2022 Rocky Mountain Bankruptcy Conference

Staying Out of Jail: Dealing with Civil and Criminal Contempt

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U.S. Bankruptcy Court (D. Colo.)
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ABI Rocky Mountain Conference
Federal Criminal and Civil Contempt

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Criminal contempt is available as a sanction in a federal district court proceeding initiated under Fed.R.Crim.P. 42 and 18 U.S.C. § 401. Under 18 U.S.C. § 401, a federal court has the power to "punish by fine or imprisonment . . . such contempt of its authority . . . as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."[1] Criminal contempt is more commonly found where a party has violated an outstanding court order. *See United States v. Voss,* 82 F.3d 1521, 1525 (10th Cir. 1996). However, "misbehavior," such as the disruption of a court proceeding, forgery of a pleading or the unauthorized practice of law in a federal court may be sufficient to warrant criminal contempt. Where appropriate, a court can impose both criminal and civil contempt on the same party for the same conduct. *United States v. Rose*, 806 F.2d 931 (9th Cir. 1986).

Fed.R.Crim.P. 42 specifies:

a) **Disposition After Notice**. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) *Notice.* The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

[1] Bankruptcy courts do not have statutory authority to issue criminal contempt orders. *In re Armstrong*, 304 B.R. 402 (10th Cir. BAP 2004).

> (3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

b) Summary Disposition. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

Criminal contempt protects the dignity of the judicial system and its mandates. *White*, 478 B.R. at 181; *McCormick v. Axelrod*, 453 N.E.2d 508, 512 (1983). Criminal intent, described as a wrongful or willful violation, is required to find criminal contempt. As held in *Hayes v. Skywest Airlines, Inc.*, 789 Fed. Appx. 701 703, 704 (10th Cir. 2019):

> A conviction under § 401(1) has four elements that must be proved beyond a reasonable doubt: (1) misbehavior, (2) in or near the presence of the court, (3) that obstructed the administration of justice, and (4) that was committed with the requisite criminal intent.

Criminal contempt cases usually involve violation of a federal court order. *United States v. Themy-Katronakis*, 140 F.3d 858 (10th Cir. 1998) (violation of a permanent injunction order); *Lundahl v. Halabi*, 600 Fed. Appx. 596 (10th Cir. 2014) (criminal contempt order and bench warrant issued for failure to attend hearing and subsequent show cause hearing). However, conduct arising to the level of a fraud on the court may also be grounds for criminal contempt. The Eleventh Circuit defines fraud on the court as "that species of fraud which does or attempts to, defile the court itself . . ." *In re Brannan*, Adv. No. 04–01037, 2011 WL 5331601, at *6 (S.D. Ala. Nov. 7, 2011) (citing *TravelersIndemnity Company v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985)). In *Brannan*, the Court described fraud on the court and abuse of the bankruptcy process as complaints "which go to the heart of the bankruptcy system." *Id.* at *5. The bankruptcy process is abused if the safeguards of judicial process—court procedures and rules requiring candor and honest representations—are disregarded. *See id.* Thus, forging a signature, which violates a fundamental safeguard of the judicial process, constitutes a fraud on the court. *See id.*

United States v. Oberhellmann, 946 F.2d 50 (7th Cir. 1991), represents the one reported federal case involving forgery as a basis for contempt. There, an attorney was found guilty of criminal contempt for forging another attorney's signature on a notice of withdrawal of appearance. The attorney was sentenced to two months in jail. In *dicta*, Judge Posner addressed the issue of whether a forged pleading occurs "in or near the presence of the court" for purposes of 18 U.S.C. § 401(1).

> The difference between these two interpretations might not affect the outcome in this case, for it is uncertain that merely filing a paper with the clerk of court should be classified as a form of misbehavior that is committed in the "presence" of the court. Perhaps the term should be confined to words uttered or gestures made in the courthouse, rather than interpreted to embrace the quiet filing of a piece of

> paper, albeit a fraudulent one. The circuits are split on this (surprisingly) infrequently litigated issue. What is plain is that a mere filing in the clerk's office could not rise to the level of a contempt committed in the "actual presence of the court," the test for whether the contempt can be punished without any notice or hearing at all, Fed. R. Crim P. 42(a) [42(b)?], because that test requires that the judge have seen or heard the act alleged to be contemptuous. The present case was and could only be prosecuted under Rule 42(b) [42(a)?], which requires notice and a hearing—but it's still a pretty summary procedure, and the occasions for its exercise should be circumscribed as narrowly as is consistent with the maintenance of order and decorum essential to the effective operation of the judicial system.
>
> *Id.* at 52-53, citations omitted.

The issue actually decided in *Oberhellmann* was whether the government had proved beyond a reasonable doubt that "the misbehavior actually obstructed the administration of justice—by delaying proceedings, making more work for the judge, inducing error, imposing costs on parties, or whatever." *Id.* at 52. Ultimately, the court reversed on grounds that the government had failed to prove that the forged pleading caused an obstruction of justice. Notwithstanding the ruling in *Oberhellmann*, the bar is set rather low. *See Hayes v. Skywest Airlines, Inc.*, 789 Fed. Appx. 701 (10th Cir. 2019) (delay resulting from the need to call a bench conference or retire the jury); *United States v. Peoples*, 698 F.3d. 185, 191 (4th Cir. 2012) (conduct interrupted the orderly process of the administration of justice by distracting court personnel from, and delaying them in, completing their duties).

The unauthorized practice of law in a federal court may also result in a citation for criminal contempt under 18 U.S.C. § 401. In *United States v. Marthaler*, 571 F.2d 1104 (9th Cir. 1978), the defendant had never been admitted to the bar of any court. Nevertheless, he signed a civil cover sheet and caused a summons to be issued in a federal civil action. The judgment for contempt under 18 U.S.C. § 401(3) was upheld on appeal. *Vaughn v. City of Flint*, 752 F.2d 1160 (6th Cir. 1985), involved a non-attorney that filed a complaint and appeared in court on behalf of the plaintiffs. Upon learning that Smith was not an attorney, the district court found him in criminal contempt. On appeal, the Sixth Circuit reversed, finding that there was insufficient proof of the requisite intent. Relying on *United States v. Seale*, 461 F.2d 345, 366-7 (7th Cir. 1972), the court identified four elements necessary to support a conviction under 18 U.S.C. § 401: (1) There must be conduct which constitutes "misbehavior"; (2) the misbehavior must amount to an "obstruction of the administration of justice"' (3) the conduct must occur in the court's presence; (4) there must be some form of intent to obstruct. "The minimum requirement of establishing intent was described as proof of 'a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful."

Criminal contempt was also reversed on appeal in *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971). There, an attorney who held membership in the bars of several courts, but not the District of Columbia, volunteered, disclosed his bar status and was appointed to represent an indigent appellant. Nevertheless, when the district court learned that he was not admitted, it cited him with contempt. The appellate court held that there had been no showing of an actual obstruction of the administration of justice and no showing of a necessary degree of intentional wrongdoing.

United States v. Kimsey, 668 F.3d 691 (9th Cir. 2012), represents somewhat of an outlier. There,

the defendant had previously engaged in the unauthorized practice of law. Having determined that he had ghostwritten eight pleadings for a pro se litigant, the district court found him in criminal contempt, based on violation of the district court local rules and the applicable Nevada statute. Largely ignoring the court's prior ruling in *Marthaler*, the Ninth Circuit reversed, holding that Kimsey was entitled to a jury trial and that district court local rules were not "rule[s]," as contemplated by 18 U.S.C. § 401(3). The reasoning and result of the *Kimsey* court were rejected in *United States v. Barker*, 2014 WL 661603 (S.D. Ohio 2014).

When holding a party in criminal contempt, the Court must decide which sanction is appropriate and available—monetary fine or imprisonment. *See United States v. Misenheimer*, 677 F. Supp. 1386,1390 (N.D. Ind. 1988). There, the court decided that Misenheimer's indigent status rendered a fine "unrealistic and unenforceable" and favored incarceration as the appropriate and available sanction. *Id.* It observed that courts have a duty to exercise the power of criminal contempt with the "utmost sense of responsibility and circumspection" because there is no statutory maximum sentence for criminal contempt. *Id.* at 1388 (quoting *Green v. United States*, 356 U.S. 165, 188 (1958)). Further, the court noted that a criminal contempt sanction "should reflect the 'least possible power adequate to the end proposed.'" *Id.* (quoting *United States v. Wilson*, 421 U.S. 309, 310 (1975)). Courts "must consider . . . the probable effectiveness of any suggested sanction bringing about the result desired." *United Mine Workers of Am.*, 330 U.S. at 302–04.

Imprisonment for criminal contempt is appropriate when the defendant disobeys a court order. *Crabtree*, 47 B.R. at 153 (citing *Gompers*, 221 U.S. at 441–43). The sanction of imprisonment will not undo or remedy the harm done nor afford compensation for the disobedience. *Id.* If the imprisonment sentence is a fixed period, the defendant cannot shorten it by promising not to repeat the offense or to comply with a court order—the damage has been done and he disobeyed a court order. *See id.*; *In re Tate*, 521 B.R. 427, 441 (Bankr. S.D. Ga. 2014). This imprisonment is solely a punishment and has no coercive effect. *See id.*

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Civil Contempt in Bankruptcy Cases

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I. What is Civil Contempt?

A. Civil contempt is defined as "The failure to obey a court order that was issued for another party's benefit. A civil-contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order. The act (or failure to act) complained of must be within the defendant's power to perform, and the contempt order must state how the contempt may be purged. Imprisonment for civil contempt is indefinite and for a term that lasts until the defendant complies with the decree." *Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

B. The purpose of civil contempt is to coerce the contemnor into compliance with the court order and/or compensate for the contemnor's noncompliance.

II. Bankruptcy Court's Authority

A. The law is generally settled that bankruptcy courts have both inherent and statutory authority to enforce their own orders through civil contempt proceedings. *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019); *In re Graham*, 981 F.2d 1135 (10th Cir. 1992); *In re Skinner*, 917 F.2d 444, 447 (10th Cir 1990).

B. Contempt power is inherent in § 105(a).

III. Process for Bringing a Contempt Action

A. Procedure

a. Due process considerations require that any party or attorney whose conduct is in question be given notice of the alleged violation and an opportunity to respond or be heard before any sanction is imposed. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *Comm. of the Conduct of Attorneys Cir. 2007).*

b. Compliance with Rule 7004 satisfies the notice requirement. *In re. M&L Bus. Mach. Co., Inc.*, 190 B.R. 111, 116 (D. Colo. 1995). However, failure to comply with Rule 7004 does not necessarily mean that notice was not given. *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 272 (2010).

c. The notice must state the specific sanctions proposed. *Bradley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987).

d. The due process standard does not necessarily require a hearing. Rather, the standard requires that the contemnor be given "an opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Standard Indus., Inc. v. Aquila, Inc. (In re C.W. Mining Co.)*, 625 F.3d 1240, 1245 (10th Cir. 2010).

B. Burden of Proof

a. The moving party has the burden of showing by clear and convincing evidence that the contemnor violated a specific and definite order of the court. The burden switches onto the contemnor to demonstrate why they were unable to comply. *U.S. v. Rylander*, 460 U.S. 752, 757 (1983)

C. Elements of Contempt

a. The moving party has the burden of proving, by clear and convincing evidence, that (1) a valid court order existed, (2) the defendant had knowledge of the order, and (3) the defendant disobeyed the order. *FTC v. Kuykendall*, 371 F. 3d 745 (10th Cir. 2004).
b. Courts apply an objective standard, meaning that a court may hold a party in civil contempt for violating a court order where there is not a "fair ground of doubt" as to whether the party's conduct might be lawful under the court's order. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019).
c. However, subjective intent is not necessarily irrelevant, as civil contempt can be warranted when a party acts in bad faith. *See id.*

IV. Potential Defenses

A. Impossibility: Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. *U.S. v. Rylander*, 460 U.S. 752, 757 (1983); *U.S. v. Butler*, 211 F.3d 826, 831 (10th Cir. 2000).
B. Substantial Compliance: substantial compliance with the terms of a court's order is a defense to civil contempt.
C. Good Faith: Good faith and reasonable interpretation of the court's order is a defense.

V. Sanctions

A. Compliance: Once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Turner v. Rogers*, 564 U.S. 431, 442 (2011)
B. Court Considerations
    a. Where the purpose of the sanction is "coercive," the court must consider " the character and magnitude of the harm threatened by continued contumacy and the probable effectiveness of any suggested sanction in bringing the result desired." *O'Connor v. Midwest Pipe Fabrication, Inc.*, 972 F.2d 1204, 1211 (10th Cir. 1992).
    b. The Court must exercise the least possible power adequate to the end proposed. *See id.*
    c. The court also must consider the contemnor's financial resources and the seriousness of the sanctions' burden. *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947).
C. Monetary Sanctions
    a. If a fine is imposed for compensatory purposes, the amount of the fine must be based on the complainant's actual losses sustained as a result of the contumacy. *O'Connor*, 972 F.2d at 1211.
    b. A coercive sanction must afford the contemnor the opportunity to "purge," meaning the contemnor can avoid punishment by complying with the order. *See id.*
        i. If there is no ability for the contemnor to purge themselves, then the sanction constitutes criminal contempt. *Penfield Co. of Cal. V. SEC*, 330 US. 585 (1947); *Armstrong v. Rushton (In re Armstrong)*, 304 B.R. 432, 437 (B.A.P. 10th Cir. 2004).
        ii. Thus, if the fine accrues for failure to comply in the future, then the contempt is civil. If it is a penalty for past conduct, then it is criminal.
D. Incarceration

a. Incarceration is an appropriate coercive sanction so long as the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. *Int'l Union, United Mine Works of Am. V. Bagwell*, 512 U.S. 821 (1994).
    i. Contemnor must "hold the keys to his own cell"
b. The sanction cannot be longer than necessary to ensure such compliance and may not be so excessive as to be punitive in nature. *In re Jove Eng'g, Inc.*, 92 F.3d 1539, 1558 (11th Cir. 1996).
c. Examples:
    i. *In re Falck*, 513 B.R. 617 (Bankr. S.D. Fla. 2014): Court incarcerated debtor after debtor did not pay monetary sanctions imposed against him. The court determined that, based on the debtor's bankruptcy schedules, he had the ability to pay the sanctions order and had not done so.
    ii. *In re Allegro Law LLC*, 608 B.R. 888 (Bankr. M.D. Ala. 2019): Court incarcerated debtor for failure to turn over millions of dollars hidden from trustee and for failure to testify. Because debtor was incarcerated in part for failure to turn over "ill gotten gains" the 18-month cap on incarceration for contempt based on failure to testify did not apply.
    iii. *In re Tate*, 521 B.R. 427 (Bankr. S.D. Ga. 2014): Debtor's failure to turnover funds from arbitration award or comply with order to provide accounting of where funds were spent resulted in incarceration for contempt.
    iv. *In re Kenny G. Enterprises, LLC*, 692 Fed. Appx. 950 (9th Cir. 2017): Bankruptcy court acted appropriately in incarcerating third party who refused to turnover $1.4 million in assets of the debtor's estate.
    v. *In re Vaso Active Pharmaceuticals, Inc.* 514 B.R. 416 (Bankr. Del. 2014): Court held third-party in adversary proceeding in contempt and ordered monetary sanctions for failure to respond to discovery requests and failure to attend a hearing. The court also ordered the defendant to appear at a later hearing and, if the defendant failed to appear, the court indicated that it would incarcerate the defendant.

Faculty

Jessica Arett is an at Sherman & Howard L.L.C. in Denver, where her litigation practice focuses on commercial disputes arising out of corporate governance, construction, creditors' rights and real estate issues, as well as commercial contracts and tort claims. She represents clients of all sizes ranging from international corporations to local small businesses and individuals, successfully helping clients navigate disputes in and out of court. Ms. Arett has experience representing clients all over the country in state and federal court, arbitration and administrative proceedings. She helps creditors navigate state and national laws and regulations related to debt collection and reporting, including state and federal fair debt collection practices acts, state consumer protection laws and the Fair Credit Reporting Act. She also has experience representing debtors in chapter 11 proceedings and has successfully tried numerous claims disallowance cases on behalf of a chapter 11 debtor. Ms. Arett is one of the few Colorado lawyers that is certified as a privacy professional through the International Association of Privacy Professionals. She advises businesses and nonprofit organizations on issues related to privacy and data security, and works closely with clients to ensure compliance with the most recent data-security laws and regulations. She has experience handling data-security issues in the education, health care, public utility and financial space, and frequently advises clients on compliance with the Health Insurance Portability and Accessibility Act (HIPAA), the Family Educational Rights and Privacy Act (FERPA), the Children's Online Privacy Protection Act (COPPA), the California Consumer Privacy Act (CCPA), the Colorado Privacy Act (CPA), the European Union's General Data Protection Regulation, and other state and federal data security laws. Ms. Arett was recently selected to both the General Counsel Mentorship Program (cohort beginning in 2022) and the Denver Metro Chamber's Impact Denver program. For two consecutive years, she has been named to *The Best Lawyers in America*'s "Ones to Watch" list in recognition of her commercial litigation and appellate practices. Throughout her career, she has also litigated cases involving immigration, civil rights and protection for victims of domestic violence as part of her *pro bono* practice. Prior to joining Sherman & Howard, Ms. Arett clerked for Justice Richard Gabriel of the Colorado Supreme Court. She received her B.A. *summa cum laude* in political science and history in 2010 from the University of Minnesota and her J.D. in 2013 from the University of Chicago Law School.

Brent R. Cohen is a partner with Lewis Roca Rothgerber Christie LLP in Denver and a senior member of the firm's Bankruptcy and Creditors' Rights Practice Group. He is experienced in a wide variety of bankruptcy and insolvency matters throughout the U.S., and his practice includes the representation of debtors, creditors and trustees in bankruptcy and insolvency proceedings, as well as workouts and restructurings outside of court. Mr. Cohen regularly provides bankruptcy advice in conjunction with a variety of complex commercial transactions and has participated in some of the more significant bankruptcy litigation in the Rocky Mountain area. He has also had involvement in oil and gas, debtor/creditor and commercial litigation. Mr. Cohen is admitted to the Bars of Wyoming and Colorado. He previously served on the board of directors of the Faculty of Federal Advocates, which in 2004 presented him with the Donald C. Cordova Distinguished Service Award, and as co-chair of ABI's Unsecured Trade Creditors Committee. Mr. Cohen has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law (2022), *Chambers USA* for Bankruptcy/Restructuring (2021), *Colorado Super Lawyers* for Bankruptcy, Business Litigation (2006-20) and *5280* magazine's "Top Lawyers" List (2020). He received

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Hon. Joseph G. Rosania, Jr. is a U.S. Bankruptcy Judge for the District of Colorado in Denver. Previously, he was a shareholder of Connolly, Rosania & Lofstedt, P.C. (CR&L), where he focused onn bankruptcy-related litigation, and clerked for Hon. Jay L. Gueck, former U.S. Bankruptcy Judge for the District of Colorado. He also ran a successful solo law practice concentrating on bankruptcy and related litigation. Judge Rosania was a member of the Panel of Private Trustees for the District of Colorado from 1985-2015. He also served as a chapter 7 and 11 trustee, an examiner in three cases including a securities fraud case, and as counsel to unsecured creditors' committees in several cases, and he represented chapter 11 debtors. A frequent speaker, Judge Rosania has taught business law classes at the University of Colorado and Colorado State University. He received his J.D. in from the University of Colorado School of Law, where he was in the top 20 percent of his class.