

A Primer for Texas Lawyers Facing Contempt¹

“You can cite me for contempt, Your Honor. I don’t care.” --Jack Kevorkian

While it may seem daring or romantic or almost nightmarish for criminal defense attorneys/writers like D.W. Buffa to wax an entire novel from a fantastic act of contempt in The Judgment (reprinted by Vision in 2002), the realities of attorneys facing contempt is neither fun and nor common. Attorneys are to zealously represent their clients and prosecutors are to pursue justice...and these obligations sometimes lead counsel toward clashes with judges. Tread lightly. Tread carefully.

Black’s Law Dictionary (4th Edition 1951):

Contempt: A willful disregard or disobedience of a public authority.

Contempt of Court: Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity.

The act or omission itself must amount to contempt, not the attitude.²

The three elements to prove contempt are: a) a reasonably specific order, b) a violation of that order, and c) a finding of willful intent to violate said order.³

Sanctions are differentiated from contempt by the receiver of fines---sanctions go to a party.

Kinds of Contempt

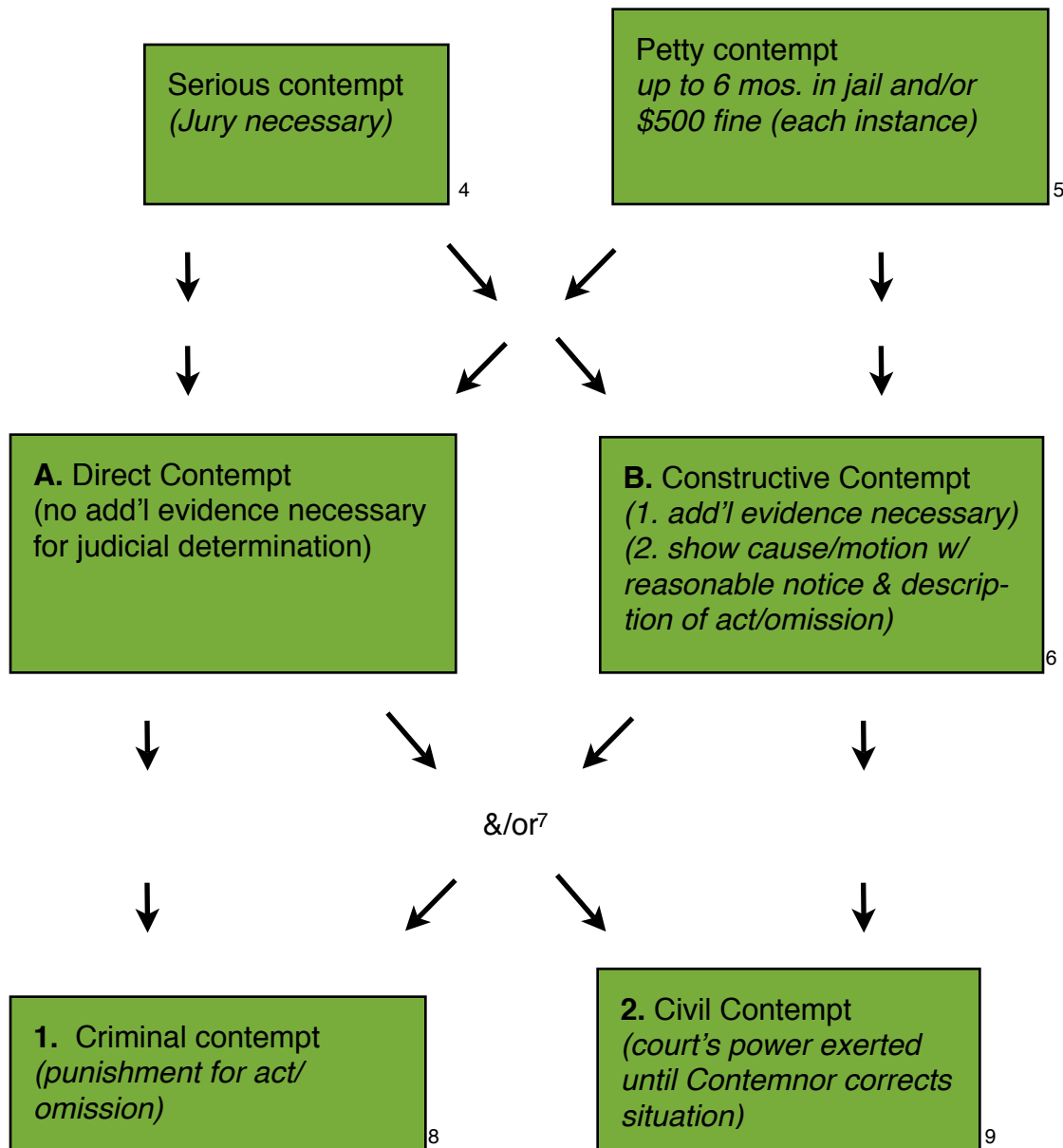
There are several different descriptions for contempt of court. The various kinds of contempt define the procedures, possible remedies and possible appellate/review tactics. To make it easier for the practitioner, attached is a chart which may assist.

In the chart, one may have **A1**, **A2**, **B1**, **B2** or a combination, thereof---but not **AB**. An act of contempt may be serious or petty. It must be direct or constructive. It may be criminal, civil or both.

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² Ex Parte Krupps, 712 S.W.2d 144 (Tx.Cr.App. 1986); Ex Parte Jacobs 664 S.W.2d 360, 364 (Tx.Cr.App. 1984)

³ Westerfeld, Andrea L., *A Prosecutor’s Guide to Contempt of Court*, Prosecutor, Vol. 38, No. 3 (2008)



⁴ Bloom v. Illinois, 391 U.S. 194 (1968); Muniz v. Hoffman, 422 U.S. 454 (1975); Ex Parte Werblud, 536 S.W.2d 542 (Tx. 1976), Ex Parte Griffin, 682 S.W.2d 261 (Tx. 1984)

⁵ Ex Parte Werblud, 536 S.W.2d 542, 547 (Tx. 1976) *with a touch of ‘I know it when I see it as to ‘petty contempt’; Ex Parte Griffin 682 S.W.2d 261 (Tx. 1984)

⁶ Ex Parte Krupps, 712 S.W.2d 144, 147 (Tx.Cr.App. 1986)

⁷ Ex Parte Sanchez, 703 S.W.2d 955, 957 (Tx. 1986) *contempt may be both criminal and civil

⁸ Ex Parte Krupps, 712 S.W.2d 144, 149 (Tx.Cr.App. 1986)

⁹ Ex Parte Busby, 921 S.W.2d 389 (Tx.Ct.App.-Austin 1996)

Though there has been discussion in Texas courts of statutory limitations on contempt being a violation of separation of powers (in dissent)¹⁰, contempt powers in Texas appear limited by statute and normal statutory construction and limitations.¹¹ All courts agree that contempt is an inherent power of court.¹²

There are several specific contempt statutes in several areas of Texas law. This article will focus on contempt against the attorney in his capacity as an officer of the court. The key statute, therefore, is Texas Govt. Code §21.002 (b)-(d). One should note the limitations in §21.002 (g) and (h) for state employees.

Due Process and Contempt

Texas Government Code §21.002 (a)-(e):

(a) Except as provided by Subsection (g), a court may punish for contempt.

(b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than \$500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

(c) The punishment for contempt of a justice court or municipal court is a fine of not more than \$100 or confinement in the county jail or city jail for not more than three days, or both such a fine and confinement in jail.

(d) An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. The presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign a judge who is subject to assignment by the presiding judge other than the judge of the offended court to determine the guilt or innocence of the officer of the court.

(e) Except as provided by Subsection (h), this section does not affect a court's power to confine a contemner to compel the contemner to obey a court order.

The statute effectively makes each act of criminal contempt petty and, thus, there appears no right to a jury. But in *Ex Parte Werblud*,¹³ the court refrained from establishing a clear rule on when a contemnor is facing a charge of serious contempt; it held that a cumulated fine of more than \$500 was still petty, but a cumulated fine of \$105,000 was serious (and thus invoking a right to jury trial).¹⁴

¹⁰ *Ex Parte Dotson*, 76 S.W.3d 393, 398 (Tx.Cr.App. 2002)

¹¹ *Ex Parte Dotson*, 76 S.W.3d 393, 395 (Tx.Cr.App. 2002)

¹² *Ex Parte Barnett*, 600 S.W.2d 252, 254 (Tx. 1980)

¹³ *Ex Parte Werblud*, 536 S.W.2d 542, 547 (Tx. 1976)

¹⁴ *Ex Parte Griffin*, 682 S.W.2d 261 (Tx. 1984)

Contempt is presumed not to exist.¹⁵ The bar on double jeopardy also applies to contempt cases.¹⁶ The test for double jeopardy in contempt cases is the same element test as in *Blockburger*.¹⁷

In constructive contempt cases, ‘full and unambiguous notice’ stating ‘how, when and by what means’ a party is alleged to have committed contempt¹⁸ must be personally served on the contemnor.¹⁹ Notice may be in the form of a show cause order or motion.²⁰ That notice must be served ‘a reasonable time prior to hearing’.²¹ The contemnor has a right to confront witnesses and be present at hearings.²² He also has the right to counsel.²³ The contemnor has a 5th Amendment right to remain silent, but may still be called to the witness stand in civil contempt cases.²⁴

In cases of civil contempt, there is a required finding that contemnor can or could in fact comply and refuses.²⁵ Furthermore, the burden of proof to show non-compliance in civil contempt cases is ‘clear and convincing evidence’.²⁶

¹⁵ Ex Parte Jacobs, 664 S.W.2d 360, 364 (Tx.Cr.App. 1997)

¹⁶ Ex Parte Busby, 921 S.W.2d 389 (Tx.Ct.App.-Austin 1996)

¹⁷ Ex Parte Rhodes, 974 S.W.2d 735, 741 (Tx.Cr.App. 1998); *Blockburger v. U.S.*, 284 U.S. 299 (1932)

¹⁸ In Re Acceptance, 33 S.W.3d 443, 448 (Tx.Ct.App.-Ft. Worth 2000); Ex Parte Wilkins, 665 S.W.2d 760 (Tx. 1984);

¹⁹ In Re Acceptance, 33 S.W.3d 443, 449 (Tx.Ct.App.-Ft. Worth 2000); Ex Parte Vetterick 744 S.W.2d 598 (Tx. 1988); Ex Parte Moore, 567 S.W.2d 523 (Tx.Ct.App.-Texarkana 1978); Ex Parte Lockey, 522 S.W.2d 735 (Tx.Ct.App.-Dallas 1975)

²⁰ Westerfeld, Andrea L., *A Prosecutor’s Guide to Contempt of Court*, Prosecutor, Vol. 38, No. 3 (2008)

²¹ In Re Acceptance, 33 S.W.3d 443, 449 (Tx.Ct.App.-Ft. Worth 2000)

²² Ex Parte Johnson, 654 S.W.2d 415 (Tx. 1983)

²³ Ex Parte Gonzales, 945 S.W.2d 830, 836 (Tx.Cr.App. 1997); *Cooke v. U.S.*, 267 U.S. 517 (1925)

²⁴ Ex Parte Werblud, 536 S.W.2d 542, 548 (Tx. 1976)

²⁵ In Re Gawerc, 165 S.W.3d 314, 315 (Tx. 2005); Ex Parte Gonzales 945 S.W.2d 830, 834 (Tx.Cr.App. 1997)

²⁶ William W. Kilgarlin and Scott A. Ozmun, 38 Baylor L.R. 291, 302 (1986); *Alberti v. Klevenhagen*, 610 F. Supp. 138, 141 (S.D. Tex. 1985)

Civil constructive contempt requires a written judgment and order of commitment (failure cannot be cured after the fact if a writ of habeas corpus is filed).²⁷ Any order which is alleged to have been violated must be clear.²⁸

In criminal contempt, the burden of proof is beyond a reasonable doubt.²⁹ The contemnor has the right to confront witnesses.³⁰

In all cases of contempt, a contempt judgment is required to show findings identifying particular acts/omissions and must be signed in a reasonably short time.³¹ It should be noted that if one punishment is assessed for multiple acts/omissions and any act is not punishable by contempt, then the entire judgment is void.³²

Officers of the court have additional processes which have been described as being similar to those of constructive contempt.³³

Contempt by Officers of the Court

When an officer³⁴ of the court is alleged to have committed contempt while pursuing the duties of an officer,³⁵ he may avail himself of Texas Government Code 21.002 (d). The officer has the right to have a personal recognizance bond. Judge Kilgarlin, in his seminal law review article on Texas contempt, speculates that a motion for personal recognizance bond may be oral in a direct contempt proceeding due to the time constraints.³⁶

In the case of constructive contempt, the contemnor attorney may best be advised to have a prepared motion for release in his briefcase or already on file.³⁷

²⁷ Ex Parte Barnett, 600 S.W.2d 252, 254 (Tx. 1980)

²⁸ Ex Parte Slavin, S.W.2d 43, 44 (Tx. 1967)

²⁹ Ex Parte Chambers, 898 S.W.2d 257 (Tx. 1995)

³⁰ Pointer v. Texas, 380 U.S. 400, 421 (1965); Kilgarlin, 38 Baylor L.R. 291, 308 (1986)

³¹ Ex Parte Cavillo Amaya, 748 S.W.2d 224 (Tx. 1988)

³² Ex Parte Henry, 154 S.W.3d 594, 598 (Tx. 1988)

³³ Ex Parte Pink, 645 S.W.2d 262, 264 (Tx.Cr.App. 1982)

³⁴ Ex Parte Sanchez, 703 S.W.2d 955 (Tx. 1986)

³⁵ Ex Parte Howell, 488 S.W.2d 123, 126 (Tx.Cr.App. 1972)

³⁶ Kilgarlin, 38 Baylor 291, 314.

³⁷ Ex Parte Waters, 499 S.W.2d 309, 310 (Tx.Cr.App. 1973), Ex Parte Murphy 669 S.W.2d 320, 322 (Tx.Cr.App. 1984)

Though it is unclear in the statute, and some judges *sua sponte* refer an officer-contempt case to another judge, the contemnor-officer should invoke his right to a hearing with another judge upon a finding of contempt.³⁸

The show cause order must be drafted by the judge in all constructive and direct cases where contemnor-officer files for a p.r. bond.³⁹

The show cause order must be personally served on contemnor-officer. A contemnor-officer must be provided a reasonable amount of time for preparation for the hearing along with a specific description of alleged acts/omissions.⁴⁰ Preparation time of five days was reasonable in one case.⁴¹

For officers of the court, a blurring of direct and constructive contempt has occurred.⁴² In *Ex Parte Howell*, the alleged contempt occurred outside of the court's immediate presence, judge pronounced guilt without a show cause order and without a hearing, yet, he *sua sponte* referred the case to a visiting judge. The visiting judge found him guilty and assessed a punishment. The hearing with the visiting judge was ruled a 'readjudication' and upheld. Thus, the 21.002 (d) hearing with the visiting judge is effectively a *de novo* trial of contempt.⁴³

Appellate Options

No direct appeals are allowed from a finding of contempt. Only collateral attacks are available.⁴⁴

Mandamus

This is a very unlikely option. Judge Kilgarlin speculates that it may be the only way to force a show cause hearing.⁴⁵ The Supreme Court has noted that habeas corpus may not be adequate in all cases.⁴⁶

³⁸ *Ex Parte Avila*, 659 S.W.2d 443 (Tx.Cr.App. 1983)

³⁹ *Ex Parte Pink*, 645 S.W.2d 262, 264 (Tx.Cr.App. 1982)

⁴⁰ *Ex Parte Pink*, 645 S.W.2d 262, 264 (Tx.Cr.App. 1982)

⁴¹ *Ex Parte Murphy*, 669 S.W.2d 320, 321 (Tx.Cr.App. 1984)

⁴² *Ex Parte Howell*, 488 S.W.2d 123, 126 (Tx.Cr.App. 1972)

⁴³ *Ex Parte Murphy*, 669 S.W.2d 320, 321-2 (Tx.Cr.App. 1984)

⁴⁴ Westerfeld, Andrea L., *A Prosecutor's Guide to Contempt of Court*, Prosecutor, Vol. 38, No. 3 (2008); In *Re Henry*, 154 S.W.3d 594, 596 (Tx. 2005); Kilgarlin, 38 Baylor L.R. 291, 294 (1986)

⁴⁵ Kilgarlin, 38 Baylor L.R. 291, 295 (1986)

⁴⁶ Kilgarlin, 38 Baylor L.R. 291, 295 (1986) citing *Deramus v. Thonton*, 333 S.W.2d 824, 827 (Tx. (1960)

Habeas Corpus (probably the only appellate option)

There must be restraint of the contemnor. A fine alone is not enough.⁴⁷ The burden is on the relator to prove the unlawful restraint.⁴⁸ There is a records requirement for habeas actions, though there is an exception in a habeas corpus from a judgment of direct contempt.⁴⁹

Jurisdiction for Habeas Corpus

The Court of Criminal Appeals has original jurisdiction in habeas corpus cases.⁵⁰ The Court of Criminal Appeals refers contempt commitment from civil proceedings to Texas Supreme Court.⁵¹ The contemnor must allege restraint, albeit he may have been released on bond.⁵²

The Court of Criminal Appeals has a policy of entertaining habeas corpus in extraordinary cases.⁵³ It was suggested that writs may be easier sought in the Court of Criminal Appeals because the rules of the Supreme Court discourage original writs in emergency situations.⁵⁴ Mootness can occur quickly.

The Courts of Appeals have concurrent original habeas corpus jurisdiction in divorce, child support and child custody matters.⁵⁵

The district courts have original jurisdiction for habeas corpus from county, justice and municipal courts.⁵⁶

Examples of Contempt

Court reporter failed to timely complete a statement of facts.⁵⁷

⁴⁷ Ex Parte Waters, 499 S.W.2d 309 (Tx.Cr.App. 1973); Kilgarlin, 38 Baylor 291, 294 (1986)

⁴⁸ Ex Parte Murphy, 669 S.W.2d 320, 322 (Tx.Cr.App. 1984)

⁴⁹ Ex Parte Krupps, 712 S.W.2d 144, 146 (Tx.Cr.App. 1986)

⁵⁰ Texas Constitution Art. V, §5; Kilgarlin, 38 Baylor L.R. 291, 296 (1986)

⁵¹ Ex Parte Cummings, 170 S.W. 153 (Tx.Cr.App. 1914); Kilgarlin, 38 Baylor L.R. 291, 206 (1986)

⁵² Kilgarlin, 38 Baylor L.R. 291, 296 (1986)

⁵³ Ex Parte Krupps, 712 S.W.2d 144, 151 (Tx.Cr.App. 1986) citing 38 Tex. Jur. 3d, Extraordinary Writs §62

⁵⁴ Ronald L. Goranson, Contempt, a CLE paper, p.13 (1990)

⁵⁵ In Re Gawerc, 165 S.W.3d 314, 315 (Tx. 2005)

⁵⁶ Ex Parte Krupps, 712 S.W.2d 144, 151 (Tx.Cr.App. 1986)

⁵⁷ Ex Parte Sanchez, 703 S.W.2d 955 (Tx. 1986)

Failure to pay a debt is not subject of confinement, but payments may be classified as ‘duties’ and ‘costs’ which can bring the possibility of confinement as a contempt action.⁵⁸

Parties and court spectators have been held in contempt for failing to rise when a judge entered the courtroom.⁵⁹

An attorney has been held in contempt for failing to timely file a client’s brief with the Texas Court of Criminal Appeals.⁶⁰

An attorney was held in contempt for being deceptive to the court.⁶¹

An attorney was held in contempt for failing to appear at a pretrial hearing and trial.⁶²

Former Harris County District Attorney Charles Rosenthal was held in contempt for deleting e-mails in violation of a discovery order. His attorney was also held in contempt for failing to appropriately advise Rosenthal on discovery compliance.⁶³

Conclusion

Make your case. Argue strenuously. Be respectful. A Texas judge may be a fellow member of the bar but he is cloaked with a stiff remedy for court disorder and disobedience. Avoid becoming the contemptuous inspiration for a Grisham, Buffa, Turow, or Michael Nava novel.

(Attached is an Application for Writ of Habeas Corpus distributed by Ronald L. Goranson at a CLE in 1990.)

⁵⁸ In Re Henry, 154 S.W.3d 594, 596 (Tx. 2005)

⁵⁹ Ex Parte Krupps, 712 S.W.2d 144 (Tx.Cr.App. 1986)

⁶⁰ Fahle v. Cornyn, 231 F.3d 193 (5th Cir. 2000)

⁶¹ Ex Parte Howell, 488 S.W.2d 123 (Tx.Cr.App. 1973)

⁶² Ex Parte Murphy, 669 S.W.2d 320 (Tx.Cr.App. 1983)

⁶³ Peggy O’Hare, *Rosenthal Found in Contempt for Deleting E-mails*, Houston Chronicle, 28 March 2008