who conduct contempt proceedings. This work may also be of interest to attorneys who represent persons charged with contempt of court. It is hoped that this new edition will help clarify an area of the law that has traditionally been a source of confusion for the legal community. Funding for the original publication was provided by the Michigan Justice Training Commission pursuant to a grant administered by the Office of Criminal Justice.

MJI director Dawn F. McCarty and former MJI staff attorney Leonhard J. Kowalski authored the 1987 version called the *Contempt of Court Benchguide*. The author of the first edition was greatly assisted by an editorial advisory committee whose members reviewed draft text and provided valuable feedback. The members of the editorial advisory committee were:

- Hon. Randy L. Tahvonen, 29th Circuit Court (*chairperson*)
- Hon. John L. Brundage, Calhoun County Probate Court
- Hon. S.J. Elden, 15th District Court
- Hon. Harold Hood, Court of Appeals
- Hon. Michael L. Stacey, 3rd Circuit Court

Tobin L. Miller, former MJI Publications Manager authored the revised and third editions of this benchbook. Hon. Randy L. Tahvonen, 29th Circuit Court, served as editorial advisor for the revised edition. Sarah Roth, MJI research attorney, authored the fourth edition of the Contempt of Court Benchbook, and Phoenix Hummel, former MJI Publications Manager, served as editor. Mary Ann McDaid, MJI Multimedia Specialist, was responsible for page layout, cover design, and coordination of reproduction. Denise D. Kruger, former MJI Administrative Assistant, coordinated distribution.

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Contempt of Court Benchbook–Fourth Edition
Updates: May 2, 2013–September 1, 2013

An update has been issued for the Contempt of Court Benchbook. A summary of the update appears below. The update has been integrated into the website version of the benchbook. Clicking on the link below will take you to the page in the benchbook where the update appears. The text added in the update is underlined.

Chapter 1: The Nature of the Contempt Power

1.4 Courts' Inherent Authority to Exercise Contempt Power

- "Inherent in the judicial power is the power to prescribe *acts* that are punishable as contempt through fine or imprisonment, or both." *In re Bradley Estate*, ___ Mich ___, ___ (2013). "This inherent judicial power to punish contempt, which is essential to the administration of the law, does not include the power to mete out certain punishments for contemptuous acts beyond those contempt powers inherent in the judiciary." *Id*. at ___ (concluding that the punishment authorized in MCL 600.1721, indemnification damages for civil contempt, does not implicate the judiciary's inherent contempt power).

Chapter 4: Sanctions for Contempt of Court

4.1 Statutory Provisions for Sanctions in Contempt Cases

- "Plainly, the first sentence of MCL 600.1721 contemplates what is, in essence, a tort suit for money damages." *In re Bradley Estate*, ___ Mich ___, ___ (2013). In addition, in the second sentence of MCL 600.1721, "the Legislature expressly recognized that a civil contempt claim seeking indemnification damages functions as a substitute for any underlying claim, and, thus bars monetary recovery that could have been

achieved in a separate cause of action. . . . [T]he statutory remedy, then, is effectively a proxy for a tort claim." *In re Bradley Estate*, ___ Mich at ___. In *Bradley*, the Court specifically found that "a civil contempt petition that seeks indemnification damages under MCL 600.1721 imposes 'tort liability' within the meaning of MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*." *In re Bradley Estate*, ___ Mich at ___. Because MCL 691.1407(1) provides governmental immunity for tort liability in certain circumstances, the statute "[c]onsequently . . . provides governmental agencies with immunity from civil contempt petitions seeking indemnification damages under MCL 600.1721." *In re Bradley Estate*, ___ Mich at ___.

4.2(A) Jail Terms, Fines, Costs, and Damages

- "[A] civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose 'tort liability.'" *In re Bradley*, ___ Mich ___, ___ (2013).

4.2(B) Jail Terms, Fines, Costs, and Damages

- "A contempt proceeding seeking indemnification damages [under MCL 600.1721] is a civil contempt proceeding[,]" that is essentially "a tort suit for money damages." *In re Bradley Estate*, ___ Mich ___, ___, ___ n 25 (2013). Thus, this sanction was omitted from the list of possible sanctions for criminal contempt.

4.3 Mandatory Compensation Sanctions

- "A contempt proceeding seeking indemnification damages [under MCL 600.1721] is a civil contempt proceeding[,]" that is essentially "a tort suit for money damages." *In re Bradley Estate*, ___ Mich ___, ___, ___ n 25 (2013).

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Chapter 1: The Nature of the Contempt Power

1.1 Definition of "Contempt of Court"

"Contempt of court is a wilful act, omission, or statement that tends to impair the authority or impede the functioning of a court." *In re Contempt of Robertson (Davilla v Fischer Corp)*, 209 Mich App 433, 436 (1995).

Examples of contempt of court include disruptive courtroom behavior, failure to appear in court when required, failure to testify when required, and failure to obey a court order.[1]

1.2 Purposes of the Contempt Power

The primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. *People v Kurz*, 35 Mich App 643, 656 (1971). A secondary purpose is to protect and enforce the parties' rights by compelling obedience to court orders and judgments.

[1] See Chapter 5 for discussion of common forms of contempt.

Harvey v Lewis (Appeal of List), 10 Mich App 709, 715-716 (1968), citing *In re Nevitt*, 117 F 448 (CA 8, 1902).

To carry out these purposes, courts impose three general types of sanctions. For criminal contempt, the court imposes punitive sanctions to vindicate its authority. For civil contempt, the court imposes coercive sanctions to force compliance with its orders. In addition, in cases where actual damage is shown, the court may order compensatory relief for a party. *In re Contempt of United Stationers Supply Co (Walker v Henderson)*, 239 Mich App 496, 499 (2000).

Criminal contempt sanctions typically include a jail term and fines that are intended to punish past contumacious behavior. Probationary terms may also be imposed in cases of criminal contempt. Civil contempt sanctions typically include a fine or jail term that ends when the offending behavior ends, and money damages may be awarded to the injured party.[2]

1.3 Courts Must Exercise Contempt Power With Restraint

"The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown." *People v Matish*, 384 Mich 568, 572 (1971). "Defendants in contempt proceedings should be given every opportunity to exonerate themselves." *In re White*, 327 Mich 316, 317 (1950).

Courts must exercise "the least possible power adequate to the end proposed[.]" *Anderson v Dunn*, 19 US 204, 231 (1821). Criminal contempt sanctions should be utilized only after the judge has determined, for good reason, that civil contempt remedies are inappropriate. *Shillitani v United States*, 384 US 364, 371 n 9 (1971).[3]

For a discussion of the misuse of the contempt power by judges, see *In re Hague*, 412 Mich 532, 554-555 (1982) (judge threatened prosecutor with contempt if he continued to file prostitution cases), and *In re Seitz*, 441 Mich 590, 599-604 (1993) (judge had an individual arrested and jailed for failing to follow his order which contradicted an administrative order from the chief judge).

[2] For further discussion of criminal and civil contempt sanctions, see Chapter 2.

[3] For discussion of the differences between civil and criminal contempt of court, see Sections 2.1, 2.2, 2.3.

1.4 Courts' Inherent Authority to Exercise Contempt Power

Courts' authority to punish for contempt is inherent in the judicial power vested in courts by Const 1963, art 6, § 1. In *In re Huff*, 352 Mich 402, 415-416 (1958), the Michigan Supreme Court stated:

> "There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of statute, which is merely declaratory and in affirmation thereof, to adjudge and punish for contempt . . . . Such inherent power extends not only to contempt committed in the presence of the court, but also to constructive contempt arising from refusal of defendant to comply with an order of the court. Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it." (Internal citations omitted.)

See also *People v Joseph*, 384 Mich 24, 35 (1970), and *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14 (1987), and cases cited therein.

"This inherent judicial power to punish contempt, which is essential to the administration of the law, does not include the power to mete out certain punishments for contemptuous acts beyond those contempt powers inherent in the judiciary." *In re Bradley Estate*, ___ Mich ___, ___ (2013) (concluding that the punishment authorized in MCL 600.1721, indemnification damages for civil contempt, does not implicate the judiciary's inherent contempt power).

A. Statutory Provisions Illustrating Use of Courts' Contempt Powers

As noted, courts have inherent power to punish contempt of court. This power cannot be limited by statute, but the Legislature may still provide for use of the contempt power in certain situations. The Michigan Legislature has enacted numerous statutes providing for the use of the contempt power. The broadest of these statutes, MCL 600.1701, contains provisions illustrative of the uses of the contempt power. That statute states:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:

"(a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due its authority.

"(b) Any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings.

"(c) All attorneys, counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner elected or appointed to perform any judicial or ministerial services, for any misbehavior in their office or trust, or for any willful neglect or violation of duty, for disobedience of any process of the court, or any lawful order of the court, or any lawful order of a judge of the court or of any officer authorized to perform the duties of the judge.

"(d) Parties to actions for putting in fictitious bail or sureties or for any deceit or abuse of the process or proceedings of the court.

"(e) Parties to actions, attorneys, counselors, and all other persons for the nonpayment of any sum of money which the court has ordered to be paid.

"(f) Parties to actions, attorneys, counselors, and all other persons for disobeying or refusing to comply with any order of the court for the payment of temporary or permanent alimony or support money or costs made in any action for divorce or separate maintenance.

"(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.

"(h) All persons for assuming to be and acting as officers, attorneys, or counselors of any court without authority; for rescuing any property or persons that are in the custody of an officer by virtue of process issued from that court; for unlawfully detaining any witness or party to an action while he or she is going to, remaining at, or returning from the court where the action is pending for trial, or for any other unlawful interference with or resistance to the process or proceedings in any action.

"(i) All persons who, having been subpoenaed to appear before or attend, refuse or neglect to obey the subpoena, to attend, to be sworn, or when sworn, to answer any legal and proper interrogatory in any of the following circumstances:

"(*i*) As a witness in any court in this state.

"(*ii*) Any officer of a court of record who is empowered to receive evidence.

"(*iii*) Any commissioner appointed by any court of record to take testimony.

"(*iv*) Any referees or auditors appointed according to the law to hear any cause or matter.

"(*v*) Any notary public or other person before whom any affidavit or deposition is to be taken.

"(j) Persons summoned as jurors in any court, for improperly conversing with any party to an action which is to be tried in that court, or with any other person in regard to merits of the action, or for receiving communications from any party to the action or any other person in relation to the merits of the action without immediately disclosing the communications to the court.

"(k) All inferior magistrates, officers, and tribunals for disobedience of any lawful order or process of a superior court, or for proceeding in any cause or matter contrary to law after the cause or matter has been removed from their jurisdiction.

"(l) The publication of a false or grossly inaccurate report of the court's proceedings, but a court shall not punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceedings, or decision had in the court.

"(m) All other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record to enforce the civil remedies of any parties or to protect the rights of any party." MCL 600.1701.

B. Courts Limited by Penalty Provisions in Statutes

Although courts have inherent contempt powers, where the Legislature provides penalties for contempt of court, courts must abide by such provisions unless they are unconstitutional. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 223 (1966), and *Catsman v City of Flint*, 18 Mich App 641, 648-650 (1969).

1.5 Statutory Provisions Assigning Contempt Powers to Particular Courts

MCL 600.1701 assigns contempt power to the "supreme court, circuit court, and *all other courts of record* . . . ." (Emphasis added.)

Under MCL 600.1416(1), the other courts of record are the Court of Appeals, the Court of Claims, probate courts, and "any other courts the legislature designates as courts of record." In addition, statutes assign the district and municipal courts contempt power. Thus, in addition to the Michigan Supreme Court and the circuit courts, the following courts possess contempt power:

- **Court of Appeals.** The Court of Appeals is a court of record. Therefore, it has the authority to punish attorneys and parties for disobedience of its orders. *In re Albert*, 383 Mich 722, 724 (1970), and *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 756-757 (1990).

- **District and Municipal Courts.** MCL 600.8317 states in part that district courts have "the same power to . . . punish for contempt as the circuit court now has or may hereafter have." See also MCL 600.6502, which states that municipal courts are "governed by statutes and supreme court rules applicable to the district court," except as otherwise provided.

- **Probate Courts.** In addition to MCL 600.1701, MCL 600.801 provides that the probate court is a "court of record." Therefore, the probate courts have the same broad contempt powers as those conferred upon all courts of record by MCL 600.1701.

- **Court of Claims.** MCL 600.6428 states that "[t]he court of claims is hereby given the same power . . . to punish for contempt as the circuit courts of this state now have or may hereafter have."

1.6 Contempt Powers of Quasi-Judicial Officers

MCL 600.1701(c) states that judges may find persons in contempt for disobeying the lawful orders of "any officer authorized to perform the duties of the judge." Thus, a judge may punish a contemnor for disobedience of an order issued or recommended by a quasi-judicial officer. MCL 600.1701(i)(*ii*) and (*iv*) provide more specific authority in cases where a person has disobeyed a subpoena. Under these provisions, "[a]ny officer of a court of record who is empowered to receive evidence" and "[a]ny referees or auditors appointed according to the law to hear any cause or matter" may recommend that a judge punish as contempt of court the disobedience of a subpoena.

In addition to these general rules, several statutes and court rules provide more specific guidance on the authority of quasi-judicial officers to punish for contempt.

A. Magistrates

MCR 4.401(A) requires proceedings involving magistrates to be in accordance with relevant statutes. MCR 4.401(B) states that "[n]otwithstanding statutory provisions to the contrary, magistrates exercise only those duties expressly authorized by the chief judge of the district or division." The word "only" is a word of limitation: even though MCL 600.8511 specifically authorizes a magistrate to conduct a certain type of proceeding, the magistrate may not conduct that type of proceeding unless authorized by the chief judge. MCR 4.401(B) allows the chief judge to limit the types of proceedings conducted by a magistrate, but it does not expressly allow the chief judge to expand a magistrate's duties beyond those listed in MCL 600.8501 *et seq*.

Under specific circumstances and if authorized to do so by the chief judge, district court magistrates may conduct arraignments for contempt violations. MCL 600.8511(d) authorizes a district court magistrate to conduct arraignments for contempt violations that "arise[] directly out of a case for which a judge or district court magistrate conducted the arraignment under subdivision (a), (b), or (c), or the first appearance under section 8513, involving the same defendant." District court magistrates are not authorized to conduct violation hearings or sentencings, but may set bond and accept pleas. MCL 600.8511(d).

B. Referees

Circuit court referees may conduct contempt proceedings but may not issue contempt orders. *Steingold v Wayne Co Probate Court Judge (In re Smith)*, 244 Mich App 153, 157 (2000).[4]

C. Administrative Hearing Officers

The Legislature has given many governmental agencies contempt powers to punish disobedience of their hearing officers' orders. In these instances, a statute will either provide for direct authority to exercise the contempt power or require the agency to apply to the circuit court to initiate contempt proceedings or enforce a contempt citation. See for example:

- MCL 257.322(3)(c) (in accordance with rules and practice in circuit courts, Secretary of State hearing officer may punish for contempt witnesses who fail to appear or testify);
- MCL 418.853 (after Workers Disability Compensation Bureau magistrate enters contempt order, magistrate may apply to circuit court for enforcement of the order);[5] and
- MCL 408.1029 (Department of Labor may apply to circuit court for order compelling evidence or testimony, and failure to obey such an order may be punished as contempt).

1.7 Jurisdiction of Contempt Proceedings

The court with jurisdiction of the proceedings during which the contempt occurred has jurisdiction of the contempt proceedings. *People v Joseph*, 384 Mich 24, 34-35 (1970), and *In re Summerville*, 148 Mich App 334, 340-341 (1986) ("juvenile court" has jurisdiction to conduct contempt proceedings for violations of its orders even after the child involved has passed the maximum jurisdictional age).

A person may not be held in contempt of court for disobeying an order the court was without jurisdiction to make. *Teasel v Dep't of Mental Health*, 419 Mich 390, 417 (1984).[6]

In cases of indirect contempt, absent a sufficient affidavit, jurisdiction over the alleged contemnor does not attach. *Steingold v Wayne Co Probate Court Judge (In re Smith)*, 244 Mich App 153, 157-159 (2000).[7]

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[4] See Sections 5.9, 5.10, and 5.21 for detailed discussion of juvenile and domestic relations contempt proceedings.

[5] See also *In re Contempt of Robertson (Davilla v Fischer Corp),* 209 Mich App 433, 439 (1995)).

[6] But see Section 5.6(C) (obedience of incorrect orders).

[7] See Section 3.9 for a discussion of affidavits.

The filing of an unverified affidavit is not a jurisdictional defect; therefore, it may be cured by amendment. *Stoltman v Stoltman*, 170 Mich App 653, 656-657 (1988).

Chapter 2: Types of Contempt of Court

2.1 Distinguishing Civil and Criminal Contempt

"The sui generis nature of contempt proceedings has often obfuscated the distinction between criminal and civil contempt." *In re Contempt of Dougherty*, 429 Mich 81, 90 (1987). This is so in part because a permissible sanction for both civil and criminal contempt of court is incarcerating the contemnor. See *id.* at 90-91.

However, prior to the initiation of a contempt proceeding, it is necessary to distinguish between civil and criminal contempt because some, though not all, of the procedural safeguards applied in ordinary criminal proceedings apply to criminal contempt proceedings. *Id.* at 91. See also *People v Johns*, 384 Mich 325, 331 (1971), and *Sands v Sands*, 192 Mich App 698, 702-703 (1992) (where defendant was not informed until sentencing that he was found in criminal contempt, conviction must be reversed).

To distinguish civil from criminal contempt, it is necessary to look at the purpose of the sanctions. If the purpose of a sanction is to punish the contemnor for a past act that he or she was forbidden to do, criminal contempt proceedings may be instituted. If, on the other hand, the purpose of the sanction is to coerce the contemnor to do an act for the benefit of the complainant, then civil contempt proceedings are appropriate. See *In re Contempt of Auto Club Ins Ass'n (Algarawi v Auto Club Ass'n)*, 243 Mich App 697, 715-716 (2000). A recent detailed

discussion of the distinction between civil and criminal contempt is contained in *In re Contempt of Dougherty, supra*.

A. *In re Contempt of Dougherty*

In *Dougherty,* the defendants were found in civil contempt of court for violating a permanent injunction prohibiting them from trespassing on the plaintiff's property and hindering access to and egress from the plaintiff's industrial plant. The defendants were jailed until they promised not to violate the injunction in the future. The Supreme Court held that the trial court erred by imposing a coercive sanction to compel future compliance with the injunction where there was only a past violation of the injunction. Because the violation occurred in the past and the defendants were in compliance with the injunction at the time of the contempt hearing, the trial court was limited to instituting criminal contempt proceedings and imposing criminal contempt sanctions upon the defendants, or to issuing a civil contempt order compensating the plaintiff for actual losses caused by the defendants' actions. *Id.* at 87.

In so holding, the *Dougherty* majority adopted the general test for distinguishing civil and criminal contempt set forth in *Gompers v Bucks Stove & Range Co*, 221 US 418, 443 (1911), and restated in *People ex rel Attorney Gen v Yarowsky (In re Smith)*, 236 Mich 169, 171-172 (1926). *Dougherty, supra* at 95-96. This test states:

> "'The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.'" *Dougherty, supra* at 94, quoting *Gompers*, *supra* at 443.

In applying the *Gompers* test, the majority in *Dougherty* first emphasized the importance of distinguishing between civil and criminal contempt. Although difficult to make, the distinction between civil and criminal contempt "is often critical since a criminal contempt proceeding requires some, but not all, of the due process safeguards of an ordinary criminal trial[1] and because the purpose sought to be achieved by imprisoning a civil contemnor (coercion) varies significantly from the purpose of imprisoning a criminal contemnor (punishment)." *Id.* at 91.

[1] See Section 3.2 for a detailed discussion of these procedural safeguards.

The *Dougherty* majority then noted that the distinction between civil and criminal contempt has in essence been codified at MCL 600.1715(2) (indefinite coercive sanction is permitted only where contemnor still has power to perform act required by court order), and added that MCL 600.1721 provides for compensatory sanctions where the contumacious conduct "has caused actual loss or injury to any person . . . ."[2]

B. Contemnor Must Be in Present Violation of the Court's Order for Coercive Remedy to Be Imposed

The *Dougherty* majority reasoned that coercive contempt sanctions were inappropriate in the case before it because the contemnors were not in present violation of the court's order. The Court admitted that, in certain cases, a coercive civil sanction may be appropriate where the contemnor has committed a past forbidden act. *Dougherty, supra* at 99. However, for a civil contempt sanction to be imposed in such a case, there must be "some act that can be coerced by the sanction . . . ." *Id.* "[A] coercive sanction is proper where the contemnor, at the time of the contempt hearing, is under a present duty to comply with the order and is in *present violation* of the order." *Id.* (Emphasis in original.) The Court used the following example to illustrate:

> "A court enjoins a defendant from striking. The defendant strikes and a contempt hearing is held. At the hearing defendant is under duty to obey the order and, if he is still on strike, is presently violating the order. Therefore, a coercive sanction, such as a $100 fine for each day he remains on strike, is entirely proper." *Id.* at 99-100.

C. Anticipatory Contempt

The concept of "anticipatory contempt," or holding a person in contempt of court for refusing to promise to obey a court's order in the future, has been repudiated by both state and federal courts. See *In re Contempt of Dougherty*, 429 Mich 81, 104-107 (1987), and cases cited therein. In *United States v Johnson*, 736 F2d 358, 360 (CA 6, 1984), one of the cases cited by *Dougherty*, the Court held that it was an improper use of the contempt power to impose coercive sanctions against a witness who stated his intention to refuse to testify at the criminal trial of alleged accomplices.

> **Note:** The Michigan Supreme Court in *Dougherty, supra* at 111-112, criticized the trial court for requiring the

[2] See Section 4.2(C) and 4.3 for discussion of these statutory provisions.

contemnors to promise to obey the injunction in the future *in order to purge themselves of the contempt.*[3] However, one commentator believes that the *Dougherty* case can be read to allow a court to require promised future compliance in order to purge the contempt, where a coercive sanction was properly imposed in the first instance (i.e., where the contemnor was under a present duty to comply and in violation of the order at the time of the hearing). See Tahvonen, *Contempt: recent developments,* 1 Colleague 1, 7 (1988).

2.2 Comparing Civil and Criminal Contempt Proceedings

A. Purpose for Imposing Sanctions

In general, the sanctions for civil contempt are coercive and remedial in nature.[4] They are intended to compel compliance with a court's directives by imposing a conditional sanction until the contemnor complies or no longer has a duty or the ability to comply. *Dougherty, supra* at 98-100. Therefore, civil contemnors carry "the keys of their prison in their own pockets." *In re Nevitt*, 117 F 448, 461 (CA 8, 1902), quoted in *Harvey v Lewis (Appeal of List)*, 10 Mich App 709, 715 (1968). See also MCL 600.1715(2) (coercive commitment must end when contemnor performs the required act or no longer has the ability to do so).

The sanctions for criminal contempt are punitive in nature. They are intended to preserve the court's authority by punishing past misconduct through imposition of a fixed sanction where there is no opportunity or need for the court to compel the contemnor's compliance with its order. *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 647-648 (1990). In *In re Contempt of Rapanos*, 143 Mich App 483, 496-497 (1985), the Court of Appeals concluded that the defendant was properly punished for criminal contempt where, for eight months, the defendant ignored the trial court's order to immediately return business records to the defendant's business partner and committed new violations by taking more records during that period. While taking the additional records, the defendant affronted the dignity of the court by stating that "he could do anything he wanted to." *Id.* at 497. The defendant's actions impaired the ongoing operation of the business and delayed the underlying litigation. *Id.* at 497-498.

[3] See Section 2.2(G) for discussion of a contemnor's ability to purge contempt.

[4] For a detailed discussion of sanctions, see Chapter 4.

B. Types of Sanctions That May Be Imposed

Two types of sanctions may be imposed in civil contempt proceedings: coercive sanctions, to force compliance with a court order, and compensatory sanctions, to compensate persons injured by the contumacious conduct. *In re Contempt of Dougherty*, 429 Mich 81, 97 (1987), *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 646-647 (1990), and MCL 600.1721. A proper civil contempt coercive sanction includes incarceration. *In re Moroun*, 295 Mich App 312, 335-336 (2012). The confinement, however, must be conditional. *Moroun*, *supra* at 336.[5] When deciding whether to impose incarceration as a sanction for civil contempt, a trial court "must consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Id.* at 337. "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy."[6] *United States v United Mine Workers*, 330 US 258, 304 (1947). The court may also require a contemnor to pay civil fines and the costs and expenses of the proceedings. MCL 600.1715(2).

In a criminal contempt proceeding, the court may impose an unconditional and fixed jail sentence, a penal fine, or both. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 223-224 (1966). Under the general contempt statutes in the Revised Judicature Act, the jail sentence may be up to 93 days and the fine may be up to $7,500. MCL 600.1715(1). The court may also place an individual on probation in the manner provided for persons guilty of a misdemeanor. MCL 600.1715(1). The contemnor may also be ordered to pay damages to any person who has suffered an actual loss or injury as a result of the contumacious conduct. MCL 600.1721.[7]

The nature of the fine imposed may itself determine whether civil or criminal proceedings are required. In *United Mine Workers v Bagwell*, 512 US 821 (1994), the trial court found the union in contempt for unlawful strike-related activities. The trial court announced that it would impose a civil fine of $100,000 for each violation involving violence and $20,000 for each non-violent violation. When the union violated the injunction, it was found in contempt of court and ordered to pay $52 million in fines to the state and two counties. The United

[5] For more information on a contemnor's ability to purge the contempt, see Section 2.2(G).

[6] The Court uses the term "fine" here to describe what MCL 600.1721 refers to as "damages."

[7] See Section 4.3 for a discussion of the availability of compensatory damages in criminal contempt proceedings.

States Supreme Court held that the fines were criminal, not civil, and reversed the trial court's decision because the union was not afforded the right to jury trial. The fines were not compensatory, and announcing them in advance did not render them coercive because the union had no opportunity to purge itself of the contempt by complying with the trial court's order after the fines were imposed. "The union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law." *Id.* at 837.[8]

C. Intent of the Contemnor

Willfulness is not a necessary element of civil contempt. *In re Contempt of United Stationers Supply Co (Walker v Henderson)*, 239 Mich App 496, 499-501 (2000). Writing for the majority in *McComb v Jacksonville Paper Co*, 336 US 187, 191 (1949), Justice Douglas explained why willful intent is not required for civil contempt:

> "The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently." (Internal citations omitted.)

An essential element of criminal contempt is that the defendant acted willfully. *DeGeorge v Warheit*, 276 Mich App 587, 592 (2007), citing *People v Matish*, 384 Mich 568, 572 (1971). "'Willfulness . . . implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.'" *Vaughn v City of Flint*, 752 F2d 1160, 1168 (CA 6, 1985), quoting *TWM Mfg Co Inc v Dura Corp*, 722 F2d 1261, 1272 (CA 6, 1983).

In *People v Little*, 115 Mich App 662 (1982), a criminal defendant moved to withdraw his guilty plea, claiming that he lied during the plea proceeding. The judge issued an order to show cause why the defendant should not be held in contempt. The defendant's attorney testified at the show cause hearing that he advised the defendant to plead guilty because "the case was unwinnable." The Court of

[8] See Section 2.2(G) (contemnor's ability to purge contempt).

Appeals reversed the criminal contempt citation, finding that it was not proved beyond a reasonable doubt that the defendant's false statements at the plea proceeding were culpable. *Id.* at 665.

D. Standard of Proof

The standard of proof for civil contempt is unsettled. Some cases hold that proof of the contumacious conduct must be "clear and unequivocal." See, e.g., *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 757 (1990). For a different view, see *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968) (applying a preponderance of evidence standard), and MCR 3.708(H)(3) (clear and convincing evidence standard applied in civil contempt proceeding after an alleged violation of a personal protection order).

In cases of criminal contempt, it must be proved beyond a reasonable doubt that the individual engaged in a willful disregard or disobedience of the authority or orders of the court. *DeGeorge v Warheit*, 276 Mich App 587, 592 (2007).

E. Primary Interested Party

The primary interested party[9] in a civil contempt proceeding is the person or persons who are being harmed by the contemnor's refusal to obey a court order. These persons are usually the parties in a case. *People ex rel Attorney Gen v Yarowsky (In re Smith)*, 236 Mich 169, 171-172 (1926), citing *State v Knight*, 54 NW 412 (1893). See also *In re Pecora (United States v Russotti)*, 746 F2d 945, 949 (CA 2, 1984), where the Court stated that, "in the context of civil litigation, . . . a civil contempt for failure to obey a court order may not be initiated by the trial judge, but is a remedy available only for the benefit of the parties who obtained the order in issue."

The primary interested parties in a criminal contempt proceeding are first, the court whose authority is being preserved, and second, the public. The United States Supreme Court in *Bloom v Illinois*, 391 US 194, 201 (1968), characterized criminal contempt as follows:

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. . . .

> "Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are

[9] See Section 3.6 for a discussion of who may initiate contempt proceedings.

> indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates."

F. Court's Ability to Restore the Status Quo Ante

Many cases decided prior to *In re Contempt of Dougherty*, 429 Mich 81 (1987),[10] distinguish civil and criminal contempt of court using an "after the fact determination" as to whether the "status quo ante" can be restored. See, e.g., *Jaikins v Jaikins*, 12 Mich App 115, 120-121 (1968).

Civil contempt proceedings are appropriate where the court is able to "restore the status quo ante." If the court is unable to do so, criminal contempt proceedings are appropriate. *In re Contempt of Rapanos*, 143 Mich App 483, 496-498 (1985). In *Rapanos*, the Court of Appeals concluded that the defendant was properly punished for criminal contempt where, for eight months, the defendant ignored the trial court's order to return business records to the defendant's business partner. The Court held that the defendant's retention of the business records so disrupted the injured party's business that the status quo could not be restored.

The ability to "restore the status quo ante" means that the court is able to do one of two things. First, the court may be able to compel the contemnor to act in accordance with the original court order. The type of sanction often used to accomplish this is a conditional jail sentence. See *Watters v Watters*, 112 Mich App 1, 10 (1981), and *Harvey v Lewis (Appeal of List)*, 10 Mich App 709, 716 (1968).

Alternatively, the court may be able to put the injured parties in the same position they were in prior to the contumacious conduct. The type of sanction often used to accomplish this is a financial penalty payable to the court or to the injured party. A financial penalty is sometimes coupled with a conditional jail sentence that must be served until the contemnor complies with the court's order to pay the financial penalty. See *United States v United Mine Workers*, 330 US 258, 302 (1947), and *In re Jacques*, 761 F2d 302, 305-306 (CA 6, 1985).

G. Contemnor's Ability to Purge the Contempt

In civil contempt proceedings, the contemnor must be given an opportunity to purge himself or herself of the contempt by complying

[10] See Section 2.1 for a discussion of *Dougherty*.

with the conditions set by the court to remedy the situation. *Casbergue v Casbergue,* 124 Mich App 491, 495 (1983). "Civil contempt imposes a term of imprisonment which ceases when the contemnor complies with the court's order or when it is no longer within his or her power to comply." *Moroun*, 295 Mich App at 336. In *Moroun*, the Court of Appeals upheld the incarceration of two individuals responsible for the contemnor corporation (the director and president), but reversed the part of the trial court's order conditioning their release on the corporation's "full compliance" with the court order requiring it to complete the performance of the construction contract at issue. The Court found that the individuals "[did] not have the present immediate ability to actually finish the construction . . . for a period of 6 to 12 months[,]" as required by the court order that prompted the contempt proceedings. *Id*. at 340. The case was remanded for the trial court "to identify the act or duty [the] appellants will be required to perform in order to purge the contempt." *Id*. at 341.

In a criminal contempt proceeding, because the penalty is unconditional, fixed, and imposed as punishment for past misconduct, the contemnor does not have the ability to purge himself or herself of the contempt. *State Bar v Cramer,* 399 Mich 116, 128 (1976).

2.3 Table: Comparison of Civil and Criminal Contempt

	Civil Contempt	Criminal Contempt
Purpose for imposing sanction	**Coercive:** to compel compliance with court's order by imposing punishment for indefinite term until contemnor complies or no longer has ability to comply. At time of hearing, contemnor must be (1) under a duty to comply with the court's order, and (2) in violation of the court's order. **Compensatory:** to indemnify for loss caused by contemnor's conduct.	**Punitive:** to preserve the court's authority and dignity by punishing past disobedience of court's order. **Compensatory:** to indemnify for loss caused by contemnor's conduct.
Sanctions that may be imposed	**Monetary:** Fine (limited to $7,500 per single contumacious act), costs, and expenses of proceedings; damages for injuries resulting from contumacious conduct, including attorney fees. **Jail:** Contemnor may be incarcerated indefinitely until compliance or contemnor unable to comply. Incarceration is indeterminate and conditional.	**Monetary:** Fine limited to $7,500 fine per single contumacious act (unless otherwise provided); damages for injuries resulting from conduct, including attorney fees. **Jail:** Limited to 93 days per single contumacious act, unless otherwise provided. Incarceration is fixed and absolute. Probation may be imposed.
Intent of contemnor	Willfulness is not required.	Willfulness is required.
Primary interested party	Injured person(s). May be the court, but is usually one of the litigants in the underlying action.	Usually the court and/or the public.
Court's ability to restore status quo ante	Status quo ante can be restored through coerced compliance, or it is still possible to grant the relief ordered in the original court order.	Status quo ante altered so that it cannot be restored, or relief ordered in original court order can no longer be obtained.
Contemnor's ability to purge contempt	Contemnor must be given opportunity to purge by complying with conditions set by the court.	Contemnor has no opportunity to purge.

2.4 Direct Contempt ("Summary Contempt Proceedings")

A. "Immediate View and Presence"

Direct contempt of court occurs "during [the court's] sitting" and "in [the court's] immediate view and presence." MCL 600.1701(a). "When any contempt is committed in the immediate view and presence of the court, the court may punish it summarily by fine, imprisonment, or both."[11] MCL 600.1711(1). Thus, when direct contempt occurs, the proceedings are often referred to as "summary contempt proceedings."

The Michigan Supreme Court defined "immediate view and presence" as follows:

> "'[I]mmediate view and presence' are words of limitation, and exclude the idea of constructive presence. The immediate view and presence does not extend beyond the range of vision of the judge, and the term applies only to such contempts as are committed in the face of the court. Of such contempts, he may take cognizance of his own knowledge, and may proceed to punish summarily such contempts, basing his action entirely upon his own knowledge. All other alleged contempts depend solely upon evidence, and are inferences from fact, and the foundation for the proceedings to punish therefor must be laid by affidavit." *In re Wood*, 82 Mich 75, 82 (1890).

To punish contempt summarily, all necessary facts must be within the personal knowledge of the judge. *In re Scott*, 342 Mich 614, 619 (1955), citing *Wood*, *supra.* A judge does not have personal knowledge for purposes of summary contempt if the judge must rely on the testimony of other persons to establish the case against the contemnor. *Scott*, *supra* at 619-622.

In *Wood*, the Michigan Supreme Court held that the alleged contemnor's writing words of protest upon a check made out to the court but delivered to the court clerk was indirect contempt and initiation of contempt proceedings required that "the misconduct which is alleged to constitute the contempt [be] proved to the satisfaction of the court by affidavit." *Wood*, *supra* at 83. Because no affidavit had been provided, the court did not have the jurisdiction necessary to conduct contempt proceedings. *Id.*

[11] Note that summary proceedings are not mandatory. See Section 3.3 and 3.4.

See also *In re Collins*, 329 Mich 192, 196 (1950) (filing of false pleadings may not be summarily punished); *In re Contempt of Barnett*, 233 Mich App 188, 190-191 (1998) (where information concerning the alleged contemnor's statements in jurors' presence was relayed to the judge by a bailiff, summary proceedings were improper); *Schoensee v Bennett*, 228 Mich App 305, 318 (1998) (summary punishment of attorney was proper where attorney admitted during a hearing that merely seeking a stay from the Court of Appeals did not stay the trial court's order, but the attorney indicated an intent to disobey the trial court's order anyway); *In re Contempt of Robertson (Davilla v Fischer Corp)*, 209 Mich App 433, 439-441 (1995) (witness's failure to obey a subpoena may not be summarily punished because the reason for the witness's absence is not within the personal knowledge of the judge).

B. "During Its Sitting"

In MCL 600.1701(a), the phrase "during its sitting" is not as strictly limited as is the phrase "immediate view and presence." "During its sitting" includes the period of time when the judge is actually in the courtroom conducting judicial business. Therefore, if the contempt occurs in the courtroom during a period when the court has concluded one case and is about to proceed with another, it qualifies as having occurred during "the sitting of the court." *In re Contempt of Warriner (City of Detroit v Warriner)*, 113 Mich App 549, 552-554 (1982).

2.5 Indirect Contempt

Indirect contempt occurs outside the immediate view and presence of the court. Such contempt may not be punished summarily but only "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." MCL 600.1711(2). MCR 3.606 contains the procedural requirements for indirect contempt cases.[12]

2.6 Summary: Elements of Contempt of Court

A. Direct Criminal Contempt

The elements of direct criminal contempt are:

- the willful doing of a forbidden act, or the willful refusal to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,

[12] See Chapter 3 for discussion of procedural requirements.

- committed in the immediate view and presence of the court,
- where the court seeks to punish misconduct that has altered the status quo ante so that it cannot be restored, or the relief sought by the original court order can no longer be obtained, or
- order in the courtroom cannot be restored unless criminal contempt sanctions are used.

B. Direct Civil Contempt

The elements of direct civil contempt are:

- the doing of a forbidden act, or the failure to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed in the immediate view and presence of the court,
- where the court seeks to coerce compliance and the contemnor is under a present duty to comply with the court's order, is in present violation of the court's order, and still has the ability to perform the act ordered by the court, or
- it is still possible to grant the relief originally sought by the court order, or
- it is still possible to restore order in the courtroom.

C. Indirect Criminal Contempt

The elements of indirect criminal contempt are:

- the willful doing of a forbidden act, or the willful refusal to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed outside the immediate view and presence of the court,
- where the court seeks to punish past misconduct and civil contempt remedies are inappropriate.

D. Indirect Civil Contempt

The elements of indirect civil contempt are:

- the doing of a forbidden act, or the failure to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed outside the immediate view and presence of the court,
- where the court seeks to coerce compliance and the contemnor is under a present duty to comply with the court's order, is in present violation of the court's order, and still has the ability to perform the act ordered by the court, or
- it is still possible to grant the relief originally sought by the court order.

Chapter 3: Procedural Requirements

3.1 Threshold Determinations

A. Informing Alleged Contemnor of the Nature of the Proceedings

Prior to initiation of the proceedings, the court must determine whether civil or criminal contempt proceedings are appropriate because a defendant charged with criminal contempt is entitled to be notified of that fact when he or she is notified of the charges. *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 649 (1990). In *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968), the Court of Appeals, quoting *Gompers v Bucks Stove & Range Co*, 221 US 418, 446 (1911),

emphasized that the nature of the proceedings must be made clear by the pleadings:

> "'Every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view.'"[1]

See also *Sands v Sands*, 192 Mich App 698, 702-703 (1992) (where a defendant was not informed that criminal contempt was alleged, and where defendant was called to testify under the "adverse party rule," defendant's contempt conviction must be reversed).

B. Determining Whether a Hearing Is Required

After the court determines whether criminal or civil contempt proceedings are appropriate, the court must determine whether the contempt was direct or indirect. If the contempt was committed "during its sitting" and in the "immediate view and presence of the court," the contempt is direct and the court may summarily make a finding of contempt and punish the contemnor. If, on the other hand, the court must rely on the testimony of others to establish that contumacious conduct has occurred, the contempt is indirect and a separate hearing must be held on the issue. Both civil and criminal contempt may be direct or indirect.[2]

3.2 Procedural Due Process Requirements

A. General Requirements for All Cases of Indirect Contempt

In all cases of indirect contempt, proper notice of the charges, a reasonable opportunity to prepare a defense or explanation, and the opportunity to testify and call witnesses are basic procedural due process requirements. *In re Contempt of Robertson (Davilla v Fischer Corp)*, 209 Mich App 433, 438 (1995). What constitutes a reasonable opportunity to prepare a defense "must be viewed in the context of the entire situation." *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 212-213 (1966). In *Cross*, the Court considered the

[1] SCAO Form MC 230, the motion and order to show cause, contains a check box to indicate civil or criminal contempt. It can be accessed at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc230.pdf.

[2] See Sections 2.4 and 2.5 for discussion of direct and indirect contempt.

seriousness of the charges and the amount of time allowed for trial preparation, including adjournments.

When a contempt hearing is held even though the contemnor is not prepared to present his or her defense, there is no due process violation when the contemnor had sufficient time in which to prepare a defense and to secure witnesses in his or her behalf. *DeGeorge v Warheit*, 276 Mich App 587, 593-594 (2007). In *DeGeorge*, the contempt hearing was held more than two months after the contemnor received notice of the contempt motion, and more than one month after the contemnor filed his memorandum in opposition to the motion. The Court concluded that the contemnor's failure to ready himself for the hearing, despite having an adequate amount of time to do so, did not offend the contemnor's due process rights.

A public trial is required. *In re Oliver*, 333 US 257, 273 (1948).

An indigent defendant may not be incarcerated following a civil or criminal contempt proceeding if assistance of counsel has been denied. *Cooke v United States*, 267 US 517, 537 (1925); *Mead v Batchlor*, 435 Mich 480, 505-506 (1990). But see *Turner v Rogers*, 564 US ___, ___ (2011),[3] where the United States Supreme Court concluded that in cases involving child support enforcement, "where . . . the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide support) [even if that person may be subject to incarceration up to one year]." However, to meet due process requirements, "the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." *Turner, supra* at ___. Alternative procedures include sufficient notice regarding the importance of the ability to pay, a fair opportunity to present and dispute relevant financial information, and court findings on the noncustodial parent's ability to pay. *Id.* at ___.

B. Procedural Requirements That Differ Depending Upon Whether Proceeding Is Civil or Criminal

In cases of criminal contempt, the contemnor is entitled to the procedural protections to which a defendant in a criminal case of equal gravity would be entitled.[4] *People v Johns*, 384 Mich 325, 333

[3] The Court specifically stated that this holding does not address cases where the past due child support is owed to the state or unusually complex cases where the noncustodial parent "'can fairly be represented only by a trained advocate.'" *Turner*, 564 US at ___, quoting *Gagnon v Scarpelli*, 411 US 778, 788 (1973).

[4] For a summary of all of the constitutional rights afforded alleged criminal contemnors, see *United Mine Workers v Bagwell,* 512 US 821, 826-827 (1994).

(1971). "[I]n a civil contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense[.]" *Porter v Porter*, 285 Mich App 450, 456-457 (2009). See also *In re Moroun*, 295 Mich App 312, 334-335 (2012) (rudimentary due process satisfied where nonparty individuals who were responsible for the conduct of contemnor corporation's affairs were aware of the court order requiring specific performance and were notified of and directed to appear at the sanction hearing).

Criminal contempt must be proven "beyond a reasonable doubt." *In re Contempt of Rapanos*, 143 Mich App 483, 488-89 (1985). In civil contempt cases, the standard of proof is unclear. Some decisions require that proof of the contumacious conduct be "clear and unequivocal." See, e.g., *In re Contempt of Robertson*, 209 Mich App 433, 439 (1995). Other decisions have required only that the contempt be proven by a preponderance of the evidence. See *Porter*, 285 Mich App at 456-457; *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968).

In criminal contempt cases, the alleged contemnor is presumed innocent and must not be compelled to testify against himself or herself. See *Gompers v Bucks Stove & Range Co*, 221 US 418, 444 (1911); *Jaikins*, *supra*.

In civil contempt proceedings and criminal contempt proceedings not deemed "serious," the contemnor has no right to a jury trial.[5]

3.3 Summary Contempt Proceedings

Summary contempt proceedings may be conducted in cases of direct contempt.[6] MCL 600.1711(1) states:

> "When any contempt is committed in the immediate view and presence of the court, the court may punish it summarily by fine, or imprisonment, or both."

Note that the statute uses the word "may" rather than "shall." Summary contempt proceedings are not required in all cases of direct contempt.

When seeking to punish for contempt of court, a court should utilize "'the least possible power adequate to the end proposed.'" *Harris v United States*, 382 US 162, 165 (1965), quoting *Anderson v Dunn*, 19 US 204, 231 (1821). See also *In re Contempt of Scharg (People v Godfrey)*, 207 Mich App 438, 439 (1994). Due process requires that summary contempt proceedings be used only when absolutely necessary to prevent

[5] See Section 3.15.

[6] For a detailed discussion of direct contempt, see Section 2.4.

"'demoralization of the court's authority.'" *In re Oliver*, 333 US 257, 275 (1948), quoting *Cooke v United States*, 267 US 517, 536 (1925).

Summary contempt proceedings are proper "where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court." *Johnson v Mississippi*, 403 US 212, 214 (1971). See also *People v Kurz*, 35 Mich App 643, 660 (1971) ("in the absence of circumstances necessitating immediate corrective action," a separate hearing before a different judge should be conducted), and *In re Contempt of Warriner (City of Detroit v Warriner)*, 113 Mich App 549, 555 (1982) ("summary punishment was required in order to restore order in the courtroom and to ensure respect for the judicial process itself" where defendant raised his fist in the air and shouted). Compare *In re Meizlish*, 72 Mich App 732, 740 (1976) (summary proceedings were inappropriate where an attorney's allegedly contemptuous remarks were made after his clients had been sentenced and the courtroom was "all but empty").

Summary punishment of contempt that occurs in the court's immediate view and presence does not violate procedural due process requirements. *Warriner*, *supra* at 554-555.

3.4 Deferred Proceedings

"Although summary punishment of contumacious behavior is proper when the behavior is committed in the court's presence, and the court further determines that immediate corrective action is necessary, [MCL 600.1711], summary punishment is regarded with disfavor when deferred until the conclusion of a trial." *In re Contempt of Scharg (People v Godfrey)*, 207 Mich App 438, 439 (1994), citing *People v Kurz*, 35 Mich App 643, 657 (1971). In *Scharg*, the defendant was a defense attorney cited for five incidents of contempt during a criminal trial. The contempt citation was deferred until the end of the trial, but the court denied defendant's request for a hearing on the contempt charges. The Court of Appeals held that a hearing was required. Defendants in deferred summary proceedings are entitled to a full hearing before a different judge.[7] The Court reasoned that deferral of a contempt citation until after the conclusion of a trial indicates that immediate corrective action was unnecessary; therefore, the contemnor must be afforded the procedural protections of indirect contempt proceedings. *Scharg*, *supra* at 439-440.

If contempt proceedings are deferred, the contemnor is entitled to all of the same procedural protections as are afforded contemnors in indirect contempt proceedings. *In re Oliver*, 333 US 257, 275-276 (1948). But see *Sacher v United States*, 343 US 1, 11 (1952), where the Court, construing

[7] See Section 3.14(A) for a detailed discussion of whether a different judge must conduct the contempt hearing.

Rule 42(a) of the Federal Rules of Criminal Procedure, upheld the punishment of attorneys following the trial during which the attorneys were found in contempt.

3.5 Indirect Contempt

A hearing must be conducted when the contempt is indirect. MCL 600.1711(2) states:

> "When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit[8] or other method and opportunity has been given to defend."

Due process requires that, when a contempt is allegedly committed outside the court's presence, the accused be given notice of the charges against him or her, a reasonable time to prepare a defense to the charges, a hearing on those charges, and a reasonable opportunity to offer a defense of explanation. *In re Contempt of Robertson (Davilla v Fischer Corp)*, 209 Mich App 433, 438 (1995), and cases cited therein. In cases of criminal contempt, if summary contempt proceedings are not utilized, the defendant is entitled to the same procedural safeguards as for other crimes of equal gravity. *People v Johns*, 384 Mich 325, 333 (1971).

> **Note:** Closely related to the question of whether a separate hearing is required is whether the alleged contemnor is entitled to a different judge at the separate hearing. See Section 3.14 for further discussion of this issue.

3.6 Prosecution of Indirect Contempt Actions

In direct contempt cases, the judge who witnessed the contumacious conduct initiates the proceedings. There is no attorney for the complainant.[9] In cases of indirect contempt, the person who initiates the proceedings differs depending on whether the proceedings are civil or criminal. In some cases, the procedures for initiating the action are set forth in statute or court rule. Where such procedures are not provided, however, courts must look to case precedents—some federal—for guidance.

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[8] For a detailed discussion of the procedures to initiate contempt proceedings, see Section 3.8.

[9] See Section 3.3 for a discussion of summary contempt proceedings.

A. Specific Indirect Contempt Proceedings

In the following circumstances, initiation and prosecution of contempt proceedings are governed by statute or court rule:

- A prosecuting attorney, the attorney general, or a citizen may bring an action to abate a nuisance. MCL 600.3805.
- The Friend of the Court or an aggrieved party may institute actions to enforce orders and judgments in domestic relations cases. MCL 552.631(1) and MCR 3.208(B).
- In criminal contempt proceedings for violations of personal protection orders, a prosecuting attorney must prosecute the proceedings unless the petitioner retains her or his own attorney. MCL 764.15b(6) and MCR 3.708(G).

B. Unspecified Indirect Contempt Proceedings

Proceedings for indirect criminal contempt need not always be initiated by a prosecutor. MCR 3.606(A) governs the initiation of contempt proceedings for conduct occurring outside the immediate presence of the court:

> "**(A) Initiation of Proceeding.** For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> > "(1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or
> >
> > "(2) issue a bench warrant for the arrest of the person."

Because the court rule makes no distinction between civil and criminal contempt, MCR 3.606 allows a private party (or that party's attorney) to initiate a civil or criminal contempt proceeding by filing an ex parte motion. *DeGeorge v Warheit*, 276 Mich App 587, 600 (2007). According to the *DeGeorge* Court:

> "[B]ecause it is apparent that such an ex parte motion would ordinarily, if not always, be brought by a party to a case against an opposing party and because civil cases often involve only private parties, it is manifest that the Michigan Court Rules contemplate that a private party

> (and by obvious extension that party's attorney acting in a representative capacity) may initiate and prosecute a motion to hold an opposing party in criminal contempt." *Id*.

Even though criminal contempt proceedings resulting from a civil case are between the public and the defendant, the contempt proceedings need not be prosecuted by the prosecuting attorney. *In re Contempt of Henry*, 282 Mich App 656, 666 (2009). In *In re Contempt of Henry*, the defendant's reliance on MCL 49.153 was misplaced (MCL 49.153 requires that all actions in which the state is a party must be prosecuted by a prosecuting attorney) because MCR 3.606 "specifically governs the intiation of contempt proceedings for conduct occurring outside the immediate presence of the court." *In re Contempt of Henry, supra* at 667. MCR 3.606 is more specific than MCL 49.153, and the "[Michigan] Supreme Court is the final arbiter of all matters of practice and procedure in the Courts of this state." *In re Contempt of Henry, supra* at 667.

3.7 Right to Counsel for Alleged Contemnor

An indigent person cannot be jailed for contempt of court unless counsel has been appointed or waived.[10] *Mead v Batchlor*, 435 Mich 480, 505-506 (1990). See also *People v Johnson*, 407 Mich 134, 148 (1979) (the court is required to appoint counsel before conducting civil contempt proceedings for a failure to testify before a grand jury). The Court in *Mead*, *supra* at 498, concluded that the civil or criminal nature of the proceeding is not the determining factor. Rather, the right to appointed counsel is triggered by a person's fundamental interest in physical liberty. But see *Turner v Rogers*, 564 US ___, ___ (2011),[11] where the United States Supreme Court concluded that in cases involving child support enforcement, "where . . . the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide support) [even if that person may be subject to incarceration up to one year]." However, to meet due process requirements, "the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." *Turner, supra* at ___. Alternative procedures include sufficient notice regarding the importance of the ability to pay, a fair opportunity to present and

[10] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 5.

[11] The Court specifically stated that this holding does not address cases where the past due child support is owed to the state or unusually complex cases where the noncustodial parent "'can fairly be represented only by a trained advocate.'" *Turner*, 564 US at ___, quoting *Gagnon v Scarpelli*, 411 US 778, 788 (1973).

dispute relevant financial information, and court findings on the noncustodial parent's ability to pay. *Id.* at ___.

3.8 Initiation of Proceedings by Affidavit or Other Method

In cases of indirect contempt, or in direct contempt cases where the court has deferred a hearing on the alleged contempt, the court may punish the contemnor only "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." MCL 600.1711(2).

A. Initiation by Affidavit

MCR 3.606(A) contains the required procedures for adjudicating indirect contempts and states in relevant part:

> **"(A) Initiation of Proceeding.** For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> > "(1) order the accused person to show cause,[12] at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or
> >
> > "(2) issue a bench warrant for the arrest of the person."

Thus, indirect and deferred contempt proceedings are usually initiated by ex parte motion supported by an affidavit containing facts upon which the contempt charges are based. The court may then issue either a show cause order or a bench warrant for the civil arrest of the alleged contemnor. Before a show cause order or civil arrest warrant may issue, there must be a sufficient foundation of competent evidence contained in an affidavit or in the court's own records. *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 757 (1990). The alleged contemnor must be informed by the order to show cause or bench warrant of the nature of the charges and whether they are civil or criminal. *Ann Arbor v Danish News Co*, 139 Mich App 218, 232 (1984).

[12] See SCAO Form MC 230. It may be accessed at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc230.pdf .

Note: Statutes and court rules specific to certain contumacious conduct may alter or replace these general requirements. See Chapter 5 for some examples.

B. "Other Method" of Initiating Proceedings

The Michigan Supreme Court has held that a trial court could take judicial notice of its own records to satisfy the requirement of MCL 600.1711(2) that proceedings must be initiated "by affidavit or other method." *In re Albert*, 383 Mich 722, 724 (1970). In *Albert*, the Court held that where the contempt consisted of the failure to timely file pleadings in the Court of Appeals, a show cause order based upon affidavit was not required. "A court's judicial notice of its own records is a wholly satisfactory 'other method' of establishing the failure or the fact of filing in a particular period . . . ." *Id.* See also *In re Hudnut (Lazaros v Estate of Lazaros)*, 57 Mich App 351, 353 (1975) (where the administrator failed to appear or file a final accounting of an estate, the court could take judicial notice of its own records rather than file an affidavit to initiate contempt proceedings).

Although MCR 3.606(A) is the default court rule governing the initiation of proceedings involving indirect contempt, other "court rules also suggest that a civil contempt proceeding in a domestic relations case may be initiated on a written complaint or petition stating sufficient foundational facts on which to base a finding of contempt." *Porter v Porter*, 285 Mich App 450, 460 (2009). In *Porter*, "[the] defendant filed his motion to show cause and attached to the motion several exhibits, including proof of service, letters, and e-mails." *Porter*, *aupra* at 461. The motion included specific facts based on the defendant's personal knowledge, and the defendant signed it, "declaring its statements 'to be true to the best of [his] knowledge, information and belief.'" *Id*. This certification subjected him to sanctions and as a result "accord[ed] similar protection against false allegations as is afforded by contempt proceedings initiated by affidavit." *Id*. In light of all the information the defendant provided with his motion to show cause and the effect of his signature on the motion itself, the *Porter* Court stated:

> "[W]e find the lack of a notary affixed to [the] defendant's petition for an order to show cause insufficient to deprive the trial court of jurisdiction or warrant reversal of an otherwise proper finding of contempt. . . . . Our review of the record convinces us that [the] plaintiff was accorded rudimentary due process, and there was sufficient evidence of a willful violation of the court's order. We therefore decline to reverse on the basis of a technical violation of MCR 3.606(A)." *Porter*, 285 Mich App at 463.

C. Waiver of Notice

The alleged contemnor may waive the right to have the charges presented by affidavit by voluntarily appearing before the court and presenting a defense. *In re Lewis (Shaw v Pimpleton)*, 24 Mich App 265, 267-268 (1970). Where the alleged contemnor does not appear voluntarily, there is no waiver of the right to have the charges presented by affidavit. *In re Contempt of Nathan (People v Traylor)*, 99 Mich App 492, 494-495 (1980) (no waiver occurred where the alleged contemnor was involuntarily returned to the courtroom by a police officer who overheard her allegedly contemptuous remarks).

3.9 Requirements for Affidavits

Affidavits must comply with MCR 2.119(B). The following discussion briefly summarizes how the formal requirements for affidavits have been applied in the context of contempt proceedings.

A. Affidavits Must Be Based on Personal Knowledge

The affidavit attached to the ex parte motion must state with specificity factual allegations that, if true, will support a finding of contempt. The allegations must be verified by a person with personal knowledge of the facts alleged; however, "the court may rely on reasonable inferences drawn from the facts stated." *Steingold v Wayne Co Probate Judge (In re Smith)*, 244 Mich App 153, 158 (2000).

B. Notice Requirements

The court may consider only those charges that the alleged contemnor has been notified of and allowed an opportunity to defend against. *In re Gilliland*, 284 Mich 604, 613 (1938). An affidavit must inform the alleged contemnor of the specific offense with which he or she is charged; however, the affidavit need not be as detailed as a criminal information. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 214-215 (1966), and *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 649 (1990).

C. Proof of Damages

If damages are sought, the affidavit should allege facts from which the court can determine what damages have been caused by the contemnor's conduct.[13]

[13] See Section 4.3 for a discussion of "compensatory contempt."

D. Service of Motion and Affidavit on Alleged Contemnor

MCL 600.1968(4) and MCR 2.107(B)(1)(b) require personal service on the party of any "notice or order" in contempt proceedings unless the court orders otherwise. Following the hearing on the ex parte motion, the motion and the supporting affidavits must be personally served on the alleged contemnor in every case, regardless of whether a show cause order or bench warrant is subsequently issued. See *In re Smilay (Smilay v Oakland Circuit Judge)*, 235 Mich 151 (1926) (service of affidavit alleging violation of injunction on attorney for contemnor was insufficient, especially where attorney refused to act on behalf of contemnor in contempt proceedings).

3.10 Requirements for Orders to Show Cause

An order to show cause why the alleged contemnor should not be held in contempt of court must contain the time within which service must be made, and a date, within a reasonable time, for a hearing on the order. MCR 2.108(D) and 3.606(A)(1).[14] Unless the court orders otherwise, the order to show cause must be personally served on the contemnor. MCL 600.1968(4) and MCR 2.107(B)(1)(b).

Where the contemnor was personally served with the court's injunctive order and the order to show cause why she should not be held in contempt for violating the order, the proceedings were not void because the contemnor was not present when testimony establishing contempt was taken. *People ex rel Attorney Gen v Yarowsky (In re Smith)*, 236 Mich 169 (1926).

In Friend of the Court-initiated proceedings to enforce an order or judgment for support, visitation, or custody, the order to show cause must be served personally or by ordinary mail at the person's last known address. MCR 3.208(B)(2). The hearing on an order to show cause may be held no sooner than seven days after the order is personally served, or no sooner than nine days after the order is served by ordinary mail. MCR 3.208(B)(3).

In cases involving the alleged violation of a personal protection order, the petitioner must have the motion and order to show cause personally served on the respondent at least seven days before the hearing. MCR 3.708(B)(2).

[14] SCAO Form MC 230 meets these requirements. It may be accessed at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc230.pdf .

3.11 Requirements for Bench Warrants

Civil arrest and imprisonment for alleged contempt of court are authorized by MCL 600.6075(1). For the requirements for a warrant for civil arrest, see MCL 600.6076, MCL 600.6077, and MCL 600.6078. In such cases, a judge or presiding officer sets bail. MCL 600.6080(2).

An alleged contemnor taken into custody on a bench warrant must be kept in actual custody until ordered released by the court or discharged on bond. MCL 600.1735 and MCL 600.6083(1). Such persons must be kept separate from prisoners accused of crimes, unless detained on a misdemeanor charge. MCL 600.6082(1) and MCL 801.103.

In most cases, the decision to issue a bench warrant rests with the discretion of the court. However, a statute or court rule may prescribe the procedure. For example, MCL 552.631(1)(d) and MCR 3.208(B)(4) allow for issuance of a bench warrant for nonpayment of support after the person has failed to appear in response to an order to show cause,[15] but MCR 3.208(B)(6) allows the Friend of the Court to petition for a bench warrant at any time "if immediate action is necessary." MCL 600.3820 requires the court to issue a bench warrant to initiate contempt proceedings to abate a public nuisance.

3.12 Writs of Habeas Corpus for Prisoners Charged With Contempt

MCR 3.606(B) allows a court to use the writ of habeas corpus to bring before it an alleged contemnor who is already confined in jail or prison. That rule states: "A writ of habeas corpus to bring up a prisoner to testify may be used to bring before the court a person charged with misconduct under this rule." In addition, "[t]he court may enter an appropriate order for the disposition of the person." *Id*. For the formal and procedural requirements for writs of habeas corpus, see MCR 3.304.

3.13 Bond in Lieu of Arrest

MCR 3.606(C) provides that a contemnor may give a bond in lieu of arrest:

> "(1) The court may allow the giving of a bond in lieu of arrest, prescribing in the bench warrant the penalty of the bond and the return day for the defendant.

[15] See SCAO Form FOC 14. It may be accessed at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/domesticrelations/generalfoc/foc14.pdf.

> "(2) The defendant is discharged from arrest on executing and delivering to the arresting officer a bond
>
> > "(a) in the penalty endorsed on the bench warrant to the officer and the officer's successors,
> >
> > "(b) with two sufficient sureties,[16] and
> >
> > "(c) with a condition that the defendant appear on the return day and await the order and judgment of the court.
>
> "(3) *Return of Bond.* On returning a bench warrant, the officer executing it must return the bond of the defendant, if one was taken. The bond must be filed with the bench warrant."

Attorneys may not become sureties or post bonds for their clients in contempt proceedings. MCL 600.2665.

If the defendant who has executed a bond under MCR 3.606(C) fails to appear on the return date set in the bench warrant, the court may assign the bond to the aggrieved party for an action to recover that party's damages and costs. MCR 3.606(D). The aggrieved party may recover on the bond by the summary procedure outlined in MCR 3.604(H) and (I). If the defendant fails to appear and the court does not assign the bond to the aggrieved party, the court must assign the bond to the prosecuting attorney or attorney general with an order to prosecute the bond under MCR 3.604. MCR 3.606(E).

3.14 Disqualification of Judge

As a general rule, a party seeking to disqualify a judge must show actual bias or prejudice. MCR 2.003(B)(1); *In re Contempt of Rapanos*, 143 Mich App 483, 498 (1985). However, because of the nature of contempt proceedings, several specific rules also apply.

A. Direct Contempt Proceedings

The judge who witnessed the contumacious conduct in direct contempt cases should preside over summary proceedings. See MCL 600.1711(1) and *In re Contempt of Warriner (City of Detroit v Warriner)*, 113 Mich App 549, 554-555 (1982). However, an independent judge must preside over direct contempt cases where proceedings are deferred. *Id.*

[16] A single corporate surety licensed to do business in the state is sufficient. MCL 600.2621 and MCR 3.604(G).

In *People v Kurz*, 35 Mich App 643, 659 (1971), the Court of Appeals stated that "in every case where a judge defers consideration of a contempt citation until after the conclusion of the trial the charge must be considered and heard before another judge." See also *In re Contempt of Scharg (People v Godfrey)*, 207 Mich App 438, 441 (1994), where the Court of Appeals stated that "*Kurz* requires a hearing before an independent judge in all deferred summary contempt citations, regardless of the actual objectivity of the court."

The *Kurz* opinion identified the requirement of an independent judge as "the *Mayberry* rule," referring to *Mayberry v Pennsylvania*, 400 US 455 (1971). In *Mayberry,* the trial judge was subjected to several personal insults by the defendant, who represented himself in a criminal trial. The United States Supreme Court concluded that a judge who is personally attacked in such a manner "necessarily becomes embroiled in a running, bitter controversy." *Id*. at 465. The defendant, therefore, was entitled to have the contempt charges heard by a different judge. *Id*. at 465-466. However, *Kurz* does not require that the judge be personally attacked before disqualification. *Kurz*, *supra* at 659.

For contrary views, see *In re Albert*, 383 Mich 722, 724-725 (1970) (Court of Appeals panel is not required to disqualify itself to hear contempt charges of attorney arguing case before that panel), and *In re Thurston (People v Shier)*, 226 Mich App 205, 209 n 3 (1997), rev'd 459 Mich 918 (1998) (the statement in *Kurz* that disqualification is required in every case is dictum).

If the judge who witnessed the contempt is disqualified from hearing the case, another judge of the same court who was not involved in the proceedings should preside. MCR 2.003(C)(4); *In re Hirsch*, 116 Mich App 233, 241 (1982).[17] If another judge is not available, the state court administrator must assign another judge to hear the case. MCR 2.003(C)(4).

B. Indirect Contempt Cases

The judge who presided over the proceedings in the context of which the indirect contumacious conduct occurred should preside over the contempt proceedings. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 212 (1966).

[17] Involving GCR 912.3(d), the predecessor to MCR 2.003.

C. Cases Involving Publication of Comments Concerning Court or Judge

Where the alleged contempt consists of the publication of comments concerning a court or judge, the defendant is entitled to have the contempt proceedings occur in a different *court.* "In proceedings for contempt arising out of the publication of any news, information, or comment concerning a court of record, except the supreme court, or any judge of that court[,] the defendant has the right to have the proceedings heard by the judge of another court of record." MCL 600.1731.[18]

3.15 Right to Jury Trial Restricted to "Serious Criminal Contempt"

There is no right to jury trial in civil contempt cases. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 211 (1966). The constitutional right to jury trial applies only to "serious" criminal contempt cases. *Bloom v Illinois*, 391 US 194, 201-211 (1968). In Michigan, criminal contempt is "petty" rather than "serious" if the penalty does not exceed six months' imprisonment. *People v Goodman*, 17 Mich App 175, 178-179 (1969). See also *Codispoti v Pennsylvania*, 418 US 506, 512-515 (1974) (a jury trial was required under US Const, Am VI, for contempt of court where the sentences imposed on each contemnor aggregated more than six months).

In *United Mine Workers v Bagwell*, 512 US 821, 837 n 5 (1994), the United States Supreme Court declined to establish a line between "petty" and "serious" fines for contempt. The Court did conclude, however, that a fine of $52 million was a "serious" criminal fine. *Id*.

3.16 Applicability of Rules of Evidence

The Rules of Evidence, other than those regarding privileges, do not apply during summary contempt hearings. MRE 1101(b)(4). However, in indirect contempt cases and cases where summary contempt proceedings could have been used but were not, the Rules of Evidence apply. MRE 1101(a).

[18] See Section 5.17 for further discussion of criticism of a court or judge as contempt.

Chapter 4: Sanctions for Contempt of Court

4.1 Statutory Provisions for Sanctions in Contempt Cases

Two general provisions of the Revised Judicature Act provide sanctions for contempt of court. MCL 600.1715, which contains the general penalties for criminal and civil contempt, states:

> "(1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform[,] shall not exceed 93 days, or both, in the discretion of the court. The court may place an individual who is guilty of criminal contempt on probation in the manner provided for persons guilty of a misdemeanor as provided in MCL 771.1–MCL 771.14a].
>
> "(2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power

> to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment."

The foregoing general provisions apply unless another statute provides specific sanctions for a particular type of contempt.[1]

In addition to imposing a fine and/or a jail term, the court must order the contemnor to pay compensatory damages to any person who suffered an actual loss or injury as a result of the contumacious conduct. MCL 600.1721 states:

> "If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury."

"Plainly, the first sentence of MCL 600.1721 contemplates what is, in essence, a tort suit for money damages." *In re Bradley Estate*, ___ Mich ___, ___ (2013). In addition, in the second sentence of MCL 600.1721, "the Legislature expressly recognized that a civil contempt claim seeking indemnification damages functions as a substitute for any underlying claim, and, thus bars monetary recovery that could have been achieved in a separate cause of action. . . . [T]he statutory remedy, then, is effectively a proxy for a tort claim." *In re Bradley Estate*, ___ Mich at ___. In *Bradley*, the Court specifically found that "a civil contempt petition that seeks indemnification damages under MCL 600.1721 imposes 'tort liability' within the meaning of MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*." *In re Bradley Estate*, ___ Mich at ___. Because MCL 691.1407(1) provides governmental immunity for tort liability in certain circumstances, the statute "[c]onsequently . . . provides governmental agencies with immunity from civil contempt petitions seeking indemnification damages under MCL 600.1721." *In re Bradley Estate*, ___ Mich at ___.

In *In re Contempt of Auto Club Ins Ass'n (Algarawi v Auto Club Ass'n)*, 243 Mich App 697 (2000), the trial court ordered an alleged contemnor to pay a $500 fine to a charity identified by the trial court. The Court of Appeals first held that the fine was legally invalid because it exceeded the $250 limit set forth in MCL 600.1715(1)[2] and could not be characterized under MCL 600.1721 as compensation for losses caused by the alleged

[1] See Section 4.4.

[2] Effective March 30, 2007, 2006 PA 544 increased the maximum fine to $7,500.

contempt. *Auto Club Ins Ass'n*, *supra* at 718-719. The Court of Appeals also held that the trial court erred by requiring the alleged contemnor to pay the fine to a charity. Under Const 1963, art 6, § 7, "[a]ll fees and perquisites" collected by Michigan courts must be paid into the state treasury. "Perquisites" include fines collected in contempt proceedings. Although the Michigan Supreme Court may approve a court's use of public funds to support services to the judiciary, the trial court erred in this case by ordering a private person to pay funds directly to a private charity. *Auto Club Ins Ass'n*, *supra* at 719-721.

4.2 Jail Terms~~, and~~ Fines, Costs, and Damages

A. For Civil Contempt

Following a finding of civil contempt, the court may order any or all of the following sanctions:

- a coercive and conditional jail sentence to compel the contemnor to comply with an order of the court, MCL 600.1715(2);
- a fine and costs and expenses of the proceedings, MCL 600.1715(1)–MCL 600.1715(2); or
- damages for loss or injury caused by the contumacious conduct, MCL 600.1721, including attorney fees incurred as a result of the contumacious conduct, *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 758 (1990).[3]

B. For Criminal Contempt

Following a finding of criminal contempt, the court may order any or all of the following sanctions:

- an unconditional and fixed jail sentence of up to 93 days, MCL 600.1715(1);
- a fine of not more than $7,500, MCL 600.1715(1);
- probation, MCL 600.1715(1).~~:~~
- ~~damages caused by the contumacious conduct, MCL 600.1721, including attorney fees incurred as a result of~~

[3] Note that "[a] civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose 'tort liability.'" *In re Bradley*, ___ Mich ___, ___ (2013). On damages under MCL 600.1721, see Section 4.3.

~~the contumacious conduct, *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 758 (1990).~~

C. Termination of Incarceration in Cases of Civil Contempt

In cases of civil contempt, the contemnor's incarceration must terminate when the contemnor complies with the court's order or no longer has the ability to comply with the court's order, and pays the fine, costs, and expenses of the proceeding. MCL 600.1715(2).

D. Suspension of Fines in Cases of Civil Contempt

In cases of civil contempt, the judge may suspend payment of properly ordered fines based on a good behavior provision. See *Acorn Inc v UAW Local 2194*, 164 Mich App 358, 369 (1987).

E. Excessive "Civil" Fines

The United States Supreme Court has held that the imposition of severe fines for civil contempt renders the proceeding criminal and requires that the alleged contemnor be afforded all attendant due process protections. In *United Mine Workers v Bagwell*, 512 US 821 (1994), the trial court found the union in contempt for unlawful strike-related activities. The trial court announced that it would impose a civil fine of $100,000 for each violation involving violence and $20,000 for each nonviolent violation. When the union violated the injunction, it was found in contempt of court and ordered to pay $52 million in fines to the state and two counties. The United States Supreme Court held that the fines were criminal, not civil, and reversed the trial court's decision because the union was not afforded the right to jury trial. The fines were not compensatory, and announcing them in advance did not render them coercive because the union had no opportunity to purge itself of the contempt after the fines were imposed. "The union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law." *Id.* at 837.

F. Cumulative Punishment

In cases of criminal contempt, the court may not impose consecutive sentences or cumulative fines for each contumacious act. See *Ann Arbor v Danish News Co*, 139 Mich App 218, 235-237 (1984) (construing previous version of §1715(1)). For criminal contempts, the maximum sentence is 93 days in jail, and the maximum fine is $7,500. MCL 600.1715(1).

In cases of civil contempt, the maximum fine is $7,500 for a single contempt citation. MCL 600.1715(1). See also *In re Contempt of Johnson (Johnson v Salem Township)*, 165 Mich App 422, 428-429 (1988) (where there was no evidence of "continuing" or "reiterated" contempt, a per diem fine was improper under the general contempt statute, even though the contemnor's conduct also violated a criminal ordinance that provided a fine for each day a defendant was in violation of the ordinance).[4]

G. Fines and Alternative Jail Sentences in Criminal Contempt Cases

In any criminal case, if a fine or imprisonment is authorized by statute, the judge may impose a jail term conditioned on the contemnor's payment of a fine within a limited time. If the defendant fails to pay the fine, the judge may require the defendant to serve the jail sentence imposed by the court. MCL 769.3. The judge must consider the reasons for the defendant's failure to pay before incarcerating the defendant. *Bearden v Georgia*, 461 US 660, 672 (1983). However, *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 223 (1966), suggests that a different rule applies to criminal contempt cases. In *Cross*, the Michigan Supreme Court construed a predecessor to MCL 600.1715(1) and held that the general contempt statute in effect at the time did not authorize a court to give each defendant a monetary fine and a jail sentence "*with a proviso for an additional jail sentence for a fixed term upon failure to pay the fine.*" *Id.*

4.3 Mandatory Compensatory Sanctions

The language of the statutory provision allowing for compensatory sanctions, MCL 600.1721, indicates that such sanctions are mandatory. That provision states:

> "If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury."

Note: *In re Contempt of Dougherty*, 429 Mich 81, 97 (1987), suggests that compensatory damages are only available for civil contempts. However, the language of MCL

[4] See also Section 5.14(C), for a discussion of repeated refusals to answer questions before a grand jury.

600.1721 does not expressly limit compensatory damages to civil contempts. See *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 651 n 1 (1990), where the Court of Appeals recognized the *Dougherty* Court's suggestion but did not address whether compensatory damages were limited to civil contempts because it was not properly raised by the parties. See also *In re Bradley Estate*, ___ Mich ___, ___, ___ n 25 (2013), where the Michigan Supreme Court noted that "[a] contempt proceeding seeking indemnification damages is a civil contempt proceeding[,]" and stated that "a court, in a civil contempt proceeding, may also order indemnification of those persons who have sustained losses as a result of contemptuous conduct under MCL 600.1721."

A. Determining the Amount of Loss or Injury

The party requesting compensation bears the burden of proving that the contemnor's conduct caused actual loss or injury and the amount of the loss. *Homestead Development Co v Holly Twp*, 178 Mich App 239, 245 (1989). The party requesting compensation must be provided an opportunity to prove the amount of damage. *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 650-651 (1990). The court should employ general principles of damages to determine the amount of the award. See *Birkenshaw v City of Detroit*, 110 Mich App 500, 510-511 (1981).

Where the contempt consists of the violation of an injunction, damages are limited to the injury caused by the violation. If the injury was caused before the injunction entered, the plaintiff is limited to the remedy provided in the original decree or another appropriate remedy and may not recover damages under the general contempt statute. *Wilkinson v Dunkely-Williams Co*, 150 Mich 253, 255 (1907).

B. Per Diem Damages

The court may order a per diem amount of damages for continuing contempt. Once the contempt abates, the court may determine the exact amount of damages caused by the defendant's failure to comply with the court's order. *Catsman v City of Flint*, 18 Mich App 641, 651 (1969).[5]

[5] Per diem damages should be distinguished from fines, which are limited to $7,500 per single contempt citation. See Section 4.2(F).

C. Costs of Court Proceedings

An attorney found in contempt of court for failing to appear in court at the scheduled time may properly be ordered to reimburse the county for costs in impaneling the jury. *In re Contempt of McRipley (People v Gardner)*, 204 Mich App 298, 301-302 (1994).

D. Attorney Fees

Compensatory sanctions may include the opposing party's reasonable attorney fees. *Homestead Dev Co v Holly Twp*, 178 Mich App 239, 245-246 (1989). Recoverable attorney fees include those incurred in seeking the contempt order, those incurred in litigation caused by the contempt, and those incurred in determining the amount of damages. *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 764 (1990); *Plumbers and Pipefitters Local No 190 v Wolff*, 141 Mich App 815, 818-819 (1985); *Birkenshaw v City of Detroit*, 110 Mich App 500, 510 (1981).

When the opposing party challenges the reasonableness of the fees requested, the court must conduct an evidentiary hearing. To determine a reasonable amount of fees in a given case, the court must consider the factors and guidelines set forth in *Wood v DAIIE*, 413 Mich 573, 588 (1982), and *Howard v Canteen Corp*, 192 Mich App 427, 437 (1992). The court must make findings of fact regarding its award of attorney fees. *B & B Investment Group v Gitler*, 229 Mich App 1, 15-17 (1998).

4.4 Statutory Exceptions to the General Penalty Provisions of the Revised Judicature Act

The general penalty provisions for contempt of court contained in MCL 600.1715 apply to cases of contempt, "except as otherwise provided by law." The following subsections summarize some of the statutory exceptions to the general penalty provisions in MCL 600.1715.

A. Failure of Witness to Obey Subpoena or Discovery Order

MCL 600.1725[6] states:

> "If any witness attending pursuant to a subpoena, or brought before any court, judge, officer, commissioner, or before any person before whom depositions may be taken, refuses without reasonable cause

[6] See also MCR 2.506(E).

> "(1) to be examined, or
>
> "(2) to answer any legal and pertinent question, or
>
> "(3) to subscribe his deposition after it has been reduced to writing, the officer issuing the subpoena shall commit him, by warrant, to the common jail of the county in which he resides. He shall remain there until he submits to be examined, or to answer, or to subscribe his deposition, as the case may be, or until he is discharged according to law."

Thus, coercive commitment appears to be mandatory under this section, and no provision is made for a fine.[7]

B. Failure of Grand Jury Witness to Testify

MCL 767.19c provides that a person who neglects or refuses to appear to testify before a grand jury when summoned shall be punished by a fine not exceeding $10,000, incarceration for up to one year, or both.[8] See also MCL 767.5, which provides that a person who fails to appear before a "one-person grand jury" in response to a summons is guilty of contempt and shall be punished by a $1,000 fine, or up to one year of imprisonment, or both.

C. Failure to Pay Child or Spousal Support

Several sections of the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq.*, govern support arrearages and associated sanctions.[9] According to MCL 552.633(1), the court may find a payer in contempt if the court finds the payer in arrears and "if the court is satisfied that the payer has the capacity to pay out of currently available resources all or some portion of the amount due under the support order." If the payer does not show the court otherwise, the court must presume that the payer has currently available resources equal to four weeks of payments under the order. The court must not find that the payer has currently available resources of more than four weeks of payments without proof from the Friend of the Court or the recipient of the support. MCL 552.633(1). If the court finds a payer in contempt of court pursuant to MCL 552.633(1), the court may enter an order doing one or more of the following:

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[7] See Section 5.4 for a more detailed discussion.

[8] See Section 5.14 for a more detailed discussion.

[9] See Section 5.9 for a more detailed discussion.

> "(a) Committing the payer to the county jail.
>
> "(b) Committing the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to go to and return from his or her place of employment.
>
> "(c) Committing the payer to a penal or correctional facility in this state that is not operated by the state department of corrections.
>
> "(d) If the payer holds an occupational license, driver's license, or recreational or sporting license, conditioning a suspension of the payer's license, or any combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
>
> "(e) Ordering the payer to participate in a work activity. This subdivision does not alter the court's authority to include provisions in an order issued under this section concerning a payer's employment or his or her seeking of employment as that authority exists on August 10, 1998.
>
> "(f) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act . . . [MCL 791.401–MCL 791.414].
>
> "(g) Except as provided by federal law and regulations, ordering the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

A court may find a payer in contempt if the court finds the payer is in arrears and one of the following:

- The court is satisfied that by the "exercise of diligence" the payer could have the capacity to pay all or some portion of the support ordered and the payer fails or refuses to do so. MCL 552.635(1)(a).

- The payer has not obtained a source of income and has not participated in a work activity after referral by the Friend of the Court. MCL 552.635(1)(b).

If the court finds the payer in contempt pursuant to MCL 552.635(1), MCL 552.635(2) requires that the court, absent good cause to the contrary, immediately order the payer to participate in a work activity. The court may also do one or more of the following:

> "(a) Commit the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to participate in a work activity.
>
> "(b) If the payer holds an occupational license, driver's license, or recreational or sporting license, condition a suspension of the payer's license, or a combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
>
> "(c) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act . . . [MCL 791.401–MCL 791.414].
>
> "(d) Except as provided by federal law and regulations, order the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

An order of commitment under MCL 552.633 or MCL 552.635 must be entered "only if other remedies appear unlikely to correct the payer's failure or refusal to pay support." MCL 552.637(1).

The order of commitment must continue until the amount ordered to be paid is paid but no longer than 45 days for the first adjudication of contempt or 90 days for a subsequent adjudication of contempt. MCL 552.637(4).

D. Failure to Comply With Parenting Time Order in Divorce Judgment

MCL 552.644(2) and (4) provide a variety of possible sanctions for a party's failure to obey a parenting time order in a divorce judgment. Sanctions include, but are not limited to, a fine of not more than $100, and commitment to jail for up to 45 days (for a first violation) or 90 days (for each subsequent violation), with mandatory release if the court has reasonable cause to believe that the parent will comply with the parenting time order. MCL 552.644(2)(d), (e), and (4).[10]

E. Failure to Abate Public Nuisance

MCL 600.3820 provides the penalty for a person's failure to obey an injunctive order to abate a public nuisance. The person must be punished by a fine of not more than $1,000, incarceration for not more than six months, or both.[11]

4.5 Assignment of Bond for Recovery of Damages

In cases of indirect contempt, MCR 3.606(C) allows an alleged contemnor to give bond in lieu of being arrested.[12] MCR 3.606(D) provides for recovery of damages from the bond:

> **"(D) Assignment of Bond; Damages.** The court may order assignment of the bond to an aggrieved party who is authorized by the court to prosecute the bond under MCR 3.604(H). The measure of the damages to be assessed in an action on the bond is the extent of the loss or injury sustained by the aggrieved party because of the misconduct for which the order for arrest was issued, and that party's costs and expenses in securing the order. The remainder of the penalty of the bond is paid into the treasury of the county in which the bond was taken, to the credit of the general fund."

4.6 Requirements for Court's Opinion and Order

As in all bench trials, the court is required in contempt proceedings to state its factual findings and conclusions of law either on the record or in a written opinion. MCR 2.517. See also *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 758 (1990) (Court of Appeals

[10] See **Section 5.10** for a more detailed discussion.

[11] See **Section 5.7** for a more detailed discussion.

[12] See **Section 3.13**.

must state findings and conclusions when adjudging contempt of its orders). The court's findings and conclusions should include:

- factual findings;
- burden of proof employed;
- type of contempt committed;
- a conclusion as to how the contumacious conduct impaired the authority or impeded the functioning of the court;
- the sanctions imposed; and
- the reasons for imposing sanctions.

See also MCR 2.602 (procedure for entry of civil judgment) and MCR 6.427 (procedure for entry of criminal judgment).

In civil contempt cases, the court's order of commitment must specify that "the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty . . . and pays the fine, costs, and expenses of the proceedings . . . ." MCL 600.1715(2).

If a member of the state bar is held in contempt of court, the clerk of the court must submit a certified copy of the order to the clerk of the Michigan Supreme Court and the state bar. MCL 600.913.

4.7 Appeals of Contempt Orders

A. Appeals to Circuit Court and Court of Appeals

Final judgments of the circuit court and Court of Claims not expressly listed in MCL 600.308(2)[13] and MCL 600.308(3)[14] are appealable as of right to the Court of Appeals. MCL 600.308(1). Final judgments of the district court and probate court are appealable as of right to the circuit court.[15] MCL 600.863(1); MCL 600.8342(2). Judgments entered by the circuit court on appeals from lower courts are appealable by application for leave to appeal to the Court of Appeals. MCL 600.8342(3) and MCL 600.863(2). "Criminal contempt is a crime and,

[13] MCL 600.308(2) lists the types of orders and judgments that are reviewable only upon application for leave to appeal.

[14] MCL 600.308(3) prohibits "an order concerning the assignment of a case to the business court" from being "appealed to the [C]ourt of [A]ppeals." l

[15] Except probate court orders applicable under MCL 600.861.

therefore, an order finding a party in criminal contempt of court and sanctioning the party is a final order from which a contemnor may appeal as of right. However, an order finding a party in civil contempt of court is not a final order for purposes of appellate review." *In re Moroun*, 295 Mich App 312, 329 (2012) (citations omitted). Thus, in a case of civil contempt, a party may only appeal by application. *Moroun, supra* at 330. "However, the same is not true for . . . nonparties who have not been held in contempt but instead have been sanctioned for [a party's] contempt." *Id*. "Because individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, these same individuals may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order." *Id*. at 332. In *Moroun*, the Michigan Court of Appeals affirmed the trial court's decision to jail two individuals who had control over the defendant company after the company was found in contempt, even though they were not parties to the suit. *Id*. at 332-333. However, because they were not parties and, therefore, would not otherwise have the ability to appeal the trial court's decision, the Court held that nonparties held in contempt or sanctioned for the contempt of another can appeal by right the trial court's order. *Id*. at 330-331.

A judge's refusal to find a party in contempt may be reviewed only by a complaint for an order of superintending control, not by appeal or cross-appeal. *Barnett v Int'l Tennis Corp,* 80 Mich App 396, 415 (1978); *Shelby Twp v Liquid Disposal, Inc,* 71 Mich App 152, 154 (1976).

B. Standard of Review

Issuance of an order finding a person in contempt of court rests in the sound discretion of the judge. *In re Contempt of Peisner (People v Jackson)*, 78 Mich App 642, 643 (1977). A finding of contempt or a refusal to find a person in contempt may be reviewed only for an abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99 (2003). The appellate court will not weigh the evidence or determine the credibility of witnesses; if evidence in the record supports the lower court's findings, the lower court will be affirmed. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 217-218 (1966).

Questions of law, such as whether the contempt statute permitted the sanctions imposed in a case, are reviewed de novo. *In re Contempt of Auto Club Ins Ass'n (Algarawi v Auto Club Ass'n)*, 243 Mich App 697, 714 (2000).

C. Waiver of Irregularities in Initiating Proceedings

In cases of indirect contempt, if no affidavit is filed, the alleged contemnor waives the irregularity in initiation of the proceedings by voluntarily appearing before the court and defending against the charge. *In re Huff*, 352 Mich 402, 413 (1958). In *In re McHugh*, 152 Mich 505, 512 (1908), the Supreme Court stated:

> "If the respondents had refused to appear in court, as was the case in [*In re Wood*, 82 Mich 75 (1890)], or if they had been arrested upon the capias and had denied the jurisdiction of the court for the reason that no affidavit or petition was presented to the court setting forth the facts, the respondents would have been in [a] position to raise this question, but their conduct waived it. They voluntarily placed themselves in precisely the same position as they would have been if the proceeding had been such as they now contend was necessary."

If, however, the defendant appears and challenges the court's jurisdiction, the defendant does not waive irregularities in the initiation of the proceedings. *In re Henry*, 25 Mich App 45, 51-52 (1970).

4.8 Double Jeopardy

The guarantee against double jeopardy "'prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.'" *Witte v United States*, 515 US 389, 396 (1995), quoting *Helvering v Mitchell*, 303 US 391, 399 (1938). Criminal sanctions trigger double jeopardy protections. Because criminal contempt sanctions clearly have a punitive purpose, the United States Supreme Court has held that double jeopardy protections attach in non-summary criminal contempt proceedings. *United States v Dixon*, 509 US 688, 696 (1993).

Civil contempt sanctions are remedial or coercive and are not typically subject to double jeopardy protections against multiple punishments. Accordingly, the United States Supreme Court has held that a person may be subjected to both criminal and civil sanctions for the same act, as long as the civil sanctions serve a purpose distinct from punishment. *Yates v United States*, 355 US 66, 74 (1957). In *Yates,* the United States Supreme Court upheld the imposition of both civil and criminal contempt sanctions for a single continuing act of contempt, reasoning that "[t]he civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent[.]"

MCL 600.1745 deals with multiple punishments for misconduct that constitutes both contempt of court and an indictable criminal offense. MCL 600.1745 states:

> "Persons proceeded against according to the provisions of this chapter, shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in imposing sentence."

Many statutes allow for punishment of both a criminal offense and contempt of court. See the following statutes, for example:

- MCL 750.394(3), throwing, propelling, or dropping a dangerous object at a train or motor vehicle;
- MCL 750.411h(5) and MCL 750.411i(6), stalking and aggravated stalking;[16]
- MCL 600.1348(1) and (2), discharging or disciplining employee summoned for jury duty; and
- MCL 780.762 and MCL 780.822, discharging or disciplining an employee who is a crime victim or a victim representative for attending court.

In *People v McCartney (On Remand)*, 141 Mich App 591 (1985), the defendant, a conservator of her minor daughter's estate, was held in criminal contempt of court for violating a court order. Subsequently, a prosecution for embezzlement was initiated. The Court of Appeals initially held that trying the defendant for embezzlement would violate the prohibitions against double jeopardy. On remand from the Supreme Court, the Court of Appeals found that the language of MCL 600.1745 was clear evidence of the Legislature's intent to allow separate punishment of a person found in criminal contempt of court if the contemptuous acts also violated a criminal statute. *Id.* at 596. However, the Court of Appeals noted that MCL 600.1745 requires the court to consider the prior contempt decision when imposing a sentence in the criminal case. See also *In re Murchison*, 340 Mich 151, 155-156 (1954) (perjury may be punished criminally and as contempt of court because the act of falsely swearing constitutes "two offenses, one against the State and the other against the court").

[16] See *People v Coones*, 216 Mich App 721, 727-728 (1996).

Chapter 5: Common Forms of Contempt of Court

5.1 Introduction

This chapter contains information about common forms of contempt of court. The sections in this chapter follow a similar structural format containing the following elements:

- applicable statutes or court rules authorizing the court to punish as contempt of court the acts in question; and
- summaries of case law and other law treating issues that commonly arise in cases involving the contumacious conduct in question.

Note that this chapter does not contain an exhaustive description of conduct that is punishable using the court's contempt powers. See Section 1.4 for a discussion of a court's inherent authority to cite persons for contempt of court.

5.2 Attorney's Misconduct in Courtroom

A. Statute

MCL 600.1701(a) allows a judge to punish misconduct in the courtroom, including misconduct by attorneys:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> > "(a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due its authority."

B. Zealous Representation or Contumacious Conduct?

In *People v Kurz*, 35 Mich App 643, 651 (1971), the Court of Appeals distinguished between zealous representation of a client's interests in court and contumacious conduct. The Court stated the following:

> "Unless a lawyer's conduct manifestly transgresses that which is permissible[,] it may not be the subject of charges of contempt. Any other rule would have a chilling effect on the constitutional right to effective representation and advocacy. In any case of doubt, the

> doubt should be resolved in the client's favor so that there will be adequate breathing room for courageous, vigorous, zealous advocacy."

In *Kurz*, defense counsel was charged with 107 instances of contempt, almost all of which involved the allegedly improper voicing of objections to questions asked by the prosecutor. *Id.* at 661-679 (transcripts of some of the charged instances of misconduct).

In *In re Contempt of O'Neil*, 154 Mich App 245, 246-247 (1986), the trial court found a criminal defense attorney in contempt for continuing to argue an issue after the court made its ruling and warning the attorney that further argument would result in a contempt citation. The Court of Appeals affirmed, finding that by the time the court warned the attorney, the attorney had fully advocated his client's position. *Id*. at 248. For cases reaching similar results, see *In re Contempt of Peisner (People v Jackson)*, 78 Mich App 642, 643 (1977), and *In re Burns*, 19 Mich App 525, 526 (1969).

To be subject to sanctions, the attorney's conduct must amount to a "wilful creation of an obstruction of the performance of judicial duty[.]" *In re Meizlish*, 72 Mich App 732, 738 (1976), citing *In re McConnell*, 370 US 230, 236 (1962). In *McConnell*, after the judge told the attorney to stop a certain line of questioning, the attorney asserted a right to ask the questions and stated that he planned to continue until the bailiff stopped him. The United States Supreme Court reversed the contempt citation against the attorney, finding that the attorney's mere statement that he planned to continue the questioning did not constitute an obstruction of justice.

The misconduct "must constitute an imminent, not merely a likely, threat to the administration of justice." *In re Little*, 404 US 553, 555 (1972).

C. Excusing the Jury

To avoid the appearance of partiality, the court should excuse the jury before citing an attorney for contempt of court. *People v Williams*, 162 Mich App 542, 547 (1987).

5.3 Attorney's Failure to Appear in Court

A. Statute

MCL 600.1701(c) gives judges broad authority to punish attorneys for neglect of their duties to the court:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(c) All *attorneys,* counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner elected or appointed to perform any judicial or ministerial services, *for any misbehavior in their office or trust, or for any willful neglect or violation of duty,* for disobedience of any process of the court, or any lawful order of the court, or any lawful order of a judge of the court or of any officer authorized to perform the duties of the judge." (Emphasis added.)

B. Attorney's Duty as Officer of Court

Because an attorney is an officer of the court as well as an agent of his or her client, the attorney has a duty to take timely affirmative action to notify the court if the attorney will not continue the representation. *White v Sadler*, 350 Mich 511, 526 (1957); *In re Lewis (Shaw v Pimpleton)*, 24 Mich App 265, 269 (1970).

The rationale for punishing an attorney for failing to appear in court is stated in *People v Matish*, 384 Mich 568, 572 (1971), quoting *Arthur v Superior Court of Los Angeles Co*, 398 P2d 777, 782 (Cal, 1965):

> "'When an attorney fails to appear in court with his client, particularly in a criminal matter, the wheels of justice must temporarily grind to a halt. The client cannot be penalized, nor can the court proceed in the absence of counsel. Having allocated time for this case, the court is seldom able to substitute other matters. Thus the entire administration of justice falters. Without judicious use of contempt power, courts will have little authority over indifferent attorneys who disrupt the judicial process through failure to appear.'"

C. Indirect Contempt

An attorney's failure to appear in court at the appointed time constitutes indirect contempt. *In re Contempt of McRipley (People v Gardner)*, 204 Mich App 298, 301 (1994).

D. Civil vs. Criminal Contempt

Willful intent is not required for a finding of civil contempt. *McComb v Jacksonville Paper Co*, 336 US 187, 191 (1949); *Catsman v City of Flint*, 18 Mich App 641, 646 (1969). If a judge feels that an attorney was merely negligent in not appearing in court, civil contempt proceedings may be instituted. If civil contempt is found, the judge must order the contemnor to pay damages for the injuries resulting from noncompliance with the court order. MCL 600.1721.[1] See *In re Jacques*, 761 F2d 302, 305-306 (CA 6, 1985), and *In re Contempt of McRipley (People v Gardner)*, 204 Mich App 298, 301-302 (1994) (attorney who failed to appear was properly ordered to reimburse county for costs of assembling jury panel). The court may also order the contemnor to pay a fine and the costs and expenses of the proceedings. MCL 600.1715(2).

In *In re Lumumba*, 113 Mich App 804, 813-814 (1982), the Court of Appeals concluded that "where an attorney makes a good faith effort to obtain a substitute lawyer for his client when the original attorney cannot appear, the failure to appear cannot be deemed willful." In *Lumumba*, the Court of Appeals reversed the trial court's finding of criminal contempt because the attorney in that case made a good faith effort to secure a substitute attorney.

In *In re Hirsch*, 116 Mich App 233, 238 (1982), the Court of Appeals affirmed a finding of criminal contempt against an attorney who was ordered to be in Recorder's Court at 9:00 a.m. and in Macomb County Circuit Court at 11:00 a.m. The attorney did not obtain substitute counsel and did not appear in Recorder's Court because he felt he would not have time to drive from Recorder's Court to Macomb County Circuit Court. The Court of Appeals found that the attorney made a willful decision to violate the Recorder's Court order and upheld the finding of criminal contempt.

5.4 Failure of Witness to Appear or Testify as Ordered by Subpoena

A. Statute and Court Rule

MCL 600.1701(i) governs the failure of witnesses to appear when required. That statute states, in pertinent part:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment,

[1] Note that MCL 600.1721 "is effectively a proxy for a tort claim." *In re Bradley Estate*, ___ Mich ___, ___ (2013). See Section 4.1 for more information.

> or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(i) All persons who, having been subpoenaed to appear before or attend, refuse or neglect to obey the subpoena, to attend, to be sworn, or when sworn, to answer any legal and proper interrogatory in any of the following circumstances:
>
> "(*i*) As a witness in any court in this state.
>
> "(*ii*) Any officer of a court of record who is empowered to receive evidence.[2]
>
> "(*iii*) Any commissioner appointed by any court of record to take testimony.
>
> "(*iv*) Any referees or auditors appointed according to the law to hear any cause or matter.
>
> "(*v*) Any notary public or other person before whom any affidavit or deposition is to be taken."

MCR 2.506(E)(1) states, in pertinent part:

> "If a person fails to comply with a subpoena served in accordance with this rule . . . , the failure may be considered a contempt of court by the court in which the action is pending."

B. Indirect Contempt

Because the court must rely on the testimony of others to determine the reason for the witness's failure to appear, and because immediate action is not necessary to preserve the court's authority, the court may not summarily punish a witness's failure to appear. *In re Contempt of Robertson (Davilla v Fischer Corp)*, 209 Mich App 433, 440-441 (1995).[3]

[2] See **Section 1.6** for a discussion of the contempt powers of quasi-judicial officers.

[3] See **Section 2.4** for discussion of summary punishment of contempt.

5.5 Juror Misconduct

Juror misconduct is addressed in MCL 600.1346, which states in pertinent part:

> "The following acts are punishable by the circuit court as contempts of court:
>
> > "(a) Failing to answer the questionnaire provided for in [MCL 600.1313].[4]
> >
> > * * *
> >
> > "(e) Failing to attend court, without being excused, at the time specified in the notice, or from day to day, when summoned as a juror."

MCL 600.1701(j) states that all courts of record may punish for contempt:

> "Persons summoned as jurors in any court, for improperly conversing with any party to an action which is to be tried in that court, or with any other person in regard to merits of the action, or for receiving communications from any party to the action or any other person in relation to the merits of the action without immediately disclosing the communications to the court."[5]

5.6 Violation of Court Order

A. Statute

MCL 600.1701(g) contains the Revised Judicature Act's general provision regarding violations of court orders:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> > "(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court."

---

[4] All prospective jurors are required to complete a "juror personal history questionnaire" prior to jury service. See MCR 2.510(B).

[5] See **Section 5.19** for a discussion of attempting to improperly influence jurors.

Note: Other statutes that make specific provisions for violating particular types of court orders take precedence over MCL 600.1701(g). See Sections 5.7, 5.9, 5.10, and 5.11.

B. Civil or Criminal Contempt Proceedings

A court may find persons who have violated a court order guilty of either civil or criminal contempt. *State Bar v Cramer*, 399 Mich 116, 126-128 (1976), abrogated on other grounds *Dressel v Ameribank*, 468 Mich 557 (2003); *Ann Arbor v Danish News Co*, 139 Mich App 218, 231-232 (1984).[6] Willfulness is not necessary to support a finding of civil contempt; negligent violation of an order is sufficient. *In re Contempt of United Stationers Supply Co (Walker v Henderson)*, 239 Mich App 496, 499-501 (2000).

In *In re Contempt of Dougherty*, 429 Mich 81 (1987), the defendants were found in civil contempt of court for violating a permanent injunction prohibiting them from trespassing on the plaintiff's property and hindering access to and egress from the plaintiff's industrial plant. The defendants were jailed until they promised not to violate the injunction in the future. The Supreme Court held that the trial court erred by imposing a coercive sanction to compel future compliance for a past violation of the injunction. Because the violation occurred in the past and the defendants were in compliance with the injunction at the time of the contempt hearing, the trial court was limited to instituting criminal contempt proceedings and imposing criminal contempt sanctions, or to issuing a civil contempt order compensating the plaintiff for actual losses caused by the defendants' actions. *Id.* at 87.

C. Even Clearly Incorrect Orders Must Be Obeyed

An order entered by a court of proper jurisdiction must be obeyed even if the order is clearly incorrect. *Kirby v Michigan High School Athletic Ass'n*, 459 Mich 23, 40 (1998).[7] In *State Bar v Cramer*, 399 Mich 116, 125 (1976), abrogated on other grounds *Dressel v Ameribank*, 468 Mich 557 (2003), the Michigan Supreme Court stated that "persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." The trial court continues to have jurisdiction to enforce its order until such time that an appellate court dissolves the

[6] See **Section 2.1** for a discussion of the distinction between civil and criminal contempt proceedings.

[7] See **Section 1.7** for case law holding that orders issued by a court *without jurisdiction* are invalid and need not be obeyed.

order. *Ann Arbor v Danish News Co*, 139 Mich App 218, 229-230 (1984). Thus, after an order has been stayed or reversed on appeal, it is no longer appropriate for the trial court to seek to compel the contemnor to comply with the order. *Davis v Detroit Fin Review Team*, 296 Mich App 568, 626 (2012). In *Davis, supra* at 626, the trial court entered an order compelling one of the defendants to hold its meetings in accord with the Open Meetings Act, which the defendant disregarded. The Court of Appeals held that the Open Meetings Act did not apply to that defendant, and that although the defendant was in contempt for disregarding the order while it was in effect, the defendant could not be ordered to comply with the order after it was vacated. The Court noted that the plaintiff could nevertheless "potentially be entitled to a civil contempt sanction in the form of a compensatory award[.]" *Id*.

> **Note:** An appeal does not automatically stay enforcement of a court's judgment or order. However, MCR 2.614(C) allows the trial court to suspend an injunction pending appeal, and MCR 7.209(A)(1) allows the trial court or the Court of Appeals to stay a trial court's order pending appeal.

In *Schoensee v Bennett*, 228 Mich App 305, 317 (1998), the attorney for a party in divorce proceedings was properly cited for contempt and ordered to pay damages after the attorney failed to advise her client to obey a court order pending appeal. Although the attorney did not instruct her client to disobey the order, her failure to advise her client to obey the order had the same effect.

In *Johnson v White*, 261 Mich App 332, 335 (2004), the Court of Appeals reversed a lower court's finding of contempt against a defendant for violating the court's order for grandparent visitation. On January 10, 2001, the lower court entered an order for grandparent visitation. Three months later, the defendant violated the order by moving his children to another state. On January 25, 2002, the Court of Appeals issued its decision in *DeRose v DeRose*, 249 Mich App 388 (2002), and found the grandparent visitation statute, MCL 722.27b, unconstitutional. On March 28, 2002, the lower court found the defendant in *White* in contempt of court for violating its order. The trial court subsequently denied the defendant's motion to vacate the contempt order.

The defendant argued on appeal that the contempt order should have been vacated because the lower court lacked subject matter jurisdiction over the grandparent visitation issue as a result of the Court of Appeals decision in *DeRose*, *supra.* The defendant claimed that MCR 7.215(C)(2) required the lower court to give immediate precedential effect to *DeRose* even though, at the time of the show cause hearing, an appeal of the decision in *DeRose* was pending in the Supreme Court. MCR 7.215(C)(2) states that a published Court of

Appeals opinion has precedential effect and the "filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." *Johnson*, *supra* at 346. The trial court disagreed and ruled that MCR 7.215(C)(2) should be read in conjunction with MCR 7.215(F)(1)(a), which states that a "Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court[.]" *Johnson*, *supra* at 347.

The Court of Appeals found the trial court's reliance on MCR 7.215(F)(1)(a) misplaced and stated that MCR 7.215(F)(1)(a) "pertains to the timing of when our judgment becomes final in regards to the parties to the appeal and its enforceability with respect to the trial court that presided over the case." *Johnson*, *supra* at 347. The Court also indicated that MCR 7.215(C)(2) clearly provides that filing an application for leave to appeal to the Supreme Court or an order granting leave does not change the precedential effect of the decision of the Court of Appeals. The Court concluded that the trial court erred in determining that it did not need to give *DeRose*, *supra*, precedential effect.

A court order must be complied with at the time it is entered even if the order is clearly incorrect. In *Johnson*, *supra*, the Court also recognized that "'[a] person may not disregard a court order simply on the basis of his [or her] subjective view that the order is wrong or will be declared invalid on appeal.'" *Johnson*, *supra* at 346, quoting *In re Contempt of Dudzinski*, 257 Mich App 96, 111 (2003). However, the Court noted that these rules only apply when the order is issued by a court with jurisdiction over the person and over the subject matter. *Johnson*, *supra* at 346. At the time the defendant was held in contempt, the opinion in *DeRose*, *supra*, had already been issued. Therefore, *DeRose* had binding precedential effect, and the lower court was without jurisdiction over the subject matter of the contempt order. Because the lower court lacked subject matter jurisdiction when it entered the contempt order, the Court of Appeals reversed the lower court's finding of contempt. *Johnson*, *supra* at 349-350.

D. Reliance on Attorney's Advice

In *In re Contempt of Rapanos*, 143 Mich App 483, 495 (1985), the Court of Appeals held that if an individual relies in good faith upon his or her attorney's advice, that individual has not willfully violated a court order and may not be found guilty of *criminal* contempt. Acting under counsel's advice, however, is not a defense to *civil* contempt charges. See *McComb v Jacksonville Paper Co*, 336 US 187, 191 (1949). In *Chapel v Hull*, 60 Mich 167, 175 (1886), the Michigan Supreme Court held that

where a client acted under his attorney's advice in violating an injunction, the client was liable for the actual damages caused by that behavior.

E. Injunctions

MCR 3.310(C)(4) states that an injunctive order "is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

In *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 216-217 (1966), union members' actual knowledge of the injunctive order was properly inferred, where a copy of the order was posted at the site of union picketing, and the order was issued one month prior to the charged acts of contempt. See also *DeKuyper v DeKuyper*, 365 Mich 487 (1962) (where a bank was served with an injunctive order but not made a party to the underlying action, the bank's actual knowledge of the order made it effective against the bank).

Courts have punished contemnors for violating injunctive orders by subterfuge or in bad faith. See *Craig v Kelley*, 311 Mich 167, 178 (1945), *Gover v Malloska*, 242 Mich 34, 36 (1928), and *In re Contempt of Rapanos*, 143 Mich App 483, 489-490 (1985).

5.7 Violation of Court Order Regarding Nuisance

A. Statute

MCL 600.3805 authorizes circuit courts to issue injunctive orders to abate public nuisance. Sanctions for violations of such orders are governed by MCL 600.3820, which states:

> "If any order or injunction granted under the provisions of this chapter is violated, the court may summarily try and punish the offender as for contempt, and the person so offending shall be punished by a fine of not more than $1,000.00, or by imprisonment in the county jail not more than 6 months, or by both fine and imprisonment, in the discretion of the court. Such violation shall be charged by a motion supported by affidavit, and the court, if satisfied of the sufficiency thereof, shall immediately issue a bench warrant for the arrest of such offender and to bring him before such court to answer for such misconduct. The court may, in its discretion, permit such person arrested to give bail and fix the

> amount thereof pending hearing of the matters charged in such motion."

B. Criminal Contempt

Contempt proceedings under the public nuisance statutes are criminal in nature. *Michigan ex rel Wayne Pros v Powers*, 97 Mich App 166, 170-171 (1980). The *Powers* Court stated that the purpose of contempt proceedings for violation of an order enjoining a public nuisance is to punish a party for past disobedience of the injunctive order.

5.8 Failure to Pay Money Judgment

A. Statute

"The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:

* * *

> "(e) Parties to actions, attorneys, counselors, and all other persons for the nonpayment of any sum of money which the court has ordered to be paid." MCL 600.1701(e).

B. Limitation of Contempt Power to Enforce Money Judgments

Money judgments, including the property settlement provisions of a divorce judgment, generally may not be enforced by contempt proceedings. *Belting v Wayne Circuit Judge*, 245 Mich 111 (1929), *Thomas v Thomas*, 337 Mich 510, 513-514 (1953), and *Guynn v Guynn*, 194 Mich App 1, 2-3 (1992).

This restriction on the use of contempt power is a necessary outgrowth of the constitutional prohibition against imprisonment "for debt arising out of or founded on contract, express or implied . . . ." Const 1963, art 1, § 21. See also *Brownwell Corp v Ginsky*, 247 Mich 201 (1929) (prohibition applies even if the court orders the money paid to the court). "[T]he process of contempt to enforce civil remedies is one of those extreme resorts which cannot be justified if there is any other adequate remedy." *Haines v Haines*, 35 Mich 138, 144 (1876).

> **Note:** Prior to 2006, it was clear that contempt powers could not be used to collect debts "in cases where by law execution cannot be awarded for the collection of the sum." However, 2005 PA 326, effective December 27, 2005, eliminated the limiting language in MCL 600.1701(e) to allow contempt procedures in many types of collection matters. See *DeGeorge v Warheit*, 276 Mich App 587 (2007) (where the plaintiff and his attorney were ordered to reimburse the defendants for filing a frivolous lawsuit, and the attorney paid his personal debts before complying with the court order, the Court affirmed a finding of contempt because the attorney violated a court order and MCL 600.1701(e) permits the circuit court to punish people for failing to pay a money judgment).

C. Exception: Specific Fund or Article

Case law has permitted an order for transfer of a specific fund or article to be enforced by contempt proceedings. *Carnahan v Carnahan*, 143 Mich 390 (1906); *American Oil Co v Suhonen*, 71 Mich App 736 (1976). The *Carnahan* and *Suhonen* decisions both held that when the decree is not for payment of money but for delivery of a specific fund, it is distinguishable from the payment of a debt, and use of the contempt power for enforcement of the order is appropriate.

In *Carnahan*, *supra* at 397, the wife had been ordered to transfer a specific fund she maintained in a Canadian bank to her former husband. A finding of contempt for her refusal to do so was affirmed by the Supreme Court, which noted:

> "This is not a decree for the payment of money in the ordinary sense. It is not subject to the exemption law. The decree requires delivery of the specific thing—i.e., the fund—in contradistinction to the payment of a debt, and a writ of execution is not appropriate in such a case."

In *Suhonen*, *supra* at 741, the Court of Appeals relied on *Carnahan* in affirming the trial court's contempt citation, where an oil company salesman failed to pay to the company $3,300 in an account subject to his control as directed by the trial judge. The Court stated:

> "The Court has repeatedly reaffirmed the 'specific' or 'special fund' exception to the execution requirement in the statute, applying an implicit trustee-beneficiary analysis. By contrast, in clear debtor-creditor situations the traditional remedy of execution has been required."

In *Schaheen v Schaheen*, 17 Mich App 147 (1969), the Court of Appeals affirmed the contempt citation against the plaintiff-husband who refused to comply with the court order that he execute a deed to his former wife of income-producing real property situated in Beirut, Lebanon. The court did so on the basis of its conclusion that transfer of the property was covered by the "specific fund or article" rule.

D. Exception: Duty to Pay Arising From a Fiduciary Relationship

Where the duty to pay arises from a fiduciary relationship between the parties, the use of contempt proceedings has been upheld. For example, in *Maljak v Murphy*, 22 Mich App 380 (1970), a contempt citation was affirmed where the contemnor refused to refund an unearned attorney fee to the estate of his former client. In doing so, the Court of Appeals emphasized that the attorney was "not an ordinary debtor" but rather someone who "bears a special responsibility" and is subject to the power of the circuit court "to make any order for the payment of money or for the performance of any act by the attorney which law and justice may require." *Id.* at 385, quoting GCR 1963, 908 (now MCR 8.122).

E. Exception: Child or Spousal Support

MCL 552.631 permits an order for child support or spousal support to be enforced by use of the contempt power.[8] In *Schoensee v Bennett*, 228 Mich App 305, 317 (1998), the Court of Appeals held that an award of attorney fees in a child custody action is not a money judgment and is therefore enforceable by contempt proceedings.

5.9 Failure to Pay Child or Spousal Support

A. Statutes

Use of the contempt power to enforce child or spousal support orders is provided for in MCL 600.1701(f):

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *

[8] See **Section 5.9** for a discussion of this provision.

> "(f) Parties to actions, attorneys, counselors, and all other persons for disobeying or refusing to comply with any order of the court for the payment of temporary or permanent alimony or support money or costs made in any action for divorce or separate maintenance."

The Support and Parenting Time Enforcement Act, MCL 552.601 *et seq.*,[9] also provides for the use of contempt powers to enforce child or spousal support orders:

> "(1) If a person is ordered to pay support under a support order and fails or refuses to obey and perform the order, and if an order of income withholding is inapplicable or unsuccessful, a recipient of support or the office of the friend of the court may commence a civil contempt proceeding by filing in the circuit court a petition for an order to show cause why the delinquent payer should not be held in contempt. If the payer fails to appear in response to an order to show cause, the court shall do 1 or more of the following:
>
> > "(a) Find the payer in contempt for failure to appear.
> >
> > "(b) Find the payer in contempt for the reasons stated in the motion for the show cause hearing.
> >
> > "(c) Apply an enforcement remedy authorized under this act or the friend of the court act for the nonpayment of support.
> >
> > "(d) Issue a bench warrant for the payer's arrest requiring that the payer be brought before the court without unnecessary delay for further proceedings in connection with the show cause or contempt proceedings.
> >
> > "(e) Adjourn the hearing.
> >
> > "(f) Dismiss the order to show cause if the court determines that the payer is not in contempt." MCL 552.631(1)(a)–MCL 552.631(1)(f).

The Support and Parenting Time Enforcement Act defines "support" to include all of the following:

[9] MCR 3.208 governs procedure under this Act.

> "(*i*) The payment of money for a child or a spouse ordered by the circuit court, whether the order is embodied in an interim, temporary, permanent, or modified order or judgment. Support may include payment of the expenses of medical, dental, and other health care,[10] child care expenses, and educational expenses.
>
> "(*ii*) The payment of money ordered by the circuit court under the paternity act . . . [MCL 722.711–MCL 722.730], for the necessary expenses incurred by or for the mother in connection with her confinement, for other expenses in connection with the pregnancy of the mother, or for the repayment of genetic testing expenses.
>
> "(*iii*) A surcharge under [MCL 552.603a]." MCL 552.602(ff)(*i*)–MCL 552.602(ff)(*iii*).
>
> **Note:** The property settlement provisions of a divorce judgment may not be enforced using the contempt power. See Section 5.8(B).

Under MCL 552.613, the court may find an "income source" guilty of contempt for violating an order of income withholding. MCL 552.625 provides the court with additional remedies for the enforcement of support orders, including executing the judgment and appointing a receiver.

An employer may be held in civil contempt of court for negligently failing to comply with a court order appointing a Friend of the Court receiver of any worker's compensation settlement to defray a child support arrearage. *In re Contempt of United Stationers Supply Co (Walker v Henderson)*, 239 Mich App 496, 499-501 (2000). In both cases, a support payer's employer was served with a copy of the receivership order but paid settlement funds directly to the support payer. Service of a copy of the receivership order by certified mail, return receipt requested, is sufficient. *Id*. at 501-503. In such cases, a court may order the employer to pay the support recipient (i.e., the custodial parent) damages in the amount of the arrearage to be paid from the settlement, attorney fees, costs, and judgment interest. *Id*. at 498-499.

B. Right to Counsel

In *Mead v Batchlor*, 435 Mich 480, 498 (1990), the Michigan Supreme Court, relying on *Lassiter v Dep't of Social Services*, 452 US 18, 25-27 (1981),[11] concluded that the civil or criminal nature of a proceeding is

[10] See MCL 552.626 (contempt proceedings involving the failure to maintain health care coverage).

not the determining factor in deciding whether procedural due process requires the appointment of counsel. Rather, the right to appointed counsel is triggered by a person's fundamental interest in physical liberty. But see *Turner*, 564 US at ___,[12] where the United States Supreme Court concluded that in cases involving child support enforcement, "where . . . the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide support) [even if that person may be subject to incarceration up to one year]." However, to meet due process requirements, "the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." *Turner, supra* at ___. Alternative procedures include sufficient notice regarding the importance of the ability to pay, a fair opportunity to present and dispute relevant financial information, and court findings on the noncustodial parent's ability to pay. *Id.* at ___.The court must focus on whether the defendant is indigent under the guidelines established by AO 2003-3 and may not rely on the statutory presumption of ability to pay contained in MCL 552.633.[13] See *Mead*, *supra* at 506 n 32 (AO 1972-4, the administrative order in effect at the time *Mead* was decided, was rescinded by AO 2003-3).

C. Ability to Pay Support Arrearage and Sanctions

Three sections of the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq.*, govern support arrearages and associated sanctions.

- Under MCL 552.633, the court may impose sanctions on a payer who has the present ability to pay but has failed or refused to do so.
- Under MCL 552.635, the court may impose sanctions on a payer who could have the ability to pay by exercising due diligence but has failed or refused to exercise due diligence.

---

[11] The United States Supreme Court clarified that the *Lassiter* Court declared its holding while *denying* the litigant's right to counsel. *Turner v Rogers*, 564 US ___, ___ (2011). Based on a reading of several cases, the *Turner* Court found that a right to counsel does not exist in all cases involving incarceration. *Turner, supra* at ___. However, the Court does suggest that the possibility of incarceration is required to trigger the right to counsel. *Id.* at ___.

[12] The Court specifically stated that this holding does not address cases where the past due child support is owed to the state or unusually complex cases where the noncustodial parent "'can fairly be represented only by a trained advocate.'" *Turner*, 564 US at ___, quoting *Gagnon v Scarpelli*, 411 US 778, 788 (1973).

[13] See Section 5.9(E).

- Sanctions are listed in MCL 552.637 and differ depending upon the payer's circumstances.

Note that under MCL 552.637 an order of commitment under either §33 or §35 may be entered "only if other remedies appear unlikely to correct the payer's failure or refusal to pay support." MCL 552.637(1).

A court may find a payer in contempt if the court finds the payer in arrears and "if the court is satisfied that the payer has the capacity to pay out of currently available resources all or some portion of the amount due under the support order." MCL 552.633(1). If the payer does not show the court otherwise, the court must presume that the payer has currently available resources equal to four weeks of payments under the order. The court must not find that the payer has currently available resources of more than four weeks of payments without proof from the Friend of the Court or the recipient of the support. MCL 552.633(1). If the court finds a payer in contempt of court pursuant to MCL 552.633(1), the court may enter an order doing one or more of the following:

> "(a) Committing the payer to the county jail.
>
> "(b) Committing the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to go to and return from his or her place of employment.
>
> "(c) Committing the payer to a penal or correctional facility in this state that is not operated by the state department of corrections.
>
> "(d) If the payer holds an occupational license, driver's license, or recreational or sporting license, conditioning a suspension of the payer's license, or any combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
>
> "(e) Ordering the payer to participate in a work activity. This subdivision does not alter the court's authority to include provisions in an order issued under this section concerning a payer's employment or his or her seeking

> of employment as that authority exists on August 10, 1998.
>
> "(f) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, . . . [MCL 791.401–MCL 791.414].
>
> "(g) Except as provided by federal law and regulations, ordering the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

MCL 552.635(1)(a)–MCL 552.635(1)(b) provides that the court may find a payer in contempt if the court finds the payer is in arrears and one of the following:

- The payer could "by the exercise of due diligence" have the capacity to pay all or some portion of the support ordered and fails or refuses to do so.
- The payer has failed to obtain a source of income and has failed to participate in a work activity after referral by the Friend of the Court.

If the court finds the payer in contempt pursuant to MCL 552.635(1), MCL 552.635(2)(a)–MCL 552.635(2)(d) requires the court, absent good cause to the contrary, to immediately order the payer to participate in a work activity and also authorizes the court to order one or more of the following:

> "(a) Commit the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to participate in a work activity.
>
> "(b) If the payer holds an occupational license, driver's license, or recreational or sporting license, condition a suspension of the payer's license, or a combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.

> "(c) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, . . . [MCL 791.401–MCL 791.414].
>
> "(d) Except as provided by federal law and regulations, order the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

The order of commitment must continue until the payer pays the amount ordered to be paid under MCL 552.637(2)(b) or (3)(b), but must not exceed 45 days for the first adjudication of contempt or 90 days for a subsequent adjudication of contempt. MCL 552.637(4).

Regardless of the length of commitment imposed by the court, an unemployed payer who finds employment while committed to jail pursuant to §35 shall be released if either (1) the payer is self-employed, has completed two consecutive weeks at his or her employment, and has made a support payment as ordered by the court; or (2) the payer is employed and has completed two weeks at work and an order of income withholding is effective. MCL 552.635(3)(a) and (b).

D. Determining Ability to Pay

The present form of the statutes governing collection of support arrearages can be traced to the Michigan Supreme Court's decision in *Sword v Sword*, 399 Mich 367 (1976), rev'd on other grounds 435 Mich 480, 506 (1990). In *Sword*, *supra* at 379, the Supreme Court stated:

> "If the judge concludes from the testimony of defendant and others that defendant has 'sufficient ability to comply with' the order or 'by the exercise of due diligence could be of sufficient ability, and has neglected or refused' to comply, defendant may be found in contempt of court."

In determining whether a payer has or should have the ability to pay, the court should consider:

- employment skills, including the reasons for any termination;
- education and skills;
- work opportunities;
- effort in seeking work;

- personal history, including present marital status and means of support;
- assets and any transfer of assets;
- efforts to modify the support order claimed to be excessive;
- health and physical ability;
- availability for work (periods of hospitalization and imprisonment); and
- the location of the payer since the decree and reasons for moves.

Sword, *supra* at 378-379. See also *Wells v Wells*, 144 Mich App 722, 732 (1985) (determination must be made on a case-by-case basis).

In *Gonzalez v Gonzalez*, 121 Mich App 289, 291 (1982), the Court of Appeals held that where the record demonstrated that the defendant had no means of support other than ADC (Aid to Dependent Children) benefits, an order to pay a portion of an arrearage or go to jail for 90 days was beyond the power of the court. See also *Causley v LaFreniere*, 78 Mich App 250, 252-253 (1977) (Court of Appeals approved an order to pay child support from future wages but held in abeyance the collection of arrearage until defendant was employed), and *Borden v Borden*, 67 Mich App 45 (1976).

E. Statutory Presumption of Ability to Pay

In the absence of proofs to the contrary, the court shall presume the payer has currently available resources equal to four weeks of support payments. MCL 552.633(1). In *Hicks on Behalf of Feicock v Feicock*, 485 US 624 (1988), the United States Supreme Court held that a statutory presumption of ability to pay would violate procedural due process requirements in a criminal contempt proceeding, but not in a civil contempt proceeding.

In *Deal v Deal*, 197 Mich App 739, 743-744 (1993), the Court of Appeals affirmed the defendant's contempt citation where the trial court ordered the defendant to pay an amount that exceeded four weeks of support payments to avoid being jailed, and where the defendant's counsel admitted the defendant's ability to pay and represented that the defendant was making regular support payments.

F. Civil or Criminal Contempt Proceedings

Contempt proceedings for nonsupport are usually civil in character. MCL 552.631(1) provides that civil contempt proceedings may be instituted following a failure to pay. There may be circumstances, however, where the court wishes to charge the defendant with criminal rather than civil contempt. This could occur where a defendant has willfully violated a support order in the past and has no present ability to comply. For example, a defendant may have received a substantial sum of money after settlement of a tort claim and may have been required by prior order to use a substantial portion of that settlement to pay past due child support. If the defendant failed to do so and now has no funds with which to pay support, the court might choose to proceed on the basis of criminal contempt. In such a situation, it would be wise for the court to refer the case to the prosecutor for possible initiation of criminal contempt proceedings. The statutory authority permitting such action is MCL 552.627(1)(d), which states that the circuit court may take other enforcement action under the applicable laws, including the general contempt statutes, MCL 600.1701 *et seq*. The court may not, however, sentence a defendant to a fixed jail term without complying with all of the procedural protections required for a criminal contempt case. *Borden v Borden*, 67 Mich App 45, 49 n 1 (1976).

G. Waiver of Contempt and Hearing on Modification of Support Order

MCL 552.17a(2) allows the court to waive the contempt in certain circumstances:

> "Upon an application for modification of a judgment or order when applicant is in contempt, for cause shown, the court may waive the contempt and proceed to a hearing without prejudice to applicant's rights and render a determination on the merits."

5.10 Violation of Parenting Time Order in Divorce Judgment

A. Statute

The Support and Parenting Time Enforcement Act, MCL 552.641(1), requires the Friend of the Court, for a "friend of the court case," to take one or more of the following actions on an alleged custody or parenting time order violation:

- Apply a makeup parenting time policy under MCL 552.642.

- Initiate civil contempt proceedings under MCL 552.644. If a parent fails to appear in response to an order to show cause, the court may issue a bench warrant, and unless good cause is shown on the record, the court shall order the parent to pay the costs of the hearing, the issuance of the warrant, the arrest, and further hearings. MCL 552.644(5).

- File a motion pursuant to MCL 552.517d for modification of the existing parenting time provisions to ensure parenting time.

- Schedule alternative dispute resolution pursuant to MCL 552.513.

- Schedule a joint meeting under MCL 552.642a.

  Note: "'Friend of the court case'" means a domestic relations matter that an office establishes as a friend of the court case as required under section 5a." MCL 552.502(o).

According to MCL 552.641(2), the Friend of the Court may decline to respond to an alleged violation of a custody or parenting time order if any of the following circumstances apply:

> "(a) The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because a complaint was found to be unwarranted, and the party has not paid those costs.
>
> "(b) The alleged custody or parenting time order violation occurred more than 56 days before the complaint is submitted.
>
> "(c) The custody or parenting time order does not include an enforceable provision that is relevant to the custody or parenting time order violation alleged in the complaint."

If the court finds that a parent has violated a custody or parenting time order without good cause,[14] the court must find that parent in contempt. MCL 552.644(2). MCL 552.644(2) provides that once the

[14] "'Good cause'" includes, but is not limited to, consideration of the safety of a child or a party who is governed by the parenting time order." MCL 552.644(3).

court finds a parent in contempt, it may do one or more of the following:

> "(a) Require additional terms and conditions consistent with the court's parenting time order.
>
> "(b) After notice to both parties and a hearing, if requested by a party, on a proposed modification of parenting time, modify the parenting time order to meet the best interests of the child.
>
> "(c) Order that makeup parenting time be provided for the wrongfully denied parent to take the place of wrongfully denied parenting time.
>
> "(d) Order the parent to pay a fine of not more than $100.00.
>
> "(e) Commit the parent to the county jail.
>
> "(f) Commit the parent to the county jail with the privilege of leaving the jail during the hours the court determines necessary, and under the supervision the court considers necessary, for the purpose of allowing the parent to go to and return from his or her place of employment.
>
> "(g) If the parent holds an occupational license, driver's license, or recreational or sporting license, condition the suspension of the license, or any combination of the licenses, upon noncompliance with an order for makeup and ongoing parenting time.
>
> "(h) If available within the court's jurisdiction, order the parent to participate in a community corrections program established as provided in the community corrections act, . . . [MCL 791.401–MCL 791.414]."

If no sanctions are imposed, the court must state on the record the reason it is not ordering a sanction listed in MCL 552.644(2)(a)–MCL 552.644(2)(h). MCL 552.644(3).

If the court finds a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction and to pay the other party's costs. MCL 552.644(6), (8). The first time a party acts in bad faith the sanction may not exceed $250. The second time a party acts in bad faith the sanction may not exceed $500. The sanction for a third or subsequent time a party acts in bad faith may not exceed $1,000. MCL 552.644(6).

See MCR 3.208 for the required procedures.

B. Civil or Criminal Contempt Proceedings

"[G]enerally, a trial court's invocation of its contempt authority to enforce a parenting time order is a civil proceeding." *Porter v Porter*, 285 Mich App 450, 458 (2009).

Where it is possible to restore the status quo by granting additional parenting time, the proceeding is civil in nature. The defendant must be given an opportunity to purge the contempt by complying with conditions set forth by the judge to remedy the violation. *Casbergue v Casbergue*, 124 Mich App 491, 495 (1983). However, where the status quo has been so altered that it cannot be restored, there is criminal contempt. *In re Contempt of Rapanos*, 143 Mich App 483, 497 (1985). The defendant must then be proven guilty beyond a reasonable doubt and cannot be compelled to testify against himself or herself. *In re Contempt of Auto Club Ass'n (Algarawi v Auto Club Ass'n)*, 243 Mich App 697, 713-714 (2000).

The court may not order a change of custody as punishment for contempt of court resulting from violation of a parenting time order. *Adams v Adams*, 100 Mich App 1, 13 (1980).

5.11 Violation of Personal Protection Order (PPO)

"[O]ne who holds a PPO is under no obligation to act in a certain way. Instead, [when determining if a PPO has been violated,] a court must look only to the behavior of the individual against whom the PPO is held." *In re Kabanuk*, 295 Mich App 252, 258 (2012).

Violation of a PPO subjects the adult offender to sanctions as provided in MCL 600.2950 ("domestic relationship" PPOs) and MCL 600.2950a (non-domestic relationship "stalking" PPOs and non-domestic sexual assault PPOs). These statutes provide for criminal contempt penalties consisting of a maximum 93-day jail term and a possible fine of not more than $500:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, shall be imprisoned for not more than 93 days and may be fined not more than $500.00." MCL 600.2950(23). See MCL 600.2950a(23) for a similar provision.

MCL 712A.2(h) assigns jurisdiction of PPO actions involving minor respondents to the Family Division of Circuit Court.[15] Sanctions for contempt by a minor are governed by MCL 712A.18.

Because PPO violations typically involve past violations of the court's order and situations where the status quo cannot be restored, criminal contempt sanctions are usually imposed. In rare cases (e.g., where the respondent refuses to relinquish property), civil contempt sanctions may be appropriate; in these cases, MCL 600.1715 applies. See MCL 600.2950(26) and MCL 600.2950a(27). The person injured by a PPO violation may also recover damages under MCL 600.1721.[16]

For information on procedures in contempt proceedings instituted after a PPO violation, see MCR 3.708.

5.12 Criminal Defendant's Disruptive Behavior in Court

A. Statute

MCL 600.1701(a) covers contempt proceedings against criminal defendants who engage in disruptive conduct in the courtroom:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> > "(a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due its authority."

B. Constitutional Right to Be Present at Trial

A criminal defendant's constitutional right to confront his or her accusers, US Const, Am VI, and Const 1963, art 1, § 20, encompasses the ancillary right to be present in the courtroom during trial.[17] *Maryland v Craig*, 497 US 836, 844 (1990). However, a defendant may waive that right by his or her conduct in the courtroom. In *Illinois v Allen*, 397 US 337, 343 (1970), the Court stated:

---

[15] See Section 5.21(C) for further discussion.

[16] Note that MCL 600.1721 "is effectively a proxy for a tort claim." *In re Bradley Estate*, ___ Mich ___, ___ (2013). See Section 4.1 for more information.

[17] See also MCL 768.3 (statutory right to be present at trial).

> "[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."

See, e.g., *People v Harris*, 80 Mich App 228, 229-230 (1977) (trial court properly exercised discretion in removing defendant who, despite numerous warnings, repeatedly interrupted the trial with his willful and disorderly behavior). Cf. *People v Buie (On Remand)*, 298 Mich App 50, 59-60 (2012) (defendant's removal from courtroom following a single interruption of voir dire not justified).

C. Constitutionally Permissible Solutions

The Court in *Allen* went on to discuss three constitutionally permissible approaches a trial judge may use in handling an obstreperous defendant.

First, the trial court may cite or threaten to cite the defendant for contempt. *Allen*, *supra* at 344. Criminal contempt may be used to punish the conduct and may deter the defendant from similar future conduct. See *People v Ahumada*, 222 Mich App 612, 617-618 (1997). Obviously, if the sanctions for criminal contempt pale in comparison to the penalty for the offense charged, criminal contempt may be of little use. Civil contempt may be used and the defendant jailed until he or she acts properly. This remedy leaves the defendant in charge of the trial process, however.

Second, the trial court may order the defendant bound and gagged. *Allen*, *supra* at 344. This has the advantage of leaving control with the judge and of assuring the defendant's presence, but it lessens the decorum and dignity of the court, prevents communication between attorney and client, and detracts from the fact-finder's ability to impartially assess the merits of the case. See, generally, *People v Conley*, 270 Mich App 301, 308-309 (2006); *People v Kerridge*, 20 Mich App 184, 186-188 (1969).

Third, the trial court may, if necessary, order the defendant removed from the courtroom until the defendant is willing to conduct himself or herself in an orderly manner. *Allen*, *supra* at 344.

Michigan courts have relied upon *Allen* in affirming convictions where the defendant's conduct resulted in his or her absence at trial. *People v Travis*, 85 Mich App 297, 300-303 (1978) (waiver of constitutional right to be present due to defendant's voluntary absence from trial); *People v Harris*, 80 Mich App 228, 229-230 (1977) (waiver of constitutional right to be present due to defendant's disruptive behavior).

"'[T]he test for whether [a] defendant's absence from a part of his [or her] trial requires reversal of his conviction is whether there was any reasonable possibility that [the] defendant was prejudiced by his absence.'" *People v Buie (On Remand)*, 298 Mich App 50, 59 (2012), quoting *People v Armstrong*, 212 Mich App 121, 129 (1995) (reversal not required where defendant was absent for only a short period during voir dire and there was no evidence to support a finding that there was any reasonable possibility that he was prejudiced by the brief absence).

5.13 Witness's Refusal to Testify

A. Statutes and Court Rule

MCL 600.1701(i)(*i*) states, in pertinent part:[18]

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(i) All persons who, having been subpoenaed to appear before or attend, refuse or neglect to obey the subpoena, to attend, to be sworn, or when sworn, to answer any legal and proper interrogatory in any of the following circumstances:
>
> "(*i*) As a witness in any court in this state."

In addition, MCR 2.506(E)(2) provides:

> "If a person refuses to be sworn or to testify regarding a matter not privileged after being ordered to do so by the

[18] Other statutes also allow tribunals to punish as contempt a witness's refusal to testify. See, e.g., MCL 418.853 and MCL 780.703.

> court, the refusal may be considered a contempt of court."

MCL 600.1725 provides the penalty for a witness's refusal to testify:

> "If any witness attending pursuant to a subpoena, or brought before any court, judge, officer, commissioner, or before any person before whom depositions may be taken, refuses without reasonable cause
>
> > "(1) to be examined, or
> >
> > "(2) to answer any legal and pertinent question, or
> >
> > "(3) to subscribe his deposition after it has been reduced to writing, the officer issuing the subpoena shall commit him, by warrant, to the common jail of the county in which he resides. He shall remain there until he submits to be examined, or to answer, or to subscribe his deposition, as the case may be, or until he is discharged according to law."

B. Fifth Amendment Privilege Against Self-Incrimination

The Michigan Supreme Court has stated that where it is apparent the answer could not injure a witness, the court should compel the witness to answer and may summarily punish the witness for a refusal to answer. *In re Bommarito*, 270 Mich 455, 458-459 (1935). "The due administration of the law does not permit [the witness] to arbitrarily hide behind a fancied or intangible danger . . . [.]" *In re Moser*, 138 Mich 302, 306 (1904). "The tendency to incriminate must be a reasonable one; an answer may not be withheld because it might possibly under some conceivable circumstances form part of a crime." *In re Schnitzer*, 295 Mich 736, 740 (1940). For a general discussion of properly invoking the privilege against self-incrimination, see *People v Joseph*, 384 Mich 24, 28-32 (1970).

C. Use of Summary Contempt Proceedings

Because a witness's refusal to testify is a contempt committed in the immediate view and presence of the court, the court may punish it summarily. MCL 600.1711(1).

D. Civil Sanctions

MCL 600.1715(1) provides that the general penalty provisions for contempt of court contained in §1715 of the Revised Judicature Act apply "except as otherwise provided by law." MCL 600.1725

mandates coercive civil incarceration for a witness's refusal to testify when required to do so, whereas, the general provision in MCL 600.1715(1) makes incarceration discretionary for a witness's failure to testify.

E. Excusing the Jury

To avoid the appearance of partiality, the court should excuse the jury before a witness is cited for contempt of court. *People v Williams*, 162 Mich App 542, 547 (1987).

5.14 Grand Jury Witness's Refusal to Testify

A. Statute

"Any witness who neglects or refuses to appear or testify or both in response to a summons of the grand jury or to answer any questions before the grand jury concerning any matter or thing of which the witness has knowledge concerning matters before the grand jury after service of a true copy of an order granting the witness immunity as to such matters shall be guilty of a contempt and after a public hearing in open court and conviction of such contempt shall be fined not exceeding $10,000.00 or imprisoned not exceeding 1 year, or both. If the witness thereafter appears before the court to purge himself of such contempt, the court shall order the recalling of the grand jury to afford such opportunity . . . [.]"MCL 767.19c.

B. Civil Contempt Proceedings

In *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 165 (1971), the Court of Appeals held that all contempt citations under MCL 767.19c are civil. The holding of *Spalter* was contrary to dictum in *People v Johns*, 384 Mich 325 (1971), a Supreme Court decision that had been decided earlier in 1971. In *Johns*, the Supreme Court stated that a witness who failed to answer questions of a grand jury could be held in either civil or criminal contempt. *Id.* at 331. In *Spalter*, the Court of Appeals pointed out that §19c had been amended since the grand jury proceedings in the *Johns* case occurred. The 1970 amendment to §19c added the provision that "the court shall order the recalling of the grand jury" to allow the witness to purge himself or herself of contempt. Therefore, the Court of Appeals concluded that

> "a witness who has been convicted of contempt for neglecting or refusing to testify before a grand jury and who thereafter appears before the court expressing a desire to purge himself of the contempt has the absolute

> right at any time to have the court order the recalling of the grand jury so as to afford him an opportunity to purge himself." *Spalter*, *supra* at 163-64.

Thus, all contempt citations under §19c are civil because the witness "carries in his pocket the keys to his cell." *Spalter*, *supra* at 164-165.

C. Sanctions for Repeated Refusal to Testify

Whether a grand juror witness's repeated refusal to testify before the same grand jury may be deemed one continuous contempt or several instances of contempt was discussed in *People v Walker*, 393 Mich 333 (1975). In that case, the Supreme Court held that whether there is one instance or several separate instances of disobedience, the one-year maximum penalty provisions of MCL 767.19c apply. The Court said that to permit each refusal to testify to be punished by a maximum sentence to be served consecutively would effectively abrogate the statutory maximum penalty provision. *Walker*, *supra* at 339. Thus, whether the refusal to testify before the same grand jury occurs continuously, or in separate instances, the penalty may not exceed the one-year statutory maximum.

However, the Supreme Court's holding in *Walker*, *supra*, does not apply to the situation where the separate refusals to testify occur before different grand juries. When this occurs, the defendant may be sentenced anew for each separate and distinct act of contempt. *People v Walker*, 78 Mich App 402, 406-407 (1977). The Court of Appeals decision involved the same defendant involved in the Supreme Court decision. After the Supreme Court had decided that the respondent's sentence could not be more than one year for repeated refusals to testify before the same grand jury, a new grand jury was convened to investigate the same subject matter. The respondent was called before the new grand jury and again refused to testify. The Court of Appeals upheld the respondent's second sentence for contempt even though when it was added to the first sentence it exceeded the statutory maximum of one year. *Id*.

5.15 Filing False Pleadings and Documents

A. Statute and Court Rule

"The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:

* * *

> "(d) Parties to actions . . . for any deceit or abuse of the process or proceedings of the court." MCL 600.1701(d).

MCR 2.114 requires "documents" (pleadings, motions, affidavits, and other papers to which the court rules rely) to be signed or verified in certain cases. MCR 2.114(A)–MCR 2.114(C). An electronic signature is also acceptable. MCR 1.109(D); MCR 2.114(C)(3). False declarations in documents are the subject of MCR 2.114(B)(2), which states:

> "If a document is required or permitted to be verified, it may be verified by
>
> > "(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or
> >
> > "(b) except as to an affidavit, including the following signed and dated declaration: 'I declare that the statements above are true to the best of my information, knowledge, and belief.'
>
> "In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court."*

B. Indirect Contempt

In *In re Collins*, 329 Mich 192, 196 (1950), the Court held that filing false pleadings constitutes indirect contempt. The filing of false pleadings may not be summarily punished because it is not an act within the immediate view and presence of the court.

C. False or Evasive Testimony or Pleading

A witness's false or evasive testimony that conflicted with other witnesses' testimony was found contumacious in *In re Scott*, 342 Mich 614, 617-618 (1955).

In *People v Little*, 115 Mich App 662 (1982), a criminal defendant moved to withdraw his guilty plea, claiming that he had lied during the plea proceeding. The judge issued an order to show cause why the defendant should not be held in contempt. The defendant's attorney testified at the show-cause hearing that he advised the defendant to plead guilty because "the case was unwinnable." The Court of Appeals reversed the criminal contempt citation, finding that it was not proved beyond a reasonable doubt that the defendant's false statements at the plea proceeding were culpable. *Id.* at 665.

5.16 Parties and Attorneys in Civil Cases Who Violate Discovery Orders

A. Statute and Court Rules

MCL 600.1701(g) allows the court to punish as contempt disobedience of its orders:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court."

MCR 2.313(A) outlines how a party may obtain an order compelling discovery. MCR 2.313(B) provides sanctions for failure to provide or permit discovery after such an order has been issued. That rule states, in pertinent part:

> "(1) *Sanctions by Court Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by a court in the county or district in which the deposition is being taken, the failure may be considered a contempt of that court.
>
> "(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party, or a person designated . . . to testify on behalf of a party, fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> * * *
>
> "(d) in lieu of or in addition to the foregoing orders, an order treating as contempt of court the failure to obey an order, except an order to submit to a physical or mental examination[.]"

B. Attorneys

The sanctions provided by the predecessor to MCR 2.313 were referred to in *Richards v O'Boyle*, 21 Mich App 607 (1970). The Court of

Appeals stated than an attorney who did not comply with the rules for expeditious handling of discovery proceedings and who did not submit answers to the defendant's interrogatories could be held in contempt. *Id*. at 611-612.

C. Refusal to Submit to Paternity Test

In *Bowerman v MacDonald*, 431 Mich 1, 23 (1988), the Michigan Supreme Court held that a putative father's refusal to submit to court-ordered blood testing or tissue typing could be punished by contempt, although a default judgment could not be entered against the putative father. In response to *Bowerman*, the Legislature amended MCL 722.716 to allow for entry of a default judgment in such cases. MCL 722.716(1)(a).

5.17 Criticism of the Court

A. Statute

MCL 600.1701(*l*) provides for a finding of contempt following criticism of a judge or court proceeding in certain circumstances:[19]

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(*l*) The publication of a false or grossly inaccurate report of the court's proceedings, but a court shall not punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceedings, or decision had in the court."

B. Freedom of Speech

Criticisms of a court have resulted in contempt proceedings against the speaker or writer. *Pennekamp v Florida*, 328 US 331, 347 (1945); *In re Contempt of Dudzinski*, 257 Mich App 96 (2003). However, much respect must be given to the freedom of public comment. In *Pennekamp*, *supra*, the United States Supreme Court stated:

[19] See Section 3.14(C) for a discussion of the contemnor's right to have the proceedings heard by another judge in such cases.

> "Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

Michigan courts have also recognized that it is a proper exercise of the rights of free speech and press to criticize the courts. *In re Gilliland*, 284 Mich 604, 610 (1938). "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men [and women] of fortitude, able to thrive on a hardy climate." *Dudzinski*, *supra* at 101.

C. Test to Determine Whether Criticism Is Contumacious

In *Dudzinski*, *supra* at 101, the Michigan Supreme Court stated that the critic should not be subject to contempt proceedings unless the criticism "constitutes an imminent threat to the administration of justice." *In re Turner*, 21 Mich App 40 (1969), also recognized the right of free discussion and reemphasized the importance it must be given in a contempt proceeding based on criticism of a court. In providing a guideline for deciding when critical comment should be subject to contempt proceedings, the Court of Appeals said:

> "In adhering to the belief that 'free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve', we conclude that inaccurate comment, false comment, even vicious comment regarding the court which does not affect pending litigation must not be dealt with by the contempt power as a means of assuring the just exercise of the judicial process." *Id*. at 51, quoting *Pennekamp*, *supra* at 346.

There must be "an immediate peril of undue influence or coercion upon pending litigation" before the contempt power may be used to punish public criticism of the court. *Turner*, *supra* at 56.

In *Dudzinski*, *supra*, the alleged contemnor, Dudzinski, was a spectator in the courtroom during a motion hearing in a civil lawsuit brought by the personal representative of a person fatally shot by a police officer. Dudzinski wore a shirt containing the phrase "Kourts Kops Krooks." The trial court found that the shirt affected the fair administration of justice and ordered Dudzinski to remove it or leave

the courtroom. Dudzinski refused and invoked his First Amendment right to freedom of expression. The trial court found Dudzinski in criminal contempt of court and sentenced him to 29 days in jail. Dudzinski served the full term. *Id*. at 97-99.

The Court of Appeals concluded that the trial court violated Dudzinski's First Amendment right to freedom of expression by ordering him to remove the shirt or leave the courtroom because the "speech" at issue did not constitute an imminent threat to the administration of justice. *Id*. at 102-104, relying on *Norris v Risley*, 918 F2d 828, 832 (CA 9, 1990). The Court of Appeals distinguished the facts in this case from those in *In re Contempt of Warriner (City of Detroit v Warriner)*, 113 Mich App 549 (1982), where a spectator at a bail hearing raised his fist and shouted. *Dudzinski*, *supra* at 102-103. The Court in *Dudzinski* also distinguished *Norris*, *supra*, where the United States Court of Appeals for the Ninth Circuit held that the appearance of 15 spectators wearing "Women Against Rape" buttons at the defendant's jury trial posed an unacceptably high risk of depriving the defendant of a fair trial. In *Dudzinski*, the Court of Appeals emphasized that the allegedly contumacious behavior occurred at a pretrial hearing rather than a jury trial and noted that Dudzinski was only one of three persons wearing the shirts. *Dudzinski*, *supra*.

Although the Court of Appeals concluded that the trial court violated Dudzinski's constitutional rights by ordering him to remove the shirt or leave the courtroom, the Court held that the trial court did not abuse its discretion by holding Dudzinski in contempt for failing to obey its order. The Court of Appeals stated that even though "the statement on [Dudzinski's] shirt did not constitute an imminent threat to the administration of justice and was constitutionally protected speech, [Dudzinski's] willful violation of the trial court's order, regardless of its legal correctness, warranted the trial court's finding of criminal contempt." *Dudzinski*, *supra* at 111.

5.18 Interfering With a Witness or Obstructing Judicial Process

MCL 600.1701(h) states, in pertinent part:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *

> (h) . . . for unlawfully detaining any witness or party to an action while he or she is going to, remaining at, or returning from the court where the action is pending for trial, or for any other unlawful interference with or resistance to the process or proceedings in any action."

A. Interference With Witnesses

"The intimidation of witnesses is naturally a criminal matter,—one in which the damages are to the public and the courts as well as to litigants." *Russell v Wayne Circuit Judge*, 136 Mich 624, 625 (1904).

Threatening a complaining witness in a criminal case may be punished as contempt of court. *In re Contempt of Nathan (People v Traylor)*, 99 Mich App 492, 493 (1980). A person may be found in contempt of court for attempting to prevent the attendance of a person not yet subpoenaed as a witness. *Montgomery v Palmer*, 100 Mich 436, 441 (1894).

B. Bribery

"To bribe or attempt to bribe a witness in a pending case is a most serious contempt of court, and one which should be promptly dealt with." *Nichols v Judge of Superior Court*, 130 Mich 187, 197 (1902).

5.19 Improper Attempt to Affect Jurors and Potential Jurors

A. Statute

MCL 600.1701(h) gives the court authority to punish as contempt any unlawful interference with its proceedings, including interference with jurors:

> "(h) . . . for any other unlawful interference with or resistance to the process or proceedings in any action."

B. Site of Contact With Jurors Irrelevant

In *Gridley v United States*, 44 F2d 716, 745 (CA 6, 1930), a litigant spoke to jurors in a restroom. The Court said: "If a litigant or his friend . . . approaches a juror in such a way as to constitute misbehavior within the meaning of the statute[,] such misbehavior is so near to the presence of the court as to obstruct the administration of justice within its meaning no matter where it takes place." *Id.* at 746.

C. Prejudice to a Party Unnecessary

In *Langdon v Judges of Wayne Circuit Court*, 76 Mich 358, 371 (1889), the Supreme Court found that a trial court has jurisdiction to punish contumacious misconduct even though no prejudice resulted to either party. Where the contemnor interfered while a suit was pending and tried to bring about disagreement among jurors by bribery, the court had jurisdiction to punish the contemnor because the act was calculated to defeat, impair, impede, or prejudice the rights or remedy of a party. *Id.* at 371-372.

5.20 Fiduciaries Who Violate Court Orders

A. Statute

MCL 600.1701(g) gives the court broad authority to punish as contempt disobedience of its orders:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court."

See MCR 5.203 for required procedures when a fiduciary is not properly administering an estate. These procedures do not preclude contempt proceedings. MCR 5.203(D).

B. Failure to Comply With Court Order

A fiduciary who fails to comply with a court order may be punished for contempt. *People v McCartney*, 132 Mich App 547 (1984), aff'd on remand 141 Mich App 591 (1985). *McCartney* involved a conservator who misused funds belonging to a minor's estate. At a show cause hearing, the probate court held the conservator in contempt after she failed to show proof of deposit of the funds in the name of the minor.

5.21 Contempt of Court Under the Juvenile Code

A. Statutes and Court Rule

A provision of the Juvenile Code, MCL 712A.26, provides "juvenile courts" (Family Division of Circuit Court) with contempt powers:

> "The court shall have the power to punish for contempt of court under . . . [MCL 600.1701–MCL 600.1745], any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter."

The parent or guardian of a juvenile over whom the court has taken jurisdiction for a criminal offense committed by the juvenile is required to attend the juvenile's dispositional hearings. MCL 712A.6a. The statute states, in pertinent part, that "[a] parent or guardian who fails to attend the juvenile's hearing without good cause may be held in contempt and subject to fines."

MCR 3.928 also provides a description of the applicable procedures and penalties for contempt of court:

> **"(A) Power.** The court has the authority to hold persons in contempt of court as provided by MCL 600.1701 and 712A.26. A parent, guardian, or legal custodian of a juvenile who is within the court's jurisdiction and who fails to attend a hearing as required is subject to the contempt power as provided in MCL 712A.6a.
>
> **"(B) Procedure.** Contempt of court proceedings are governed by MCL 600.1711, 600.1715, and MCR 3.606. MCR 3.982–MCR 3.989 govern proceedings against a minor for contempt of a minor personal protection order.
>
> **"(C) Contempt by Juvenile.** A juvenile under court jurisdiction who is convicted of criminal contempt of court, and who was at least 17 years of age when the contempt was committed, may be sentenced to up to 93 days in the county jail as a disposition for the contempt. Juveniles sentenced under this subrule need not be lodged separately and apart from adult prisoners. Younger juveniles found in contempt of court are subject to a juvenile disposition under these rules."

B. Common Uses of Contempt Power in Juvenile and Child Protective Proceedings

In child protective proceedings, the court has statutory authority to permanently restrain a "nonparent adult" from coming into contact with the child. The court may also order the nonparent adult to comply with and participate in the Case Service Plan. In addition to criminal penalties for violations of such orders, the court may exercise its criminal or civil contempt powers for violation of these provisions. See MCL 712A.6b(5).

MCL 712A.13a(4)–MCL 712A.13a(5) give the court authority to order a parent, nonparent adult, or other person out of the child's home before trial if the petition contains allegations of abuse. If a person violates a court order issued under §13a is found guilty of criminal contempt, the court must order the person to jail for not more than 90 days and may fine the person not more than $500. MCL 764.15f(1)(e).

The "juvenile court" may cite a parent for contempt in delinquency cases for failure to attend a hearing without good cause. MCL 712A.6a and MCR 3.928(A). A juvenile court may also punish persons who fail to appear in court in response to a summons. MCL 712A.13.

The juvenile court may also enforce its reimbursement orders through use of the contempt power. See MCL 712A.18b. If a parent or other adult legally responsible for the child's care fails or refuses to obey a reimbursement order, the court that entered the order may order a wage or salary assignment to recover the amount of unpaid support. MCL 712A.18b. The court may also enforce an order assessing attorney costs through its contempt powers. See MCL 712A.17c(8), MCL 712A.18(5), and MCR 3.915(E). See, generally, *In re Reiswitz*, 236 Mich App 158, 172 (1999).

C. Enforcement of Personal Protection Orders (PPOs) Against Juveniles

The Family Division of Circuit Court has jurisdiction over proceedings involving a personal protection order issued under MCL 600.2950 or 600.2950a, in which the respondent is a juvenile less than 18 years of age. MCL 712A.2(h). Court rules governing procedure for juvenile violations of personal protection orders are found in MCR 3.982–MCR 3.989. Violations of personal protection orders may be punished by contempt sanctions.

D. Jurisdiction

A juvenile court has jurisdiction of contempt proceedings involving contempt of its orders even where the contemnor is over age 19 (when

jurisdiction over the child must terminate in most delinquency cases) at the time of the hearing. *In re Summerville*, 148 Mich App 334, 341 (1986). Thus, the court may punish as contempt of court the failure to reimburse costs after it has terminated jurisdiction over the juvenile. *In re Reiswitz*, 236 Mich App 158 (1999).

E. Authority to Punish Juvenile for Contempt Committed in Proceedings Not Under the Juvenile Code

It is unclear whether a court has authority to punish a juvenile for contempt of court when he or she commits contumacious acts while appearing in proceedings not governed by the Juvenile Code. MCL 600.1701 gives all courts of record the authority to punish *persons* who are found in contempt of court. However, MCL 712A.2(a)(1) assigns the juvenile court exclusive jurisdiction, superior to and regardless of the jurisdiction of any other court, over any child under 17 years of age found to have violated any criminal law or ordinance. Thus, an argument could be made that this statutory grant of exclusive jurisdiction to the juvenile court divests adult courts of authority to *impose sanctions* against a juvenile for contempt in proceedings not governed by the Juvenile Code.

However, such a conclusion is contrary to the rationale of the Michigan Supreme Court's decision in *People v Joseph*, 384 Mich 24, 34-35 (1970). In that case, the defendant was convicted of criminal contempt in Wayne County Circuit Court for having refused to answer questions put to him by a one-man grand jury convened by that court. On appeal to the Supreme Court, the defendant challenged the jurisdiction of the Recorder's Court to hear all prosecutions and proceedings for crimes committed within the corporate limits of the city of Detroit. In rejecting that challenge, the Supreme Court stated:

> "While contempt, like other crimes, is an affront to society as a whole, it is more directly an affront to the justice, authority and dignity of the particular court involved. Accordingly, the court with jurisdiction over the proceedings wherein the alleged contempt occurred has jurisdiction over contempt proceedings." *Joseph*, *supra* at 35.

Thus, in *Joseph*, the Supreme Court concluded that the exclusive statutory grant of authority in criminal cases to Recorder's Court did not divest Wayne County Circuit Court of the authority to utilize contempt sanctions to enforce its orders. Likewise, in the case of contumacious conduct by a juvenile appearing in adult court, it cannot be said that the grant of exclusive jurisdiction over children under 17 to juvenile court divests the adult court of its authority to

utilize appropriate contempt sanctions, including committing the juvenile.

If a juvenile is committed to a detention facility, he or she must be confined in the least restrictive environment[20] that will meet the needs of the juvenile and the public, and that will conform to the requirements of the Juvenile Code. MCR 3.935(D)(4). MCL 712A.16(1) establishes the general rule that a juvenile may not be jailed unless he or she is over age 15 and the juvenile's habits or conduct are considered a menace to other children, or unless the juvenile might not otherwise be safely detained. The juvenile must be placed in a room or ward out of sight and sound of adult prisoners, and for a period not to exceed 30 days, unless longer detention is necessary for service of process. MCL 712A.16(1); MCL 764.27a(2).

5.22 Table: Procedures and Sanctions for Common Forms of Contempt

The following table indicates whether the acts described in Chapter 5 constitute direct or indirect contempt and whether the acts may be treated as civil or criminal contempt of court. See Chapter 3 for detailed treatment of the procedures required for each type of contempt proceeding.

Contumacious conduct	Whether conduct is direct or indirect contempt	Whether conduct is civil or criminal contempt
Attorney's failure to appear in court See Section 5.3	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted. Attorney's willfulness need not be proven to order civil sanctions, including costs of assembling jury panel. *In re Contempt of McRipley (People v Gardner)*, 204 Mich App 298, 301-02 (1994).
Attorney's misconduct in courtroom See Section 5.2	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Most reported cases involve criminal sanctions, but civil sanctions may be appropriate where it is still possible to restore order in the courtroom.

[20] "'Least restrictive environment' means a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only utilized as a last resort based on the best interest of the juvenile or for reasons of public safety." MCL 712A.1(1)(i).

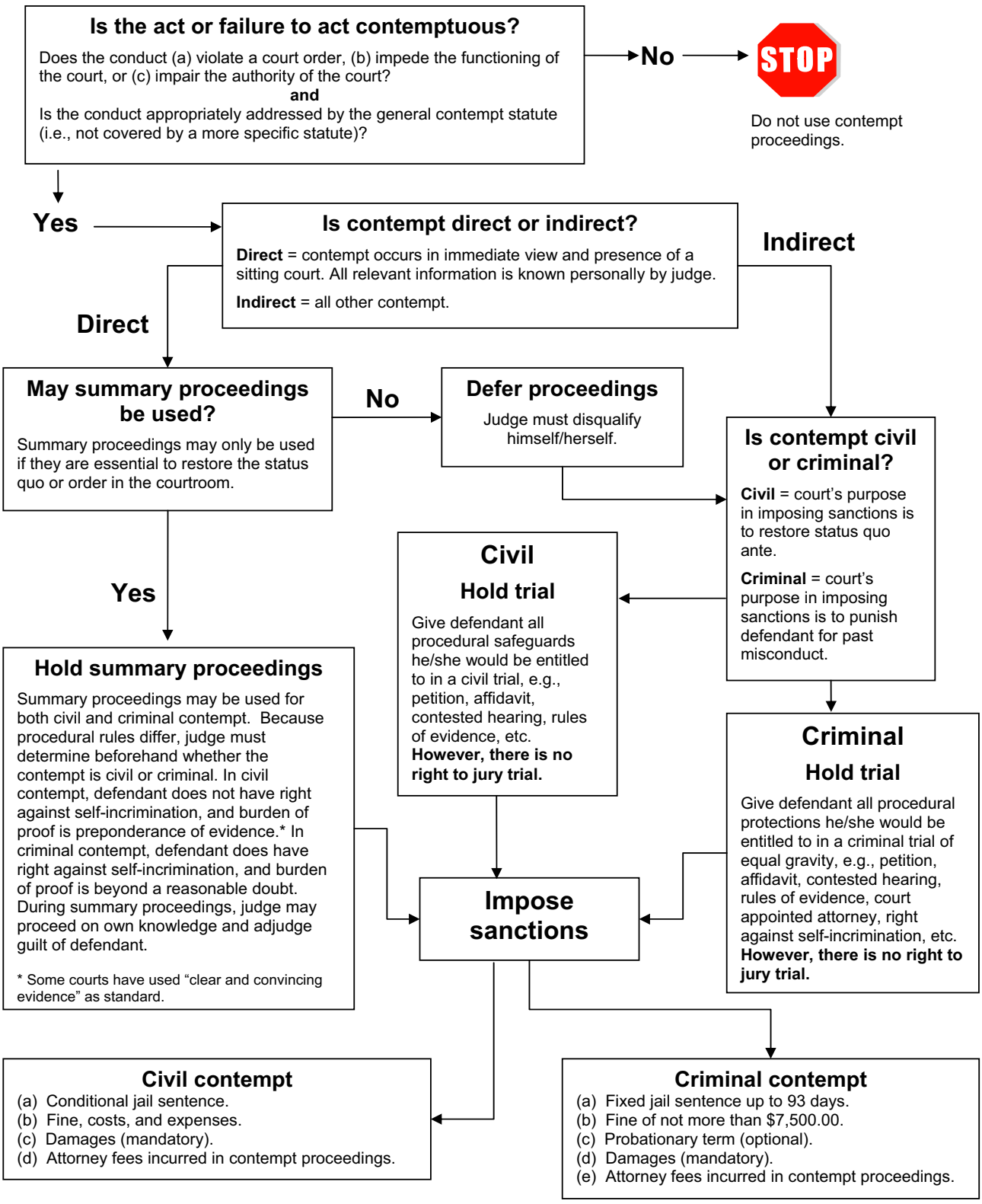
Contumacious conduct	Whether conduct is direct or indirect contempt	Whether conduct is civil or criminal contempt
Contempt of court under the Juvenile Code See Section 5.21	May be either direct or indirect contempt. Summary punishment may be imposed if the violation occurred in the immediate view and presence of the court.	Civil or criminal contempt proceedings may be instituted.
Criminal defendant's disruptive behavior in court See Section 5.12	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Civil or criminal contempt sanctions may be imposed.
Criticism of the court See Section 5.17	May be either direct or indirect contempt. Summary punishment may be imposed if the violation occurred in the immediate view and presence of the court.	Civil or criminal contempt proceedings may be instituted.
Failure of witness to appear or testify as ordered by subpoena See Section 5.4	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted.
Failure to pay child or spousal support See Section 5.9	Always indirect contempt.	Civil contempt proceedings are mandated by MCL 552.631(1), but criminal proceedings may be appropriate in certain situations. *Borden v Borden*, 67 Mich App 45, 49 n 1 (1976).
Failure to pay money judgment See Section 5.8	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted, but a coercive civil sanction may better achieve the desired result.
Fiduciaries who violate court orders See Section 5.20	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted.

Contumacious conduct	Whether conduct is direct or indirect contempt	Whether conduct is civil or criminal contempt
Filing false pleadings and documents See Section 5.15	Always indirect contempt.	Most reported cases involve criminal contempt proceedings.
Grand jury witness's refusal to testify See Section 5.14	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Only civil contempt sanctions may be imposed. *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 164-65 (1971).
Improper attempt to affect jurors and potential jurors See Section 5.19	Always indirect contempt.	Criminal contempt proceedings must be instituted.
Improper attempt to affect witness testimony See Section 5.18	Always indirect contempt.	Criminal contempt proceedings must be instituted. *Russell v Wayne Circuit Judge*, 136 Mich 624, 625 (1904).
Juror misconduct See Section 5.5	Usually indirect contempt.	Civil or criminal contempt proceedings may be instituted.
Obstructing judicial process or service See Section 5.18	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted.
Parties and attorneys in civil cases who violate discovery orders See Section 5.16	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted.
Violation of court order See Section 5.6	May be either direct or indirect contempt. Summary punishment may be imposed if the violation occurred in the immediate view and presence of the court.	Civil or criminal contempt proceedings may be instituted.

Contumacious conduct	Whether conduct is direct or indirect contempt	Whether conduct is civil or criminal contempt
Violation of court order regarding nuisance See Section 5.7	Always indirect contempt.	Criminal contempt proceedings must be instituted. *Michigan ex rel Wayne Pros v Powers*, 97 Mich App 166, 171 (1980).
Violation of parenting time order in divorce judgment See Section 5.10	Always indirect contempt.	If it is possible to restore the status quo by granting additional parenting time, civil contempt proceedings may be instituted. If it is not possible to restore the status quo, criminal contempt proceedings may be instituted. *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968).
Violation of personal protection order See Section 5.11	Usually indirect contempt.	Criminal contempt proceedings are usually instituted, but statute and court rule allow for imposition of civil sanctions, which may be appropriate in certain situations (e.g., respondent fails to relinquish property).
Witness's refusal to testify See Section 5.13	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Under MCL 600.1725, a coercive (civil) commitment is the prescribed punishment.

Appendices

Appendix A:
Contempt of Court Flowchart*



*This chart applies to contempt proceedings initiated under the general contempt statute—MCL 600.1715. Contempt proceedings involving conduct addressed under specific statutes (MCL 600.2950 and 600.2950a, for example) are subject to the provisions of those specific statutes. See Chapter 5 for examples of contumacious conduct governed by statutes other than MCL 600.1715.

Appendix B: Checklist for Summary Punishment of Direct Contempt of Court

*When all of the facts necessary to establish contempt of court are within the personal knowledge of the judge, he or she may punish it summarily. See **Sections 2.4** and **3.3**.*

*In most cases, the judge who witnessed the contumacious conduct may conduct the summary proceedings. If the proceedings are deferred, another judge must conduct the contempt proceedings. See **Section 3.14**.*

☐ 1. Determine whether summary proceedings are appropriate. See **Sections 2.4** and **3.3**.

- ☐ the misconduct occurred in the judge's "immediate view and presence."
- ☐ immediate corrective action is necessary to restore order and maintain the dignity and authority of the court.

Note: If contempt proceedings are deferred, the contemnor is entitled to all of the procedural protections afforded during civil or criminal indirect contempt proceedings. See **Section 3.4** and **Appendix C** and **Appendix D**.

☐ 2. Determine whether the misconduct constitutes civil or criminal contempt of court. See **Sections 2.1**, **2.2**, and **2.3**.

☐ 3. If necessary, excuse the jury. See **Sections 5.2(C)** and **5.13(E)**.

☐ 4. Inform the contemnor that he or she is being charged with contempt of court.

- ☐ describe in detail the misconduct.
- ☐ state whether the contempt is civil or criminal.
- ☐ allow the contemnor an opportunity to orally answer the charge.

☐ 5. State your factual findings and conclusions of law on the record. Include the following:

- ☐ facts that occurred in the immediate view and presence of the court and that constitute contempt.
- ☐ whether the contempt was civil or criminal.
- ☐ a conclusion as to how the contumacious conduct impaired the authority or impeded the functioning of the court.
- ☐ the sanctions imposed.
- ☐ the reasons for imposing the sanctions. See **Section 4.6**.

☐ 6. Immediately impose sanctions. See **Sections 4.1**, **4.2**, and **4.3**.

For civil contempt:

- ☐ conditional jail sentence.
- ☐ fine of not more than $7,500.
- ☐ costs and expenses of the proceedings.
- ☐ damages to injured party, including attorney fees.

For criminal contempt:

- ☐ fixed jail sentence of up to 93 days.
- ☐ fine of not more than $7,500.

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- ☐ probation.
- ☐ costs and expenses of the proceedings.
- ☐ damages to injured party, including attorney fees.

☐ 7. Sign and enter an order adjudging the contemnor guilty of contempt. In cases of civil contempt, the order of commitment must specify that the jail term must end when the person performs the required act or duty, or no longer has the power to perform the act or duty, and pays the fine, costs, and expenses of the proceeding. See **Section 4.6**.

Appendix C: Checklist for Conducting Civil Contempt Proceedings

*This checklist is appropriate for use in a civil contempt proceeding under MCL 600.1701 et seq., and MCR 3.606. Different rules may apply in other cases, such as a contempt proceeding for nonsupport. See **Sections 3.6(A)**, **3.10**, **3.11**, **4.4**, and Chapter 5.*

*In most cases, the judge who presided over the case that gave rise to the contempt charge may conduct the contempt proceedings. See **Section 3.14**. There is no right to jury trial. See **Section 3.15**.*

☐ 1. Determine that the affidavit accompanying the ex parte motion:

- ☐ states with specificity factual allegations that will support a finding of contempt.
- ☐ contains the required verification by a person with personal knowledge of the facts alleged.

Note: In an appropriate case, the court may take judicial notice of its own records when initiating proceedings. See **Section 3.8(B)**.

☐ 2. Before issuing a bench warrant or an order to show cause, determine that the alleged conduct constitutes civil contempt. See **Sections 2.1**, **2.2**, **2.3**, **2.6(D)**, and **3.8(A)**.

☐ 3. Conduct a pretrial hearing.

- ☐ Determine that the file contains a motion, affidavit, proof of service showing personal service, and a bench warrant or an order to show cause. See **Sections 3.9**, **3.10**, and **3.11**.
- ☐ Inform the alleged contemnor of the charges.
- ☐ Inform the alleged contemnor that the charge must be proven by a preponderance of the evidence, or that evidence of the alleged contempt must be "clear and unequivocal." See **Sections 2.2(D)** and **3.2(B)**.
- ☐ Inform the alleged contemnor of the possible sanctions. See **Section 4.2(A)**.
- ☐ Inform the alleged contemnor that if he or she is indigent, the court may not jail the alleged contemnor unless counsel has been appointed or waived. Appoint counsel if required. See **Sections 3.7** and **5.9(B)**.
- ☐ Ask the alleged contemnor how he or she wishes to plead.
- ☐ Set date for trial if necessary. The alleged contemnor must be given a reasonable opportunity to prepare a defense or explanation. See **Section 3.2(A)**.
- ☐ Set bond if the alleged contemnor was arrested on a bench warrant. See **Section 3.13**.

☐ 4. Conduct a nonjury civil trial at which the following procedures apply:

- ☐ The alleged contemnor is given an opportunity to examine opposing witnesses and produce witnesses. See **Section 3.2**.
- ☐ The Michigan Rules of Evidence apply. See **Section 3.16**.
- ☐ The contempt is proven by a preponderance of the evidence, or by "clear and unequivocal" evidence. See **Sections 2.2(D)** and **3.2(B)**.

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- ☐ 5. State your factual findings and conclusions of law on the record or in a separate written opinion. Include the following:
  - ☐ facts that constitute contempt.
  - ☐ the standard of proof applied.
  - ☐ a conclusion as to how the contumacious conduct impaired the authority or impeded the functioning of the court.
  - ☐ the sanctions imposed.
  - ☐ the reasons for imposing the sanctions. See **Section 4.6**.
- ☐ 6. If the alleged contemnor is found guilty, impose sanctions. See **Sections 4.1**, **4.2**, **4.3**, and **4.4**.
  - ☐ conditional jail sentence.
  - ☐ fine of not more than $7,500.
  - ☐ costs and expenses of the proceedings.
  - ☐ damages to injured party, including attorney fees.
- ☐ 7. Sign and enter an order adjudging the contemnor guilty of civil contempt. The order of commitment must specify that the jail term must end when the person performs the required act or duty, or no longer has the power to perform the act or duty, and pays the fine, costs, and expenses of the proceeding. See **Section 4.6**.

Appendix D: Checklist for Conducting Criminal Contempt Proceedings

This checklist is appropriate for use in a criminal contempt proceeding under MCL 600.1701 et seq., and MCR 3.606. Different rules may apply in other cases, such as a contempt proceeding on an alleged violation of a personal protection order. See ***Sections 3.6(A)****,* ***3.10****,* ***3.11****,* ***4.4****, and Chapter 5.*

In most cases, the judge who presided over the case that gave rise to the contempt charge may conduct the contempt proceedings. See ***Section 3.14****. Unless the possible penalty exceeds six months' incarceration, there is no right to jury trial. See* ***Section 3.15****.*

- ☐ 1. Appoint the prosecutor. If the prosecutor declines to handle the case, a disinterested private attorney may be appointed as special prosecutor. See **Section 3.6(A)**–**Section 3.6(B)**.
- ☐ 2. Determine that the affidavit accompanying the ex parte motion:
  - ☐ states with specificity factual allegations that will support a finding of contempt.
  - ☐ contains the required verification by a person with personal knowledge of the facts alleged.

  Note: In an appropriate case, the court may take judicial notice of its own records when initiating proceedings. See **Section 3.8(B)**.
- ☐ 3. Before issuing a bench warrant or an order to show cause, determine that the alleged conduct constitutes criminal contempt. The bench warrant or order to show cause must inform the defendant that he or she is charged with criminal contempt. See **Sections 2.1**, **2.2**, **2.3**, **2.6(C)**, and **3.8(A)**.
- ☐ 4. Conduct a pretrial hearing.
  - ☐ Determine that the file contains a motion, affidavit, proof of service showing personal service, and a bench warrant or an order to show cause. See **Sections 3.9**, **3.10**, and **3.11**.
  - ☐ Inform the defendant of the charges.
  - ☐ Inform the defendant that the alleged contempt must be proven "beyond a reasonable doubt." See **Sections 2.2(C)** and **3.2(B)**.
  - ☐ Inform defendant of the possible sanctions. See **Section 4.2(B)**.
  - ☐ Inform defendant that if he or she is indigent, the court may not jail respondent unless counsel has been appointed or waived. Appoint counsel if required. See **Sections 3.7** and **5.9(B)**.
  - ☐ Ask defendant how he or she wishes to plead.
  - ☐ Set date for trial if necessary. Defendant must be given a reasonable opportunity to prepare a defense. See **Section 3.2(A)**.
  - ☐ Set bond if defendant was arrested on a bench warrant. See **Section 3.13**.
- ☐ 5. Conduct a nonjury criminal trial at which the following procedures apply:
  - ☐ Defendant is given an opportunity to examine opposing witnesses and produce witnesses. See **Section 3.2**.
  - ☐ The Michigan Rules of Evidence apply. See **Section 3.16**.
  - ☐ The privilege against self-incrimination applies. See **Section 3.2(B)**.

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- ☐ The prosecutor or special prosecutor proves "beyond a reasonable doubt" that defendant engaged in a willful disregard or disobedience of the authority or orders of the court. See **Section 2.2(C)** and **3.2(B)**.

☐ 6. State your factual findings and conclusions of law on the record or in a separate written opinion. Include the following:

- ☐ facts that constitute contempt.
- ☐ a finding that defendant is guilty of criminal contempt "beyond a reasonable doubt."
- ☐ a conclusion as to how the contumacious conduct impaired the authority or impeded the functioning of the court.
- ☐ the sanctions imposed.
- ☐ the reasons for imposing the sanctions. See **Section 4.6**.

☐ 7. If defendant is found guilty, impose sanctions. See **Sections 4.1**, **4.2**, **4.3**, and **4.4**.

- ☐ fixed jail sentence of up to 93 days.
- ☐ fine of not more than $7,500.
- ☐ probation.
- ☐ damages to injured party, including attorney fees.

☐ 8. Sign and enter an order adjudging the contemnor guilty of criminal contempt. See **Section 4.6**.

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