

# CHAPTER 15

## CONTEMPT OF COURT

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# CHAPTER 15

## CONTEMPT OF COURT

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### I. DIRECT CRIMINAL CONTEMPT

Direct contempt usually considered to be disruptive conduct committed in actual presence of court or in its immediate vicinity, whether during trial or during recess. Ind. Code § 34-47-2-1. See also LaFave & Scott, *Substantive Criminal Law* Vol. 1-4 §1.7(e), at 68.

#### A. PRINCIPLES OF DIRECT CRIMINAL CONTEMPT

Direct contempt refers primarily to maintenance of order and respect in courtroom, and to such areas adjacent thereto as are necessary for control for such purposes. McIntire v. State, 248 Ind. 142, 144-45, 223 N.E.2d 347, 348-49 (1967).

The purpose of this power is to enable court to protect itself against “gross violations of decency and decorum.” In re Contempt Hearing of Nasser, 644 N.E.2d 93, 95 (Ind. 1994) (*quoting Brown v. Brown*, 4 Ind. 627 (1853)).

##### 1. Acts which are disrespectful, defiant or otherwise deter court process

Contempt of court involves disobedience of a court which undermines the court’s authority, justice, and dignity. Any act related to current or pending proceeding that tends to deter court from performance of its duties may support contempt proceeding. Any act that manifests disrespect and defiance of court may constitute direct criminal contempt. See Hopping v. State, 637 N.E.2d 1294, 1297 (Ind. 1994) (superseded on other grounds as noted by Downs v. State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)); Brumbaugh v. State, 491 N.E.2d 983, 984 (Ind. 1986); In re Nasser, 627 N.E.2d 1338, 1340-41 (Ind. Ct. App. 1994).

Warr v. State, 877 N.E.2d 817 (Ind. Ct. App. 2007) (direct contempt finding upheld where defendant failed to heed trial judge’s warning and continued to disrupt court by using vulgar and profane language).

Tunis v. State, 129 N.E.3d 258 (Ind. Ct. App. 2019) (direct contempt finding upheld because defendant’s refusal to testify despite trial court’s grant of immunity interfered with felony prosecution and undermined trial court’s authority).

Turquette v. State, 298 S.W. 15 (Ark. 1927) (striking a judge because of adverse ruling supports a summary proceeding for criminal contempt, even when the altercation occurs in another jurisdiction).

Mitchell v. State, 580 A.2d 196 (Md. 1990) (making an obscene gesture after a sentencing hearing is direct criminal contempt).

Jackson v. Bailey, 605 A.2d 1350 (Conn. 1992) (uttering an obscenity after a bond reduction hearing is direct criminal contempt).

##### (a) Bad acts not necessarily directly contemptuous

Actions may be frivolous, unethical, malicious, or even perjurious, but still not amount to direct contempt if do not cause disruption or disturbance. In re Guardianship of C.M.W., 755 N.E.2d 644, 651 (Ind. Ct. App. 2001).

In re Marriage of Neiswinger, 477 N.E.2d 257, 260 (Ind. 1985) (giving false testimony, the falsity of which could not be known but only inferred by reference to

later testimony and which causes no disturbance or disruption, is not direct contempt).

## 2. Requirements

In order to be found guilty of direct contempt, the following is required:

- (a) Conduct must take place: (i) in or immediately adjacent to courtroom; (ii) while court in session; (iii) such that judge has first-hand knowledge of contemptuous conduct in official capacity;
- (b) Circumstances must demand immediate action to maintain order for the court and respect for its authority; and
- (c) Court must distinctly state the act, words, signs or gestures, or other conduct of defendant which is alleged to constitute such contempt; and
- (d) Statement must then be reduced to writing and set forth in order that includes any explanation, extenuation, or denial thereof.

### (a) Conduct must be before or in presence of court

Conduct must take place: (i) in or immediately adjacent to courtroom; (ii) while court in session; (iii) such that judge has first-hand knowledge of contemptuous conduct in official capacity. Andrews v. State, 505 N.E.2d 815 (Ind. Ct. App. 1987).

Contempt before or in presence of court, or so near to court as to interrupt its proceedings, may be punished in summary manner, without any other evidence than personal knowledge of trial judge. Johnson v. State, 426 N.E.2d 104 (Ind. Ct. App. 1981).

Macon v. State, 629 N.E.2d 883 (Ind. Ct. App. 1994) (contemptuous conduct occurs in presence of court if it disrupts or disturbs proceedings).

Srivastava v. Indianapolis Hebrew Congregation, Inc., 779 N.E.2d 52, 60 (Ind. Ct. App. 2002) (no direct contempt because party presents no actions that happened in open court; in order for contempt to be direct, it must take place in presence of the court, so that the judge has personal knowledge of it).

Davidson v. State, 836 N.E.2d 1018 (Ind. Ct. App. 2006) (trial court erred in entering direct contempt finding against defendant, who at county jail refused to sign his probation terms and shouted obscenities at his probation officer and told him “you can tell the Judge fuck him, too”; no direct contempt because judge did not possess immediate and personal knowledge of contemptuous act).

### (1) To punish, the judge only needs personal knowledge

Presence in judicial hearing not necessary element of direct contempt; all that is necessary is that court has first-hand and immediate knowledge of acts. Hopping v. State, 637 N.E.2d 1294 (Ind. 1994) (superseded on other grounds as noted by Downs v. State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)).

Direct contempt are those actions that are committed in immediate view or presence of court that obstructs the course of proceedings. Hegedus v. Hegedus, 178 Ind. App. 620, 383 N.E.2d 446, (1978).

### (2) Presence through video conference sufficient

Although appearing in court through a video conferencing system is not physical presence, an unruly person can still be found in direct contempt if their behavior

causes a disturbance in the court while the court is conducting business.

Carroll v. State, 54 N.E.3d 1081 (Ind. Ct. App. 2015) (defendant's contempt citation affirmed even though his unruly conduct did not occur in the courtroom, but inside the county jail where he participated by video conference).

**(b) Circumstance must demand immediate action**

Circumstances must demand immediate action to maintain order for the court and respect for its authority. Brennan v. State, 242 Ind. 79, 173 N.E.2d 312 (1961).

Russell v. State, 428 N.E.2d 1271 (Ind. Ct. App. 1981) (evidence not sufficient to support summary contempt conviction where alleged contempt reflects nothing more egregious than ill-advised response to opposing counsel, "I will excuse you if you sit down and shut up.").

Johnson v. State, 426 N.E.2d 104 (Ind. Ct. App. 1981) (judge may act summarily in dealing with direct contempt of court because immediate vindication of these interests outweighs necessity of completely neutral and detached magistrate to decide if party should be held in contempt of court).

**(c) Court must distinctly state alleged contemptuous conduct**

Court must distinctly state "act, words, signs or gestures, or other conduct of defendant which is alleged to constitute such contempt." Ind. Code § 34-47-2-4(b).

Matter of Contempt against Steelman v. Mills, 648 N.E.2d 366 (Ind. Ct. App. 1995) (court distinctly stated acts constituting direct contempt in its order stating witness had been offered use immunity and derivative use immunity but refused to testify).

**(d) Court must issue order explicitly detailing conduct**

Statement must then be reduced to writing and set forth in order that includes any explanation, extenuation, or denial thereof. Ind. Code § 34-47-2-4. See also Skolnick v. State, 180 Ind. App. 253, 388 N.E.2d 1156 (1979); In re Bennington, 24 N.E.3d 958 (Ind. 2015).

**(1) Mere recital of conclusions insufficient**

Mere recital of judge's conclusions not sufficient to satisfy requirement acts constituting any alleged direct contempt shall be stated distinctly in court's order. State ex rel. Stanton v. Murray, 231 Ind. 223, 236, 108 N.E.2d 251, 257 (1952).

Order must recite in detail the acts found to have been committed and which constitute the contempt for which the defendant is punished. State ex rel. Allen v. Vermillion Circuit Court, 226 N.E.2d 324, 326 (Ind. 1967).

Andrews v. State, 505 N.E.2d 815, 827 (Ind. Ct. App. 1987) (court's memo did not satisfy requirement that court must issue order explicitly detailing contemptuous conduct; findings stated defendant found in contempt for continuing to issue questions and to make statements of particular nature after having been told to cease, that defendant continued to make statements, including labeling proceedings as "Kangaroo Court", and that defendant made statements on record).

**(2) Cannot amend written statement**

Contempt conviction cannot be sustained based on judge's purported amendment of its finding, or upon other, unalleged contemptuous acts, where there is no prior

written note, minute, or memorial reflecting the factual basis for a *nunc pro tunc* entry. Russell v. State, 428 N.E.2d 1271 (Ind. Ct. App. 1981).

**(3) Harmless error**

Reversal of a contempt finding may not be required where no harm is shown by the absence of the detailed statement. In re Contempt Findings Against Schultz, 428 N.E.2d 1284 (Ind. Ct. App. 1981). Detailed writing is vital where the court's written statement is all that reveals the conduct to the reviewing court but is less important where the nature of the conduct is easily discernible from the record. Aguilar v. State, 416 N.E.2d 887, 891 (Ind. Ct. App. 1981).

In re Contempt Findings Against Schultz, 428 N.E.2d 1284 (Ind. Ct. App. 1981) (no reversal of contempt conviction, even though court failed to make written statement describing witness's acts of contempt; no harm had been shown by absence of statement since record revealed in detail the alleged conduct).

**3. Unique features of proceeding**

**(a) Summary punishment without jury (for sentences not exceeding six months)**

Proceeding for criminal contempt is a criminal action in nature against the accused. *Ex parte Fennig*, 216 Ind. 298, 23 N.E.2d 678 (1939).

Summary proceeding for contempt is conducted in a prompt and simple manner, without the aid of a jury, and in other respects out of regular course of normal trial procedures. Hopping v. State, 637 N.E.2d 1294, 1297 (Ind. 1994). The power to summarily punish for direct criminal contempt is inherent in courts. Id.

Sentences up to six months may be imposed for criminal contempt without guilt or innocence being determined by a jury; however, sentences exceeding six months may not be imposed absent a jury trial or waiver thereof. Holly v. State, 681 N.E.2d 1176 (Ind. Ct. App. 1997). Although a court may find a person in contempt multiple times in a single proceeding, the sentence still may not exceed six months absent a jury trial or waiver thereof. Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974).

Fearman v. State, 89 N.E.3d 435 (Ind. Ct. App. 2017) (trial court impermissibly stacked multiple six-month sentences to justify a 910-day sentence for direct contempt).

Grogg v. State, 156 N.E.3d 744 (Ind. Ct. App. 2020) (because defendant's repeated violations of no-contact order and order suspending communication privileges were separate, discrete acts of contempt, trial court did not abuse its discretion ordering four separate sanctions be served consecutively to each other).

**(b) No filing of charges**

No affidavit, charging information, or complaint required when any person arraigned for direct contempt. Ind. Code § 34-47-2-4. Filing of charges is not required. Skolnick v. State, 388 N.E.2d 1156 (Ind. Ct. App. 1979). Defendant is not entitled to an arraignment. Coons v. State, 191 Ind. 580, 134 N.E.194 (1922).

**(c) Single contemptuous episode**

Where the defendant's actions start and continue during a single proceeding, last a short time, are not interrupted by another proceeding, and flow from a single criminal intent, the actions will be considered part of only one single contemptuous episode and thus there can only be one contempt charge allowed for such conduct. Mockbee v. State, 80



N.E.3d 917 (Ind. Ct. App. 2017).

Mockbee v. State, 80 N.E.3d 917 (Ind. Ct. App. 2017) (trial court should have found defendant in direct contempt only once even though defendant continued to behave in a contemptuous manner after the initial contempt citation, his behavior was in response to the trial court's initial contempt citation and flowed from the same criminal objective).

Fearman v. State, 89 N.E.3d 435 (Ind. Ct. App. 2017) (while a person can be in contempt multiple times arising out a single proceeding, defendant here interrupted the court and spoke profanely multiple times before the court removed him from the courtroom and sentenced him for content, there constituting only one contemptuous episode).

Wine v. State, 147 N.E.3d 409 (Ind. Ct. App. 2020) (no IAC for failing to challenge 900-day sentence for four counts of criminal contempt because sentence was not based on one continuous episode of contempt, but sentence reduced to 720 days because conduct amounted to four separate acts of contempt rather than five).

#### **4. Subsequent prosecution for unlawful act**

Principles of double jeopardy do not preclude subsequent prosecution of person for engaging in conduct which constitutes unlawful act simply because court has invoked power of direct contempt to protect itself against gross violations of decorum. Ellis v. State, 634 N.E.2d 771 (Ind. Ct. App. 1994).

But see Buford v. State, 139 N.E.3d 1074 (Ind. Ct. App. 2019) (contempt sanction was punitive and thus resulting sentence was punishment; therefore, State filing criminal charge for same acts on same day of contempt hearing after expressly stating it would not file charges "constitute[d] double jeopardy concerns" warranting reversal of contempt finding).

### **B. LAWYERS**

#### **1. Higher standard for lawyers**

Attorneys are held to higher standard of conduct than laymen, and as such may be held in contempt for behavior for which a layman might not be held in contempt. Williams v. State ex rel. Harris, 690 N.E.2d 315, 317 (Ind. Ct. App. 1997).

#### **2. Practice pointers**

Contempt proceeding is serious and may subject you to fines, imprisonment, and additional sanctions by bar.

##### **(a) Judge cannot use power to protect his personal feelings**

Power to punish contempt should not be misused as in cases where utilized to protect personal or individual feelings of judge. Grimm v. State, 162 N.E.2d 454 (Ind. 1959).

##### **(b) Summary contempt proceeding proper if compelling need**

Summary contempt proper only if compelling need for immediate action and involves contemptuous behavior: (1) occurring near court; (2) interfering with business of court; and (3) of which judge has personal knowledge. Hopping v. State, 637 N.E.2d 1294 (Ind. 1994) (superseded on other grounds as noted by Downs v State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)).

**(c) If held in direct contempt**

Court must distinctly: (1) recite facts in order of contempt; and (2) offer you chance to explain, show extenuation, or deny. Ind. Code § 34-47-2-4.

Ensure that your client is not being unduly prejudiced by court's actions. Make sure record reflects events accurately.

**(d) Do not scream at or insult judge**

When judge refuses to let you do what you need to do to zealously represent your client:

- (1) Maintain composure and avoid screaming or insulting judge (only increases likelihood any contempt citation will be upheld, and will likely bias jury against your client);
- (2) Attempt to avoid claim that your behavior constitutes material obstruction of justice; and
- (3) Calmly explain on record why you are doing what you are doing and why court's refusal to let you do so unfairly prejudices your client.

**(e) Judge's rulings do not justify attorney misconduct**

Wrongful rulings of court or remarks to counsel do not justify misconduct of counsel amounting to contempt of court.

Dodge v. State, 140 Ind. 284, 39 N.E. 745 (1895) (contention that language of court was provoking and detrimental to interest of client can have no weight or consideration from the legal standpoint; contempt punishes the act, not the intent of the actor).

**(f) Not entitled to change of venue from judge**

Unless statute providing for change of venue specifically gives right to such change in contempt of court cases, parties are not entitled to change of venue. State ex rel. Trotcky v. Hutchinson, 224 Ind. 443, 68 N.E.2d 649 (1946); Linton v. Linton, 166 Ind. App. 409, 336 N.E.2d 687, 692 (1975).

Jacobsen v. State, 179 Ind. App. 37, 384 N.E.2d 1041 (1979) (court did not lose jurisdiction over contempt proceeding after it had granted change of venue in underlying case out of which contempt proceedings arose).

**Note:** Court of Appeals in Jacobsen reversed trial court because judge failed to disqualify himself from presiding at subsequent contempt hearing.

**3. Examples of Lawyers Guilty of Contempt****(a) Failure to appear and inadequate explanation**

When the law requires a lawyer's presence at a particular place at a particular time, the lawyer's non-presence is conduct that occurs within the courtroom and may be considered direct contempt. Curtis v. State, 625 N.E.2d 496 (Ind. Ct. App. 1993).

In re Contempt Hearing of Nasser, 644 N.E.2d 93 (Ind. 1994) (failure of defense counsel to appear for jury trial, retarding progress of proceedings, affronting dignity of court, and wasting judicial resources, was properly found to be direct contempt because it directly interfered with court proceedings).

Attorney's absence and lack of adequate reason for absence citable summarily for direct contempt if, in the presence of the court: (1) the attorney refuses to give explanation of

absence; or (2) the attorney offers insulting, frivolous or clearly inadequate explanation for absence. Curtis v. State, 625 N.E.2d 496 (Ind. Ct. App. 1993).

If the attorney offers some evidence of an adequate explanation for the attorney's failure to appear, the matter should be treated as an indirect contempt and thus the procedural safeguards available for defendants in those cases apply. Curtis v. State, 625 N.E.2d 496 (Ind. Ct. App. 1993).

Jailing an attorney for failing to appear due to conflict of schedule is a questionable practice, but within sound discretion of trial court. Matter of Atanga, 636 N.E.2d 1253 (Ind. 1994).

**(b) Failing to timely abide by court orders**

Failure of an attorney to comply with court orders in a willfully disobedient manner can warrant a finding of direct contempt. Matter of Toomey, 532 N.E.2d 608 (Ind. 1989).

**(c) Use of questions previously ruled inadmissible**

See 82 ALR4th 886.

**(d) Refusal to proceed in representation**

Lawyer properly found to be in contempt when he refused to represent client despite being ordered to remain at counsel table. In re Ortiz, 604 N.E.2d 602 (Ind. 1992).

**4. Examples of Lawyers Not Guilty of Contempt**

Remarks made to opposing counsel or others may not be sufficient for direct contempt convictions. See generally 68 ALR3d 273.

Grimm v. State, 240 Ind. 125, 162 N.E.2d 454 (1959) (attorney not guilty of contempt where judge told accused bond was being set because accused and his attorney failed to appear on March 10, and attorney, who had mistakenly believed he had been in court on March 10, turned to accused and said "That is not so; I was present." Remark of attorney not addressed to court).

Russell v. State, 428 N.E.2d 1271 (Ind. Ct. App. 1981) (not sufficient to support summary contempt conviction where remarks nothing more egregious than ill-advised response to opposing counsel's interruption "I will excuse you if you sit down and shut up.").

**C. DEFENDANT OR WITNESS**

**There are various types of conduct that a defendant or a witness can engage in that may subject them to direct contempt proceedings:** (1) noise and confusion disturbing business of court; (2) carrying gun; (3) fleeing courtroom; (4) contemptuous, insolent, or disorderly behavior to court; (5) racial slur; (6) refusal to testify; (7) refusal to disclose identity of informant; (8) refusal to take oath or affirmation; (9) intentionally giving false testimony; (10) purposefully demeaning self to retard proceedings; (11) affidavit or pleading – scurrilous charges against judge; or (12) failure to appear.

**1. Noise/outbursts and disregard for authority**

Pursuant to Ind. Code § 34-47-2-1(a), Every person is considered guilty of a direct contempt of court who disturbs the business and proceedings of a court: (1) by creating any noise or confusion; (2) in a court of record; and (3) while the court is open for and engaged in the transaction of business.

This includes disturbance caused: (1) by the commission of a felony, misdemeanor, or other

unlawful act; (2) by talking, moving about, or by signs or gestures; or (3) in any other manner. Ind. Code § 35-47-2-1(b).

Hopping v. State, 637 N.E.2d 1294, 1296 (Ind. 1994) (superseded on other grounds as noted by Downs v State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)) (disruption of actual court proceeding sufficient condition - but not a necessary condition - for direct criminal contempt; here, defendant properly subjected to direct criminal contempt where he came to courthouse to schedule small claims cases with secretary who was trying to organize docket, judge working on other legal matters; defendant's outburst interrupted these activities).

Macon v. State, 629 N.E.2d 883 (Ind. Ct. App. 1994) (defendant's actions did not constitute contempt where person unrepresented by counsel in traffic court said, "I knew that" and "fine"; not loud, accompanied by unruly physical conduct, or disruptive except to extent they indicated some lack of respect for court or proceedings).

Hunt v. Martin County Circuit Court, 864 N.E.2d 425 (Ind. Ct. App. 2007) (trial court clerk's alleged misrepresentation that trial court's order to release bond to defendant has been complied with did not constitute direct contempt because it did not disturb the business of the court).

## 2. Gun

Merely having a handgun on one's person in a courtroom is not sufficient to find them in contempt if the court was unaware of the presence of the firearm during the proceedings and did not otherwise cause an actual disturbance of the court. Macon v. State, 629 N.E.2d 883 (Ind. Ct. App. 1994).

Davis v. State, 608 N.E.2d 995 (Ind. Ct. App. 1993) (defendant could not be found in direct contempt summarily when he attempted to bring loaded firearm into courtroom while court in session and did not interfere directly with court proceedings).

## 3. Flight from courtroom

Contempt includes disobedience to a court by acting in opposition to the court's authority, including an order by the court to remain in the courtroom; failing to obey such an order can be grounds for contempt. Brumbaugh v. State, 491 N.E.2d 983 (Ind. 1986). See also Ellis v. State, 634 N.E.2d 771 (Ind. Ct. App. 1994).

## 4. Contemptuous, insolent, or disorderly remarks

Manner of expression may make remark contemptuous. Russell v. State, 428 N.E.2d 1271 (Ind. Ct. App. 1981).

Certain statements, not in themselves sufficient for direct contempt, might constitute contempt if made in a rude, insolent, and disrespectful manner. State ex rel. Stanton v. Murray, 231 Ind. 223, 108 N.E.2d 251 (1952).

### (a) Criticizing judge

When critics of court charge judicial conduct influenced by improper, corrupt, or selfish motives, or that such conduct was affected by political prejudices or interest, they commit contempt. Grimm v. State, 162 N.E.2d 454 (Ind. 1959).

Skolnick v. State, 180 Ind. App. 253, 388 N.E.2d 1156, 1168 (1979) (statements sufficient for summary and immediate conviction of witness for direct contempt where witness stated in open court judge was corrupt, guilty of breach of judicial

ethics, and he staged calling of witness for improper purposes; statements retarded progress of proceedings);

Boggs v. State, 179 Ind. App. 607, 386 N.E.2d 992 (1979) (statements made outside court did not amount to direct contempt where sheriff made statements that indictment of son politically motivated and inspired and such statements appeared in newspapers).

However, no contemptuous conduct so long as critics of court confine their criticism to facts and base them upon decisions of court, no matter how severe criticism may be.

Grimm v. State, 162 N.E.2d 454 (Ind. 1959).

## 5. Racial slur

Racial slurs directed at a judge or others can be contemptuous enough to subject a defendant to contempt proceedings. Hopping v. State, 637 N.E.2d 1294 (Ind. 1994) (superseded on other grounds as noted by Downs v State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)).

Cf. In re Atanga, 636 N.E.2d 1253 (Ind. 1994) (attorney admonished for remarks made to reporter and published in newsletter that judge who had imprisoned him for contempt of court was “ignorant, insecure, and a racist”; remarks were made with reckless disregard as to its truth and impaired authority of the courts); but see 636 N.E.2d at 1258 (Justice Sullivan’s dissent, arguing that “derogatory” remarks and “criticism” do not deserve sanction, particularly in light of judge’s misbehavior).

## 6. Refusal to testify

Pursuant to Ind. Code § 34-47-2-2, every person is considered guilty of a direct contempt of court who: (1) is sworn to testify as a witness, in any trial or proceeding, in any court of record, and refuses to testify in the trial or proceeding; (2) is required by any court to be sworn in any trial or proceeding, and refuses to take an oath or affirmation; or (3) while upon the witness stand, is purposely so demeaning as to retard or disturb the proceedings of the court.

Aguilar v. State, 416 N.E.2d 887 (Ind. Ct. App. 1981) (evidence sufficient to support direct contempt conviction, witness refused to answer several questions by prosecutor, defense counsel and court, questions within scope of trial; witness refused to answer because questions asked for his opinion and he was not called as expert).

La Grange v. State, 153 N.E.2d 593 (Ind. 1958) (direct contempt where witness refuses to take witness stand).

A person may not use the Fifth Amendment to avoid answering basic identification questions during a proceeding, and thus may be in contempt for failing to do so. Packer v. State, 777 N.E.2d 773 (Ind. Ct. App. 2002). The privilege against self-incrimination contained in the Fifth Amendment exists up to the point where there can be no further incrimination, such as where the sentence has been fixed and the judgment of conviction has become final, or when charges are dismissed pursuant to a plea agreement. Highbaugh v. State, 773 N.E.2d 247 (Ind. 2002). Being granted immunity and derivative use immunity remove the incrimination risk and thus a party so ordered to testify, who refuses to do so, may be found in contempt. Matter of Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995).

**(a) Refusal to testify only single act of contempt**

Where witness refuses at outset to testify and steadfastly continues to do so, refusal to answer string of questions may only be treated as single act of contempt. In re Craig, 552 N.E.2d 53 (Ind. Ct. App. 1990).

See also 94 A.L.R.2d 1246 (separate contempt prosecutions on successive refusals to respond to same or similar questions).

**(b) Expert Opinion Testimony**

An expert may not be compelled to testify as to opinion on matters within the expert's field without adequate compensation and may not be subject to contempt proceedings for failing to testify without compensation. Dills v. State, 59 Ind. 15 (1877).

**7. Refusal to disclose identity of informer**

See 76 A.L.R.2d 262.

**8. Refusing to take oath or affirmation**

Ind. Code § 34-47-2-2 provides in part: "Every person who . . . is required by any court to be sworn in any such trial or proceeding, shall refuse to take an oath or affirmation; . . . is considered guilty of a direct contempt of court."

**9. Intentionally giving false testimony**

In order for a finding of contempt to stand, false testimony must have been such that it was directly apparent to be false and occurred within the presence of the court; actions can be frivolous, unethical, malicious, or even perjurious without being directly contemptuous. White v. White (In re C.M.W.), 755 N.E.2d 644 (Ind. Ct. App. 2001).

In re Marriage of Neiswinger, 477 N.E.2d 257 (Ind. 1985) (summary action of direct contempt not warranted where false testimony did not pose sufficient threat to order of court; witness denied due process of law required under indirect contempt statute when convicted without notice or opportunity to be heard).

C.F. v. State, 521 N.E.2d 1338 (Ind. Ct. App. 1988) (no substantial evidence witness gave perjured testimony, grand jury target witness who had been granted immunity not subject to contempt proceedings for answering, "I don't know why I started the fire," when repeatedly asked, "What was your reason or motive for starting the fire?;" her answers did not tend to impede grand jury's investigation).

**10. Witness demeaning self to retard proceedings**

Ind. Code § 34-47-2-2 provides in part: "Every person who . . . while upon the witness stand, is purposely so demeaning as to retard or disturb the proceedings of the court; is considered guilty of a direct contempt of court."

**11. False pleading or inappropriate affidavit**

Making false or inappropriate claims in affidavits filed with the court may be grounds for a finding of direct contempt. Jacobsen v. State, 179 Ind. App. 37, 384 N.E.2d 1041 (1979).

**12. Failure to appear**

A layperson, unlike an attorney, does not commit direct contempt for merely failing to appear at a court hearing. Rice v. State, 874 N.E.2d 988 (Ind. Ct. App. 2007).

Bellamy v. State, 952 N.E.2d 263 (Ind. Ct. App. 2011) (despite defendant's status as layperson, trial court properly found him in direct contempt for failure to timely appear

for trial after receiving express prior warning that such failure would result in contempt finding).

## **D. CONTESTING CONTEMPT FINDING**

### **1. Motion to reconsider opinion and judgment**

Ind. Code § 34-47-2-5(b) provides:

“In all cases where the defendant may be adjudged to pay a fine of fifty dollars (\$50) or more, or to be imprisoned for such contempt, the defendant has the right, either before or after the payment of the fine, or undergoing the imprisonment, to move the court to reconsider its opinion and judgment of the case upon (1) the facts before the court, or (2) the affidavits of any or all who are actually present and heard, or saw the conduct alleged to have constituted the contempt.”

Judge must consider facts before it, or upon affidavits of any, or all persons who are actually present and heard, or saw conduct alleged to have constituted such contempt. Ind. Code § 34-47-2-5(b). If the defendant fails to present affidavit of every person present, in support of his motion for reconsideration, court may direct affidavits to such persons to be procured. Ind. Code § 34-47-2-5(c).

### **2. New Trial**

The defendant may move the court for a new trial and a recession of the court’s judgment against the defendant. Ind. Code § 34-47-2-5(d). If the court overrules such a motion, the defendant may appeal. Ind. Code § 34-47-2-5(e).

Brennan v. State, 173 N.E. 2d 312 (Ind. 1961) (motion for new trial timely where filed two days after overruling of motion to reconsider). See also Johnson v. State, 426 N.E.2d 104, 106 (Ind. Ct. App. 1981).

### **3. Appeal**

The defendant has the right to appeal the conviction if found guilty of contempt. Ind. Code § 34-47-2-5(a). No appealable final judgment until court has proceeded to attach and punish defendant for contempt by fine or imprisonment. State ex rel. Neal v. Hamilton Circuit Court, 224 N.E.2d 55, 58 (Ind. 1967). The reviewing court can consider claim when issue not properly raised in initial brief, however, not required to do so. Everroad v. State, 571 N.E.2d 1240, 1246 (Ind. 1991).

#### **(a) Determine whether acts recorded constitute contempt**

The reviewing court will accept as true the statements entered into the record by the trial court. Blankenbaker v. State, 166 N.E. 265, 268 (Ind. 1929). However, the court will examine record to determine whether acts recorded do in fact constitute contempt. State ex rel. Stanton v. Murray, 108 N.E.2d 251, 257 (Ind. 1952).

#### **(b) Review of Contempt Sentence**

Sentence for contempt is reviewed under new less stringent standard of whether sentence is “appropriate” when considering the nature of the particular offense and character of offender. See Ind. App. R. 7(B) and State v. MacWilliams (In re Gardner), 713 N.E.2d 346, 347 (Ind. Ct. App. 1999). However, it is unclear whether Appellate Rule 7(B)’s “appropriate” standard should apply in reviewing contempt sentences. Downs v. State, 827 N.E.2d 646 (Ind. Ct. App. 2005).

Tunis v. State, 129 N.E.3d 258 (Ind. Ct. App. 2019) (declining to decide whether Appellate Rule 7(B), a “reasonableness” or “manifestly unreasonable” standard

would apply in reviewing contempt sentence after finding sentence did not warrant revision).

Hopping v. State, 637 N.E.2d 1294, 1297 (Ind. 1994) (term of sixty days not manifestly unreasonable for two counts of direct criminal contempt) (superseded by new standard for appellate review of sentences as noted by Downs v State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)).

Jones v. State, 847 N.E.2d 190 (Ind. Ct. App. 2006) (under any standard, a 200-day “flat” sentence for indirect contempt, which was commuted to 102 days, was appropriate and reasonable),

Matter of Cudworth, 815 N.E.2d 1019 (Ind. Ct. App. 2004) (six-month sentence was not inappropriate although it was maximum sentence available absent a jury trial).

Gerber v. State, 167 N.E.3d 792 (Ind. Ct. App. 2021) (six-month sentence was reasonable for violating court order by calling victim 552 times in 54 days).

Though not required by Art. I, § 16 of the Indiana Constitution, proportionality review is appropriate in contempt cases. State v. MacWilliams (In re Gardner), 713 N.E.2d 346, 347 (Ind. Ct. App. 1999).

State v. MacWilliams (In re Gardner), 713 N.E.2d 346, 347 (Ind. Ct. App. 1999) (compared to similar offenses of perjury and obstruction of justice, which are Class D felonies with sentence range from six months to three years, 11-and-a-half-year sentence for contempt manifestly unreasonable; maximum sentence of three years is proportionate to nature of offense of criminal contempt).

### (c) Post-Conviction Relief

Defendant may raise Ineffective Assistance of Counsel in contempt proceedings in a petition for post-conviction relief. Wine v. State, 147 N.E.3d 409 (Ind. Ct. App. 2020).

Wine v. State, 147 N.E.3d 409 (Ind. Ct. App. 2020) (on appeal from denial of PCR, Court rejected State’s argument on cross-appeal that post-conviction rules do not apply to criminal contempt adjudications, finding that PCR is criminal contemnor’s only opportunity to collaterally challenge such adjudication).

## E. RIGHTS IF HELD IN CONTEMPT

### 1. Must be given an opportunity to respond

Person entitled to make statement in response to alleged contemptuous conduct which may be in form of explanation, extenuation, or denial of alleged conduct. Ind. Code § 34-47-2-4.

Davis v. State, 608 N.E.2d 995, 996 (Ind. Ct. App. 1993) (reversal because court did not afford defendant opportunity to respond, even if defendant in direct contempt by bringing gun into court building).

### 2. No right to counsel

There is no right to counsel in proceeding in which a person is summarily convicted and punished for direct criminal contempt. Skolnick v. State, 388 N.E.2d 1156 (Ind. Ct. App. 1979).

## F. PUNISHMENT

The power to punish contempt is limited by reasonableness. In re Gardner, 713 N.E.2d 346, 347 (Ind. Ct. App. 1999). It is unclear whether Indiana Appellate Rule 7(B), providing appropriateness standard of sentencing review, applies for sentences of contempt. However, a



sentence exceeding six months cannot be imposed absent a jury trial or waiver thereof. Holly v. State, 681 N.E.2d 1176 (Ind. Ct. App. 1997).

#### **1. Court's discretion**

Punishing or refusing to punish for contempt within discretion of trial court. Clark v. Clark, 404 N.E.2d 23 (Ind. Ct. App. 1980).

Davis v. Sponhauer, 574 N.E.2d 292 (Ind. Ct. App. 1991) (alleged contemnor disobeyed a preliminary injunction; direct contempt was not appropriate remedy).

#### **2. Fine and/or imprisonment**

Judge can protect court against insult and gross violations of decorum by infliction of summary punishment by fine, imprisonment or both via contempt citation. McQueen v. State, 396 N.E.2d 903 (Ind. 1979); Robertson v. Wittenmyer, 736 N.E.2d 804, 806 (Ind. Ct. App. 2000).

#### **3. Imprisonment must be for set term**

Imprisonment for set term or fine is considered punitive and imposed only in criminal contempt proceedings. State ex rel. McMinn v. Gentry, 100 N.E.2d 676 (Ind. 1951); Pickett v. Pelican Service Associates, 495 N.E.2d 245, 246 (Ind. Ct. App. 1986).

In re Bennington, 24 N.E.3d 958 (Ind. 2015) (judge abused contempt powers by not imposing a determinate contempt sentence and not reducing her order to writing as required by statute).

#### **4. Punishment must be appropriate**

Former Ind. Code § 34-4-7-6 limited punishment to \$500 fine and three months imprisonment, but such statutory limitations no longer exist. Now, the power to punish contempt is limited by reasonableness and is reviewed under the same appropriateness standard as for other sentences. State v. MacWilliams (In re Gardner), 713 N.E.2d 346, 347 (Ind. Ct. App. 1999). However, it is unclear whether Appellate Rule 7(B)'s appropriateness standard applies in reviewing contempt sentences. Downs v. State, 827 N.E.2d 646 (Ind. Ct. App. 2005).

Jones v. State, 847 N.E.2d 190 (Ind. Ct. App. 2006) (under any standard, a 200-day "flat" sentence for indirect contempt, which was commuted to 102 days, was appropriate and reasonable).

Warr v. State, 877 N.E.2d 817 (Ind. Ct. App. 2007) (180-day sentence was proportionate to defendant's consistently disrespectful and outrageous behavior in court).

Gerber v. State, 167 N.E.3d 792 (Ind. Ct. App. 2021) (180-day sentence for numerous violations of no-contact order was appropriate).

Though not required by Art. I, § 16 of the Indiana Constitution, proportionality review is appropriate in contempt cases. State v. MacWilliams (In re Gardner), 713 N.E.2d 346, 347 (Ind. Ct. App. 1999).

State v. MacWilliams (In re Gardner), 713 N.E.2d 346, 347 (Ind. Ct. App. 1999) (compared to similar offenses of perjury and obstruction of justice, which are Class D felonies with sentence range from six months to three years, 11.5-year sentence for contempt was manifestly unreasonable; maximum sentence of three years is proportionate to nature of offense of criminal contempt).

**Practice Pointer:** Although any length of sentence for contempt should be argued to be inappropriate, depending on the circumstances, State v. MacWilliams, 713 N.E.2d 346, 347 (Ind. Ct. App. 1999), implies that any sentence for criminal contempt of greater than three years is per se invalid.

### 5. Trial court cannot suspend an attorney from the practice of law

Suspension from practice of law in particular court not among court's available punishments for contempt. McQueen v. State, 396 N.E.2d 903 (Ind. 1979).

## II. INDIRECT CRIMINAL CONTEMPT

Acts that undermine activities of court but fail to satisfy one of other direct contempt requirements may constitute indirect contempt. In re Contempt Hearing of Nasser, 644 N.E.2d 93 (Ind. 1994).

Indirect contempt usually refers to: (1) willful disobedience of any lawfully entered court order; (2) of which offender has notice; and (3) arising from conduct not occurring in presence of court. Jackson v. State, 644 N.E.2d 607 (Ind. Ct. App. 1994).

### A. ACTS CONSTITUTING INDIRECT CONTEMPT

Indirect criminal contempt falls within one of four categories:

- (1) violation of court order; (Ind. Code § 34-47-3-1)
- (2) resisting or delaying process; (Ind. Code § 34-47-3-2)
- (3) assaulting, influencing or intimidating witnesses; or (Ind. Code § 34-47-3-3)
- (4) false or inaccurate reporting of proceeding. (Ind. Code § 34-47-3-4)

#### 1. Violation of court order

Person commits indirect contempt by willful disobedience of any process or any order lawfully issued: (1) by court of record, or proper officer of court; (2) under the authority of law, or the direction of the court; and (3) after the process or order has been served upon the person. Ind. Code § 34-47-3-1.

##### (a) Willful failure to obey Supreme Court

Willful failure to obey order of Indiana Supreme Court punishable as indirect criminal contempt; act must be done with intent to show disrespect or defiance. In re Hatfield, 607 N.E.2d 384 (Ind. 1993).

Hunter v. State, 102 N.E.3d 326 (Ind. Ct. App. 2018) (trial court abused its discretion by imposing criminal contempt sanction for defendant's violation of a condition of bail prohibiting him from being around anyone under the age of 18; held, defendant's conduct did not affect the dignity or operation of the court, which is required for criminal contempt sanctions).

Gerber v. State, 167 N.E.3d 792 (Ind. Ct. App. 2021) (sentence for indirect criminal contempt upheld where defendant's flagrant violation of no-contact order was an act directed against dignity and authority of trial court).

##### (b) Must be express command or prohibition, lawfully issued

To provide foundation to punish for violation of court's order, must be order or decree commanding accused either to do or to refrain from doing something. Ind. Code § 34-37-3-1.

In re Hatfield, 607 N.E.2d 384 (Ind. 1993) (court reporter held in contempt for failing to finish transcript by deadline where she received court order requiring her to complete transcript, instead of attempting to comply with it, she chose to conduct business as usual; evidence established she could have complied with deadline and could have “farmed out” other transcription work to other court reporters).

Order or judgment may be insufficient if it merely declares the rights of parties without any express command or prohibition.

Nicholas v. Nicholas, 482 N.E.2d 770 (Ind. Ct. App. 1985) (father ordered to pay higher education expenses of children, had not been asked to pay and was not aware that the obligations had been incurred).

H.K. Porter Co. v. Nat. Friction Products, 568 F.2d 24 (7th Cir. 1978) (no contempt possible where judgment did not use language which turned contractual duty into an obligation to obey an operative command; order merely approving of contractual obligations is insufficient for contempt).

Before finding of contempt is entered, order contemnor has flouted must be a “lawfully issued” order. Ind. Code § 34-47-3-1.

City of Gary v. Major, 822 N.E.2d 165 (Ind. 2005) (a person cannot be held in contempt for failure to obey an order if the issuing court had no jurisdiction to give the order. Such an order is void and unenforceable; however, a defendant may be held in contempt of an erroneous order. The only remedy from an erroneous order is appeal and disobedience thereto is contempt).

**(c) Act done with intent to show disrespect or defiance**

Act must be done willfully and with intent to show disrespect or defiance. In re Perrello, 260 Ind. 26, 291 N.E.2d 698 (1973); In re Hatfield, 607 N.E.2d 384 (Ind. 1993).

Pettit v. Pettit, 626 N.E.2d 444, 448 (Ind. 1993) (with respect to non-payment of child support, contempt is not appropriate unless the parent has the ability to pay the support due, because inability to pay is not willful disobedience).

Metzger v. State, 6 N.E.3d 485 (Ind. Ct. App. 2014) (defendant’s uncooperative actions of willfully resisting, hindering or delaying execution of warrant for blood draw amounted to contempt of court).

Intent is a question of fact to be decided after hearing all evidence. Matter of Crumpacker, 431 N.E.2d 91 (Ind. 1982).

Nicholas v. Nicholas, 482 N.E.2d 770 (Ind. Ct. App. 1985) (requisite intent lacking and no willful disobedience by father in his failure to pay on daughter’s student loans, where father obligated by decree to pay educational expenses for children beyond 12th grade; he had not been asked to pay and was not aware obligations had been incurred).

The trial court has the discretion to determine if the act was willful. Emery v. Sautter, 788 N.E.2d 856, 859-60 (Ind. Ct. App. 2003).

Emery v. Sautter, 788 N.E.2d 856, 859-60 (Ind. Ct. App. 2003) (sufficient evidence of willful disobedience where father was employed and earning \$808 per week but did not pay child support).

**(d) Knowledge of court's order must be established**

No presumption of knowledge of order; knowledge must be established from facts presented to court. Bottoms v. B & M Coal Corp., 405 N.E.2d 82 (Ind. Ct. App. 1980).

Caito v. Indianapolis Produce Terminal, Inc., 160 Ind. App. 590, 320 N.E.2d 821 (1974) (sons acquiesced in violation of injunction and were properly cited for contempt where father in same business as sons caused dock adjacent to warehouse being rented by sons to be enclosed with knowledge that such action was enjoined; at least one son knew construction had taken place).

**2. Resisting or delaying process**

"A person who willfully resists, hinders, or delays the execution of any lawful process, or order of any court of record is guilty of an indirect contempt of court." Ind. Code § 34-47-3-2.

In re Mental Health Actions for A.S., 9 N.E.3d 129 (Ind. 2014) (Respondent could not have willfully resisted a court order because there was no lawful order in place when she acted; in fact, Respondent's actions of applying for emergency warrant to detain and treat her co-worker for a purported psychiatric crisis led to trial court issuing indirect contempt and fine against Respondent, which it did not have authority to impose).

**3. Influencing or intimidating witnesses**

A person is guilty of an indirect contempt of the court in which such witness may be called to testify, if the acts are done elsewhere, out of the presence of the court who: (1) offers, gives, or promises any reward to; threatens to assault or injure; assaults or beats; or in any other manner influences, intimidates, or attempts to influence; any witness to give or abstain from giving testimony in any case, or to abstain from attending as a witness in any case; (2) who does any act to put a witness in fear, on account of any testimony that the witness may have given; or (3) who, on account of any testimony, injures, or threatens to injure a witness; is guilty of an indirect contempt of the court in which such witness may be called to testify, if the acts are done elsewhere, out of the presence of the court. Ind. Code § 34-47-3-3.

See also 52 A.L.R.2d 1297.

**4. False or inaccurate reporting of case or proceeding**

Ind. Code § 34-47-3-4(a) provides that: A person who falsely makes, utters, or publishes any false or grossly inaccurate report of any case, trial, or proceeding, or part of any case, trial, or proceeding is considered guilty of an indirect contempt of the court, if made at any time: (1) after the proceeding commenced; (2) while the proceeding is pending; (3) while the court has jurisdiction; and (4) before the proceeding is fully determined and ended.

The person is considered guilty of an indirect contempt of the court making the ruling or order if a report described in Ind. Code § 34-47-3-4(a) is made: (1) pending the case, trial, or proceeding; and (2) concerning any ruling or order of the court. Ind. Code § 34-47-3-4(b).

**5. Refusal to testify notwithstanding grant of immunity**

"If a witness refuses to give the evidence [compelled by court] after he has been granted use immunity, the court may find him in contempt." Ind. Code § 35-37-3-3(c).

Jackson v. State, 644 N.E.2d 607, 609 (Ind. Ct. App. 1994) (indirect contempt pursuant to Ind. Code § 35-37-3-3 for refusing to testify during deposition conducted by co-defendant and during co-defendant's trial; court granted use and derivative use immunity).

## B. PROCEDURES

Proceeding for indirect criminal contempt: (1) must have been filed as independent action, as distinct from one filed as civil contempt in another proceeding; (2) must have been prosecuted by State; and (3) act constituting criminal contempt must have been characterized as deliberate intention to defy authority of court. Allison v. State, 187 N.E.2d 565 (Ind. 1963).

### 1. Service of rule upon defendant

In all cases of indirect contempt, the person charged with indirect contempt is entitled to be served with a rule of the court against which the contempt was alleged to have been committed: (1) before answering the charge; or (2) being punished for the contempt. Ind. Code § 34-47-3-5(a).

Peterson v. State, 468 N.E.2d 556 (Ind. Ct. App. 1984) (subsequent finding of contempt violated right of due process where judge failed to prepare and serve upon or make available to defendants a rule to show cause defining contumacious conduct).

### 2. Rule to show cause must set forth facts of alleged contempt and give notice of right to offer defense

Ind. Code § 34-47-3-5(b) provides that the rule to show cause must: (1) clearly and distinctly set forth the facts that are alleged to constitute the contempt; (2) specify the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant; and (3) specify a time and place at which the defendant is required to show cause, in the court, why the defendant should not be attached and punished for such contempt.

### 3. Court may extend time to give defendant opportunity to be purged of contempt

Ind. Code § 34-47-3-5(c) provides that the court shall, on proper showing, extend the time provided under Ind. Code § 34-47-3-5(b)(3) to give the defendant a reasonable and just opportunity to be purged of the contempt.

Thompson v. Thompson, 811 N.E.2d 888, 906 (Ind. Ct. App. 2004) (claiming that in certain cases, including indirect criminal contempt, court may issue punitive contempt order without opportunity to purge).

T.T. v. State, 439 N.E.2d 655, 659 (Ind. Ct. App. 1982) (criminal contempt proceeding is a separate action from the main action out of which it arises).

### 4. Rule cannot issue until information and sworn affirmation attest to contempt

Ind. Code § 34-47-3-5(d) provides that: a rule provided for under Ind. Code § 34-47-3-5(b) may not issue until the facts alleged to constitute the contempt have been: (1) brought to the knowledge of the court by an information; and (2) duly verified by the oath of affirmation of some officers of the court or other responsible person.

### 5. Strict compliance not required if sufficient notice is given

Strict compliance with Ind. Code § 34-47-3-5's requirement that a defendant be served with a rule of the court that clearly and distinctly sets forth the facts that are alleged to constitute the contempt can be excused if the party in contempt has been sufficiently notified of their contempt. Reynolds v. Reynolds, 64 N.E.3d 829 (Ind. 2016).

Reynolds v. Reynolds, 64 N.E.3d 829 (Ind. 2016) (contempt affirmed although trial court did not provide father with a proper rule to show cause, mother filed a verified motion for rule to show cause, alleging father should be held in contempt for failing to comply with the dissolution decree and agreed modification order, which the court concluded was

specific enough to excuse strict compliance with the contempt statute and protect the father's due process rights).

## C. RIGHT TO COUNSEL

### 1. Indiana

Due process of law mandates that one charged with criminal contempt be afforded notice of the charges against him, and the right to be represented by counsel. Skolnick v. State, 388 N.E.2d 1156, 1164 (Ind. Ct. App. 1979).

#### (a) Exception—Direct Contempt

Right to counsel does not attach when trial judge compelled to convict and punish summarily for direct criminal contempt. Skolnick v. State, 388 N.E.2d 1156, 1164 (Ind. Ct. App. 1979).

See Ind. Code § 34-47-2 (direct contempt; disturbing court).

#### (b) Contempt in Child Support Cases

Where the possibility exists that an indigent defendant may be incarcerated for contempt for failure to pay child support, he or she has a right to appointed counsel and to be informed of that right prior to commencement of the contempt hearing; this is so regardless of whether a private person or the State initiates the contempt proceedings. Moore v. Moore, 11 N.E.3d 980 (Ind.Ct.App. 2014) and Marks v. Tolliver, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005).

### 2. Federal - Right Attaches if Requested

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. *We think this includes the assistance of counsel, if requested....*" Harris v. United States, 382 U.S. 162, 167, 86 S.Ct. 352, 355 (1965).

Whether counsel is required for contempt is subject to analysis under Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

#### (a) Exception—Direct Contempt

The right to counsel does not attach when a trial judge is compelled to convict and punish summarily for direct criminal contempt. In re Oliver, 333 U.S. 257, 273 (1984).

#### (b) Contempt in Child Support Cases

The Due Process Clause does not automatically require provision of counsel at civil contempt proceedings to indigent individual subject to child support order, even if he faces incarceration for up to a year; in particular, the Clause does not require provision of counsel where opposing parent or other custodian to whom support funds owed not represented by counsel and State provides alternative procedural safeguards equivalent to adequate notice of importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings. Turner v. Rogers, 131 S.Ct. 2107, 180 L.Ed.2d 452 (2011).

## D. DEFENSES

### 1. Void orders

If an order is void, then a person may not be held in contempt based on failure to obey the order. State ex rel. Leffingwell v. Superior Court No. 2, 262 Ind. 574, 321 N.E.2d 568 (1974) (order void for lack of jurisdiction).

See also *Must be express command or prohibition, lawfully issued*, section II.A.1(b), above.

### 2. Inability to pay fines

Inability to pay fine or other charge, such as child support, pursuant to order by court is a defense to a contempt proceeding.

Smith v. Indiana State Bd. of Health, 303 N.E.2d 50 (Ind. Ct. App. 1973) (affidavits of defendants charged with contempt for failure to comply with restraining order insufficient to show an inability to pay, and court properly denied remission of fine assessed against defendants; affidavits merely alleged generalities as to liens and attachments against their property, did not specifically identify source and details of liens and attachment nor amounts of some attachments, and defendants failed to specify their assets, if any).

With respect to non-payment of child support, contempt is not appropriate unless the parent has the ability to pay the support due, because inability to pay is not willful disobedience. Pettit v. Pettit, 626 N.E.2d 444, 448 (Ind. 1993).

Emery v. Sautter, 788 N.E.2d 856, 859-60 (Ind. Ct. App. 2003) (trial court has discretion to determine if disobedience was willful or involuntary; sufficient evidence of willful disobedience where father was employed and earning \$808 per week but did not pay child support).

### 3. Lack of intent

Lack of intent is also a defense to a contempt proceeding. State ex rel. Purcell v. Circuit Court of Sullivan County, 228 Ind. 410, 423, 92 N.E.2d 843, 849 (1950).

### 4. Inability to comply

Inability to comply with court order is a defense to contempt. Where a person seeks to satisfy the court that his failure to obey a court order was due to inability to render obedience, the burden is upon him. State ex rel. Thrasher v. Hayes, 177 Ind. App. 196, 378 N.E.2d 924 (1978).

Aguilar v. State, 416 N.E.2d 887 (Ind. Ct. App. 1981) (defendant has burden of showing legitimate inability to comply with order by trial court to answer questions).

### 5. Substantial compliance

If the defendant can show substantial compliance with an order, it may be a defense to an indirect contempt charge.

Broderick v. Denbo, 413 N.E.2d 948 (Ind.Ct.App. 1980), *vacated in part on other grounds* 422 N.E.2d 1334 (sheriff lacked any intent and purged of alleged contempt for his failure to appear in his official capacity at hearing, where the asserted reasons for the failure to appear were that similar orders in different proceedings had merely required appearance of a subordinate with the necessary information and that sheriff believed that, by ordering such subordinates to appear on the advice of his attorney, sheriff had substantially complied with the order to appear).

## 6. Acts not constituting indirect contempt

If an act is not indirect contempt, it is a defense.

State v. Heltzel, 552 N.E.2d 31 (Ind. 1990) (solicitation of information concerning secret grand jury evidence, deliberations, and votes from former grand jurors who served on a grand jury nearly two years before the information was sought did not rise to the level of actionable indirect contempt).

## 7. Denial of due process no excuse

A denial of due process, even if a denial of the most fundamental of procedural protections, is no excuse for contumacious conduct where the person asserts that the contumacious conduct was precipitated by the due process denial. Skolnick v. State, 180 Ind. App. 253, 388 N.E.2d 1156 (1979).

## 8. Other possible defenses

Some other possible defenses include:

- Vague, indefinite, or unreasonable orders
- Recalcitrant witness
- Fines imposed beyond life of grand jury
- Conduct during stay of proceedings

# III. DIFFERENCES BETWEEN CRIMINAL AND CIVIL CONTEMPT

Generally, civil contempt is intended to be coercive, while criminal contempt is meant to be punitive. Hopping v. State, 637 N.E.2d 1294, 1296 (Ind. 1994) (superseded on other grounds as noted by Downs v State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)).

McCollum v. FSSA, 82 N.E.3d 368 (Ind. Ct. App. 2017) (150-week term of imprisonment for failure to pay child support was inconceivable sanction on a defendant in a civil contempt proceeding; held, punishment was punitive in nature, not coercive or remedial).

Civil contempt is for the benefit of a party who has been injured or damaged by the failure of another to conform to a court order issues for the private benefit of the aggrieved party. Cowart v. White, 711 N.E.2d 523, 530 (Ind. 1999). Criminal contempt is to prevent acts obstructing justice or court's operation. A criminal contempt sanction is punitive in nature because its purpose is to vindicate the authority of the court, and it benefits the State rather than the aggrieved party. Wilson v. State, 988 N.E.2d 1211, 1218 (Ind. Ct. App. 2013).

## A. CONTEMPT DEFINED

Contempt is disobedience to a court by acting in opposition to the court's authority, justice and dignity. Brumbaugh v. State, 491 N.E.2d 983, 984 (Ind. 1986).

Contempt is defined as any act related to current or pending proceeding that ends to deter or frustrate the court from performance of its duties. Hopping v. State, 637 N.E.2d 1294 (Ind. 1994) (superseded on other grounds as noted by Downs v State, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005)).

State v. Heltzel, 552 N.E.2d 31, 34 (Ind. 1990) (direct contempt involves acts which are committed in the presence of the court or in such close proximity to it so as to disrupt its proceedings while in session; indirect contempt involves acts committed outside court's presence but that nevertheless tend to interrupt, obstruct, embarrass or prevent the due administration of justice).



In re Mental Health Actions for A.S., 9 N.E.3d 129 (Ind. 2014) (trial court lacked authority to find nurse Respondent committed indirect civil contempt and fine her, even though she misled it into issuing an emergency warrant so her co-worker could be detained and treated for a purported psychiatric crisis).

### 1. Power necessary to protect administration of justice

Contempt powers of courts necessary to protect orderly administration of justice and maintain authority and dignity of court. Johnson v. State, 426 N.E.2d 104 (Ind. Ct. App. 1981).

### 2. Intrinsic judicial power; neither civil, criminal, nor equitable

Contempt of court is neither civil, criminal, nor equitable; it is a purely judicial power inherent to all courts. Because it is not the creature of legislation, it is inalienable and indestructible. State v. Heltzel, 526 N.E.2d 1229, 1230 (Ind. Ct. App. 1988).

Reed v. Cassidy, 27 N.E.3d 1104 (Ind. Ct. App. 2015) (contempt statute is a legislative recognition of the courts' inherent power to cite and punish for contempt).

## B. CRIMINAL CONTEMPT

Purpose of criminal contempt primarily to: (1) preserve power, authority, dignity of courts, and (2) punish for disobedience of their orders.

Criminal contempt is any contempt which attacks integrity of court or its officers and: (1) hinders and delays operation of court; (2) is in disrespect of court; (3) tends to obstruct administration of justice; or (4) brings court into disrepute. Dale v. State, 198 Ind. 110, 150 N.E. 781 (1926), *overruled on other grounds*, LaGrange v. State, 238 Ind. 689, 153 N.E.2d 593 (1958).

In re Perrello, 260 Ind. 26, 291 N.E.2d 698 (1973) (any act which manifests disrespect for and defiance of court).

**Note:** Criminal contempt is most common in cases involving attorney and client behavior during trial.

To constitute criminal contempt, acts in defiance of court must be characterized by deliberate intention to disobey court's authority. Denny v. State, 203 Ind. 682, 182 N.E. 313 (1932).

Criminal contempt independent of action from which it rose. Matter of May, 171 Ind. App. 440, 358 N.E.2d 138 (1976); T.T. v. State, 439 N.E.2d 655, 659 (Ind. Ct. App. 1982).

## C. CIVIL CONTEMPT

Civil contempt is used to compel obedience to orders and decrees made to enforce rights and administer remedies to which court has found them to be entitled.

Punishment not primary objective of civil contempt; however, civil contempt's may seek to coerce behavior or to compensate party when court order violated. Clark v. Atkins, 489 N.E.2d 90 (Ind. Ct. App. 1986).

McCollum v. FSSA, 82 N.E.3d 368 (Ind. Ct. App. 2017) (150-week term of imprisonment for failure to pay child support was inconceivable for a sanction on a defendant in a civil contempt proceeding; held, punishment was punitive in nature, not coercive or remedial).

Herron v. City of Indianapolis, 59 N.E.3d 319 (Ind. Ct. App. 2015) (\$1,000 fine for violation of order to not own or keep animals in Marion County was punitive; no evidence that the fine would compensate the city for its losses and therefore was punitive rather than coercive or compensatory in nature, which is impermissible in a civil contempt setting).

**1. Offense against party on whose behalf court issued mandate**

Civil contempt is offense against party in whose behalf court's mandate was issued. Hegedus v. Hegedus, 178 Ind. App. 620, 383 N.E.2d 446 (1978).

**2. Inherent power to impose sanctions within ongoing judicial process**

Trial court's inherent power to impose sanctions need not always be tied to a contempt finding, but it must serve the same purpose: to enforce obedience to its lawful orders against parties who have been subjected properly to its jurisdiction. Noble County v. Rogers, 745 N.E.2d 194, 198 (Ind. 2001). In other words, the offending behavior must arise within an ongoing judicial process. Id.

"The inherent power of the judiciary to impose sanctions, while flexible and significant, begins and ends with the courtroom and the judicial process" In re Mental Health Actions for A.S., 9 N.E.3d 129 (Ind. 2014).

In re Mental Health Actions for A.S., 9 N.E.3d 129 (Ind. 2014) (trial court lacked authority to find Respondent nurse in indirect contempt and impose sanctions, because her application for an emergency detention began and ended upon completion of the application; it did not occur in the courthouse and did not occur "within" an already ongoing legal proceeding).

**D. OPPORTUNITY TO PURGE ONLY IN CIVIL CONTEMPT**

Court should indicate to party held in indirect civil contempt of possibility of purging self of punishment by complying with its orders. Thompson v. Thompson, 811 N.E.2d 888, 893 (Ind. Ct. App. 2004). Sentence for contempt is illegal where the court expressly states that it is ordering punishment for the party's contempt rather than conditioning punishment on party complying with the order. Id.

**1. No need for purge opportunity for indirect criminal contempt**

In some instances, the court may issue punitive contempt order without provision for opportunity to purge, including in cases of indirect criminal contempt. Thompson v. Thompson, 811 N.E.2d 888, 893 (Ind. Ct. App. 2004).

**2. Attempt to purge must be timely**

If the attempt to purge is not timely, it may be void. Matter of Cudworth, 815 N.E.2d 1019 (Ind. Ct. App. 2004).

Matter of Cudworth, 815 N.E.2d 1019 (Ind. Ct. App. 2004) (witness could not purge self of contempt when he offered to testify after damage resulting from two separate refusals had been done, as State had been forced to move on in case and dismiss witness whose testimony was rendered irrelevant as result of witness's refusal to testify).