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AN OVERVIEW OF ILLINOIS CONTEMPT LAW: A COURT'S INHERENT POWER AND THE APPROPRIATE PROCEDURES AND SANCTIONS

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INTRODUCTION

This article examines the law of contempt of court in Illinois, drawing upon both Illinois and federal authority. Preliminarily, it is important to note that the word "contempt" connotes two different meanings. In one sense, contempt is a means of controlling courtroom conduct, either by coercing compliance with court orders or by punishing those who embarrass or obstruct the court in its administration of justice.[1] When speaking of contempt in this sense, we refer to an inherent power of the court.[2]

In order for the court to have the power to hold an individual in contempt of court, the court must have jurisdiction to enter such an order. Where jurisdiction is lacking, an order of contempt is void.[3] Moreover, the Illinois Supreme Court has recently observed that the exercise of the power of contempt "is a delicate one and care is needed to avoid arbitrary and oppressive conclusions."[4] Thus, in order for the exercise of the contempt power to be appropriate, the contemnor must demonstrate willful conduct to the court,[5] and as

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1. People v. Ernest, 141 Ill. 2d 412, 421, 566 N.E.2d 231, 235 (1990); County of Cook v. Lloyd A. Fry Roofing Co., 59 Ill. 2d 131, 135, 319 N.E.2d 472, 475 (1974).

2. Michaelson v. United States, 266 U.S. 42, 65 (1924) (stating that courts have the inherent power to punish for contempt of court); *In re* G.B., 88 Ill. 2d 36, 41, 430 N.E.2d 1096, 1098 (1981).

3. Guertin v. Guertin, 204 Ill. App. 3d 527, 529, 561 N.E.2d 1339, 1340 (3d Dist. 1990).

4. *Ernest*, 141 Ill. 2d at 421, 566 N.E.2d at 235.

5. *Id.* at 424, 566 N.E.2d at 236; *See also* Bank of Aspen v. Fox Cartage, Inc., 126 Ill. 2d 307, 321, 533 N.E.2d 1080, 1086 (1989) (holding that "to constitute criminal contempt, one must willfully or contumaciously violate the order of the court").

contempt is a drastic means of controlling courtroom conduct,[6] the court should consider alternative means.[7]

In the second sense, "contempt" refers to the conduct which justifies the court's action. Contempt in this consequential sense has been described somewhat generically as "conduct calculated to embarrass, hinder or obstruct a court in its administration of justice or to derogate from its authority or dignity or bring the administration of law into disrepute."[8] Contemptuous conduct may consist of an act or omission.[9] This may include behavior during a trial, such as the disruption of court proceedings[10] or the disobedience of judicial orders.[11]

This article first describes the different kinds of contemptuous conduct which include civil and criminal contempt, and direct and indirect contempt. Civil contempt and criminal contempt are exclusive terms, as are direct contempt and indirect contempt. It is of paramount importance that contemptuous conduct be correctly identified and labelled since different punishments and proceedings apply to each kind of contemptuous conduct.[12] Accordingly, a trial court's misidentification of contemptuous conduct can make for a confusing or flawed record which may be the basis for a reversal of a contempt conviction on appeal.[13] Such a reversal, of course,

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6. Lane v. Sklodoeski, 97 Ill. 2d 311, 320, 454 N.E.2d 322, 326 (1983).

7. For an extended discussion of whether the trial court must consider alternative methods than contempt for controlling courtroom conduct see *infra* notes 268-81 and accompanying text. For a discussion of ensuring civility and decorum in judicial proceedings see Geoffrey C. Hazard, *Securing Courtroom Decorum*, 80 YALE L.J. 433 (1970).

8. *In re* Estate of Melody, 42 Ill. 2d 451, 452, 248 N.E.2d 104, 105 (1969).

9. Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 184-85 (1971).

10. *See* People v. Wright, 51 Ill. App. 3d 990, 992, 367 N.E.2d 492, 493 (3d Dist. 1977) (holding the defendant in contempt for interrupting court proceedings with belligerent and insulting comments); People v. Wilson, 35 Ill. App. 3d 86, 341 N.E.2d 34 (1st Dist. 1975) (finding a spectator to be in contempt of court for arguing loudly with the bailiffs and thereby interrupting court proceedings).

11. *See* Comet Cas. Co. v. Schneider, 98 Ill. App. 3d 786, 789, 424 N.E.2d 911, 914 (1st Dist. 1981) (finding the attorney in contempt for his "willful and flagrant violation of court orders").

12. *In re* Marriage of Betts, 200 Ill. App. 3d 26, 43, 558 N.E.2d 404, 415 (4th Dist. 1990) (emphasizing the importance of properly classifying the type of contemptuous conduct, stating that "because the procedures which must be followed in contempt cases vary according to the type of contempt involved, proper classification of contempt charges is not a mere academic exercise").

13. The distinction between civil and criminal contempt is important because of the consequences that attach to the characterization of the conduct. In *People v. Otten*, the trial court held the defendant in contempt for failing to cooperate with his probation officer. 228 Ill. App. 3d 305, 308, 591 N.E.2d 907, 909 (4th Dist. 1992). Judge Steigmann of the appellate court reversed:

> [T]he contempt procedures utilized at the trial level were flawed . . . . The most striking feature about the contempt proceedings in the present case is the apparent confusion by all trial level participants regarding the nature

thwarts the court's intent for finding an individual in contempt in the first instance, and occassions the use of valuable judicial resources for naught.[14]

Next, this article examines the proceedings which pertain to the different kinds of contempt. Then, the appropriate sanctions for contemptuous conduct will be set forth, followed by a section on appealability and reviewability of contempt orders. Finally, this article considers a number of miscellaneous issues involving contempt of court, including a discussion of the need for courts to carefully examine the appropriateness of the use of the contempt power, and alternative means of controlling courtroom conduct.[15]

I. KINDS OF CONTEMPTUOUS CONDUCT

As indicated, there are generally four kinds of contemptuous conduct: civil contempt and criminal contempt, direct contempt and indirect contempt.[16] It is important to identify the different types of contempt because the purpose, procedures and consequences of each vary. Civil contempt is coercive and conducted as a civil proceeding. Criminal contempt is punitive and conducted as a criminal proceeding. Direct contempt is a summary proceeding, while indirect contempt involves an evidentiary proceeding.

> of the contempt charge at issue .... The record in the present case does not make clear whether the trial court incarcerated defendant for contempt until such time as he complied with the court's requirement to cooperate with the probation office (civil contempt), or, instead, to simply punish defendant for his failure to cooperate (criminal contempt). Our difficulty with viewing the contempt order as civil in nature is that the trial court never specified what defendant must do in order to be released from jail .... On the other hand, our difficulty with viewing the trial court's contempt order as criminal in nature is that defendant was afforded none of the criminal due process rights to which he is entitled when a person is charged with indirect criminal contempt.

Id. at 310-11, 591 N.E.2d at 911 (citations omitted). *See also* People v. Doherty, 165 Ill. App. 3d 630, 634, 518 N.E.2d 1303, 1305 (2d Dist. 1988) (holding that principals of double jeopardy "do not apply where the prior adjudication was one of civil contempt . . . ," thus a proper characterization is of the utmost importance).

14. *Id. See also* Hoga v. Clark, 113 Ill. App. 3d 1050, 1058, 448 N.E.2d 196, 201 (5th Dist. 1983) (stating, "The distinction between civil and criminal contempt, though exceedingly difficult to apply, is nevertheless important due to the procedural and substantive requirements which attach to each.").

Courts and practitioners must always bear in mind that while the generic definition of contempt encompasses all of the kinds of contempt, once contemptuous conduct is labelled, important and different consequences result.

15. For an excellent discussion of the law of contempt of court see Dobbs, *supra* note 9. *See also* Edward R. Burr, *The Law of Contempt in Illinois*, 19 LOY. U. CHI. L.J. 827, 853 (1988) (reviewing contempt of court in Illinois).

16. Dobbs, *supra* note 9, at 186.

A. Civil and Criminal Contempt

In the 1953 case of *People ex rel. Chicago Bar Ass'n v. Barasch*,[17] the Illinois Supreme Court explained:

> Contempt proceedings, while usually called civil or criminal, are, strictly speaking, neither. They may best be characterized as *sui generis*, and may partake of the characteristics of both. Proceedings in the nature of criminal contempt have been defined as those directed to preservation of the dignity and authority of the court, while it has been said that civil contempts are those prosecuted to enforce the rights of private parties and to compel obedience to orders or decrees for the benefit of opposing parties . . . . A further guide may be found in the purpose of the punishment. Imprisonment for criminal contempt is inflicted as a punishment for that which has been done, whereas imprisonment for civil contempt is usually coercive . . . .[18]

Generally, criminal contempt arises out of acts that tend to lessen the dignity of the court or acts that impede the process of the court.[19] Criminal contempt proceedings serve a punitive function.[20] Civil contempt ordinarily occurs when the contemnor fails to comply with a civil court order for the opposing litigant's benefit.[21] Civil contempt proceedings are not punitive in nature, but rather are instituted to compel or coerce certain conduct.[22]

B. Direct and Indirect Contempt

Contemptuous conduct may be further characterized as direct or indirect. "Indirect contempt occurs outside the presence of the court."[23] Therefore, extrinsic evidence must be utilized to prove indirect contempt.[24] Where the court does not personally observe an element of the offense, testimony of third parties must be used

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17. 21 Ill. 2d 407, 173 N.E.2d 417 (1961).

18. *Id.* at 409, 173 N.E.2d at 418 (citations omitted).

19. *Clark*, 113 Ill. App. 3d at 1058, 448 N.E.2d at 201.

20. *Barasch*, 21 Ill. 2d at 409-410, 173 N.E.2d at 418.

21. People v. Shukovsky, 128 Ill. 2d 210, 220, 538 N.E.2d 444, 447 (1989).

22. *Hoga*, 113 Ill. App. 3d at 1058, 448 N.E.2d at 201; Matter of Crededio, 759 F.2d 589, 590 (7th Cir. 1985). In Hicks v. Feiock, 485 U.S. 624 (1988), the United States Supreme Court engaged in a lengthy analysis of how to distinguish between whether a contempt is civil or criminal:

> [T]he critical features are the substance of the proceeding and the character of the relief that the proceeding will afford . . . . [I]f the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period."

Id. at 631-32. According to the Seventh Circuit, *Hicks* "teaches that the purpose of the contempt order is to be determined by the nature of the sentence, not by the contents of the judge's head." United States v. Jones, 880 F.2d 987, 989 (7th Cir. 1989) (refering to the U.S. Supreme Court's holding in *Hicks*).

23. Weglarz v. Bruck, 128 Ill. App. 3d 1, 8, 470 N.E.2d 21, 26 (1st Dist. 1984).

24. *Id.*

to establish the offense.[25] Consequently, the "accused contemnor must be given notice, a fair hearing and an opportunity to be heard."[26] Unlike indirect contempt, direct contempt occurs "in the very presence of the judge, making all elements of the offense matters within the personal knowledge of the judge and tending directly to obstruct and prevent the administration of justice . . . ."[27] It follows that "extrinsic evidence is not necessary to prove direct contempt" and such contempt "may be determined and punished summarily in the absence of the formalities of pleadings and a trial."[28]

Additionally, some courts refer to what must be considered "constructive" direct contempt.[29] Such conduct, for example, includes the filing of contemptuous documents which, although not personally observed by the trial judge, takes place "within an integral part of the court."[30] In Illinois, the *raison d'etre* for this subcategory is not apparent since this type of contempt does not invoke any procedural requirements different than indirect contempt. Thus, constructive direct contempt in Illinois is something of a contradiction in terms, and may have its genesis in the perceived need to ascribe a greater dignity to court proceedings, even if not occurring in the courtroom, than out-of-court proceedings which relate to an action.[31]

C. *Illustrative Cases*

Contempt may arise at any stage of the judicial proceedings, in limitless factual situations, either in or out of the presence of the judge. A compilation of all the situations involving actual or possible contemptuous conduct is impossible. However, this section will present some of the illustrative cases involving contempt to further an understanding of the law of contempt.

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25. *Id.*

26. *Id.*

27. *Weglarz*, 128 Ill. App. 3d at 8, 470 N.E.2d at 426-27.

28. *Id.*

29. *Betts*, 200 Ill. App. 3d at 47-48, 558 N.E.2d at 418.

30. People *ex rel.* Kunce v. Hogan, 67 Ill. 2d 55, 60, 364 N.E.2d 50, 51-52 (1977).

31. It could be argued, of course, that constructive direct contempts, as in the case of the filing of false or unauthorized documents, have a way of reaching the court personally. *See, e.g.*, Kunik v. Racine County, Wis., 946 F.2d 1574 (7th Cir. 1991) (finding that the trial court correctly held a party in contempt for submitting a pleading which contained "vituperative" language and refused to amend the pleading). An excellent discussion of constructive direct contempt is found in the case of People *ex rel.* Finck v. Locher, 172 Ill. App. 3d 706, 710-11, 526 N.E.2d 935, 938-39 (5th Dist. 1988). In the Seventh Circuit, unlike Illinois, contempts occurring constructively in the judge's presence may be punished summarily. FED. R. CRIM. P. 42(a); *Kunik*, 946 F.2d at 1583. *See generally* Matter of Jafree, 741 F.2d 133 (7th Cir. 1984).

1. In-Court Conduct - Disrupting the Judicial Proceedings

Criminal contempt is found where an attorney, litigant or other engages in conduct disruptive to the court's proceedings. Such contempts will generally be direct, occurring in the presence of the judge. One example of direct criminal contempt arising out of the disruption of court proceedings is found in the 1971 United States Supreme Court case of *Mayberry v. Pennsylvania*.[32] There, a criminal defendant was held in contempt based upon conduct which was directed at the judge himself. "Many of the words leveled at the judge . . . were highly personal aspersions, even 'fighting words' — 'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool.' . . . [The trial judge] was charged with running a Spanish Inquisition and told to 'go to hell' and 'keep your mouth shut.' "[33] Although the *Mayberry* Court remanded the proceeding on procedural grounds,[34] it left little doubt that it considered the conduct contemptuous.[35]

The next year, the Seventh Circuit Court of Appeals handed down two well-publicized opinions involving direct criminal contempts, namely *United States v. Seale*[36] and *In re Dellinger*.[37] In these cases, the Honorable Julius J. Hoffman presided over the controversial conspiracy trial of the "Chicago Seven."[38] The court examined the sufficiency of numerous obstructive instances of conduct, ruling that some of the trial court's specifications of contempt, although provocative, did not as a matter of law rise to the level of contemptuous conduct under the applicable federal rule.[39] These provocative acts included disrespectful comments to the trial judge, failure to sufficiently adhere to the trial court's directives and evidentiary rulings, and failure to cease argument and sit when the trial judge so instructed the contemnors.[40] The Seventh Circuit remanded the *Seale* and *Dellinger* cases concluding that the conduct so personally involved the trial judge that the contempt hearing should be presented before another judge. Thus, the issues of whether the allegedly contemptuous conduct was in fact contemptuous were not decided.[41] Nevertheless, *Seale* and *Dellinger* pro-

32. 400 U.S. 455 (1971).

33. *Id.* at 466.

34. *Id.* (finding that due process required the contempt proceeding to be "before a judge other than the one reviled by the contemnor.").

35. *Id.* at 462-63.

36. 461 F.2d 345 (7th Cir. 1972).

37. *Id.* at 389.

38. *Id.*; *Seale*, 461 F.2d 345.

39. *Seale*, 461 F.2d at 366-71; *Dellinger*, 461 F.2d at 397-401.

40. *Dellinger*, 461 F.2d at 400-01.

41. Both *Seale* and *Dellinger* were remanded under the authority of *Mayberry*, 400 U.S. 455, as the trial judge was personally reviled, and thus the contempt hearings were required to be held before a different judge.

vide the unusual element of analyzing the propriety of the trial judge's conduct during trial.[42]

A further example of direct contempt is found in the 1979 case of *People v. Graves*.[43] There, during a trial for armed robbery, defense counsel was in the process of cross-examining an accomplice witness who was testifying on behalf of the State.[44] Defense counsel sought to impeach the witness by disclosing the agreement that the state made with the witness for his testimony.[45] During a sidebar, counsel expressed his desire to explore the witness' knowledge of the possible penalties for armed robbery.[46] The trial judge allowed defense counsel to ask the witness what the police told the witness he could receive by way of penalties, but the trial court expressly ruled that counsel could not ask the witness if he knew he could receive a greater penalty than that of which he was informed.[47] Defense counsel indicated that he understood the order.[48] When cross-examination resumed, however, defense counsel proceeded to ask, in leading form, if the witness could receive probation for the offense, and after an immediate objection was sustained, counsel asked the witness, again in a leading manner, if he could receive a sentence of life imprisonment.[49] Counsel was then found in contempt of court.[50]

On appeal, the Illinois Supreme Court affirmed the finding of contempt, observing that the contemnor "clearly failed to comply with the ruling of the court and propounded a series of questions which, by itself, impermissibly informed the jury of the seriousness of potential penalties facing the accused . . . ."[51] The court reiterated the settled law that where a court has subject matter jurisdiction, its order must be followed until the time either the trial or

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42. The *Dellinger* court stated:

> The record discloses that the trial judge, when ordering counsel to terminate their argument or sit down, frequently added a rejoinder or coupled the order with a statement which called for a response by the attorneys. In such situations, it is our view that an invited, additional response cannot subsequently be viewed as a contemptuous violation of the order.

Dellinger, 461 F.2d at 399. Moreover, the court instructed that upon remand, "judicial (or prosecutorial) provocation is to be considered by the new hearing judge in extenuation of the offense and in mitigation of any penalty to be imposed." *Id.* at 401.

43. 74 Ill. 2d 279, 384 N.E.2d 1311 (1979).

44. *Id.* at 280-82, 384 N.E.2d at 1312-13.

45. *Id.*

46. *Id.* at 280, 384 N.E.2d at 1313.

47. *Id.* at 280-81, 384 N.E.2d at 1313.

48. *Graves*, 74 Ill. 2d at 281, 384 N.E.2d at 1313.

49. *Id.*

50. *Id.* at 281-82, 384 N.E.2d at 1313.

51. *Id.* at 282, 384 N.E.2d at 1314.

appellate court sets aside the order.[52] The court further observed that, since the contemptuous conduct occurred in the presence of the trial judge, a summary conviction of contempt based upon the conduct was not a denial of due process.[53]

In a recent Fifth District Appellate Court case, *In re Contempt of Ellis*,[54] the court relied on *Graves* in affirming the finding of direct criminal contempt against an attorney for his in-court conduct. In *Ellis*, the attorney argued a motion to vacate a default judgment against his client.[55] Counsel was given an opportunity for rebuttal argument.[56] As the trial judge was ruling on the motion, counsel interrupted the court.[57] The judge informed counsel that he had received his turn to argue and admonished counsel not to interrupt the court while the court ruled.[58] When the court finished ruling, against counsel's client, counsel attempted to further argue the case.[59] The trial judge informed counsel that he had ruled, yet counsel continued to attempt to argue his client's case.[60] The trial judge directed the courtroom bailiff to remove counsel from the courtroom before he was found in contempt.[61] Counsel stated to the court that he intended to appeal the court's decision, to which the judge responded, "That's your right . . . ."[62] Counsel then made the following retort: "Your [sic] damn right that's my right."[63] At this point, the court found counsel in contempt of court.[64]

The *Ellis* court rejected contemnor's argument that his conduct was not contemptuous but merely that of a vigorous advocate.[65] Referring to the power of contempt, the court observed that "the ne-

52. *Id.* at 282-83, 384 N.E.2d at 1314. This rule is a corollary to the rule that justification in refusing to follow an order occurs only where that order is void. Faris v. Faris, 35 Ill. 2d 305, 309, 220 N.E.2d 210, 212 (1966).

53. *Graves*, 74 Ill. 2d at 283, 384 N.E.2d at 1314. Note that it is no defense to a contempt proceeding to show that an order is erroneous. *Faris*, 35 Ill. 2d at 309, 220 N.E.2d at 212. It has been held that for a finding of contempt to be sustained based upon a violation of an *in limine* order, the order must be clear and specific and all parties concerned must have an accurate understanding of its limitations. *See* People v. Romanski, 155 Ill. App. 3d 47, 51, 507 N.E.2d 887, 890 (3d Dist. 1987) (reversing the contempt conviction of an attorney charged with violating an unclear order).

54. 206 Ill. App. 3d 388, 564 N.E.2d 186 (4th Dist. 1990).

55. *Id.* at 390, 564 N.E.2d at 187.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Ellis*, 206 Ill. App. 3d at 390, 564 N.E.2d at 187.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Ellis*, 206 Ill. App. 3d at 391, 564 N.E.2d at 187-88.

65. *Id.* at 395, 564 N.E.2d at 190. Post-*Ellis*, the limits to which an attorney may advocate a client's position when arguing before a trial judge are clear. The court left little doubt upon the issue:

cessity for orderly administration of justice compels the view that the judge must have the power to set limits on argument."[66] It is interesting to note that in making this statement, the court cited to the Seventh Circuit case *In re Dellinger*.[67] In *Dellinger*, the court observed, "Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf."[68] The *Ellis* court rejected at least part of this comment in *Dellinger*, stating that "[w]e do not agree with the [f]ederal court that an attorney has the right to go so far in his conduct as to appear obnoxious to the court . . . ."[69]

The Seventh Circuit Court of Appeals has held that contempts arising out of misbehavior alleged to "obstruct the administration of justice" must be supported by more than mere behavior which would likely obstruct the administration of justice.[70] Regardless of whether the questionable conduct occurs in the presence of the court, actual obstruction to the administration of justice must occur.[71] In the recent case of *United States v. Oberhellmann*,[72] an attorney was held in contempt of court for forging another attorney's signature on a notice of withdrawal of appearance. The court stated that "wherever the misbehavior occurs, the government must prove (of course beyond a reasonable doubt) that the misbehavior actually obstructed the administration of justice — by delaying proceedings, making more work for the judge, inducing error, imposing costs on parties, or whatever."[73] The *Oberhellmann* court held that the contemnor was not properly found in contempt of court under the applicable federal statute[74] because it was not sufficiently shown that the conduct at issue obstructed the administra-

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> When, as here, the trial court has directly and clearly informed counsel that their opportunity for argument is over, that is a nondebatable order, and no misguided sense of advocacy can be permitted to overcome it. If an attorney believes that the trial court's findings of fact or conclusions of law are in error, than that attorney can file a post-trial motion or appeal. His options, however, do not include the privilege of interrupting the trial court as it states its findings or conclusions, nor do his options include the privilege of arguing with the court after its rulings have been made.

Id. at 397, 564 N.E.2d at 191-92.

66. *Id.* at 397, 564 N.E.2d at 191 (quoting *In re* Magnes, 8 Ill. App. 3d 249, 253-54, 290 N.E.2d 378, 382 (1st Dist. 1972)).

67. 461 F.2d 389 (7th Cir. 1972).

68. *Id.* at 400.

69. *Ellis*, 206 Ill. App. 3d at 396, 564 N.E.2d at 191.

70. *See In re* McConnell, 370 U.S. 230, 233-34 (1962) (holding that counsel's assertion of the right to ask questions until stopped by the bailiff was not sufficiently disruptive of the trial court's business); United States v. Seale, 461 F.2d at 367 (7th Cir. 1972).

71. *McConnell*, 370 U.S. at 233-34.

72. 946 F.2d 50 (7th Cir. 1991).

73. *Id.* at 52.

74. 18 U.S.C. § 401(1) (1992).

tion of justice.[75]

2. *Filing Contemptuous Documents*

Another course of action which may form the basis for a finding of criminal contempt is the filing of false, altered, impertinent or intimidating documents. In *People v. Campbell*,[76] the Illinois Appellate Court affirmed the finding of indirect criminal contempt where defendant, on the eve of his third rape trial (following two mistrials), filed a civil lawsuit against the prosecutor and the complainant.[77] The lawsuit first accused the prosecutor of harassment, and second accused the prosecution's witness of "adultery, unfaithfulness and a total lack of moral character."[78] The court noted that the act of filing the complaint could well be regarded as "constructive" direct criminal contempt, because it, though not occurring in the immediate physical presence of the trial judge, was within an integral part of the court.[79] Nonetheless, as contemnor was afforded a hearing and the trial court treated the matter as one involving indirect contempt, the court affirmed based on the fact that the contempt was established beyond a reasonable doubt.[80]

3. *Disobeying Court Orders*

Disobedience of court orders provides a common basis for a court's finding of indirect civil contempt. It is clear, however, that in order for conduct to be contemptuous in such a scenario, the order allegedly violated must be reasonably clear and specific.[81] One example of such a failure to obey a court order is presented in the 1984 Illinois Supreme Court case of *In re Marriage of Logston*,[82] where the contemnor disregarded a court order to pay maintenance

75. *Oberhellmann*, 946 F.2d at 53. For other examples of direct criminal contempt see People v. Kaeding, 192 Ill. App. 3d 660, 662, 548 N.E.2d 1118, 1120 (2d Dist. 1989) (holding that criminal contemptuous conduct includes misrepresenting one's identity to the court), and People v. Page, 73 Ill. App. 3d 796, 799-800, 392 N.E.2d 411, 413 (5th Dist. 1979) (holding that perjury constitutes criminal contemptuous conduct).

76. 123 Ill. App. 3d 103, 462 N.E.2d 916 (5th Dist. 1983).

77. *Id.* at 104, 462 N.E.2d at 918.

78. *Id.* at 105, 462 N.E.2d at 918.

79. *Id.* at 108, 462 N.E.2d at 920.

80. *Id.* at 112, 462 N.E.2d at 923.

81. *In re* Betts, 927 F.2d 983 (7th Cir. 1991). The *Betts* court observed: "To support a federal contempt conviction, 'the government must prove: (1) that the court entered a lawful order of reasonable specificity; (2) the order was violated; and (3) the violation was willful.' " *Id.* at 986 (quoting United States v. Burstyn, 878 F.2d 1322, 1324 (11th Cir. 1989)). Whether an order is reasonably specific "is a question of fact to be resolved with reference to the context in which the order is entered and the audience to which it is addressed." *Burstyn*, 878 F.2d at 1324.

82. 103 Ill. 2d 266, 469 N.E.2d 167 (1984).

after the dissolution of his marriage.[83] In affirming the finding of indirect criminal contempt,[84] the court reaffirmed the propriety of finding contempt in cases of willful refusal to pay pursuant to such an order.[85] In *Chicago v. King*,[86] an Illinois appellate court affirmed a finding of contempt based on the contemnor's defiance of a court order forbidding a civil rights march.[87] While the violation of an injunction often results in a finding of contempt,[88] a void injunction may not serve as the grounds for contempt.[89] Further, "a court order which enjoins free speech cannot be the basis for contempt."[90]

The obstruction of court process can result in a court resorting to its power of contempt. In the 1952 case of *People v. Gholson*,[91] a chiropractor, shortly before trial for a criminal violation of the Illinois Medical Practice Act, sent a newsletter which contained a laudatory article about himself to a number of individuals, includ-

83. *Id.* at 272, 469 N.E.2d at 169.

84. *Id.* at 286-87, 469 N.E.2d at 176. Contempt findings in the context of disobedience of orders in marriage dissolution cases are quite common. For recent cases of contempt findings in this scenario see generally *In re* Marriage of Cummings, 222 Ill. App. 3d 943, 584 N.E.2d 900 (2d Dist. 1991) (discussing an order prohibiting contact with children); Pryweller v. Pryweller, 218 Ill. App. 3d 619, 579 N.E.2d 432 (1st Dist. 1991) (involving an order to produce children for therapy and visitation); *In re* Marriage of Winton, 216 Ill. App. 3d 1084, 576 N.E.2d 856 (2d Dist. 1991) (holding husband in contempt for failing to make maintenance payments to his ex-wife); *In re* Marriage of D'Attomo, 211 Ill. App. 3d 914, 570 N.E.2d 796 (1st Dist. 1991) (involving a custody order that ex-husband violated by abducting his son and hiding him for two years); *In re* Marriage of Dall, 212 Ill. App. 3d 85, 569 N.E.2d 1131 (5th Dist. 1991) (discussing an order to pay child support); *In re* Marriage of Betts, 190 Ill. App. 3d 961, 547 N.E.2d 686 (4th Dist. 1989) (discussing an order to pay child support); and *In re* Marriage of Scordo, 176 Ill. App. 3d 269, 530 N.E.2d 1170 (3d Dist. 1988) (dealing with a father's failure to pay maintenance pursuant to a court order).

85. *Id.* at 285, 469 N.E.2d at 175.

86. 86 Ill. App. 2d 340, 230 N.E.2d 41 (1st Dist. 1967).

87. *Id.* at 348, 230 N.E.2d at 45.

88. *See* Southern Ill. Medical Business Ass'n v. Camillo, 208 Ill. App. 3d 354, 369, 567 N.E.2d 74, 84 (5th Dist. 1991) (holding defendant in contempt for violating injunction prohibiting him from competing directly with his former employer); City of Chicago v. Rago, 188 Ill. App. 3d 482, 487, 544 N.E.2d 993, 997 (1st Dist. 1989) (finding defendants in contempt for violating injunction mandating that they disconnect and remove their crematory's furnace); and Falcon, Ltd. v. Carr's Natural Beverages, 173 Ill. App. 3d 291, 527 N.E.2d 504 (1st Dist. 1988) (discussing defendant's violation of order enjoining defendant from interfering with plaintiff's contractual relationship with its sub-distributors).

89. People v. Sequoia Books, Inc., 172 Ill. App. 3d 627, 635, 527 N.E.2d 50, 55 (2d Dist. 1988) (recognizing that "an injunction which was transparently void may not be the grounds for a contempt finding.").

90. *Id.* at 635, 527 N.E.2d at 55. *See also* People v. Thomas, 220 Ill. App. 3d 110, 580 N.E.2d 1353 (2d Dist. 1991) (finding defendant in contempt for refusing to undergo an AIDS test). In *Thomas*, the defendant was ordered to undergo the AIDS test pursuant to an Illinois statute, 730 ILL. COMP. STAT. 5/5-5-3 (1993) (ILL. REV. STAT. ch. 38, para. 1005-5-3(h) (1987)), after he was convicted of unlawful possession of a hypodermic needle. *Id.* at 112, 580 N.E.2d at 1356.

91. 412 Ill. 294, 106 N.E.2d 333 (1952).

ing some prospective jurors.[92] Also shortly before trial, the contemnor took out advertisements in newspapers of general circulation "puffing" his skills and successes.[93] On the day of the trial itself, he organized a motor caravan of hundreds of supporters who attended the trial.[94] The court affirmed a finding of indirect criminal contempt.[95]

Symbolic acts may give rise to a finding of contempt. In *United States ex rel. Robson v. Malone*,[96] a 1969 Seventh Circuit case, two spectators in the courtroom were held in direct criminal contempt for refusing to rise (in protest of the judicial system) when the court was called into session.[97] Symbolic acts, however, may raise constitutional issues,[98] as in a clash of the important and potentially competing interests of freedom of speech and courtroom order or decorum.

4. Discovery Orders

The violation of a discovery rule may serve as the basis for a finding of contempt of court. "In this situation, a contempt citation is [generally viewed as] an appropriate means for testing the propriety of a discovery order."[99] As one Seventh Circuit opinion succinctly observed, "If the underlying order is invalidated, the contempt judgment falls with it."[100] Thus, where a trial court's discovery order is invalid, such as where it orders the disclosure of privileged material, a finding of contempt will be reversed.[101] One court recently addressed an attorney's refusal to comply with a trial

92. *Id.* at 296, 106 N.E.2d at 334-35.

93. *Id.*

94. *Id.*

95. *Id.* at 297, 106 N.E.2d at 335. In doing so, the court overruled the doctrine of "purgation by oath," which provided that in cases of indirect contempt, the sworn answer of the alleged contemnor denying the charge left prosecution for perjury as the only option. *Id.* at 303, 106 N.E.2d at 338.

96. 412 F.2d 848 (7th Cir. 1969).

97. *Id.* at 849.

98. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969) (recognizing that the First Amendment protects the wearing of an armband that is intended to express certain views as a symbolic act); *but see In re* Watts, 66 Ill. App. 3d 971, 384 N.E.2d 453 (2d Dist. 1978) (reversing the trial court's contempt order, not due to constitutional concerns, but rather due to the defendant's lack of knowledge as to what conduct is forbidden).

99. Flannery v. Lin, 176 Ill. App. 3d 652, 655, 531 N.E.2d 403, 405 (2d Dist. 1988).

100. Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1157 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985).

101. *Flannery*, 176 Ill. App. 3d at 655, 531 N.E.2d at 405. At issue in *Flannery* was whether a code blue evaluation was privileged under the Medical Studies Act, 735 ILL. COMP. STAT. 5/8-2101 (1993) (ILL. REV. STAT. ch. 110, para. 8-2101 (1987)). *Id.* at 655, 531 N.E.2d at 406. As the matter was deemed privileged and not discoverable, the finding of contempt based upon failure to report was reversed. *Id.* at 658, 531 N.E.2d at 407.

court's order that attorneys for the opposing litigant had no right to be present for the filming of a "day in the life" film of the personal injury plaintiff.[102] The court, although partially affirming the substance of the order, held that the finding of contempt should be reversed because the discovery issue was one of first impression.[103]

A finding of contempt in an effort by either the court or the attorney to have a discovery order reviewed, however, is not always viewed in a manner which mandates reversal of the contempt finding, even if the underlying order is invalid. One Seventh Circuit Justice has noted that there is an apparent contradiction in case law over whether an appealed contempt finding in a discovery context presents the validity of the underlying discovery order, or whether it is to be independently reviewed.[104] This conflict is reconciled when it is recalled that in the line of cases "where the validity of the underlying order was held not to be reviewable on appeal from the judgment of contempt, the order could have been appealed as of right directly . . . ."[105]

Another recent case which involved a finding of contempt for an attorney's failure to comply with a discovery order is the Illinois Supreme Court case of *Cesena v. County of DuPage*.[106] In *Cesena*, the attorney of a client involved in a hit-and-run accident was unable to timely report the accident due to an error by the Sheriff's office.[107] In the subsequent civil action against the driver, the attorney refused to answer questions at his deposition regarding the contents of the report, asserting the attorney-client privilege.[108] When the attorney refused to comply with the court's order to answer the questions, the trial court found the attorney in contempt.[109] The appellate court affirmed the finding of contemptuous conduct,[110] ruling that the attorney-client privilege had been waived.[111] The supreme court ordered the attorney to file the actual report. However, it abandoned the lower court's analysis of the attorney-client privilege and decided the case on equitable grounds.[112] With regard

102. Cisarik v. Palos Community Hosp., 193 Ill. App. 3d 41, 44, 549 N.E.2d 840, 842 (1st Dist. 1989).

103. *Id.* at 45, 549 N.E.2d at 842. The court stated, "Where noncompliance with an order by an attorney raises an issue of first impression, the resulting contempt order and fine shall be set aside." *Id.* (citing Consolidated Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250 (1982)).

104. *Marrese*, 726 F.2d at 1157 (en banc) (Posner, J.).

105. *Id.*

106. 145 Ill. 2d 32, 582 N.E.2d 177 (1991).

107. *Id.* at 34, 582 N.E.2d at 178.

108. *Id.* at 37-38, 582 N.E.2d at 180.

109. *Id.* at 38, 582 N.E.2d at 180.

110. *Id.*

111. *Cesena*, 145 Ill. 2d at 41, 582 N.E.2d at 182.

112. *Id.* at 42, 582 N.E.2d at 182.

to the contempt finding, the court stated, "The instant action involves an issue of first impression. Upon invoking our equitable jurisdiction, this court is charged with doing full and complete justice among all parties. Therefore, we set aside the circuit court's order finding [the attorney] in contempt of court and imposing a fine."[113]

II. CONTEMPT PROCEEDINGS

Because direct contempt takes place in the presence of the judge who has personal knowledge of the facts, extrinsic evidence is not necessary to prove direct contempt, whether civil or criminal in nature.[114] In cases of indirect contempt, on the other hand, a number of distinct procedures apply. In general, indirect civil contempt invokes the rules of civil procedure, and indirect criminal contempt invokes the rules of criminal procedure. However, because contempt is *sui generis*, the rules of procedure do not always operate neatly.

A. Civil Contempts

Civil contempt is a continuation of the original case,[115] and the rules of civil procedure generally govern a civil contempt proceeding.[116] The proceeding is subject to the requirements of notice and an opportunity for the alleged contemnor to be heard.[117] Because it is a continuation of the original case, civil contempt is entitled in the caption of the original case,[118] although it may be entitled in the name of the individuals on the relation of the complaining party.[119]

While the court may issue an *ex parte* order initiating contempt proceedings,[120] ordinarily an adverse party initiates civil contempt

113. *Id.* at 43, 582 N.E.2d at 182 (citations omitted). In an even more recent case, the Illinois Supreme Court was faced with a contempt finding arising out of an attorney's failure to disclose potentially inculpatory information about her client. The court reversed a contempt finding in an extended opinion where it was not established that the "crime-fraud" exception to the attorney-client privilege applied. *In re* Marriage of Decker, No. 71259, 1992 WL 337916 (Ill. Nov. 19, 1992).

114. Weglarz v. Bruck, 128 Ill. App. 3d 1, 8, 470 N.E.2d 21, 26-27 (1st Dist. 1984).

115. Marcisz v. Marcisz, 65 Ill. 2d 206, 208, 357 N.E.2d 477, 478 (1976).

116. 47th & State Currency Exch., Inc. v. B. Coleman Corp., 56 Ill. App. 3d 229, 234, 371 N.E.2d 294, 298 (1st Dist. 1977).

117. *In re* Estate of St. George, 99 Ill. App. 3d 388, 390, 426 N.E.2d 6, 7 (1st Dist. 1981).

118. *See, e.g., Marcisz*, 65 Ill. 2d at 206, 357 N.E.2d at 477 (showing that the contempt proceeding is cited as the same case).

119. *See, e.g., 47th & State Currency Exch.*, 56 Ill. App. 3d at 229, 371 N.E.2d at 294.

120. ILL. S.CT. RULE 296(l) (1989) (ILL. REV. STAT. ch. 110A, para. 296(l) (1991)).

proceedings by filing a "petition for a rule to show cause" in the court which issued the order allegedly violated by the other party. However, civil contempt proceedings and indirect criminal contempt proceedings may be prosecuted by the State's Attorney, on a court referral, or by a court appointed *amicus curia*.[121] The initiating party may request a hearing prior to filing the petition to determine whether civil or criminal contempt is more appropriate under the circumstances.[122] The petition should recite the type of order, the conduct that constitutes a violation of the order, a request for an order to show cause (a copy of which should be attached to the petition) to issue, and a request for other relief such as attorney's fees and costs. The petition should be verified,[123] and a court may strike the petition if it fails to set forth sufficient facts establishing a right to relief.[124]

In civil contempt proceedings, the respondent is entitled to notice sufficient to safeguard the respondent's due process rights.[125] Therefore, the respondent should be served notice of the hearing and the petition, or if a rule to show cause is issued without notice, served with the rule to show cause.[126] An individual charged with indirect civil contempt may waive service of written notice of the charge by voluntarily appearing in court and defending the charge.[127] Failure on the part of the respondent to appear may result in a hearing in the absence of the respondent. For instance, in

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121. Ill. Commerce Comm'n v. Salamie, 54 Ill. App. 3d 465, 479, 369 N.E.2d 235, 245 (1st Dist. 1977); *Marcisz*, 65 Ill. 2d at 210, 357 N.E.2d at 479.

In Young v. United States *ex rel.* Vuitton, 481 U.S. 787 (1987), the Supreme Court held that an attorney for a party who was the beneficiary of a court order may not prosecute a contempt charge premised upon the violation of that order. *Young*, however, was decided in the exercise of the Court's supervisory authority over federal courts and did not reach a constitutional issue. *Id.* at 809. Thus, Illinois courts may still, and often do, allow prosecution of contempt cases by a litigant's counsel. *In re* Estate of Wernick, 176 Ill. App. 3d 153, 158-59, 530 N.E.2d 1127, 1130-31 (1st Dist. 1988); *Betts*, 200 Ill. App. 3d at 59, 558 N.E.2d at 425. For a discussion of *Young*, see Neil Devins & Steven Mulloy, Note, *Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in* Young v. United States *ex. rel.* Vuitton et Fils S.A., 76 KY. L.J. 861 (1987).

122. Kay v. Kay, 22 Ill. App. 3d 530, 318 N.E.2d 9 (1st Dist. 1974).

123. *But see* People v. Spounias, 20 Ill. App. 2d 184, 189, 155 N.E.2d 326, 328 (3d Dist. 1959) (holding that verification is not necessary if the defendant is given notice of the contempt proceeding and an opportunity to be heard).

124. People *ex rel.* Fahner v. Colorado City Lot Owners and Taxpayers Ass'n, 119 Ill. App. 3d 691, 700, 456 N.E.2d 943, 950 (1st Dist. 1983), *rev'd on other grounds*, 106 Ill. 2d 1, 476 N.E.2d 409 (1985).

125. *In re* Estate of St. George, 99 Ill. App. 3d 388, 390, 426 N.E.2d 6, 7 (1st Dist. 1981).

126. *Id.*

127. Williamsburg Village Owners' Ass'n v. Lauder Assoc., 200 Ill. App. 3d 474, 558 N.E.2d 208 (1st Dist. 1990); People v. Martin-Trigona, 94 Ill. App. 3d 519, 521, 418 N.E.2d 763, 765 (4th Dist. 1980).

the case of *In re Estate of St. George*,[128] an executor of an estate filed a petition for a rule to show cause why respondent should not be held in contempt for failing to turn property over to the executor pursuant to court order.[129] According to the court:

> After several continuances an evidentiary hearing was held . . . which respondent failed to attend. Her attorney explained that she was not present because "her husband was very sick, she did not want to come alone, she is afraid." After the petitioner testified, the court entered an order holding respondent in contempt, but the petitioner agreed to refrain from proceeding on an attachment order for 5 days. Apparently respondent did not appear then or subsequently.[130]

The court affirmed the holding of contempt, finding that the respondent was provided due notice of both the charges and the hearing.[131]

As *In re Estate of St. George* indicates, although notice of the proceedings ordinarily is appropriate before an attachment is issued, in some situations an attachment may issue without notice. In one case,[132] the trial court issued a writ of attachment without service of a rule to show cause after notice of the hearing on the petition was personally served upon the respondents and respondents failed to appear.[133] Notice of the hearing on the rule to show cause by registered mail was returned unserved by postal authorities.[134] Nevertheless, the appellate court held that the trial court did not improperly issue the writ of attachment as actual notice.[135]

Once contempt proceedings have been initiated, a respondent may file an answer to the petition or the rule to show cause.[136] In addition to denying the allegations, the respondent may allege affirmative defenses, such as the court lacked jurisdiction to enter the order, the respondent was unable to comply with the order, or that the order required the respondent to commit an illegal act.[137] Fail-

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128. *In re* Estate of St. George, 99 Ill. App. 3d 388, 426 N.E.2d 6 (1st Dist. 1981).

129. *Id.* at 389-390, 426 N.E.2d at 6-7.

130. *Id.* at 390, 426 N.E.2d at 7.

131. *Id.* at 390-91, 426 N.E.2d at 7-8.

132. McGann v. Lurie, 15 Ill. App. 2d 297, 146 N.E.2d 223 (1st Dist. 1957).

133. *Id.* at 299, 146 N.E.2d at 225.

134. *Id.*

135. *Id.* at 300, 146 N.E.2d at 225.

136. Faris v. Faris, 35 Ill. 2d 305, 307, 220 N.E.2d 210, 211 (1966).

137. *Id.* at 309, 220 N.E.2d at 212; Abbott v. Abbott, 129 Ill. App. 2d 96, 100, 262 N.E.2d 502, 504 (4th Dist. 1970). In *In re* Alltrop, 203 Ill. App. 3d 606, 561 N.E.2d 394 (4th Dist. 1990), the Appellate Court of Illinois, Fourth District held:

> As a general rule,the commencement or continuation of a judicial proceeding to obtain or enforce a judgment against a debtor who has filed a bankruptcy petition violates the Bankruptcy Code. However, where contempt is invoked to uphold the dignity of the court and to punish the contemnor for his contumacious behavior, the proceedings are not subject to an automatic stay. . . . Accordingly, we hold that indirect civil contempt proceedings

ure to raise a defense in the answer does not preclude the respondent from raising the defense at trial.[138]

The respondent is entitled to be represented by a lawyer of his or her choice at the hearing.[139] A split of authority exists in Illinois on the question of whether a respondent in an indirect civil contempt proceeding is entitled to appointment of counsel, with some courts holding that, absent a statute authorizing appointment of counsel, the respondent is not entitled to appointment of counsel.[140] The Seventh Circuit Court of Appeals has not addressed the issue, although it has questioned an indigent respondent's right to appointment of counsel.[141]

The respondent is further entitled to a hearing before an impartial judge. Chapter 110, section 2-1001 of the Illinois Code of Civil Procedure,[142] which governs changes of venue prior to trial in Illinois, provides that a change of venue is available where the judge is a party to the case or interested in the case, where the judge's testimony is material to either party, or where the judge is either related to a party or has represented a party.[143] Even if the statutory requirements are not satisfied, a judge may still decide to re-

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designed to compel an alleged contemnor to make a payment (other than for child support or maintenance) are barred by the contemnor's filing of a bankruptcy petition. We also hold that indirect criminal contempt proceedings are not barred by the filing of a bankruptcy petition.

Id. at 613-14, 561 N.E.2d at 399 (citations omitted).

138. People v. Weigley, 155 Ill. 491, 500, 40 N.E. 300, 302 (1895).

139. *In re* Marriage of Betts, 200 Ill. App. 3d 26, 51, 558 N.E.2d 404, 421 (4th Dist. 1990).

140. *Compare Betts*, 200 Ill. App. 3d at 53-57, 558 N.E.2d at 522-524 (holding that indigents faced with jail sentences for indirect civil contempt are not entitled to court-appointed counsel); Sanders v. Shephard, 185 Ill. App. 3d 719, 728-30, 541 N.E.2d 1150, 1156-57 (1st Dist. 1989) (holding that indigent respondents in indirect civil contempt proceedings are entitled to appointed counsel where contempt proceedings may result in imprisonment).

141. In Mann v. Hendrian, 871 F.2d 51 (7th Cir. 1989), the court passed upon the issue and discussed relevant federal authority. The court stated:

> [T]here is a right to counsel in a purely civil contempt proceeding that eventuates in imprisonment, albeit for a term wholly dependent on the defendant's own obduracy. [Several cases] suggest that there is a right to counsel in civil contempt proceedings, period, unless it is made clear to the defendant at the outset that he will not be imprisoned for the contempt. This position seems inconsistent with Scott v. Illinois, but that is not an issue we need pursue in this case.

Id. at 52 (citations omitted).

142. 735 ILL. COMP. STAT. 5/2-1001 (1992) (ILL. REV. STAT. ch. 110, para. 2-1001 (1991)). The Federal Rules of Civil Procedure govern federal contempt procedure. *See, e.g., In re* Grand Jury Proceedings, 894 F.2d 881, 882 (7th Cir. 1989).

143. Where the requirements of section 2-1001 of the code are made out, the respondent is entitled to a hearing before another judge. *See In re* Marriage of Kozloff, 101 Ill. 2d 526, 532, 463 N.E.2d 719, 722 (1984) (stating, "There is always a right to a change of venue, even after a substantial ruling, if actual prejudice can be demonstrated.").

cuse himself from the proceedings to avoid appearances of impropriety where he or she has been the object of personal attack.[144]

Given the coercive nature of civil contempt proceedings and that the respondent may purge him or herself of contempt, the respondent is not entitled to a jury trial.[145] Indirect civil contempt must be proved by a preponderance of the evidence.[146] The trial judge, as the trier of fact, weighs the evidence and evaluates the credibility of the witnesses.[147] A reviewing court will reverse a trial judge's finding of contempt only for a clear abuse of discretion or when the findings are against the manifest weight of the evidence.[148] The petitioner has the burden of presenting evidence sufficient to show disobedience of the court order.[149]

In a marriage dissolution case, where the violation alleged involves the failure to pay money, the disobedience shown must be willful.[150] The lack of compliance with an order to pay maintenance, a common allegation of contempt, constitutes *prima facie* evidence of contempt.[151] Therefore, once the *prima facie* showing is made, the burden shifts to the respondent, who may defend on the basis of inability to pay.[152] To prove this defense, a respondent must show that he or she did not have the money at the time of the proceeding, and that he has not wrongfully disposed of money or assets that he could have used to pay maintenance.[153] In *People v. Mowery*,[154] the court reversed the trial court's finding the defendant in contempt for violating a probation order.[155] The order required the defendant to make restitution and to remain steadily employed.[156] At the hearing, the *pro se* defendant admitted to failure to make restitution, and the trial court forthwith held him in contempt and proceeded without pause to the sentencing hear-

144. *See* People v. Kaeding, 192 Ill. App. 3d 660, 662, 548 N.E.2d 1118, 1120 (2d Dist. 1989) (finding that a judge against whom the defendant had filed suit should recuse himself from defendant's "contempt hearing so as to avoid the appearance of impropriety.").

145. Shillitani v. United States, 384 U.S. 364, 365 (1966); Cheff v. Schnackenberg, 384 U.S. 373, 377 (1968); Falcon, Ltd. v. Corr's Natural Beverages, Inc., 173 Ill. App. 3d 291, 527 N.E.2d 504 (1st Dist. 1988).

146. *Hoga*, 113 Ill. App. 3d at 1061, 448 N.E.2d at 203.

147. *In re* Marriage of Logston, 103 Ill. 2d 266, 286-87, 469 N.E.2d 167, 176 (1984).

148. *Id.*

149. *Id.* at 287, 469 N.E.2d at 176.

150. *Id.* at 285, 469 N.E.2d at 175.

151. *Id.*

152. *Logston*, 103 Ill. 2d at 285, 469 N.E.2d at 175.

153. *Id.*

154. 116 Ill. App. 3d 695, 452 N.E.2d 363 (4th Dist. 1983).

155. *Id.*

156. *Id.*

ing.[157] The appellate court held, "Fundamental fairness dictates that at the minimum the defendant be advised that he had the opportunity to prove that the nonpayment was not willful."[158] Other courts, however, have observed that in cases involving civil contempts, the intent of the contemnor is not relevant, and that it is sufficient to show that the violation was "knowing."[159]

B. Criminal Contempts

A party seeking to uphold a criminal contempt order bears the burden of showing that the court properly exercised its power.[160] In criminal contempt proceedings, intent, or at least knowledge of the nature of the contemnor's act, is an element.[161] In a direct criminal contempt case, this intent "may be inferred from proof of surrounding circumstances" and the contemnor's actions.[162] If the trial court imposes a fine in excess of $500.00, or a prison sentence of more than six months in a direct criminal contempt case, the contemnor is entitled to have a jury trial.[163] In the recent case of *In re Marriage of Betts*,[164] the court made the following observations:

> When the aggregate punishments for a particular course of criminally contemptuous conduct committed in the presence of a judge exceed the parameters of punishments normally imposed for misdemeanors and the punishments are not imposed immediately after occurrence of the contemptuous conduct, the contemnor is entitled to a jury trial as to the contempt charges. The traditional test for determining whether or not a charged offense is a misdemeanor is whether the penalties exceed $500 or six months imprisonment. Where, as with criminal contempt in Illinois, no maximum punishment is prescribed for an offense, courts look to the penalty actually imposed to determine whether an offense is so serious that a jury trial was required. Some decisions suggest that in the context of contempt proceedings, the $500 fine component . . . is subject to upward adjustment on the basis of the

157. *Id.* at 698, 452 N.E.2d at 366.

158. *Id.* at 704, 452 N.E.2d at 369.

159. People v. Toomin, 18 Ill. App. 3d 824, 310 N.E.2d 767 (1st Dist. 1974).

160. *Id.* at 826, 310 N.E.2d at 769.

161. People v. Rodriguez, 91 Ill. App. 3d 626, 627, 414 N.E.2d 1202, 1204 (1st Dist. 1981). In People v. Ernest, 188 Ill. App. 3d 987, 990, 544 N.E.2d 1275-76 (5th Dist. 1989), *aff'd*, 141 Ill. 2d 412, 566 N.E.2d 231 (1990), the court stated, "In terms of a common law analysis of *mens rea*, therefore, a general intent is all that is required. Thus, intent, knowledge, or recklessness will satisfy the *mens rea*." *Id.*

162. People *ex rel.* Kunce v. Hogan, 67 Ill. 2d 55, 61, 364 N.E.2d 50, 52 (1977), *cert. denied*, 434 U.S. 1023 (1978).

163. *See generally* Duncan v. Louisiana, 391 U.S. 145 (1968). In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the United States Supreme Court rejected Pennslyvania's argument that multiple instances of contempt arising "from a single trial . . . charged by a single judge, and . . . tried in a single proceeding," were separate offenses and that because no more than six months imprisonment was imposed for the single offenses, no jury trial was necessary. *Id.* at 516.

164. 200 Ill. App. 3d 26, 558 N.E.2d 404 (4th Dist. 1990).

contemnor's financial resources and inflationary trends.[165]

In the federal system, direct criminal contempts are regulated by both rule and statute. Section 401 of the Federal Criminal Code expressly defines the types of behavior which constitute criminal contempt and establishes a federal court's power to punish criminal contempt by fine or imprisonment.[166] Section 402 of the Code,[167] the object of which is to limit application to prosecutions for contempt arising out of cases instituted by private litigants, sets forth the penalties which may be imposed for contemptuous conduct in the federal court.[168] Federal Rule of Criminal Procedure 42[169] es-

165. *Id.* at 50, 558 N.E.2d at 420 (citations omitted). *See also* United States v. Kozel, 908 F.2d 205 (7th Cir. 1990). *Kozel* is one of the opinions in the *Betts* set. Two significant issues arose in *Kozel*: first, when the right to a jury trial attaches in a criminal contempt proceeding; second, what standard of proof is required to prove a defendant guilty of criminal contempt. *Id.* at 206-08. The court concluded that the right to a jury trial did not attach because the contemnor was only sentenced to a fine and community services. *Id.* at 207. Regarding the standard of proof, the Seventh Circuit held, "criminal contempt — like other criminal charges — must be proved beyond a reasonable doubt." *Id.* at 208. However, in this case, the "district judge never stated on the record that the government's proof had met the standard. He made detailed findings but without mentioning, either in open court or on paper, reasonable doubt or any other standard of proof." *Id.* Nevertheless, the Seventh Circuit affirmed stating that "absent a clear sign that some other standard of proof had been used — and there is no such indication here — we will not infer that such a basic norm of our legal system was contravened or ignored." *Id.*

166. 18 U.S.C. § 401 (1991), which provides that a "court of the United States shall have the power" to punish by fine or imprisonment, at its discretion, contempt in the form of "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . misbehavior of any of its officers in their official transactions . . . disobedience or resistance to its lawful writ, process, order, rule, decree, or command." *Id.*

167. 18 U.S.C. § 402 (1991).

168. Hill v. United States, 300 U.S. 105 (1937).

169. FED. R. CRIM. P. 42, provides:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon notice and hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

tablishes both the power for the summary contempt procedure which a judge may employ in cases of direct criminal contempt in the federal court, and sets forth certain due process safeguards a contemnor is accorded in nonsummary contempt proceedings. The Seventh Circuit has cautioned that the summary procedure under Rule 42 should be used "sparingly," and suggested that its existence does not "mean that a judge must or should dispense with *all* procedure."[170]

Where a defendant commits direct criminal contempt in open court, the trial judge may proceed upon his personal knowledge of the facts and may punish the offender summarily absent notice, without entering written charges, and without hearing any evidence.[171] However, the Seventh Circuit has indicated that for a proper summary proceeding in a case of direct contempt, the court should give the person a warning of "the consequences of his persisting in the allegedly contemptuous conduct and give him an opportunity to be heard."[172] The United States Supreme Court observed in *Johnson v. Mississippi*[173] that the practice of summary proceedings is properly followed where the purpose of imposing sanctions is to restore order in the courtroom or to maintain control over courtroom proceedings.[174] However, it is not necessary in every direct criminal contempt case that the trial court proceed summarily, thus the trial judge may hear evidence.[175] When an individual reviles a judge during court proceedings, it is likely that the remarks leave "personal stings," and sanctions for contempt are not immediately imposed for the purpose of maintaining courtroom order. In such a situation, due process requires that the contempt charges be adjudicated by a different judge than the one who presided over the proceedings wherein the contemptuous conduct occurred.[176] Further, where the contemptuous conduct occurs only constructively in the court's presence, the court may need to receive

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An excellent discussion of the federal rules and statutes governing contempt of court is contained in Matter of Jafree, 741 F.2d 133, 135-36 (7th Cir. 1984).

170. United States v. Lowery, 733 F.2d 441, 446-47 (7th Cir. 1984) (emphasis in original).

171. People v. Graves, 74 Ill. 2d 279, 384 N.E.2d 1311 (1979). For an extended discussion of a court's power to punish direct contempt summarily, see Teresa S. Hunger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 533 (1987).

172. *Lowery*, 733 F.2d at 448 (7th Cir. 1984) (finding that holding a person in contempt without "providing him an opportunity to be heard" constitutes a violation of due process).

173. 403 U.S. 212 (1971).

174. *Id.* at 214.

175. *Betts*, 200 Ill. App. 3d at 50, 558 N.E.2d at 419-20.

176. Marberry v. Pennsylvania, 400 U.S. 455, 464-66 (1971).

additional evidence.[177]

The adjudication for direct criminal contempt must be supported by either an order of contempt or an adequate record.[178] A written order should cite the jurisdiction of the court, fully set forth the facts upon which the contempt is based and the willful nature of the conduct, and, if the contempt is civil, the conditions by which the contemnor may purge him or herself of contempt.[179]

When an individual is entitled to a jury trial on the charge of contempt of court, the trial must conform to procedural requirements generally applicable to trials of other serious criminal charges.[180] This holds true, however, to the extent that the procedural requirements do not conflict with the caveat that direct contempt charges are to be adjudicated based exclusively upon the record of the judicial proceedings in which the contemptuous conduct is alleged to have occurred.[181] As such, the respondent in a criminal contempt trial has the right to counsel, the right to have counsel appointed if indigent, the right to be present at trial, and the right to have a public trial.[182] Further, guilt must be proven beyond a reasonable doubt.[183] It is important to keep in mind, however, that these procedural rights do not apply to trials of alleged direct criminal contempt where a jury trial is not mandated, regardless of whether a finding of contempt is made immediately when the contemptuous conduct occurs.[184]

"Indirect criminal contempt proceedings must generally conform to the same constitutionally mandated procedural requirements as other criminal proceedings."[185] To be found in indirect criminal contempt, the contemnor must be accorded the requirement of procedural due process, including the constitutional rights

177. *See* People v. Howarth, 415 Ill. 499, 505-09, 114 N.E.2d 785, 790 (1953) (stating, "When a direct contempt occurs in a constituent part of a court and not in the immediate presence of the judge as in the case here, extrinsic evidence is essential to substantiate the charge.").

178. *Betts*, 200 Ill. App. 3d at 49, 558 N.E.2d at 419.

179. *See* People v. Jashunsky, 51 Ill. 2d 220, 224, 282 N.E.2d 1, 3 (1972) (stating that due process requires that the defendant be made aware of ways to purge himself of contempt), *cert. denied*, 409 U.S. 989 (1972); *see also* Pryweller v. Pryweller, 218 Ill. App. 3d 619, 633, 579 N.E.2d 432, 442 (1st Dist. 1991) (finding that a civil contempt order must set forth conditions by which the contemnor may purge herself).

180. *Betts*, 200 Ill. App. 3d at 51, 558 N.E.2d at 421.

181. *Id.* at 51-52, 558 N.E.2d at 421.

182. *Id.*

183. *Id.* at 51, 558 N.E.2d at 421.

184. *Id.* at 51-52, 558 N.E.2d at 421. This is true because, in the words of the *Betts* court, "Summary proceedings in [cases where a jury trial is not mandated] do not impair any of a contemnor's constitutional rights." *Id.*

185. *Betts*, 200 Ill. App. 3d at 58, 558 N.E.2d at 425.

of notice, a full hearing, counsel and confrontation.[186] The mere opportunity to testify in one's own behalf is not sufficient to satisfy due process requirements.[187] Likewise, one charged with indirect criminal contempt is entitled to constitutional guarantees against self-incrimination.[188] The right to counsel and appointment of counsel applies if the contemnor qualifies.[189]

When a defendant admits his contempt in open court, he may then be punished summarily, as in direct contempt proceedings.[190] Further, a contemnor may not purge him or herself of an indirect contempt charge simply by filing a verified answer denying the alleged contempt.[191] The Illinois Code of Criminal Procedure governs the substitution of judges in indirect criminal contempt proceedings.[192] As in cases of direct criminal contempt, the contemnor must be found guilty beyond a reasonable doubt,[193] and a trial judge must expressly state this in either the sentencing order or at the contempt hearing.[194] In Illinois, the same procedural requirements that apply to cases of indirect criminal contempt apply

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186. *Id.* In *In re* Marriage of Alltrop, 203 Ill. App. 3d 606, 561 N.E.2d 394 (4th Dist. 1990), Judge Steigmann addressed the question of what notice is due:

> The present case demonstrates the need for both court and counsel to keep in mind the distinctions between indirect civil and indirect criminal contempt . . . . [T]his appeal provides us with the opportunity to revisit the issue of notice due to an alleged criminal contemnor . . . . [W]e hold that due process requires that before criminal sanctions may be imposed upon a respondent as a result of indirect criminal contempt proceedings, notice must be provided to the alleged contemnor that such sanctions are being sought and might be imposed. This requirement can be met by entitling the initial pleading, "petition for adjudication of criminal contempt."
>
> We hold that a pleading entitled "petition for rule to show cause" is not sufficient to provide the due process to which an alleged criminal contemnor is entitled.

Id. at 615-16, 561 N.E.2d at 400-01 (citations omitted).

187. *See* People v. L.A.S., 111 Ill. 2d 539, 543-44, 490 N.E.2d 1271, 1273 (1986) (finding that due process requires "notice, opportunity to answer, and a hearing").

188. *Betts*, 200 Ill. App. 3d at 58-59, 558 N.E.2d at 425; *In re* Marriage of Wilde, 141 Ill. App. 3d 464, 471, 490 N.E.2d 95, 100 (2d Dist. 1986).

189. *Betts*, 200 Ill. App. 3d at 58, 558 N.E.2d at 425. *See also* Mann v. Hedrian, 871 F.2d 51, 52 (7th Cir. 1989) (stating that the right to counsel exists where a criminal proceeding may result in a prison sentence, and therefore, applies in proceedings for criminal contempt).

190. People v. Bennett, 51 Ill. 2d 282, 286-88, 281 N.E.2d 664, 667-68 (1972).

191. People v. Gholson, 412 Ill. 294, 301-02, 106 N.E.2d 333, 337 (1952).

192. 725 ILL. COMP. STAT. 5/100-1 (1992) (ILL. REV. STAT. ch. 38, para. 100-1 (1991)).

193. *Betts*, 200 Ill. App. 3d at 58, 558 N.E.2d at 425.

194. *See* People v. Brigham, 47 Ill. 2d 444, 448, 198 N.E.2d 106, 109 (1st Dist. 1964) (finding that all facts constituting contempt must be set forth in the contempt order). *But see* United States v. Kozel, 908 F.2d 205 (7th Cir. 1990) (noting that the district court judge never stated the standard of proof or whether the government met any such standard).

to cases of constructive direct criminal contempt.[195]

C. Sanctions

The failure to properly designate the type of contempt involved in a given case can cause numerous problems. Among the most difficult problems caused by such a failure to properly designate the type of contempt is the imposition of an improper sanction for the contemptuous conduct. Here again, the distinction between the generic contempt definition and the conseqences of labelling what type of contempt is involved, must be carefully heeded.

The court's power to punish contempt is inherent, and given the *sui generis* nature of contempt proceedings, is not dependent upon legislation or the constitution.[196] Further, because courts retain the inherent power to punish for contempt,[197] an Illinois appellate court decision states, "the courts are not strictly bound by the provisions of the Civil Practice Act . . . or the Code of Civil Procedure."[198]

1. Imprisonment and Fines

A contumacious party in civil contempt may be fined an indeterminate amount or sentenced to an indeterminate period to coerce compliance with a court order as long as the party may purge him or herself of the contempt by compliance.[199] According to the Illinois Supreme Court, the contemnor must be provided with the "keys to his cell."[200] In a recent case,[201] the trial court jailed an individual as a sanction for contempt, and stated that the contemnor could be released from prison upon the testimony of a recalcitrant witness.[202] The appellate court found an abuse of discretion in sentencing because the contemnor did not, under the circumstances have the opportunity to purge herself of contempt.[203] An order of civil contempt must contain the conditions by which the contemnor may comply, and those conditions must be such that the

195. *Betts*, 200 Ill. App. 3d at 59-60, 558 N.E.2d at 426.

196. *In re* Peasely, 189 Ill. App. 3d 865, 869, 545 N.E.2d 792, 794 (1989).

197. Michaelson v. United States, 266 U.S. 42, 65 (1924) (stating that courts have the inherent power to punish for contempt of court).

198. *Peasely*, at 189 Ill. App. 3d 869, 545 N.E.2d at 794.

199. *In re* Marriage of Logston, 103 Ill. 2d 266, 289, 469 N.E.2d 167, 177 (1984); *In re* Marriage of Talmadge, 179 Ill. App. 3d 806, 818, 534 N.E.2d 1356, 1363 (2d Dist. 1989).

200. *Logston*, 103 Ill. 2d at 289, 469 N.E.2d at 177; *see also In re* Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167, 1169-70 (7th Cir. 1990) (stating that civil contemnors "hold the key of their prison in their own pockets").

201. Pryweller v. Pryweller, 218 Ill. App. 3d 619, 579 N.E.2d 432 (1st Dist. 1991).

202. *Id.* at 626, 579 N.E.2d at 438.

203. *Id.* at 633, 579 N.E.2d at 442.

contemnor has the "power and opportunity" to comply.[204] However, a reviewing court should not vacate a sanction on the sole basis that the trial court erred in labeling the contemptuous conduct.[205]

A contumacious person adjudged criminally in contempt, on the other hand, may be fined only a determinate amount or sentenced to a determinate term of imprisonment.[206] Thus, one court remanded a case where the trial court had found the contemnor in civil contempt, but had imposed a determinate sentence, noting that the contempt was criminal in nature and therefore the contemnor benefited from a reasonable doubt standard of proof.[207] A recent Seventh Circuit decision,[208] in finding that the contempt was civil rather than criminal in nature, noted that the contemnor had the ability to purge himself of the contempt.[209] The court reached this result despite the fact that the district court had clearly stated that in entering its sanction it intended to punish the contemnor, which is the purpose of criminal contempt orders.[210]

2. *Payment of Damages*

While some jurisdictions allow for damages to compensate a party who is injured by the violation of a prohibitory injunction, an Illinois court, in dicta, has rejected this approach.[211] Courts have found that violation of probation in the form of failure to pay restitution or costs can be treated as civil contempt.[212] Illinois allows attorneys fees and costs in both civil and criminal cases.[213]

3. *Double-Jeopardy*

In Illinois, any criminal charge following the adjudication of direct criminal contempt does not offend the double-jeopardy clause

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204. *Id.*

205. *Id.* at 630, 579 N.E.2d at 440 (citing Sunset Travel, Inc. v. Lovecchio, 113 Ill. App. 3d 669, 447 N.E.2d 891 (1983)).

206. *See* Estate of Shlensky, 49 Ill. App. 3d 885, 364 N.E.2d 430 (1st Dist. 1977) (finding that imprisonment for criminal contempt must be for a specified term).

207. *In re* Marriage of Talmadge, 179 Ill. App. 3d 806, 818, 534 N.E.2d 1356, 1363 (2d Dist. 1989).

208. United States v. Jones, 880 F.2d 987 (7th Cir. 1989).

209. *Id.* at 989.

210. *Id.* at 988.

211. Eberle v. Greene, 71 Ill. App. 3d 85, 93, 217 N.E.2d 6, 10 (3d Dist. 1966).

212. *See, e.g.*, People v. Penson, 197 Ill. App. 3d 941, 557 N.E.2d 230 (1990) (defendant convicted of deceptive practice willfully refused to pay restitution to the victim).

213. *See* Welch v. City of Evanston, 181 Ill. App. 3d 49, 56, 536 N.E.2d 866, 871 (1st Dist. 1989) (stating that "a court may properly assess fees as a sanction in a contempt proceeding . . . ."). The fees sought must be reasonable and evidenced by the submission of detailed time records to the court. *Id.*

of either the United States or Illinois constitutions.[214] This is so because the summary proceedings employed in direct contempt cases do not implicate the adversarial ramifications of a criminal charge.[215] Instead, the Illinois Supreme Court has observed, "the first and only trial-type harassment the contemnor faces is the subsequent criminal prosecution."[216] Thus, prosecution for obstruction of justice was not barred where the contemnor had misrepresented himself to be the defendant (his brother) in a criminal trial, as the contempt involved was direct criminal contempt.[217]

In cases of *indirect* criminal contempt, the Illinois Supreme Court, in *People v. Totten*,[218] stated that the test for determining whether a subsequent prosecution on a criminal charge is barred for double jeopardy purposes is "whether each provision requires proof of a fact which the other does not."[219] Applying that test to the question of whether indirect criminal contempt and aggravated battery are the same for purposes of the double-jeopardy clause, the *Totten* court focused on the elements of the offense charged, rather than the evidence adduced at trial.[220] As the aggravated battery involved proof of great bodily harm, while contempt does not, and indirect criminal contempt required the existence of a court order, while aggravated battery does not, the court concluded they were neither the same offense nor a lesser-included offense of the other, and thus prosecution of aggravated battery did not offend the double jeopardy clause.[221] Relying on *Totten*, an Illinois appellate court has held that neither simple battery nor aggravated assault are the same offenses as indirect criminal contempt under a double jeopardy analysis.[222]

The double jeopardy analysis in a contempt case is not an easy one, and its difficulty is compounded by the variety of slightly varying criminal statutes pertaining to similar offenses. For instance, in Illinois, whether child abduction is the same offense as indirect criminal contempt depends on what type of child abduction is involved. One court focused on the fact that proof of failure to comply with a custody order and the abduction statute both require violation of the same order, and found the offenses to be the

214. People v. Heard, 208 Ill. App. 3d 278, 281, 566 N.E.2d 896, 898 (4th Dist. 1991) (citing People v. Totten, 118 Ill. 2d 124, 514 N.E.2d 959 (1987)).

215. People v. Totten, 118 Ill. 2d 124, 132-33, 514 N.E.2d 959, 962 (1987).

216. *Id.*

217. *Heard*, 208 Ill. App. 3d at 281, 566 N.E.2d at 898.

218. 118 Ill. 2d 124, 514 N.E.2d 959 (1987).

219. *Id.* at 137, 514 N.E.2d at 964.

220. *Id.* at 138, 514 N.E.2d at 965 (citing Blockburger v. United States, 284 U.S. 299 (1932)).

221. *Id.* at 138-39, 514 N.E.2d at 965.

222. People v. Lucas, 170 Ill. App. 3d 164, 169-70, 524 N.E.2d 246, 249-50 (3d Dist. 1988)

same.[223] Another court, however, found that the subsequent prosecution was not barred where the abduction charge was premised upon a showing of lack of consent on the part of the putative father.[224]

III. APPEALABILITY

Ordinarily only final orders are appealable.[225] The rationale is that interlocutory appeals are disruptive and uneconomical.[226] However, in certain instances interlocutory appeals are allowed when the appeal will expedite the litigation or address important policy questions.[227] For example, in *Cohen v. Beneficial Industrial Loan Corp.*,[228] the Supreme Court created the collateral-order doctrine. In *Cohen*, the Court recognized a small class of cases "which finally determine claims of right separable from, and collateral to, rights asserted in the action" and held an interlocutory order immediately appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[229]

An order imprisoning or fining a person for contempt may be appealable as a final order or a collateral order.[230] However, important distinctions arise as to whether the order is for criminal or civil contempt, or is against a party to the action in which the contempt order is filed rather than a third-person such as a lawyer or witness. An order finding and sentencing a person for contempt in which the only issue of the action is the contemptuous conduct of that person

223. *In re* Marriage of D'Attomo, 211 Ill. App. 3d 914, 570 N.E.2d 796 (1991).

224. Sanders v. Shephard, 185 Ill. App. 3d 719, 731, 541 N.E.2d 1150, 1157-58 (4th Dist. 1989).

225. People v. Ross, 344 Ill. App. 407, 101 N.E.2d 112 (2d Dist. 1951).

226. Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978); Landau v. Landau, 409 Ill. 556, 101 N.E.2d 103 (1951).

227. United States v. Nixon, 418 U.S. 683 (1974); *In re* Uphoff's Marriage, 99 Ill. 2d 90, 457 N.E.2d 427 (1983); Cleaners Guild of Chicago v. City of Chicago, 312 Ill. App. 102, 37 N.E.2d 857 (1941).

228. 337 U.S. 541, 546-47 (1949).

229. *Id.* The Court followed Cohen in *Swift & Co. Packers v. Compania Columbiana Del Caribe*, where the Court held an order appealable and said that "[u]nder these circumstances the provision for appeals only from final decisions . . . should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process." 339 U.S. 684, 689 (1950). The principle was again recognized in *Di Bella v. United States*, where the Court said that "the concept of finality as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction." 369 U.S. 121, 125 (1962). *See generally* K. Kendall & B. McMillan, *Appeals from Civil Contempt Orders*, 4 APP. L. REV. 48 (1992) (providing an overview of Illinois law of appeals from civil contempt orders).

230. Bray v. United States, 423 U.S. 73, 75-76 (1975) (stating that sentencing for criminal contempt is a final decision which is immediately appealable); Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150, 1158 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985).

is final.[231] Except for civil contempt of a party, such an order entered in an action in which the order is incidental to the issues in the action is collateral.[232]

In the federal system, an order holding a person in criminal contempt is immediately appealable.[233] It is appealable as a final or collateral order. However, the appellate court may not ordinarily review the validity of the order that was disobeyed.[234] An order holding a party in civil contempt is not immediately appealable, but an order holding a nonparty in civil contempt is immediately appealable.[235] The distinction rests directly upon the collateral-order doctrine. An order holding a party in civil contempt is merely one of the many possible orders entered in the litigation. It is neither collateral to the action nor final. An order holding a nonparty in civil contempt is final as to that person and collateral to the action. A nonparty, under the circumstances, has no effective means of review unless he or she can immediately appeal the order when it is imposed.

By contrast, in the Illinois system, an order imprisoning or fining a party or a person for contempt is immediately appealable.[236]

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231. *See* Laurent v. Brelji, 74 Ill. App. 3d 214, 216, 392 N.E.2d 929, 930 (4th Dist. 1979) (stating, "An order which in substance finally adjudicates the rights of the parties and terminates the litigation is final and appealable.").

232. *See* Young v. Makar, 207 Ill. App. 3d 337, 340, 565 N.E.2d 1030, 1031 (2d Dist. 1991) (stating, "A contempt order is collateral to and independent of the case in which it arises. As such a contempt order is final and appealable . . . ."). *Also see* Grinnell Corp. v. Hackett, 519 F.2d 595, 598 (1st Cir. 1975) (finding that an order adjudicating a party in civil contempt is not appealable), *cert. denied*, 423 U.S. 1033 (1975).

233. Bray v. United States, 423 U.S. 73, 75-76 (1975) (stating that sentencing for criminal contempt is a final decision which is immediately appealable); Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150, 1158 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985).

234. *Marrese*, 726 F.2d at 1158. However, this may apply only to criminal contempt when a person is contesting the validity of a discovery order. *See* City of North Chicago v. North Chicago News, Inc., 106 Ill. App. 3d 587, 593, 435 N.E.2d 887, 891 (2d Dist. 1982) (stating that a party may, by subjecting itself to criminal contempt, test the validity of a pre-trial discovery order); Bauter v. Reding, 68 Ill. App. 3d 171, 173, 385 N.E.2d 886, 889 (3d Dist. 1979) (allowing the defendant to appeal a criminal contempt order imposed for failure to comply with a discovery order).

235. *See In re* Witness Before Special Oct. 1981 Grand Jury, 722 F.2d 349, 351 (7th Cir. 1983) (stating that "an order of civil contempt against a party to an action in which the order is entered is not appealable . . . ."); *In re* Att'y Gen. of the United States, 596 F.2d 58, 61 (2d Cir. 1979) (finding a party may not appeal a civil contempt order for breach of discovery order); David v. Hooker Ltd., 560 F.2d 412, 415 (9th Cir. 1977) (stating that a non-party may appeal a sentence for civil contempt); Grinnell Corp. v. Hackett, 519 F.2d 595, 598 (1st Cir. 1975) (finding that an order adjudicating a party in civil contempt is not appealable), *cert. denied*, 423 U.S. 1033 (1975).

236. People *ex rel.* Scott v. Silverstein, 87 Ill. 2d 167, 172, 429 N.E.2d 483, 486 (1981); *In re* Marriage of Ruchala, 208 Ill. App. 3d 971, 567 N.E.2d 725 (2d Dist. 1991). *See* Monier v. Chamberlain, 35 Ill. 2d 35, 221 N.E.2d 410, 414 (1966)

If contempt is the only issue in the action, the order is final. If it is incidental to the issues in the action it is viewed as an original special proceeding, collateral to and independent of the case in which the contempt arises.[237]

A contempt order against a nonparty is not always a necessary condition for immediate review of a discovery order under the collateral-order doctrine.[238] In *Covey Oil Co. v. Continental Oil Co.*,[239] a nonparty witness sought a protective order against disclosure of trade secrets contained in documents subpoenaed by the defendant in an antitrust case. The trial court denied the protective order, whereupon the nonparty witness sought immediate review of the denial under the collateral-order doctrine. The court of appeals found the order collateral and, unless subject to immediate review, one that would be mooted and made irreparable by any subsequent appeal. In holding the order appealable, the court rejected the argument that the nonparty witness could obtain review by disobeying the order and appealing from a subsequent contempt adjudication. The court stated, "these non-party witnesses should not be required to expose themselves to the hazard of punishment in order to obtain a determination of their claimed rights."[240]

Some courts, however, expressly reject the dicta in *Covey*. In *Ryan v. Commissioner of Internal Revenue*,[241] the court expressly ruled that an order requiring the plaintiffs to answer an interrogatory, allegedly in violation of the party's Fifth Amendment privilege against self-incrimination, was not immediately appealable.[242] The plaintiffs claimed that answering the Commisioner's request would tend to incriminate them and probably result in criminal

(party's lawyer and insurer were both fined $50 and were allowed to appeal). *See also* Pemberton v. Tieman, 117 Ill. App. 3d 502, 506, 453 N.E.2d 802, 805 (1st Dist. 1983) (holding that "[u]nder these circumstances, the trial court acted properly in finding counsel in contempt for refusing to comply with the discovery order. However, because [counsel's] action was a good faith effort to secure an interpretation of the Rules, the fine is vacated.").

237. *Scott*, 87 Ill. 2d at 172, 429 N.E.2d at 486. "An order cast in terms of a contempt proceeding imposing sanctions . . . [is] an appropriate method for testing pretrial discovery orders." *Id.* *See* Young v. Makar, 207 Ill. App. 3d 337, 340, 565 N.E.2d 1030, 1031 (2d Dist. 1991) (stating, "A contempt order is collateral to and independent of the case in which it arises. As such a contempt order is final and appealable . . . .").

238. In United States v. Nixon, 418 U.S. 683, 691 (1974), the Court held that President Nixon need not force a contempt citation in order to appeal an order for discovery since it would be unseemly for the president to be in contempt and thus would impinge on the separation of powers. *Id.* at 691. However, in *In re* Att'y Gen. of the United States, 596 F.2d 58 (2d Cir. 1979), the court refused to extend the doctrine to cabinet officers.

239. 340 F.2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964 (1965).

240. *Id.* at 996-97.

241. 517 F.2d 13, 17-18 (7th Cir. 1975), *cert. denied*, 423 U.S. 892 (1975).

242. *Id.* at 17-20.

consequences, thus, the order was separate and independant of the civil action.[243] The court ruled that the order was not collateral and, alternatively, that even if it was collateral, the order was not final since no sanction was imposed on the plaintiffs.[244] The *Ryan* court, in conclusion, noted that the *Covey* dicta had not been followed in subsequent decisions by the Supreme Court or other courts of appeal.[245]

In Illinois, a contempt order against a nonparty is a necessary condition for immediate review of a discovery order. In *People ex rel. Scott v. Silverstein*,[246] a newsman was ordered to appear and testify at a deposition.[247] The newsman immediately appealed.[248] The defendant suggested that only after the newsman refused to obey the order and was adjudged in contempt would the matter be final.[249] The court agreed and dismissed the appeal.[250] However, in explaining finality of contempt orders the court distinguished *Laurent v. Brelji*.[251] In that case a physician refused to testify before an administrative agency about a former patient.[252] The administrative agency obtained a court order from the circuit court requiring the doctor to testify.[253] The doctor appealed the order to testify contending that the order required disclosure of privileged information.[254] The only issue was whether the doctor must testify in the administrative proceeding.[255] The *Laurent* court in its opinion stated:

> Generally, an order allowing discovery or directing disclosure of information is considered interlocutory and, therefore, not appealable. A party could, nevertheless, test the validity of such an order by refusing to obey and defending in a contempt proceeding. An order of contempt is clearly appealable.
>
> The absence of an order of contempt in this case, however, does not deprive us of jurisdiction over the matter, since we conclude the order of the circuit court was final and not interlocutory. An order which in substance finally adjudicates the rights of the parties and terminates the litigation is final and appealable. Here, the proceeding before the circuit court was a separate, independent action. After the

243. *Id.* at 17.
244. *Id.* at 19.
245. *Id.*
246. 87 Ill. 2d 167, 429 N.E.2d 483 (1981).
247. *Id.* at 169, 429 N.E.2d 484-85.
248. *Id.* at 170, 429 N.E.2d 485.
249. *Id.* at 173, 429 N.E.2d 486-87.
250. *Id.* at 174, 429 N.E.2d 487.
251. 74 Ill. App. 3d 214, 392 N.E.2d 929 (1980). The *Scott* court, however, did express doubts about the finality of the *Laurent* order. *Scott*, 87 Ill. 2d at 172, 429 N.E.2d at 486.
252. *Laurent*, 74 Ill. App. 3d at 215, 392 N.E.2d at 930.
253. *Id.*
254. *Id.*
255. *Id.*

court ordered the recusant witness to testify and produce the records, the proceeding before it was terminated.[256]

The Supreme Court in *Scott*, distinguished *Laurent* by acknowledging that there the circuit court proceeding ordering the physician to testify was separate and independant from the administrative proceeding, and therefore, constituted a final appealable order.[257]

IV. MISCELLANEOUS ISSUES

A. Venue

Neither of the venue provisions of the Illinois Codes of Civil or Criminal Procedure strictly apply to contempt proceedings given the *sui generis* nature of the proceedings.[258] However, when a trial court fails to grant a proper petition for a change of venue, a judgement which holds the defendant in contempt of court will be reversed.[259] Such petitions may be premised, as discussed, upon the fact that a trial judge is impartial, or has been personally reviled in a manner which casts doubt upon his or her ability to impartially preside over the contempt proceedings.[260] The mere fact that a contempt was committed against a judge, or the judge's court, does not require disqualification of the offended judge without a sufficient level of "viciousness."[261]

Illinois courts, however, have guarded closely against the appearance of impropriety. Thus, in a recent case where the trial judge was the subject of a contemptuous lawsuit, the appellate court, apparently *sua sponte*, remanded for a hearing under a new judge where the court determined the contempt order should be reversed for failure of sufficient notice to the contemnor.[262] In another recent case, the appellate court vacated a sentence and remanded for a new sentencing hearing where the trial judge who imposed the sentence had served as a witness in the contempt hearing.[263]

Upon transfer to another judge, the following procedures are to be employed:

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256. *Id.* at 215-16, 392 N.E.2d at 930-31 (citations omitted).

257. People *ex rel.* Scott v. Silverstein, 87 Ill. 2d 167, 173, 429 N.E.2d 483, 486 (1981).

258. *In re* Peasley, 189 Ill. App. 3d 865, 869, 545 N.E.2d 792, 794-95 (4th Dist. 1989).

259. People v. Hathaway, 24 Ill. 2d 284, 181 N.E.2d 172 (1962).

260. Federal Rule of Criminal Procedure 42(b) provides for disqualification from the contempt hearing of a judge who has been personally reviled. FED. R. CRIM. P. 42(b). *See supra* note 169 for a full transcription of Rule 42.

261. *Peasley*, 189 Ill. App. 3d at 869, 545 N.E.2d at 795.

262. People v. Kaeding, 192 Ill. App. 3d 660, 548 N.E.2d 1118 (2d Dist. 1989).

263. People v. Fields, 177 Ill. App. 3d 129, 137-38, 533 N.E.2d 48, 53 (4th Dist. 1989).

> When such a case is transferred, the judge before whom the contempt was committed should specify the acts of contempt in writing and direct that a record of the proceedings surrounding the acts be prepared. Both the transferring judge's charge of contempt and the transcript are forwarded to the judge to whom the case has been assigned. The judge hearing the matter shall base his findings and adjudication of the contempt charge solely on the transferred written charge and record.[264]

B. Statute of Limitations

There is no statute of limitations directed to the inherent power of the court to hold one in contempt. As such, the court may proceed for contempt at any time in which it retains jurisdiction over a matter.[265] Despite the absence of a statutory limitations period, though, courts may deem an action for contempt barred when the lapse of time would make it unfair for the respondent to answer the charge.[266] Illinois courts have tended to find fairness where, although contempt proceedings are brought years after the contemptuous conduct, the conduct itself was engaged in over a course of years.[267]

C. Alternative Means of Punishment

The inherent power of a court to hold an individual in contempt is, although a necessary power, an awesome one. In the case of criminal contempt, it is a crime lacking codification.[268] Whether in civil or criminal contempt, an individual is subject to fine, imprisonment, or both. Given that contempt is a drastic remedy, a court may more appropriately employ alternative means of controlling conduct.

To a large degree, the atmosphere in a courtroom controls the conduct of the participants in a legal proceeding. Illinois Supreme Court Rule 63[269] contains several suggestions for judges which, when adhered to, should help ensure a proper atmosphere in courtrooms. Canon 3 of the Illinois Code of Judicial Conduct includes a

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264. People v. Ernest, 188 Ill. App. 3d 987, 991-92, 544 N.E.2d 1275, 1277 (5th Dist. 1989), *cert. denied*, 112 S. Ct. 50 (1991).

265. People v. Martin-Trigona, 94 Ill. App. 3d 519, 522, 418 N.E.2d 763, 766 (4th Dist. 1980), *cert. denied sub nom.* Martin-Trigona v. Illinois, 456 U.S. 934 (1982).

266. People *ex rel.* Chicago Bar Ass'n v. Barasch, 21 Ill. 2d 407, 412, 175 N.E.2d 417, 420 (1961).

267. *Id.* (defendant holding himself out as attorney); People v. Levinson, 75 Ill. App. 3d 429, 394 N.E.2d 509 (1979) (attorney misconduct as a "continuing offense"), *cert. denied*, 449 U.S. 992 (1980).

268. *See* People v. McCaffrey, 232 Ill. App. 462, 475 (1924). Generally, courts have defined the boundaries of contemptuous conduct in common law. *See supra* notes 32-113 for a discussion of some cases that define contemptuous conduct.

269. ILL. S.CT. RULE 63 (1987) (ILL. REV. STAT. ch. 110A, para. 63 (1991)).

number of suggestions: first, that judges "maintain order and decorum in proceedings before [them]"; second, that judges "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with [whom] he deals"; and finally, that judges "should require similar conduct of lawyers" and others under their control.[270]

Chief Justice Burger observed that "civility is relevant to judges, and especially trial judges because they are under greater stress than other judges . . . . Every judge must remember that no matter what the provocation, the judicial response must be judicious."[271] The Chief Justice, in *United States v. Young*,[272] further observed that a trial judge "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct."[273] He suggested that trial judges should discourage misconduct which "invites" further misconduct.[274] A number of cases exist in which a trial judge might have exercised more courtroom control and thus, would not have needed to resort to the drastic power of contempt. In *People v. Ziporyn*,[275] a 1985 Illinois Supreme Court case, a witness was held in contempt for using a "vile epithet" after an exchange of words with the prosecutor.[276] In *Eggleston v. Chicago Journeymen Plumbers' Local 130*,[277] a 1981 Seventh Circuit decision, a discovery dispute involving mutually offensive inquiries developed between opposing counsel.[278] Each case suggests that greater control of courtroom atmosphere might have avoided the necessity of the court to resort to its contempt power.

Moreover, several alternatives to the exercise of the power of contempt are available to the court. Judges may refer attorney misconduct to the appropriate disciplinary body.[279] Further, judges have broad powers to admit or exclude individuals to and from their courtrooms.[280] Unprofessional conduct such as assault in the courtroom may, on occasion, more properly be dealt with by use of crimi-

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270. *Id.*

271. Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 215 (1971). *See also* COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, FINAL REPORT (1992).

272. 470 U.S. 1 (1985).

273. *Id.* at 10 (quoting Quercia v. United States, 289 U.S. 466, 469 (1933)).

274. *Id.* at 10, 12-13.

275. 106 Ill. 2d 419, 478 N.E.2d 364 (1985).

276. *Id.* at 420-21, 478 N.E.2d at 365-66.

277. 657 F.2d 890 (7th Cir. 1981), *cert. denied sub nom.* Joint Apprenticeship Comm. Local No. 130 v. Eggleston, 455 U.S. 1017 (1982).

278. *Id.* at 893, 896-902.

279. *See In re* Jafree, 741 F.2d 133 (7th Cir. 1984) (recognizing the ability of judges to report attorney misconduct to an appropriate disciplinary commission).

280. People v. Charles, 46 Ill. App. 3d 485, 360 N.E.2d 1214 (3d Dist. 1977) (acknowledging a judge's discretionary power to exclude persons from the courtroom).

nal charges. Further, where an attorney or *pro se* litigant engages in frivolous or malicious litigation, a court may appropriately issue civil sanctions pursuant to statute.[281] The significant body of Illinois and Seventh Circuit case law dealing with the contempt of court power, contemptuous conduct and the rights of those found in contempt, attest to the importance of a court prudently exercising its powers of contempt.

CONCLUSION

The court's *sui generis* power to hold an individual in contempt of court is inherent in its ability to control courtroom conduct. Depending on the circumstances of the contemnor's conduct, the court may characterize it as criminal or civil, and direct or indirect. With civil contempt, a court can coerce compliance with court orders. However, a court will hold a defendant in criminal contempt to punish him for obstructive, offensive conduct which disrupts the judicial proceedings, possibly resulting in substantial fines, or imprisonment of the contemnor. Although in cases of direct contempt a court may issue sanctions summarily, cases of indirect contempt require evidentiary proceedings.

The inherent, but necessary power of the court to coerce compliance with its orders, or to punish for obstructive, offensive conduct is awesome. The consequences of contempt orders in some situations may reach beyond fines and incarceration to affect professional reputations and personal relationships. For these reasons, a court's faithful adherence to the appropriate procedural rules assures fairness to the alleged contemnor and reinforces public confidence in the judicial system.

281. FED. R. CIV. P. 11; ILL. S.CT. RULE 137 (1989) (ILL. REV. STAT. ch. 110A, para. 137 (1991)).