

I'M IN HANDCUFFS; HOW CAN IT BE CIVIL CONTEMPT?

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Attorneys, judges and academics alike have long lamented the confusion surrounding criminal versus civil contempt. A law review article from the 1940s references contempt proceedings against the United Mine Workers, wherein the judge stated to defense counsel, “If you know the exact difference between a civil and criminal contempt, you are perhaps the only person who does.”

While on paper the law has evolved significantly since then, in practice the lack of understanding lingers, as evidenced recently by the court-ordered restraint of a public defender, purportedly for civil contempt. Hardly a distinction without a difference, the classification is significant, as it dictates differing procedures and constitutional protections. For practitioners, particularly in the heat of the moment, understanding these rights may help to preclude a contempt order that can carry with it significant professional consequences.

Criminal Versus Civil Contempt

The conclusive, most important factor in distinguishing between criminal and civil contempt is the purpose of the contempt order. If its purpose is to punish the contemnor or to vindicate the authority of the court, then the proceeding is criminal. Conversely, if its purpose is to coerce the contemnor into compliance with a court directive, then the proceeding is civil.

A key determinant in this inquiry is whether the penalty imposed is absolute or conditional on the contemnor’s conduct. Criminal contempt is a form of punishment that may not be impacted by the contemnor’s future behavior, but is instead imposed, and required to be endured, strictly on the basis of previous misconduct. For example, if a judge orders an attorney handcuffed as a punishment for something the attorney said or did, without offering the attorney an opportunity to remedy his or her conduct, the contempt is criminal in nature. By contrast, if the same attorney is offered the opportunity to remove the handcuffs if, for example, he or she is willing to apologize and does so, then the contempt is civil. Civil contempt is remedial in nature and intended to compel the contemnor’s future compliance. When contemnors carry the keys to their prison in their own pockets, the contempt proceedings are almost always civil.

Criminal Contempt

Unlike civil contempt, criminal contempt is intended to vindicate the court’s authority in the face of insubordinate and disrespectful acts. NRS 199.340 defines a wide range of behaviors as contemptuous. By way of example, NRS 199.340(1) provides that contempt is “[d]isorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority.” Criminal contempt is a

misdeemeanor crime in Nevada, carrying a possible penalty of up to six months in jail and a fine of up to \$1,000. As it concerns the violation of a penal statute, contempt allegations must be strictly construed in favor of the accused. Accordingly, criminal penalties may not generally be imposed against a contemnor who has not been afforded applicable constitutional protections, including the right to receive notice of the charges, to present a defense and, most significantly, to prove beyond a reasonable doubt.

Civil Contempt

Contrary to the traditional notions of due process afforded criminal contempt proceedings, Nevada judges may employ the summary contempt power to punish attorneys for courtroom misconduct without the same reflection and formality. NRS 22.030(1) permits summary punishment for contemptuous behavior in the immediate view and presence of the court provided that a written order is promptly entered. To ensure the summary contempt power is used appropriately, and for the purposes of appellate review, the written order must contain specific facts, not mere conclusory characterizations. The detail required to support a finding of contempt includes the actual comments held to be contemptuous and any non-verbal conduct, such as body language, tone of voice and volume.

Similar to criminal contempt, the civil contempt statute NRS 22.010 sets forth a lengthy list of acts or omissions that constitute contempt. For example, NRS 22.010(2) provides that contempt is “[a] breach of the peace, boisterous conduct or violent disturbance in the presence of the court, or in its immediate vicinity, tending to interrupt the due course of the trial or other judicial proceedings.” Pursuant to NRS 22.100, a civil contempt order carries a possible penalty of up to 25 days in jail, a fine of up to \$500 or both. In the event the contempt finding involves an act which is in the power of the contemnor to perform, NRS 22.110 permits the court to imprison the contemnor until he or she performs it.

Conclusion

While contempt of court is necessary to the preservation of our courts, it is equally important that the exercise of the contempt power, particularly the summary contempt power, be limited to the least possible power necessary to prevent the actual obstruction of justice. To that end, a working knowledge of the distinction between civil and criminal contempt will help ensure strict adherence to procedural safeguards. As the Supreme Court observed in *In re McConnell*, “[a]n independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.” **NL**



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