

CONTEMPT OF COURT

A Continuing Judicial Education Topic by Charles B. Mikell, Jr.
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I. Introduction

- (A) 1983 Ga. Const., Art. 1, Sec. 2, Par. 4.
“The power of the courts to punish for contempt shall be limited by legislative acts.”
- (B) 1983 Ga. Const., Art. 6, Sec. 1, Par. 4.
“Each court may exercise such powers as necessary in aid of its jurisdiction or to protect or effectuate its judgments”
- (C) OCGA § 15-1-3.
“Every court has power:
- (1) To preserve and enforce order in its immediate presence and, as near thereto as is necessary, to prevent interruption, disturbance, or hindrance to its proceedings . . . ;
 - (3) To compel obedience to its judgments, orders, and process. . . .”
- (D) OCGA § 15-1-4 (a).
“The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of:
- (1) Misbehavior of any person or persons in the presence of such courts or so near thereto as to obstruct the administration of justice;
 - (2) Misbehavior of any of the officers of the courts in their official transactions;
 - (3) Disobedience or resistance by any officer of the courts, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the courts;

(4) Violation of subsection (a) of Code Section 34-1-3, relating to prohibited conduct of employers with respect to employees who are required to attend judicial proceedings; and .

(5) Violation of a court order relating to the televising, videotaping, or motion picture filming of judicial proceedings.

(E) OCGA § 5-6-13 (a), (b).

(a) A judge of any trial court or tribunal having the power to adjudge and punish for contempt shall grant to any person convicted of or adjudged to be in contempt of court a supersedeas upon application and compliance with the provisions of law as to appeal and certiorari, where the person also submits, within the time prescribed by law, written notice that he intends to seek review of the conviction or adjudication of contempt. It shall not be in the discretion of any trial court judge to grant or refuse a supersedeas in cases of contempt.

(b) This Code section shall not apply to contempt in the presence of the court during the progress of a proceeding.

II. General Rules

(A) “Misbehavior” is contemptuous when it “threatens a court’s immediate ability to conduct its proceedings, such as where a witness refuses to testify or a party disrupts the court.” *International Union v. Bagwell*, 512 U. S. 821, 832 (144 SC 2552, 129 LE 2d 642) (1994).

NOTE: a mere insult to the judge is insufficient to be contempt of court because it does not hinder the work of the court.

(B) Contempt may be direct or indirect. Contempt is direct when the act (or omission) occurs in the presence of the judge or so near to the judge that it may be perceived by his or her senses (*e.g.*, obscenities shouted in the hallway outside the courtroom loudly enough to be heard by the judge). Indirect contempt is contempt which is not direct (*e.g.*, an ex-wife who refuses to pay court-ordered child support; a lawyer who does not show up for a scheduled docket call).

The distinction matters because direct contempt may be punished “summarily,” i.e. with some but quite minimal due process. See: *In re Terry*, 128 U. S. 289 (9 SC 77, 32 LE 405) (1888); *Offutt v. United States*, 348 U. S. 11 (75 SC 11, 99 LE 11) (1954). By contrast “[w]here the misbehavior is not in the immediate presence of the court so that it may act on its own knowledge of the facts, summary punishment is not authorized.” *McDaniel v. State*, 202 Ga. 409 (414 SE2d 536) (1992), quoting *Moody v. State*, 131 Ga. App. 355, 359 (2) (206 SE2d 79) (1974).

In a summary contempt proceeding, “objectively observable and describable behavior that causes an articulable interference with the administration of justice must be demonstrably present.” *In re Shafer*, 216 Ga. App. 725, 726 (455 SE2d 421) (1995). The conduct must have occurred in open court and “threaten[] a court's immediate ability to conduct its proceedings.” *International Union v. Bagwell*, supra; *Ramirez v. State*, 279 Ga. 13 (608 SE2d 645) (2005).

- (C) Remedy. The remedy may be criminal (i.e. punitive) or civil (i.e. coercive). The same act (or omission) may be criminal contempt or civil contempt depending on how the judge decides to deal with it.

The standard of proof for criminal contempt is beyond a reasonable doubt. The standard of proof for civil contempt is a preponderance of the evidence. Compare *In re Crane*, 253 Ga. 667 (324 SE2d 443) (1985) with *In re Harvey*, 219 Ga. App. 76 (464 SE2d 34) (1995).

- (D) Maximum penalty when judge uses criminal contempt is \$500.00 fine and/or 20 days in jail. OCGA § 15-6-8 (5). Maximum coercion allowed in civil contempt is unlimited (believe it or not!).
- (E) Summary treatment is allowed only when absolutely necessary because the judge is a witness, not subject to cross-examination, as well as the jury.

III. The Rule of Necessity

Summary punishment (i.e. punishment after minimal due process) is allowed only when necessary to preserve order and move the case along during a trial or a hearing even when the contempt was direct.

Minimal due process, which is always required, is to give notice that the miscreant might be held in contempt and giving him/her a brief chance to explain. Also required in every case is a minimal written order prepared soon after the event, which can be just a few sentences referring to the record, so that an appellate court will know why you did what you did. E.g.,

Sentencing Order

Attorney John Q. Badboy was found in contempt of court, beyond a reasonable doubt, for the reasons stated on the record during the trial, and was sentenced to four (4) days in jail, suspended on condition of not throwing any more spitballs at the bench for the next twenty (20) days.

This the ____ day of _____

Judge, Superior Court

Maximum due process is:

- (a) your recusal and referral to another judge;
- (b) advance notice of a hearing and time to prepare;
- (c) right to counsel;
- (d) probably more elaborate findings of fact on the record or in sentencing order. See *In Re Shafer*, 216 Ga. App. 725 (455 SE2d 421) (1995); *In Re Bryant*, 188 Ga. App. 383, 384 (373 SE2d 74) (1988); *Garland v. State*, 99 Ga. App. 826 (110 SE2d 143) (1959).

VI. The Sliding Scale of Due Process

Necessity for immediate action to preserve order during a trial or hearing allows minimal due process. The less pressing the necessity for instant action by the court, the more due process is required.

The approximate scale, beginning with the most necessity for instant action, and the least due process, looks like this:

- (A) Direct contempt, treated by the court as civil. (E.g., “Mr. Badboy, if you continue to refuse to show that exhibit to your opponent, as I ordered you to do, I am going to hold you in civil contempt and fine you \$100 per minute until you hand it to her.”)

Due Process = Right to explain (or to comply).

- (B) Direct contempt, treated by the court as criminal. (E.g., “Mr. Badboy, your refusal to show the exhibit to Ms. Talented, as I ordered you to do, might be a contempt of court. Is there anything you would like to say before I decide whether it was a contempt or not?”) **NOTE:** Must sentence immediately, but can stay execution of sentence.

Due Process = Very minimalist “hearing.”

Important: When contempt is direct and is dealt with immediately, there is no right to counsel, and judge does not need to recuse even if contempt was directed at him/her personally.

In re Willis, 259 Ga. App. 5 (576 SE2d 22) (2002).

- (C) Indirect Contempt, treated by the court as civil. (e.g., “Mr. Badboy, I denied your request to be excused from Grand Jury duty. I will schedule a hearing on possible contempt and maybe your paying us a reasonable per diem until you decide to honor us with your presence.”)

Due Process = Advance notice of hearing, right to counsel.

- (D) Direct contempt, treated by court as criminal, but treatment deferred. (e.g., “Mr. Badboy, your coming back from lunch thirty minutes after the time I told you and the jury to be back might be contempt of court. I’ll deal with you after the trial.” Or, “Mr. Badboy, after hearing your explanation for throwing your pen at the witness, I find you in contempt but will defer sentencing until the jury has gone for the day).

Due Process = Advance notice of hearing, right to counsel maybe recusal when contempt was directed at judge and judge has “become involved.” See *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L. Ed. 2d 897 (1974); *Dowdy v. Palmour*, 251 Ga. 135 (304 SE2d 52) (1983); *Ramirez v. State*, 279 Ga. 13 (608 SE2d 645) (2005); *In re Schoolcraft*, 274 Ga. App. 271 (617 SE2d 241) (2005); *In re Adams*, 215 Ga. App. 372 (450 SE2d 851) (1994).

- (E) Indirect Criminal (e.g., “Mr. Badboy, you allegedly telephoned one of the jurors after the trial and cussed her out. I am going to schedule a hearing for possible contempt.”)

Due Process = Advance notice of hearing, right to counsel. Maybe recusal. See, e.g., *McDaniel v. State*, 202 Ga. App. 409 (414 SE2d 536) (1992); *Ramirez*, supra.

V. No Show Lawyers

- (A) The contempt, if any, is indirect, despite earlier cases to the contrary.
- (B) Try to handle informally to learn if lawyer has a valid excuse — e.g., he/she had heart attack, bad car wreck on way to courthouse, etc.
- (C) If no good excuse, cite for contempt, refer to another judge, order lawyer to appear before that other judge at specified time. Have formal *rule nisi* served by sheriff if necessary.

- (D) The other judge, the hearing judge, will issue a bench warrant only if attorney failed to appear at the rule nisi hearing after being cited by you for the earlier, alleged contempt and only if he had actual notice of the rule nisi hearing. The federal courts also treat a failure to appear as an indirect contempt not subject to summary proceedings. See, e.g., *United States v. KS & W Offshore Engineering*, 932 F.2d 906 (11th Cir. 1991).
- (E) When a lawyer, (a party, a witness or a juror) comes to court but leaves without permission, his/her contempt is direct and may be punished summarily. See, e.g., *In Re Sykes*, 151 Ga. App. 233 (259 SE2d 215) (1979). But, how do you do that when the contemnor is not there?

VI. Recusal

- (A) No need to recuse when no objection and no motion to recuse. See *In re Brant*, 230 Ga. App. 283 (496 SE2d 321) (1998).
- (B) No need to recuse when contempt is direct and court deals with it immediately. See *In re Shook*, 254 Ga. App. 706 (563 SE2d 435) (2002).
- (C) When a hearing or sentencing is deferred after a direct contempt, Georgia law requires recusal when the contempt was directed at the judge and judge has “become involved” in the controversy. See *In re Burgar*, 264 Ga. App. 92 (589 SE2d 679) (2003) (physical precedent only); *In re Adams*, 215 Ga. App. 372 (450 SE2d 851) (1994). Compare *Ramirez v. State*, 279 Ga. 13 (608 SE2d 645) (2005) (indirect but no recusal necessary) with *In re Schoolcraft*, 274 Ga. App. 271 (617 SE2d 241) (2005) (indirect but recusal required).

The federal rule is identical. “[A] judge, the target of extreme insolence, vilification and insult, must pass contempt proceedings to another judge if the original judge does not adjudicate and punish the contemptuous act during trial.” *Sandstrom v. Butterworth*, 738 F.2d 1200, 1212 (11th Cir. 1984), citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 SC 499, 27 LE2d 532 (1971).

- (D) When contempt was indirect, and hence judge was by definition not a witness, and the contempt was not directed at the judge, then recusal not required unless usual recusal rules apply per Uniform Superior Court Rule 25. *Ramirez*, supra.

(Examples of indirect contempt: witness not obeying properly served subpoena, lawyer not showing up for trial, juror disobeying order not to read newspaper, etc.)

VII. Miscellaneous

- (A) Except where authorized by statute as in divorce cases, or when used by equity to enforce a duty, or sometimes in equity when an order to pay is interlocutory, contempt of court may not be used to collect a money judgment. As explained by our Supreme Court, “[n]ormally, . . . a money judgment may be enforced only by execution thereon, not by contempt proceedings.” *McKenna v. Gray*, 263 Ga. 753, 755 (438 SE2d 901) (1994), quoted in *Hill v. Paluzzi*, 261 Ga. App. 123, 126 (581 SE2d 730) (2003).
- (B) Even in equity a person may not be imprisoned for contempt without a jury trial when he/she is ordered to pay money over and he denies that the money is in his possession or control. OCGA § 15-1-4 (b). There are no cases applying this statute, enacted in 1987. It probably is restricted to fights over a particular fund of money. Contempt after failing to pay alimony requires no jury trial. *Branch v. Branch*, 219 Ga. 601 (135 SE2d 269) (1964).

VIII. Authorities

- (A) Stephenson, *The Appellate Judiciary of Georgia and Contempt Out of Court*, 2 GA. L. REV. 341 (1968).
- (B) E. H. Johnson and R. D. Reeves, *Contempt of Court in Georgia*, 23 GA. ST. BAR J. 66 (1986).
- (C) C. D. Brooks, *Note and Comment: A Survey of Georgia Contempt Law*, 13 GA. ST. U. L. REV. 1073 (1997).