CONTEMPT

Michael Crowell
UNC School of Government
January 2014

THE DIFFERENCE BETWEEN CRIMINAL AND CIVIL CONTEMPT

Criminal and civil contempt have different purposes, require different procedures and result in different sanctions. Criminal contempt is used to punish a person for violating a court order or interrupting or expressing disrespect for the court. Civil contempt, on the other hand, is intended to make someone obey a court order. The purpose of criminal contempt is punishment; the purpose of civil contempt is compliance. Criminal contempt punishes behavior that already has occurred. Civil contempt tries to affect ongoing behavior.

> "A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." — *Blue Jeans Corporation v. Amalgamated Clothing Workers of America, AFL-CIO*, 275 N.C. 503, 507-8 (1969) (quoting 17 Am. Jur. 2d, Contempt, § 4).

> "Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. " — *O'Briant v. O'Briant*, 313 N.C. 432, 434 (1985).

CIVIL AND CRIMINAL CONTEMPT FOR THE SAME ACT

Both G.S. 5A-12(d) and 5A-21(c) specify that a person may not be held in both civil and criminal contempt for the same conduct. That provision was added to the statute in 1999 and negates previous case law such as *Lowder v. All Star Mills, Inc.*, 301 N.C. 561 (1981), which had said that both civil and criminal punishment were available in some instances. Sometimes a defendant's conduct may warrant either civil or criminal contempt and the hearing may proceed on the premise that both possibilities are in play. At the end, though, the judge has to choose one or the other. If the choice is criminal contempt, it is essential to confirm that the standard for a criminal conviction has been met and the particular rights of the defendant associated with a criminal proceeding have been satisfied.

NO CONTEMPT BASED ON INVALID ORDER

If the court which entered the original order did not have authority to do so, the order is a nullity and can be ignored and no one can be held in contempt for violating it. *Corey v. Hardison*, 236 N.C. 147 (1952). The critical issue is whether the first judge had jurisdiction to enter the order. If not, the order is considered void *ab initio* and a later judge may ignore it without violating the rule against one trial judge overruling another. If the first judge had jurisdiction, even though the order may be incorrect as a matter of law, the order is merely voidable and remains in effect, and must be honored by the second judge, until it has been voided by a direct challenge to its validity. *State v. Sams*, 317 N.C. 230 (1986).

CRIMINAL CONTEMPT

The grounds for criminal contempt —

Criminal contempt may be imposed only for one of the grounds specified in G.S. 5A-11(a), which are:

> "(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
> (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
> (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
> (4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.
> (5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.
> (6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.
> (7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.
> (8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.
> (9)Willful communication with a juror in an improper attempt to influence his deliberations.
> (9a) Willful refusal by a defendant to comply with a condition of probation.
> (10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt. "

Explanation of the most common grounds for criminal contempt —

GS 5A-11(a)(1): Interruption of court proceedings —

The statute allows criminal contempt for willful behavior committed during the sitting of the court "directly tending to interrupt its proceedings." For instance, in *In the Matter of Paul*, 84 N.C. App. 491 (1987), a lawyer was held in criminal contempt and sentenced to 30 days in jail for coaching a spectator to attempt to disrupt the trial by standing up and yelling out a protest. The spectator would have been in contempt as well, of course. (The lawyer's actions took place outside the court, before the trial, and thus were handled as indirect contempt. The spectator would have been guilty of direct contempt because his actions occurred in the court's presence. The difference between direct and indirect criminal contempt is discussed below.)

Criminal contempt, cont.

GS 5A-11(a)(2): Disrespect for the court —

Criminal contempt includes willful behavior occurring in the court's "immediate view and presence" and "directly tending to impair the respect due its authority." This provision covers the lawyer or witness or spectator who curses the judge, yells in the courtroom, will not stop talking or otherwise is offensive and disrespectful to the judge. An example is *In the Matter of Nakell*, 104 N.C. App. 638 (1991), in which the lawyer was held in criminal contempt and imprisoned for ten days and fined $500 for repeatedly interrupting the judge, refusing to stop talking, failing to sit down, and encouraging his client to be disruptive. *Also see State v. Johnson*, 52 N.C. App. 592 (1981) (defendant in bond hearing argued with judge, refused to sit down and be quiet, prompting spectators to start chanting, "Let him speak"); *State v. Wheeler*, 174 N.C. App. 367, 2005 WL 2850891 (2005) (unpublished) (defendant in probable cause hearing before magistrate asked magistrate whether the magistrate wanted defendant to "kiss his ass," and in response to threat of contempt said, "I don't give a damn, give me ninety days.").

A spectator's refusal to stand at the bailiff's call for all to rise constitutes disrespect which may be punished as criminal contempt:

> "Courtroom decorum and function depends upon the respect shown by its officers and those in attendance. Unexcused refusals to stand creates a rift in that respect and interrupts the normal proceedings of the court." — *State v. Randall*, 152 N.C. App. 469, 473 (2002). (The contempt conviction was reversed, however, for the failure to give the defendant an opportunity to explain his refusal to stand.)

Note that the statute requires that contempt "directly tending to impair the respect due [the court's] authority" must occur during the sitting of the court and in the court's "immediate view and presence." Consequently, such behavior will be direct criminal contempt and may be punished summarily by the judge, as discussed below. Standing outside the courthouse and arguing so as to be heard in the courtroom through the window has been considered criminal contempt within the presence of the court. *State v. Evans*, 193 N.C. App. 455, 2008 WL 4635437 (2008) (unpublished).

GS 5A-11(a)(3): Disobedience of court's order —

Willful disobedience of, or resistance to or interference with, a the court's "lawful process, order, directive, or instruction or its execution" is criminal contempt. Examples include refusal to comply with a court order requiring delivery of court documents to a receiver, *Lowder v. Mills, Inc*., 301 N.C. 561 (1981); refusing to comply with an order to have blood tested, *State v. Mauney*, 106 N.C. App. 26 (1992); failing to comply with an order to pay alimony, *Faught v. Faught*, 67 N.C. App. 37 (1984); and encouraging a witness to disobey a subpoena, *State v. Wall*, 49 N.C. App. 678 (1980). In *State v. Pierce*, 134 N.C. App. 149 (1999), a juror in a drunk driving case was found in contempt for

disobeying the court's instructions when he called individuals outside the court to research the reliability of the breathalyzer.

Note that the statute provides for contempt for "interference with" a court order, in addition to disobedience. This wording makes criminal contempt broader than civil and allows punishment when a person acts to thwart a court order but is not personally disobeying the order. *Atassi v. Atassi*, 122 N.C. App. 356 (1996).

For criminal contempt, the court's "order, directive, or instruction" need not be in writing. In *State v. Simon*, 185 N.C. App. 247 (2007), the defendant was found in contempt for disobeying an oral directive from the judge not to call or fax papers to the judges' office, nor to visit the judges' office, without permission. The appellate court said, however, that the better practice is for such an order to be in writing. The court also distinguished the wording of the criminal contempt statute from the civil contempt statute, suggesting that the imposition of civil contempt for disobedience of a court order does require the order to be in writing.

The judge must find that the defendant indeed had the ability to comply with the order, otherwise the failure cannot be willful. *Lamm v. Lamm*, 229 N.C. 248 (1948).

GS 5A-11(a)(4): Refusal to be sworn or to answer questions —

Testimony which is obviously false or evasive is the equivalent of refusing to testify and may be punished as contempt. *Galyon v. Stutts*, 241 N.C. 120 (1954); *In re Edison*, 15 N.C. App. 354 (1972). Note, however, that the use of contempt may preclude a later prosecution for perjury because of double jeopardy (see the discussion of double jeopardy below).

GS 5A-11(a)(7): Failure to comply with schedule or practices of the court —

The statute allows criminal contempt for willful or grossly negligent "failure to comply with schedules and practices of the court" when it results in "substantial interference with the business of the court." The failure of an attorney to appear at a probation violation hearing was criminal contempt in *State v. Key*, 182 N.C. App. 624 (2007). The lawyer argued that he was entitled to withdraw and not appear because he had not been paid by his client, but his withdrawal had not been approved by the court.

Contempt for failure to comply with the court's practices occurs when parties who have agreed to settle a case then fail to execute the necessary settlement papers as required by a local rule on calendaring and settlement of cases. *Lomax v. Shaw*, 101 N.C. App. 560 (1991).

To establish that the failure to appear had caused substantial interference with the business of the court, the court in *Key, supra,* noted that had the lawyer appeared the matter could have been resolved in about five minutes but that his absence required the

clerk to make nine separate telephone calls; that the case had to be continued until the next day; and that an out-of-county probation officer had to return the next day. By contrast, in *State v. Chriscoe*, 85 N.C. App. 155 (1987), the criminal contempt conviction was reversed in part because there was no evidence that the tardiness of the witness had interfered with the court's business; in fact, the trial had proceeded without delay in her absence. (Moreover, she had not clearly been ordered to be present at the start of court and her delay was not willful.)

Even though a party's required appearance usually can be satisfied by the lawyer's presence, the party may be held in contempt when the order directs the party to appear personally. *Cox v. Cox*, 92 N.C. App. 702 (1989).

Direct vs. indirect contempt —

Criminal contempt may be direct or indirect, a distinction not relevant to civil contempt. Direct criminal contempt is behavior that occurs in the court's presence. Criminal contempt is indirect when it occurs outside the sight or hearing or immediate proximity of the court. Direct criminal contempt may be punished summarily on the spot by the judge in front of whom the behavior occurs, while indirect contempt requires issuance of a show cause order and a hearing. (The AOC form for summary criminal contempt is AOC-CR-390; the form for a show cause order for a plenary proceeding for criminal contempt is AOC-CR-219.) The reason that direct contempt may be punished summarily is that the judge has witnessed the contempt and needs no testimony or other evidence to know what occurred.

Purusant to G.S. 5A-13(a) contempt is direct when the act is (1) committed "within the sight or hearing of a presiding judicial official," (2) "committed in, or in immediate proximity to, the room where proceedings are being held before the court," and (3) "likely to interrupt or interfere with matters then before the court." All three elements are necessary for the contempt to be direct and for the judge to be entitled to punish summarily.

Two cases cited earlier illustrate the difference between direct and indirect contempt. In *In re Nakell* the lawyer was guilty of direct criminal contempt for arguing with the judge and failing to be quiet and sit down. In *In the Matter of Paul*, the lawyer's criminal contempt was indirect because his act of coaching and encouraging a spectator to disrupt the court proceeding took place before the trial and well away from the courtroom. *Also see State v. Wall*, 49 N.C. App. 678 (1980) (indirect criminal contempt for defendant to attempt to persuade a witness not to appear).

The defendant's contempt was considered direct when his arguing and fighting took place outside the courthouse but he was close enough to be heard through the window. *State v. Evans*, 193 N.C. App. 455, 2008 WL 4635437 (2008) (unpublished).

The cases sometimes have treated failure to appear as direct contempt and sometimes as indirect. In *State v. Verbal*, 41 N.C. App. 306 (1979), the Court of Appeals said it was not clear whether direct or indirect contempt applied to a lawyer returning 18 minutes late from a court

recess. Later, however, in *Cox v. Cox*, 92 N.C. App. 702 (1989), the court specifically decided that a party's failure to appear in response to a show cause order was indirect contempt because the court had no direct knowledge of facts to establish that the failure to appear was willful. The latter decision seems correct. A summary proceeding is allowed only because the judge has witnessed the contempt and needs no further evidence. If witnesses are needed to explain why the person failed to show or was late, then a plenary proceeding is required.

Willfulness —

G.S. 5A-11(a) specifies that an act must be willful to constitute criminal contempt (though "grossly negligent failure" also is sufficient for contempt for failing to comply with the court's schedule and practices or an officer failing to perform a duty).

> "'Willfulness' in this statute means an act 'done deliberately and purposefully in violation of law, and without authority, justification, or excuse.' *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987). The term has also been defined as 'more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.' *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E. 2d 729, 730 (1983)." — *State v. Phair*, 193 N.C. App. 591, 594 (2008).

In *Phair* the court decided that a lawyer could not be held in contempt just because her cell phone rang in court, despite posted warnings to turn phones off. The court considered the lawyer's failure to turn off the phone "certainly irresponsible," but the inaction did not amount to willfulness.

A lawyer's shouting at the judge and refusing to stop talking and sit down was considered willful in *In re Brown*, 181 N.C. App. 148, 2007 WL 3778 (2007) (unpublished), even though he contended his actions to have testimony preserved in the record only "represented zealous advocacy for his client."

Willfulness to interfere with the court proceeding was inferred in *State v. Evans, supra*, based on defendant's arguing and fighting outside but near the window to the courthouse because defendant "was familiar with the criminal court system and should have known the importance of maintaining a level of decorum in and around the courthouse." Thus, he "should have known that the loud yelling of profanity outside of the courtroom and directly outside the judge's chambers would likely interrupt court proceedings. . . ."

A witness' hour-late arrival in court did not amount to willfulness because she was trying to locate her mother and determine her condition after her mother failed to answer her telephone. *State v. Chriscoe*, 85 N.C. App. 155 (1987).

As mentioned above, when the criminal contempt is for failure to comply with a court order the judge must find that the defendant had the ability to comply; without such a finding the failure cannot be willful. *Lamm v. Lamm*, 229 N.C. 248 (1948).

Criminal contempt, cont.

Need for warning —

The statute on sentencing for criminal contempt, G.S. 5A-12(b)(2), states that no punishment may be imposed for criminal contempt unless the person was given "a clear warning by the court that the conduct is improper" or the act was "willfully contemptuous."

Some kinds of conduct would seem certain to be willfully contemptuous and not require a warning. A spectator who jumps up, screams at the judge and takes a wastebasket and tosses it across the courtroom, for example, would be in contempt even though the judge never warned the person not to do those things. On the other hand, explicit warnings will be needed for behavior that is not as inherently unacceptable. Thus, if the court wishes to control the kind of clothing worn by parties, witnesses and spectators, or wants to punish those who allow their cell phones to ring in the courtroom, notices should be posted or an announcement made to provide the necessary warning.

Summary proceeding for direct contempt —

The contempt statutes provide that a summary proceeding is available only for direct contempt, i.e., contempt committed in the presence of the judge. Due process, too, allows a summary proceeding only when the contempt occurred within the personal view of the judge. *In re Oliver*, 333 U.S. 257 (1948); *Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011).

Even in a summary proceeding the defendant must be given notice of the basis for the contempt and an opportunity to respond. The form used for a summary proceeding for direct criminal contempt, AOC-CR-390, states that an opportunity was given. The notice may be given orally by the judge. *State v. Johnson*, 52 N.C. App. 592 (1981). As stated in the Official Commentary to G.S. 5A-14, the proceeding is not meant to be a full-blown hearing:

> "This was intended not to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort."

In *State v. Randell*, 152 N.C. App. 469 (2002), the contempt conviction of a spectator for refusing to stand at the call of the bailiff was reversed because the judge gave him no chance to explain. In *State v. Verbal*, 41 N.C. App. 306 (1979), a lawyer's contempt for returning 18 minutes late from a recess was reversed for the judge's failure to allow him to respond. (Note that although *State v. Verbal* left open the question of whether the failure to appear was direct or indirect contempt, the court held later in *Cox v. Cox*, 92 N.C. App. 702 (1989) that it should be treated as indirect contempt.)

A summary proceeding is required by G.S. 5A-14(a) to take place "substantially contemporaneously" with the contempt. Although typically that means the proceeding should occur right after the contempt, circumstances may allow a delay. Whether the delay is allowable

depends on the defendant's notice or knowledge of the misconduct being charged, the nature of the misconduct and other circumstances that affect the right to a fair and timely in hearing. *State v. Johnson*, *supra*. In *Johnson*, the defendant was removed from a bond hearing for being disruptive and the summary contempt proceeding held the next morning was considered substantially contemporaneous. In *In re Nakell*, 104 N.C. App. 638 (1991), a proceeding two days after the lawyer's contemptuous acts was considered substantially contemporaneous when the judge notified the lawyer immediately of the basis for the charge. The stated purpose of the delay was to give the lawyer time to respond; the appellate court treated it as a continuance.

Under G.S. 5A-16(a) the judge may order the person charged with direct criminal contempt to be taken into custody and restrained to the extent necessary to assure the person's presence at the summary proceeding.

An indigent's right to counsel, which applies when there is a plenary proceeding for contempt, is not applicable to a summary proceeding. *In re Williams*, 269 N.C. 68, *cert. denied*, 388 U.S. 918 (1967).

A direct contempt need not be handled summarily. The judge may choose instead to use the plenary proceeding under G.S. 5A-15.

Plenary proceeding —

When the contempt does not occur in front of the judge and thus is indirect criminal contempt, or the judge chooses not to act summarily on a direct contempt, a plenary proceeding meeting the requirements of G.S. 5A-15 must be followed.

The basics of a plenary proceeding include:

Order to show cause —

The plenary proceeding is commenced by the judge's issuance of an order to the person being charged to show cause why the person should not be held in contempt. The form for the show cause order is AOC-CR-219. The order must give adequate notice of the acts considered to be contemptuous. *O'Briant v. O'Briant*, 313 N.C. 432 (1985) (insufficient notice when order said only that hearing was to dispose of "all pending motions"); *In re Board of Commissioners*, 4 N.C. App. 626 (1969) (insufficient notice to county commissioner when order said to show cause for failure to provide "adequate office space" to the clerk of court); *Ingle v. Ingle*, 18 N.C. App. 455 (1973) (insufficient notice when it only directs person to appear "to testify"). Contempt may not be found for acts that occurred after the show cause order was entered because the order would not include the required notice. *State v. Coleman*, 188 N.C. App. 144 (2008).

Criminal contempt, cont.

Order for arrest —

G.S. 5A-16(b) provides that a judicial official who initiates a plenary proceeding for criminal contempt may issue an order for arrest upon a finding of probable cause that the person will not appear in response to the show cause order. The finding or probable cause has to be based on a sworn statement of affidavit. A person arrested is entitled to bail.

Venue —

G.S. 5A-15(b) provides that the proceeding may be held anywhere in the district.

Appointment of prosecutor —

G.S. 5A-15(g) authorizes the judge conducting the plenary hearing to appoint a district attorney or assistant DA to prosecute the contempt or, if there is an apparent conflict of interest, some other lawyer.

Right to counsel —

G.S. 7A-451(a)(1) provides that an indigent is entitled to appointment of counsel in any case in which the person is likely to be imprisoned or fined $500 or more. Thus, an indigent is entitled to counsel in a plenary proceeding for criminal contempt. *State v. Wall,* 49 N.C. App. 678 (1980).

Right against self-incrimination —

G.S. 5A-15(e) specifies that the right against self-incrimination applies to a plenary hearing for criminal contempt.

<u>Criminal contempt cannot be initiated by a private party</u> —

For the defendant to receive adequate notice of the charge, due process requires that criminal contempt be initiated by the court and not by a private party. *Brandt v. Gooding,*636 F.3d 124 (4th Cir. 2011). Thus, the court may not consider criminal contempt when a private party has initiated a civil contempt proceeding under G.S. 5A-23 by simply filling a motion and serving it on the other party (see below), even though the basis for the motion may be disobedience of a court order which could be either civil or criminal contempt. When the court issues a show cause order in response to the party's motion it may be that the show cause order can serve as adequate due process notice of criminal contempt if the show cause specifically states that the proceeding is to consider both civil and criminal contempt.

Criminal contempt, cont.

Contempt for violation of domestic violence protective order —

G.S. 50B-4(a) provides that contempt may be used for violation of a domestic violence protective order, but does not say whether the violation is to be treated as civil or criminal contempt. Although the statute refers to the procedure for initiating civil contempt under G.S. 5A-23, it would seem that most violations of a domestic violence protective order would warrant criminal contempt rather than civil — the purpose is to punish the person for a past violation of the order, not to imprison them until they comply. The AOC forms (AOC-CV-307, -308, -309) are numbered as civil forms, but they include options for either criminal or civil contempt.

The domestic violence statute, G.S. 50B-4(a), says the party protected by the order may proceed *pro se* using a form provided by the clerk or by a magistrate authorized by the chief district judge to hear domestic violence matters. The form is AOC-CV-307. The clerk is to schedule and issue a notice for a show cause hearing at the earliest possible date allowed under the civil contempt statute, G.S. 5A-23, which generally requires five days' notice. If the clerk is not available and there is a danger of domestic violence, the magistrate may issue the show cause order. The clerk or magistrate who issues the order is responsible for seeing that it is served by law enforcement.

No right to jury trial —

In *Bloom v. Illinois*, 391 U.S. 194 (1968), the United States Supreme Court held that criminal contempt is a crime in the ordinary sense of the term and that "serious" criminal contempts, i.e, contempts with punishment of imprisonment for more than six months or a fine of more than $500, are subject to the constitutional requirement of a jury trial. Because the maximum punishment for criminal contempt in North Carolina is 30 days' imprisonment and/or a $500 fine, the North Carolina Supreme Court held in *Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers*, 275 N.C. 503 (1969), that the right to jury trial does not apply under either the federal or state constitution. Since that decision the criminal contempt punishment statute, G.S. 5A-12, has been amended to allow imprisonment for up to six months for refusing to testify after being granted immunity. Because the maximum punishment still is not more than six months, however, the right to jury trial would not apply.

Recusal —

G.S. 15A-15(a), the statute on plenary proceedings for criminal contempt, includes this admonition about the show cause hearing: "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." There is no comparable statutory provision for summary proceedings for direct criminal contempt. Nevertheless, there may be times when the events leading up to the summary proceeding show an ongoing conflict between the judge and the defendant and suggest personal feelings on the part of the judge that warrant recusal. When any such question arises, the better practice is to recuse.

Criminal contempt, cont.

> "Precedent decrees that a judge should recuse himself in contempt proceedings where they involve personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter. Snyker's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666, 30 Am. Jur. 786. And it has been declared the better practice in recusations for prejudice to call upon some other judge whose rulings have not been ignored or disregarded, especially in cases of indirect or constructive contempt." — *Ponder v. Davis*, 233 N.C. 699, 704(1951).

As a general matter the judge who has initiated the contempt proceeding should decide whether to recuse and need not refer the issue of disqualification to another judge. When a party moves to disqualify the judge and provides sufficient support to require findings of fact, however, the decision on recusal should be referred to another judge. *Bank v. Gillespie*, 291 N.C. 303 (1976). The judge whose bias is in question then may respond to the allegations by affidavit or by testimony.

Burden of proof and standard of proof —

G.S. 5A-15(f) provides that in a plenary proceeding guilt of criminal contempt must be established beyond a reasonable doubt. Moreover, because criminal contempt, whether direct or indirect, is a crime, the constitutional safeguards applicable to all crimes apply. *O'Briant v. O'Briant*, 313 N.C. 432 (1985); *State v. Key*, 182 N.C. App. 624, 628 ("On a hearing for criminal contempt, the State must prove all of the requisite elements under the applicable statute, beyond a reasonable doubt."). Therefore, the standard of proof beyond a reasonable doubt applies regardless of whether the proceeding is summary or plenary.

The issuance of a show cause order does not shift the burden of proof in a criminal contempt proceeding. "To the contrary, a show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State." *State v. Coleman*, 188 N.C. App. 144, 150 (2008). The defendant's admission of facts may be used to establish those facts. *State v. Simon*, 185 N.C. App. 247 (2007).

Sanctions —

Although generally the punishment for criminal contempt is censure, imprisonment for up to 30 days, a fine of not more than $500, or any combination of those three (G.S. 5A-12), the imprisonment may be for up to six months for failure to testify as a witness after being granted immunity; for up to 90 days for failure to comply with a nontestimonial identification order; and for up to 120 days (which must be suspended) for failure to pay child support.

Imprisonment for criminal contempt differs from imprisonment for civil contempt in that it is for a set time whereas imprisonment for civil contempt is open-ended and continues until the person complies with the court's order. Still, G.S. 5A-12(c) empowers a judge who imposes the sentence for criminal contempt to withdraw the censure, or terminate the imprisonment or reduce the time, or remit or reduce the fine at any time "if warranted by the conduct of the

contemnor and the ends of justice." In considering such a reduction, the court should keep in mind that the purpose of criminal contempt is punishment. If the judge wants to imprison someone until the person complies with an order, civil contempt is the proper route. When a sentence for "criminal" contempt includes a set term of imprisonment but also provides for the person to be released upon payment of a sum of money or satisfaction of some other condition, it is really civil contempt. *Bishop v. Bishop*, 90 N.C. App. 499 (1988).

A sentence for criminal contempt may be suspended with conditions and the defendant placed on probation. Any special condition of probation must be reasonably related to the defendant's rehabilitation. *See State v. Key*, 182 N.C. App. 624 (2007).

The award of attorney's fees is not appropriate as part of criminal contempt. *United Artists Records, Inc., v. Eastern Tape Corporation*, 18 N.C. App. 183 (1973). Nor may the payment of attorney's fees be made a condition of a suspended sentence for criminal contempt. *M.G. Newell Company, Inc., v. Wyrick*, 91 N.C. App. 98 (1988).

Under GS 7A-304(a) costs are to be assessed in "every criminal case in the superior or district court, wherein the defendant is convicted." Although criminal contempt is not considered a criminal "conviction" for some purposes — it does not count as a prior conviction for sentencing, for example — it likely is sufficiently criminal in nature that costs may be assessed. The attorney appointment fee assessed under GS 7A-455.1 would be included in the costs because that fee was determined to be part of court costs by *State v. Webb*, 359 N.C. 92 (2004).

Although there is no case law on the issue, judges sometimes impose consecutive sentences for multiple instances of criminal contempt. For an example of three consecutive 30-day sentences for a string of obscenities, in a case resolved on other grounds, see *State v. James*, 159 N.C. App. 229 (2003) (unpublished). An argument that consecutive sentences are not appropriate is that the 30 days' punishment allowed for criminal contempt is the same as the punishment for a Class 3 misdemeanor and the sentencing statutes do not allow consecutive sentences when all convictions are for Class 3 misdemeanors.

Although contempt proceedings are for punitive purposes and are criminal in nature, a contempt conviction does not count as a prior conviction under state sentencing law. *State v. Reaves*, 142 N.C. App. 629 (2001).

Corporation held in contempt —

A corporation may be held in criminal contempt; an officer of the corporation may be ordered to pay a fine and be imprisoned if the officer knew of the court order and had responsibility and authority to bring the corporation into compliance. *State ex rel. Grimsley v. West Lake Development, Inc.,* 71 N.C. App. 779 (1984).

Criminal contempt, cont.

Double jeopardy —

A defendant may not be prosecuted for a criminal offense following a finding of criminal contempt when the contempt was based on violation of an order that prohibited the same acts that constitute the criminal offense. The test as to whether it is the same offense is the "same elements" test from the majority opinion in *United States v. Dixon*, 509 U.S. 688 (1993), based on the elements that actually led to the finding of contempt. *State v. Gilley*, 135 N.C. App. 519 (1999); *also see State v. Dye*, 139 N.C. App. 148 (2000). In district court the double jeopardy issue may arise, for example, when the defendant is being prosecuted for domestic violence after having been held in contempt for violation of a domestic violation prevention order. In superior court the issue may arise when a witness testifies falsely; holding the witness in criminal contempt likely will preclude a prosecution for perjury.

A contempt conviction does not count as a prior conviction under state sentencing law, however. *State v. Reaves*, 142 N.C. App. 629 (2001).

Appeal —

G.S. 15A-17 provides that appeal of a conviction of criminal contempt is the same as for appeals of any other criminal action, with the exception that appeal from any judicial official below a superior court judge is to the superior court. Thus, appeal from a magistrate's decision on criminal contempt is to superior court, not to district court. And appeal from a district judge's determination of criminal contempt also would be to superior court. The appeal is for a hearing *de novo*. Appeal from superior court is to the Court of Appeals.

Because G.S. 5A-17 provides that appeal of criminal contempt is the same as appeal of a criminal conviction, the provisions of G.S. 15A-1451 concerning stay of the sentence pending appeal would apply. Under G.S. 15A-1451 the defendant's notice of appeal automatically stays payment of a fine and costs but does not stay confinement until conditions of release have been determined under the bail statutes. Starting December 1, 2013, G.S. 5A-17 has been amended (see N.C. Session Law 2013-303) to provide that the bail hearing for confinement for criminal contempt must be held within a reasonable time after imposition of the confinement and that a defendant may not be confined for more than 24 hours without a bail hearing. When a magistrate or clerk orders jail for criminal contempt, the bail hearing is to be by a district judge. When a district judge orders jail for criminal contempt, the bail hearing is to be by a superior court judge. And when a superior court judge orders jail, the bail hearing is to be by a different superior court judge. If the proper official has not acted within 24 hours of the confinement, any other judicial official may hold the bail hearing.

As with other criminal matters, there is no appeal from a determination of not guilty of criminal contempt. *Patterson v. Phillips*, 56 N.C. App. 454 (1982).

CIVIL CONTEMPT

Nature and purpose of civil contempt —

Civil contempt is not punishment, it is a means to force compliance with a court order.

> "The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court." — *Jolly v. Wright*, 300 N.C. 83, 92 (1980).

Because the purpose of civil contempt is compliance, the contempt order must always include an "out" for the person who is being held in contempt, a means to clear the contempt and avoid imprisonment. If, for example, the defendant is being held in contempt for failing to transfer a deed to the other party as previously ordered by the court, the contempt order should say that the defendant is being imprisoned until the deed is signed over and will be released as soon as the defendant complies. It is an essential feature of civil contempt that the defendant always be given a means to purge the contempt and avoid the sanction. If there is no way to purge the contempt, then the defendant is being punished for criminal contempt rather than civil contempt. As stated in G.S. 5A-22(a):

> "A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in contempt must specify how the person may purge himself of the contempt."

A civil contempt order which has no purge provision will be of no effect:

> "Furthermore, the contempt order must be vacated because it fails to specify as required by G.S. 5A-22(a) how the defendant might purge herself of contempt. The purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order. *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). Thus the purging provision is essential to the order." — *Bethea v. McDonald*, 70 N.C. App. 566, 570 (1984).

Need for a written order —

In *State v. Simon*, 185 N.C. App. 247 (2007), the court held that an order did not have to be in writing for the defendant to be held in criminal contempt for its violation, but noted that the civil contempt statute is different and suggested civil contempt can be based only on a written order. *Hassell v. Hassell*, 149 N.C. App. 972 (2002) (unpublished), say so more explicitly.

No distinction between direct and indirect civil contempt —

The distinction between direct and indirect contempt, so important to criminal contempt, is irrelevant to civil contempt. There is only one kind of proceeding for civil contempt and it matters not whether the contempt occurred before the judge or not. In essence, all civil contempt is indirect and requires a notice and hearing as described below.

Civil contempt, cont.

Notice of civil contempt proceeding —

Commencement of the proceeding —

A proceeding for civil contempt may be initiated several different ways as provided in G.S. 5A-23. First, an aggrieved party may simply file and serve a motion with the appropriate notice to the party alleged to be in contempt. The motion has to be accompanied by a sworn statement or affidavit explaining the basis for contempt, but no judicial official has to review the documents before the notice is sent out.

A second option is for the complaining party to take the sworn statement or affidavit to a judge, have the judge review it and find probable cause to believe that contempt has occurred. The judge then has two choices, to either issue a notice of hearing or a show cause order. A court-issued notice of hearing informs the defendant that the hearing is being held and that the defendant will be held in contempt unless the defendant appears, but it does not specifically order the person to come to court. The show cause order does just that, it orders the defendant to appear and show cause why contempt should not be found.

As a final possibility, the notice or show cause order does not have to be initiated by a party, it may be initiated by a judge filing a sworn statement or affidavit.

Often the motion prepared by the complaining party is ambiguous as to whether the party is seeking civil or criminal contempt. If the motion is made pursuant to G.S. 5A-23, it is supposed to be for civil contempt, not criminal, and that is what the party's motion and the court's show cause order should say. If, even though the matter was brought to the court's attention by a private party, the court is contemplating criminal contempt, the show cause order must say so, because due process requires that a proceeding for criminal contempt be initiated by the court, not by a private litigant. *Brandt v. Gooding*, 646 F.3d 124 (4th Cir. 2011). In other words, if the private party is initiating the process by simply filing and serving a motion, it can only be for civil contempt and the court cannot consider criminal contempt. If the private party has sought and the court is ready to issue a show cause order, it may be that the show cause order can satisfy the due process requirement for criminal contempt, but to do so it must state clearly that the defendant might be held in criminal contempt, there should be no ambiguity about what the defendant is facing. Additionally, a defendant in a criminal contempt proceeding has rights that do not apply in civil contempt, and the punishment that may be applied is different. It is important, therefore, for the judge who signs the show cause order or who hears the matter to be clear as to which form of contempt is at issue, so as to avoid error in the proceeding.

Waiver of need for affidavit —

Although under each of the several procedures for initiating a civil contempt hearing the notice or order is supposed to be based on a sworn statement or affidavit, the

defendant waives that requirement by appearing in court to answer the charges. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 583 (1981). A defendant should be able to make a limited appearance to contest the sufficiency of the notice.

Service of notice —

Whichever way the contempt proceeding is begun, G.S. 5A-23 requires that the motion or notice or order be served on the defendant at least five days before the hearing. The contempt is invalid if no notice or show cause order is issued. *Watkins v. Watkins*, 136 N.C. App. 844 (2000). In the case of *In re Ammons*, 344 N.C. 195 (1996), a judge was censured for, among other things, issuing an arrest order in a civil contempt proceeding without notice and an opportunity to be heard.

The statute allows the five-day notice to be shortened for good cause. The actual notice the defendant has received and the time the defendant has had to prepare are factors to be considered in determining whether notice of less than five days was sufficient.

> "Thus, the judge was authorized to shorten the notice period [to five hours] for good cause, which he found upon undisputed facts to the effect that defendant had known for several months of the particular charges pending against him, had had ample opportunity to prepare and meet them, and all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties." — *M.G. Newell Company, Inc., v. Wyrick*, 91 N.C. App. 98, 101 (1988).

Contempt for failure to pay child support —

G.S. 50-13.4(f)(9) provides that an order or judgment for periodic payment of child support may be enforced through civil contempt, and that disobedience of such an order may be punished pursuant to criminal contempt.

The civil contempt proceeding may be initiated in the same manner as any other civil contempt proceeding as described above, or it may be initiated pursuant to G.S. 50-13.9(d). The AOC forms for contempt for failure to pay child support under G.S. 50-13.4 are AOC-CV-601 (motion for show cause order) and -602 (show cause order). Although the forms are designated as civil forms they include options for either civil or criminal contempt. The form for commitment of the violator, AOC-CV-603, is written as commitment for civil contempt.

Under G.S. 50-13.9(d) the clerk or court or a district court judge initiates the contempt proceeding upon an affidavit from the person to whom the child support payment is owed or, in the case of IV-D payments, the IV-D agent.

The show cause order issued under G.S. 50-13.9(d) directs the person obligated to pay child support to appear and show why that person should not be subjected to income withholding or held in contempt or both. The order also directs the person to bring to the hearing records and

information related to the person's employment and amount of disposable income. The order has to be served according to Rule 4 of the Rules of Civil Procedure.

In most child support cases there is no question that the obligor has failed to make the child support payments; the issue for the court usually is whether the failure is willful and whether the person has the present ability to pay.

For a more detailed discussion of contempt and child support, see "Using Contempt to Enforce Child Support Orders," by John Saxon, School of Government, Special Series No. 17 (February 2004).

Contempt for violation of domestic violence protective order —

As discussed above under Criminal Contempt, G.S. 50B-4(a) provides for the use of contempt for violation of a domestic violence protective order but does not specify whether it is civil or criminal contempt. As discussed above, it would seem that in most instances the proper course would be criminal rather than civil contempt. The forms provided by the AOC are numbered as civil forms but are written with options for either criminal or civil contempt.

Order for arrest —

As discussed above, G.S. 5A-16 states that a judge may issue an order for arrest for a defendant charged with criminal contempt, if it appears unlikely the person will appear. The statute on orders for arrest, G.S. 15A-305, likewise specifies in subdivision (b)(9) that an order for arrest may be issued as authorized by G.S. 5A-16. The civil contempt statutes have no provision comparable to G.S. 5A-16 about orders for arrest. There is no specific authority, therefore, for the court to issue an order for arrest for a person to appear for a civil contempt hearing.

To complicate matters, the statute on orders for arrest says in G.S. 15A-305(b)(7) that an order for arrest may be used in any situation in which the "common-law writ of capias has heretofore been issuable." Capias, also known as a "bench warrant," may have been used at some stage in a civil contempt proceeding in the days before Chapter 15A, but there is no good case law on the subject to serve as a reference.

The order for arrest issue creates difficulty only with respect to the initial hearing on civil contempt. If the defendant fails to show for the civil contempt hearing, the defendant then is in criminal contempt for disobeying the court's notice to appear or show cause order, and an order for arrest clearly could be issued then to have the person taken into custody to appear in the criminal contempt proceeding. Or the capias justification may apply at that point.

Recusal —

As discussed above, the statute on plenary proceedings for indirect criminal contempt admonishes the judge issuing the show cause order to have it returned before another judge if the contempt "is based upon acts before a judge which so involve him that his objectivity may

reasonably be questioned." There is no comparable statutory provision for direct criminal contempt nor for civil contempt. Nevertheless, as already suggested, there will be times when the history leading up to the contempt hearing implies the presence of personal feelings on the part of the judge that warrant recusal. The better practice is to recuse when there is a question.

Right to counsel —

The United States Supreme Court recently held that due process does not always require the appointment of counsel for an indigent in civil contempt proceedings where incarceration is threatened. In *Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507 (2011), the South Carolina civil contempt hearing in a child support case was initiated by one parent, unrepresented, against the other. The Supreme Court said appointment of counsel was not required because the complaining parent was unrepresented and the state had procedural safeguards to protect the defendant's interests, including notice to defendant of the importance of the ability to pay to the issue of contempt plus a fair opportunity to present evidence and to dispute relevant information. The defendant ended up serving a year for contempt, the maximum allowed under South Carolina law if the defendant failed to purge the contempt.

Before *Turner v. Rogers* the North Carolina appellate courts had held that the appointment of counsel in civil contempt cases depends on the likelihood of the person being imprisoned. An indigent defendant who is going to be jailed for civil contempt is presumed to be entitled to appointed counsel.

> "The private interest at stake in the present case [civil contempt for failure to pay child support] is, perhaps, the most fundamental interest protected by the Constitution of the United States – the interest in personal liberty. A defendant who is found in civil contempt and incarcerated for nonsupport does not 'hold the keys to the jail' if he cannot pay the child support arrearage which will procure his release. Under such circumstances, the deprivation of liberty that occurs is tremendous and may not be diminished by the fact that a civil contempt order contains a purge clause providing for the contemnor's release upon payment of arrearages." — *McBride v. McBride*, 334 N.C. 124, 130 (1993).

When faced with a potentially indigent defendant who might be jailed for civil contempt, the North Carolina Court of Appeals has said that the trial court is supposed to (1) determine how likely it is the defendant will be jailed, (2) if jail is likely, ask whether the defendant wants a lawyer and determine the ability to pay, and (3) if the defendant wants a lawyer but is indigent, appoint counsel. *King v. King*, 144 N.C. App. 391, 394 (2001). In the end, though, the right to counsel applies only if the defendant actually is jailed. Even though the indigent defendant faces the possibility of incarceration, if the court finally decides not to impose jail time then it does not matter that no lawyer was appointed. *Id.*

While *Turner v. Rogers* may allow civil contempt against an indigent defendant without counsel when the complaining party also is not represented and the defendant has been given adequate notice of the important issues to be determined, a trial court should continue to follow the

directions in *McBride* and *King* until the North Carolina appellate courts have had an opportunity to reassess their holdings in light of the United States Supreme Court's decision.

No right to jury trial —

It does not appear that a defendant is entitled to a jury trial for civil contempt, but there is no appellate decision which explicitly says so. Although the annotations in the General Statutes list *In re Gorham*, 129 N.C. 481 (1901), as holding that there is no right to a jury trial for civil contempt, the punishment rendered in that case actually looks more like criminal contempt than civil. No later cases seem to have addressed the issue, though any number of sources assume there is no jury trial for civil contempt.

As discussed above, the constitutional right to a jury trial would apply to criminal contempt as to any other criminal proceeding if the permissible punishment exceeded six months' imprisonment, but most criminal contempt is capped at 30 days' imprisonment and, therefore, there is no right to a jury. Regardless of the law about criminal contempt, civil contempt is a civil proceeding, not criminal, and the purpose is not punishment but forcing compliance with a court order. The limits on imprisonment for civil contempt are discussed below. While some acts of contempt allow indefinite incarceration, most instances of failure to pay money — with the notable exception of child support — are limited to 90 days, subject to renewal if the person still refuses to pay. It is important to remember, though, that in all cases the imprisonment is only until the defendant complies. Thus, unlike criminal contempt which requires the full sentence of imprisonment to be served, incarceration for civil contempt always is subject to the defendant being released earlier by purging the contempt.

Willfulness and the standard of proof —

The civil contempt statute specifies in G.S. 5A-21(a)(2a) that contempt requires that the "noncompliance by the person to whom the order is directed is willful." Before that language was added, the courts already had mandated a finding of willfulness:

> "Although the statutes governing civil contempt do not expressly require willful conduct . . ., case law has interpreted the statutes to require an element of willfulness. (citation omitted) In the context of a failure to comply with a court order, the evidence must show that the person was guilty of 'knowledge and stubborn resistance' in order to support a finding of willful disobedience." — *Sharpe v. Nobles*, 127 N.C. App. 705, 709 (1997).

Surprisingly, there does not seem to be any case law about the standard of proof for civil contempt. With no other standard defined, the fallback as in any civil case is preponderance of the evidence.

Civil contempt, cont.

Burden of proof —

The burden of proof in civil contempt lies with the party who is asserting that the other person is in contempt. However, once a judge has found that probable cause exists for finding contempt and has issued a show cause order, the burden shifts to the defendant to show why contempt should not be found.

Recall that contempt can be initiated by the judge or by a party who claims that the other side is in contempt. The private party may either file a motion and serve notice of the contempt hearing or may go to a judge and request a show cause order. When the private party initiates the contempt by simply filing a motion and serving notice and there has been no judicial finding of probable cause, G.S. 5A-23(a1) specifies that the complainer has the burden of proof: "The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." Because there has not yet been a finding of probable cause, the burden may not be shifted to the defendant in that circumstance. *Trivette v. Trivette*, 162 N.C. App. 55 (2004). More typically, though, the complaining party goes to a judge and makes a sufficient showing for issuance of a show cause order. When the judge has found probable cause, the burden then shifts to the defendant to show why contempt is not appropriate. *Plott v. Plott*, 74 N.C. App. 82 (1985).

The contempt proceeding also may be initiated by the judge. Under G.S. 5A-23(a) the judge is supposed to provide a sworn statement or affidavit and there is supposed to be a finding of probable cause. The result is a show cause order, just as if the contempt was initiated by a private party providing an affidavit or sworn statement. If that has happened, the burden would be on the defendant to show why contempt is not appropriate.

Regardless of who has the burden of proof, the order holding the defendant in contempt has to include findings of fact which show that evidence has been introduced to support the conclusion that the defendant has the ability to comply and has acted willfully in refusing to do so. It is not enough for the order to just state that the defendant failed to show why contempt was not appropriate.

Ability to purge the contempt, present ability to comply —

The purpose of civil contempt is not punishment, it is to obtain compliance with a court order. It follows, therefore, that the civil contempt order must specify the means by which the defendant can be in compliance and purge the contempt. This requirement has been codified in G.S. 5A-22: "The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." The purge provision is essential to the civil contempt order and without it the order must be vacated. *Bethea v. McDonald*, 70 N.C. App. 566 (1984).

It also follows logically from the purpose of civil contempt that the contempt order must include a finding that the defendant has the present ability to comply with the order. *Teachey v. Teachey*, 46 N.C. App. 332 (1980). If the person cannot comply, there is no contempt. Criminal contempt requires a finding that the defendant had the ability to comply sometime in the past and willfully chose not to do so, but what happened earlier is irrelevant to civil contempt.

Civil contempt, cont.

Although it is preferable that the contempt order include specific findings about the defendant's ability to comply, a finding that says only that the defendant has "present means to comply" is "minimally sufficient" for the appellate courts. *Adkins v. Adkins*, 82 N.C. App. 289, 292 (1986).

Civil contempt often is for failure to pay money owed to another party. The court does not need to find that the defendant has the money on hand, it is sufficient that defendant has assets that can be liquidated. In *Hartsell v. Hartsell*, 99 N.C. App. 380, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991), for example, the defendant's home equity of $60,000 was enough to establish the ability to pay $30,000. Likewise, in *Adkins v. Adkins*, 82 N.C. App. 289 (1986), the defendant's ownership of three automobiles and three trucks in his business showed he could pay.

The present ability to pay also may be based on the defendant's ability to take a job or borrow money. *Teachey v. Teachey*, 46 N.C. App. 332 (1980). If the defendant does not have a job and testifies that no work is available, however, the court must find that work is available rather than just saying that the defendant can get a job. *Self v. Self*, 55 N.C. App. 651 (1982).

A defendant may be held in contempt if the defendant can pay a portion of the money owed, but the contempt order can require payment only of that portion. *Brower v. Brower*, 70 N.C. App. 131 (1984).

As would seem obvious, a judge cannot hold a defendant in civil contempt after finding as a fact that defendant is not able to pay the amount due. *Carter v. Hill*, 186 N.C. App. 464 (2007).

No contempt if person has complied by time of hearing —

Civil contempt is used to compel a person to comply with a court order. If by the time of the hearing the person has already paid the money owed or taken whatever other action was required, there can be no finding of civil contempt, even though the compliance took place after the show cause order was entered and served. *Ruth v. Ruth*, 158 N.C. App. 123 (2003).

No right against self-incrimination —

The right against self-incrimination does not apply to civil contempt proceedings, and a defendant who refuses to present evidence in response to a show cause order does so at that person's own peril. *Hartsell v. Hartsell*, 99 N.C. App. 380, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991). By contrast, G.S. 5A-15(e) says that a person charged with criminal contempt cannot be called as a witness against the person's own interest. It is important to remember, then, that if the proceeding began with the possibility of both criminal and civil contempt, and the defendant is required to testify, the court may punish only for civil contempt.

Civil contempt, cont.

Contempt against a state agency —

A state agency may not be held in civil contempt. Sovereign immunity applies and the state has not consented to being held for contempt. *North Carolina Department of Transportation v. Davenport*, 334 N.C. 428 (1993). In *Davenport* the agency was ordered to reinstate a fired employee to the same position. When DOT put him in a different job he sought contempt, but the Supreme Court said it was not available.

Sanctions —

The only sanction the court may impose for civil contempt is imprisonment until the defendant complies with the court order. Keeping in mind that the only purpose of civil contempt is to compel compliance, a punitive sanction such as a fine or a set term of imprisonment would not be appropriate.

(Although G.S. 5A-21 lists only incarceration as a sanction for civil contempt, the possibility of a fine is mentioned in some appellate cases. In those cases, however, the discussion about a fine for civil contempt comes in the context of a general discussion about contempt and not when the court actually is reviewing the propriety of such a sanction. In *Jolly v. Wright,* 300 N.C. 83 (1980), for example, the court says that the purpose of a fine or imprisonment in civil contempt is to get the defendant to comply and that the fine or imprisonment is lifted once the defendant complies. The cited authority for that statement is a New Hampshire case, and in *Jolly* itself the issue being decided was an indigent's right to counsel, not whether a fine had been imposed properly. Likewise, the opinion in *Bishop v. Bishop,* 90 N.C. App. 499 (1988), includes a useful explanation of the difference between civil and criminal contempt. In one example, the court says that if the relief is monetary the contempt still is civil if the money is paid to the complainant or if the defendant can avoid payment by performing an act required by the court. In *Bishop*, though, the sanction used was incarceration, not a fine, and other cases clearly state that a fine may not be imposed to award compensatory damages to a plaintiff in a civil contempt proceeding. *Hartsell v. Hartsell*, 99 N.C. App. 380, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991). Given the absence of authorization in G.S. 5A-21 for use of a fine as a sanction for civil contempt, and the absence of any case law directly upholding the use of a fine, it seems that the only permissible sanction is imprisonment.)

G.S. 5A-21 spells out the length of imprisonment that may be imposed for civil contempt. Although subsection (b) says that the defendant "may be imprisoned as long as the civil contempt continues," the remainder of the statute modifies that rule. The imprisonment indeed may continue indefinitely if the contempt is for something other than paying money or if the contempt is for failure to pay child support. If the contempt is for failure to pay something other than child support, the imprisonment is for up to 90 days, keeping in mind that the defendant may go free at any time upon complying with the order and purging the contempt. If the person has not purged the contempt in 90 days, the court must conduct a new hearing and then, if it finds that the defendant still has the ability to pay, order incarceration for up to 90 more days. That process may be repeated until a full one year has been served. At that point, civil contempt is no longer available for the failure to pay.

Civil contempt, cont.

If the civil contempt is for failure to comply with a nontestimonial identification order, G.S. 5A-21(b1) limits the imprisonment to 90 days total. At the end of that time, the person must be released or arrested for the offense to which the order is related.

Award of damages and costs —

The general rule is that a court may not award costs or damages to a private party in a civil contempt proceeding. *Green v. Crane*, 96 N.C. App. 654 (1990). North Carolina is in the minority on this issue, with most other jurisdictions allowing compensatory damages to the plaintiff. See *Atassi v. Atassi*, 122 N.C. App. 356 (1996); 85 A.L.R.3d 895. The plaintiff does not get costs either. Thus, for example, the court may not order the defendant to pay the cost of the other side's expert certified public accountant. *Watson v. Watson*, 187 N.C. App. 55 (2007). Costs may be awarded, though, when the settlement agreement being enforced by the court through civil contempt (having been adopted by the court as its own judgment) specifically provides for the award of the costs of enforcement. *PCI Energy Services v. Wachs Technical Services, Inc.*, 122 N.C. App. 436 (1996).

Award of attorney's fees —

In general attorney's fees are not available in a contempt proceeding, and the court's inherent authority to issue sanctions for failure to obey its orders does not include an award of attorney's fees. *Baxley v. Jackson*, 179 N.C. App. 635 (2006). There are exceptions, however. If the court is enforcing a settlement agreement which has been adopted by the court as its own judgment, and that agreement provides for indemnification of the costs of enforcing the agreement, the court can award costs and can include attorney's fees in those costs. *PCI Energy Services v. Wachs Technical Services, Inc.*, 122 N.C. App. 436 (1996).

More importantly for district court, attorney's fees may be awarded in a contempt proceeding for child support, *Blair v. Blair*, 8 N.C. App. 61 (1970), and when the contempt is to enforce an equitable distribution order, *Hartsell v. Hartsell*, 99 N.C. App. 380 (1990). Attorney's fees also have been allowed in contempt for failure to pay alimony. *Shumaker v. Shumaker*, 137 N.C. App. 72 (2000).

Appeal —

G.S. 5A-24 provides that appeals of civil contempt are the same as appeals of other civil matters. Thus, appeal of civil contempt from either district or superior court is to the Court of Appeals. *Hancock v. Hancock*, 122 N.C. App. 518 (1996).

Trial court jurisdiction after appeal —

A civil contempt order imposing sanctions for failing to comply with discovery is immediately appealable. Although the contempt order is interlocutory, it affects a substantial right and thus may be heard on appeal. *Benfield v. Benfield*, 89 N.C. App. 415 (1988). In a case involving

contempt for noncompliance with child support and equitable distribution orders the Court of Appeals said that immediate appeal applies to all contempt orders: "The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154 (2002). The court cites *Willis v. Power Co*., 291 N.C. 19 (1976), but *Willis* does not go so far, it addresses only contempt for failing to comply with discovery. The dissent in *Guerrier* argues that the contempt order sometimes may affect a substantial right and sometimes may not and that a blanket rule is not possible. The broad statement by the majority in *Guerrier* might be considered dictum, and one should not assume that all contempt orders are immediately appealable.

If a contempt order has been appealed, the giving of notice of appeal removes the case from the trial court's jurisdiction, meaning that the court may not enforce the contempt sanctions until the appeal is decided or it is determined that there is no right to immediate appeal. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561 (1981); also see G.S. 1-294 ("When an appeal is perfected . . . it stays all proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . .")

By statute, however, appeal does not stay enforcement of contempt in cases of child support (G.S. 50-13.4(f)(9)), custody (G.S. 50-13.3) and alimony (G.S. 50-16.7(j)). *Guerrier v. Guerrier*, 155 N.C. App. 154 (2002).

Contempt to enforce a consent judgment —

Although the general rule is that civil contempt may not be used to enforce a consent judgment, the exceptions almost swallow the rule. The reasoning behind the rule is that a consent judgment is a contract and should be enforced by the same means as other contracts, not by contempt.

One exception is a consent judgment in a domestic relations case. There, the private contract is considered superseded by the court's adoption of the agreement as its own determination of the parties' rights. *Henderson v. Henderson*, 307 N.C. 401(1983).

For other kinds of consent judgments the issue is whether the court has made its own determination of facts and conclusions of law rather than simply approving the agreement of the parties. If the court has made its own determinations, the consent judgment may be enforced by contempt just like any other judgment. An example of a consent judgment that was not enforceable because it only recites the parties' agreement is *Crane v. Green*, 114 N.C. App. 105 (1994), where the judgment included no findings of fact or conclusions of law, it merely recited that it was being entered pursuant to the parties' agreement. On the other hand, in *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188 (1995), the agreement was enforceable by contempt because the consent order entered by the judge included findings of fact and conclusions of law. The findings and conclusions need not be created anew by the judge. In *PCI Energy Services v. Wachs Technical Services*, 122 N.C. App. 436 (1996), the court "adopted" and "incorporated" the parties' settlement agreement into a document which recited that it was an enforceable judgment of the court. That, in addition to the judge being familiar

Civil contempt, cont.

with the facts because he had entered a preliminary injunction in the case, was sufficient to make the agreement a court-ordered judgment subject to contempt.

CONTEMPT BY JUVENILE

Article 3 of General Statutes Chapter 5A provides slightly modified procedures for contempt by a juvenile. For purposes of the contempt statute, a juvenile is someone between six and 16 years of age who has not been emancipated and has not been convicted of a crime in superior court. G.S. 5A-31(a).

The acts which may constitute contempt by a juvenile are listed in G.S. 5A-31(a) and are the same as the acts listed in G.S. 5A-11(a) for criminal contempt.

The court may use the contempt authority against a juvenile only for direct contempt, *i.e.*, contempt that occurs in the court's presence and is likely to interrupt or interfere with matters before the court. G.S. 5A-31(b). Indirect contempt has to be handled according to the procedures in General Statutes Chapter 7B for adjudication of a juvenile as undisciplined or delinquent. G.S. 5A-33.

Direct contempt by a juvenile may be handled in a summary proceeding, but the court must appoint a lawyer to represent the juvenile and must give the lawyer and juvenile time to confer. G.S. 5A-32(a). If the court chooses not to use a summary proceeding, the judge must enter a show cause order which also appoints a lawyer to represent the juvenile. G.S. 5A-32(b). The court may order the juvenile detained as necessary to assure the juvenile's presence for the summary proceeding or to receive notice of a plenary proceeding. The order may be oral. G.S. 5A-32(e).

Sanctions may not be imposed unless the court finds that the contempt was willfully contemptuous or that the juvenile was first warned that the conduct was improper. G.S. 5A-32(c). The facts must be proved beyond a reasonable doubt. G.S. 5A-32(a)(3).

The sanctions that the court may impose for contempt by a juvenile include any or all of the following:

- Detention in a juvenile detention facility for up to five days.
- Up to 30 hours of supervised community service.
- Evaluation to determine the needs of the juvenile.

The judge may terminate or reduce the sanctions at any time if warranted by the juvenile's conduct. G.S. 5A-32(d).

Appeal of juvenile contempt is to the Court of Appeals. G.S. 5A-32(g).