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# Chapter 9: Contempt

# CHAPTER 9 - CONTEMPT

## 9. CONTEMPT

### 9.1 DEFINITION AND SCOPE OF CONTEMPT

**9.11** Definition of contempt:

A. Type of Behavior -

1. Disregard for or disobedience to command of the court;

**OR**

2. Interruption of court by disorderly or insolent conduct either in its presence or so near thereto as to disturb its proceedings or impair due respect for the authority, justice or dignity of the court. [Wood, 103 App. 305, 119 SE2d 261 (1961), rev'd 370 U.S. 375 (1962)].

B. Effect - Conduct must constitute "clear and present danger to orderly administration of justice" - some interference with the court's administration of justice must actually result or be imminently threatened [Wood v. Ga., 370 U.S. 375 (1962); Garland, 253 Ga. 789, 325 SE2d 131 (1985)].

C. **Courtroom Advocacy Test**: "[A]ttorney may be held in contempt for statements made during courtroom proceedings only after the court has found:
1. that the attorney's statements and attendant conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice and
2. that the attorney knew or should have known that the statements and attendant conduct exceeded the outermost bounds of permissible advocacy." [In re Jefferson, 283 Ga. 216, 657 SE2d 830 (2008)].
3. Factors to consider in considering contempt from courtroom advocacy:
   a. extent to which the attorney was put on notice prior to the contempt citation that a continuation of the offending statements would constitute contempt;
   b. likely impact of statements on fact-finder deliberations, including both the nature and timing of conduct and whether the fact-finder is a judge or jury;
   c. whether the offending statements occurred as an isolated incident or constituted a pattern of behavior;
   d. significance of the particular issue in question to the case as a whole and the relative gravity of the case; and
   e. the extent, if any, to which the trial court provoked the offending statements with its own improper statements. [In re Jefferson].

**9.12** Inherent authority - Every court has the inherent power to protect the integrity of its proceedings and processes [GA. CONST. Art. 6, Sec. 1, Para. 4].

**9.13** Limitations on exercise to control **statements** - the power of the court to punish for contempt is limited by the right of free speech and depends upon the setting of the conduct [Garland, 253 Ga. 789, 325 SE2d 131 (1985)]:

A. In court statements are subject to reasonable control, court's power broad.

B. Out of court statements during pendency of proceedings may constitute contempt **if** clear and present danger **but** balance with free speech rights delicate and court must proceed carefully.

C. Following end of proceedings or concerning judge who will no longer be involved in case, it is almost impossible to show clear and present danger.

**9.14** Exercise of contempt power last resort - Judge should never enter a finding of contempt where conduct has destroyed objectivity or even engaged judge's emotions.

**9.15** Types of Contempt

A. Civil Contempt is a tool to force obedience to court's order to do or refrain from act [Cobb v. Black, 34 Ga. 162 (1865)]. It is remedial and contemnor may be imprisoned ***only*** until he\she performs act or agrees to adhere to order [Ensley v. Ensley, 239 Ga. 860, 238 SE2d 920 (1977); [Schmidt v. Schmidt, 270 Ga. 461, 510 SE2d 810 (1999)]. It is said that contemnor has the key to the jailhouse door since compliance ends civil contempt. Considered civil proceeding.

B. Criminal Contempt consists of acts done or words spoken constituting disorderly or insolent conduct disturbing the proceedings or impairing due respect for the authority, justice or dignity of the court such that there is a clear and present danger to the orderly administration of justice. Wood v. Ga., 370 U.S. 375 (1962); Garland, 253 Ga. 789, 325 SE2d 131 (1985). The purpose of criminal contempt is punitive, not remedial; it is considered a criminal proceeding subject to criminal due process safeguards including proof beyond a reasonable doubt [Garland, 253 Ga. 789, 325 SE2d 131 (1985)] and right to counsel [McDaniel, 202 App. 409, 414 SE2d 536 (1992)]. Criminal contempt can remain an issue even after contemnor has ceased defying the court and belatedly complied with a court order, but whenever punishment is unconditional and defendant cannot end punishment by compliance, criminal due process applies [Schmidt v. Schmidt, 270 Ga. 461, 510 SE2d 810 (1999)]. Punishment is limited to 10 days and/or $200 [OCGA 15-10-2]; The procedure in criminal contempt varies depending upon whether it is ***direct*** or ***indirect*** contempt:

1. Direct criminal contempt involves disorderly or disrespectful acts committed in the presence or so near the presence of the court as to

obstruct the administration of justice. This means ***within the judge's sensory perception*** (e.g., sight, hearing, etc.) [White, 71 App. 512, 31 SE2d 78 (1944)]; court must be able to "act on its own knowledge of the facts [McDaniel, 202 App. 409, 414 SE2d 536 (1992); Moody, 131 App. 355, 358(2), 206 SE2d 79 (1974)]. Judge must be able to perceive the contemnor, need not observe the contempt [Hayes, 298 App. 419, 680 SE2d 508 (2009) (physical precedent only)(judge could not smell alcohol)]. Case law conflicting over whether non-appearance in court is direct or indirect contempt (see "Attorney non-appearance," below).

2. Direct contempt may be result of conduct outside court [Hayes (presence of alcohol in system result of prior evening's drinking)].
3. Indirect criminal contempt involves contemptuous behavior outside of the court's sensory presence [Herring, 165 Ga. 254, 140 SE2d 491 (1927)].

**9.16** Disobedience of Court Orders - To find contempt from a disobedience of a court order, one must find:

A. Accused had ***actual knowledge*** of the court order [Lassiter v. Swift & Co., 204 Ga. 561, 50 SE2d 359 (1948)];
B. Order was ***definite*** enough to put the accused on notice of what conduct was prohibited [Schiselman v. Trust Co. Bank, 246 Ga. 274, 271 SE2d 183 (1980); Affatato v. Considine, 305 Ga.App. 755, 700 SE2d 717 (2010)];
C. Order was directed to accused [In re Hadaway, 290 App. 453, 659 SE2d 863 (2008)];
D. Accused was ***able to comply*** but wilfully refused to do so [In Re: Brookins, 153 App. 82, 264 SE2d 580 (1980); A.H. Robins Co. v. Fadely, 299 F2d 557 (5th Cir., 1962); In re Hadaway (lack of wilfulness found on appeal)].

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**NOTE** - Violation of a conditional pretrial release bond is not contempt of court for either the Defendant or the victim (for instance, where the victim encourages the defendant to violate a "no-contact" provision. The only remedy is revocation of the bond [Salter v. Greene, 226 App. 384, 486 SE2d 650 (1997)]. Bonds for good behavior are different.

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**9.17** Double Jeopardy from Contempt Finding - A finding of criminal contempt is a criminal conviction for purposes of the U.S. Fifth Amendment's Double Jeopardy clause. If proof of the contempt and proof of the crime each require an element of proof not found in the other, prosecution may proceed. If one charge requires proof of everything required to show the other (plus perhaps additional elements) then double jeopardy prevents prosecution [U.S. v. Dixon, 509 U.S. 2849 (1993)].

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**EXAMPLE -** A defendant found guilty of violating a bond for good behavior which prohibited him from "assaulting or threatening" his girlfriend

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**9.2** DIRECT CRIMINAL CONTEMPT [OCGA 15-1-4]

**9.21** Record all proceedings [In re Shafer, 216 App. 725; 455 SE2d 421 (1995)] (if not feasible, must draw very detailed order with findings of fact and conclusions of law).

**9.22** Notify the accused of observed contemptuous conduct [Mayberry v Pa., 400 US 455 (1971)].

A. Must be done **immediately** after conduct, if using summary procedure [[Dowdy v. Palmour, 251 Ga. 135, 141-142(2), 304 SE2d 52 (1983)].

B. Notice must contain all factual elements of contemptuous conduct [Mayberry v Pa., 400 US 455 (1971)]; recite words or acts as exactly as possible - no conclusory statements. [In re Shafer, 216 App. 725; 455 SE2d 421 (1995)].

NOTE - Definition of "contempt" not limited to OCGA 15-1-4 [See Bradley, 111 Ga. 168, 36 SE2d 630 (1900)].

**CAUTION** - Opportunity to speak (allocation) after apprising contemnor of basis of contempt inquiry is ***always required*** - even when court just observed contemptuous conduct in its presence. Coleman, 269 App. 827, 605 SE2d 424 (2004).

**9.23** Give accused opportunity to speak (for allocution) [Mayberry v. Pa., 400 US 455 (1971); Johnson, 258 App. 33, 572 SE2d 669 (2002)]:

A. Accused may show cause why conduct not contempt.

B. Accused may show mitigating factors.

C. Accused may apologize to court.

**9.24** Pronounce sentence [OCGA 15-1-4]:

A. Must do **at once** in summary proceedings [Taylor v Hayes, 418 US 488 (1974); Spruell, 148 App. 99, 250 SE2d 807 (1978)].See order below (**9.51**).

**CAUTION -** Unless notification (**9.22**), opportunity to respond (**9.23**), and sentence are all done immediately, use the ***same procedure as indirect contempt*** (see **9.3**); additionally, if contempt is directed to judge or judge reacts to become involved in the controversy, cite the contemptuous conduct by rule nisi or other written order and recuse self from hearing the contempt [Dowdy v. Palmour, 251 Ga. 135, 141-142(2), 304 SE2d 52 (1983) (delay until end of proceeding); *compare* In re Hatfield, 290 App. 134, 658 SE2d 871 (2008) *with* In re Longino, 254 App. 366; 562 SE2d 761 (2002)]. If sentence is immediate, imposition of punishment may be postponed until the end of the proceedings [Dowdy].

B. Must be sustained by evidence beyond reasonable doubt [Garland, 253 Ga. 789, 325 SE2d 131 (1985)].

C. No right to attorney [In re Longino, 254 App. 366, 562 SE2d 761 (2002)] (but see "Right to Counsel" discussion under Case Citations below).

D. No right to jury [Bennett v. Bagwell & Stewart, Inc., 216 Ga. 290, 116 SE2d 288 (1980)].

E. Judge must not personally react or inject self in controversy [Taylor v. Hayes, 418 US 488 (1974); In re Crane, 253 Ga. 667, 324 SE2d 443 (1985)].

NOTE - If judge not able to remain impersonal, appoint another judge to hear evidence in later full hearing.

F. Order must state that:

1. Conduct was in immediate presence of Court;
2. Factual description of words or acts, stating words as exactly as possible;
3. Adverse impact of acts or words on court and administration of justice;
4. Allocution, if any, by contemnor. [In re Shafer, 216 App. 725; 455 SE2d 421 (1995)].

**9.25** Prepare written order [Barlow, 237 App. 152, 513 SE2d 273 (1999); Healy, 241 App. 266, 526 SE2d 616 (1999)].

| NOTE - Cover elements in making oral pronouncements above. |
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A. Set out and DESCRIBE fully all facts constituting contempt [Mayberry v. Pa., 400 US 455 (1971); White, 71 App. 512, 31 SE2d 78 (1944), cert. den. 324 US 864 (1945)]. May include tone of voice. Should set out word by word or act by act description. [In re Shafer, 216 App. 725; 455 SE2d 421 (1995)].

B. Identify if conduct is violation of prior order or contemporaneous warning by the court [In re Longino, 254 App. 366; 562 SE2d 761].

C. State that conduct was in immediate presence of court.

D. Set out HOW conduct interfered with or obstructed the business of the court or impaired due respect for the authority, justice or dignity of the court [Wood, 103 App. 305, 119 SE2d 261 (1961), rev'd Wood v. Ga., 370 US 375 (1962)]. [In re Shafer, 216 App. 725; 455 SE2d 421 (1995)].

E. State that court finds accused guilty of DIRECT CRIMINAL CONTEMPT by evidence establishing guilt beyond a reasonable doubt [Garland, 253 Ga. 789, 325 SE2d 131 (1985)].

F. State allocution-explanation of contemnor. [In re Shafer, 216 App. 725; 455 SE2d 421 (1995)].

G. Set out sentence imposed (maximum per contempt 10 days or $200.00 fine or both) [OCGA 15-10-2(7)]. May not impose attorney fees as part of punishment in criminal contempt. [Rapaport v. Buckhead Coach, Inc., 234 App. 363, 506 SE2d 690 (1998).]

H. Sign order.

I. File order as part of record.

## 9.3 INDIRECT CRIMINAL CONTEMPT

**9.31** Notify accused in written document (Rule Nisi) of:

A. All factual elements of alleged contemptuous conduct;

B. Date, time and place of hearing [Martin v. Waters, 151 App. 149, 259 SE2d 153 (1979)];

C. Hearing held to SHOW CAUSE why accused should not be held in contempt and punished [Carson v. Ennis, 146 Ga. 726, 728, 92 SE 221 (1917); Salter v. Greene, 226 App. 384, 486 SE2d 650 (1997)]; if notice is unclear that contempt is the issue at the hearing or fails to "inform of the charges," then it is defective [Hedquist v. Hedquist, 275 Ga. 188, 563 SE2d 854 (2002)];

D. That accused may bring legal counsel to the hearing.

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NOTE - Have accused **personally SERVED** with the Rule Nisi [Anthony v. Anthony, 240 Ga. 155, 240 SE2d 45 (1977); Salter v. Greene, 226 App. 384(1), 486 SE2d 650 (1997)]. If contemnor appears and has had adequate notice and time to prepare personal service may be waived. [Mijajlovic, 179 App. 506, 347 SE2d 325 (1986)]. It would not appear that sui juris service upon another in the household would suffice.

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**9.32** Subpoena witnesses.

**9.33** Appoint prosecutor.

NOTE - Judge may proceed without prosecutor, although this is not preferred method.

**9.34** Hold hearing:

A. Put on record (if not feasible, must make complete finding of facts in order).

B. Check if accused has attorney - if no attorney, should:

1. Determine whether defendant qualifies for appointed counsel;
2. Warn of dangers of proceeding with self-represention;
3. Obtain written waiver form if possible [Merritt, 261 App. 597, 583 Seed 283 (2003); see **5.4**D, G, **5.5**D].

C. Check that witnesses present.

D. No jury necessary [Bennett v. Bagwell & Stewart, Inc., 216 Ga. 290, 116 SE2d 288 (1960); Codispoti v. Pa., 418 US 506 (1974)].

E. Hear evidence (allow accused to cross examine, testify and present evidence).

F. Give accused opportunity for allocution to show why act not contempt, to show mitigating factors or apologize to court [Mayberry v. Pa., 400 US 455 (1971)].

G. Must find contempt beyond a reasonable doubt [Garland, 253 Ga. 789, 325 SE2d 131 (1985)].

**9.35** Pronounce sentence/draft order.

A. Must be sustained by evidence beyond reasonable doubt [Garland, 253 Ga. 789, 325 SE2d 131 (1985)].

B. Must be in dispassionate manner showing judge not personally reacting or injecting himself in the controversy [Taylor v. Hayes, 418 US 488 (1974); In Re: Crane, 253 Ga. 667, 324 SE2d 443 (1985)].

C. Should fully state facts found sustaining contempt.

D. Should state that conduct interfered with or obstructed the business of the court or impaired due respect for the authority, justice, or dignity of the court [Wood, 103 App. 305, 119 SE2d 261 (1961), rev'd Wood v. Ga., 370 US 375 (1962)].

E. State that accused found guilty of indirect criminal contempt.

F. Order covering all above matters should be in writing.

G. State and put in order sentence imposed (maximum 10 days, or $200.00, or both) [OCGA 15-10-2(7)]. May not impose attorney fees as part of punishment in criminal contempt. [Rapaport v. Buckhead Coach, Inc., 234 App. 363, 506 SE2d 690 (1998).]

H. Sign order.

I. File order as part of record.

## **9.4** CIVIL CONTEMPT

**9.41** Notify accused in writing (Rule Nisi) of:

A. All factual elements of alleged contumacious conduct;

B. Date, time, place of hearing;

C. That hearing to SHOW CAUSE why accused should not be held in contempt and punished;

D. That accused may bring legal counsel to hearing (not required, but is better practice);

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NOTE - Have accused **personally SERVED** with the Rule Nisi [Anthony v. Anthony, 240 Ga. 155, 240 SE2d 45 (1977); Salter v. Greene, 226 App. 384(1), 486 SE2d 650 (1997); Crocker v. Crocker, 132 App. 582, 589, 208 SE2d 602 (1974)]. If contemnor appears and has had adequate notice and time to prepare personal service may be waived. [Mijajlovic, 179 App. 506, 347 SE2d 325 (1986). It would not appear that sui juris service upon another in the household would suffice.

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**9.42** Subpoena witnesses.

**9.43** Hold hearing:

A. Put hearing on record (if not feasible, must make complete finding of facts in order);

B. Check if accused has attorney;

C. Check that witnesses present;

D. No jury necessary;

E. Hear evidence (allow accused to cross examine, testify and present evidence);

F. Must find that accused had ACTUAL KNOWLEDGE of Court's order that was violated to attach the accused for contempt [Lassiter v. Swift & Co., 204 Ga. 561, 50 SE2d 359 (1948)];

G. Must find Court's Order definite enough to put accused on notice of what is prohibited conduct [Schiselman v. Trust Co. Bank, 246 Ga. 274, 271 SE2d 183 (1980)]; to find an ***individual*** liable for failure of a ***corporation*** to answer, one would have to have a motion to compel and an ***order*** directed to and personally served upon the ***individual*** to meet this requirement;

H. Must find that Defendant able to comply but wilfully refused to do so [In Re: Brookins, 153 App. 82, 264 SE2d 580 (1980); A.H. Robins Co. v. Fadely, 299 F2d 557 (5th Cir., 1962)];

I. May find civil contempt by preponderance of evidence [Wagner v. Commercial Printers, Inc., 203 Ga. 1, 45 SE2d 205 (1947)].

**9.44** Pronounce sentence/draft order:

A. Recite order or decree, and duties imposed on accused, and that ORDER CLEARLY sets these out;

B. Recite findings that accused had ACTUAL KNOWLEDGE of Court's Order violated;

C. Recite FINDINGS OF FACT constituting contempt by accused;

D. Recite that accused ABLE TO COMPLY and failure to comply was due to accused's willful CONTEMPT rather than to inability;

E. Recite that all this is shown by the PREPONDERANCE OF EVIDENCE;

F. Adjudicate accused in CIVIL CONTEMPT of COURT;

G. Set conditions of Purge;

H. Order accused imprisoned (OR fined) until purge or further order of court; not limited to 10 days [Ensley v. Ensley, 239 Ga. 860, 238 SE2d 920 (1977)];

I. Draft written Order incorporating ALL above;

J. Sign Order;

K. File Order as part of record.

**9.45** Post-judgment Interrogatories Civil Contempt - CHECKLIST

1. Check the judgment date and that the judgment is not suspended by appeal or bankruptcy stay (oral notice of bankruptcy sufficient).

2. Check service of interrogatories or other notice of discovery - that the date and form of service are in order. If the discovery is against a party, service of the discovery and the motion to compel may be by mail [Clinton Leasing Corp. v. Patterson, 209 Ga. App. 336, 433 SE2d 422 (1993) (court erred in denying motion to compel due to mail service of discovery and motion to compel in default judgment, shortly after time for appeal had expired)].

3. Post-judgment interrogatories made be served on non-parties, although not pre-judgment [Esasky v. Forrest, 231 Ga. App. 488, 499 SE2d 413 (1998)].

4. Motion to compel and clear and definite order from court requiring individual to answer [*see* Affatato v. Considine, 305 Ga. App. 755, 700 SE2d 717 (2010)];

5. Were motion for contempt and show cause order (see **9.54**) ***served personally*** on the individual person to be held in contempt (see **9.41**)? *If not, do not proceed unless contemnor is present and ready to proceed.* Is the judgment debtor and person to be held in contempt the same person? If not, double-check whether person has been properly ordered to respond.

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**NOTE - Judgments against corporations** - If the post-judgment discovery is directed to a corporation, it does not authorize contempt against officers or registered agents. Discovery could be sent to a corporation, served upon the registered agent, but upon a failure to answer the agent can't be held in contempt, although the corporation may be fined each day of non-performance [American Express Co. v. Baker, 192 Ga. App. 21, 383 SE2d 576 (1989)]..

To hold an ***individual*** in contempt would require:

A. Discovery against individual (or showing that an individual had notice and responsibility for answering for corporation);
B. Motion and order compelling individual to answer [*see* Affatato v. Considine, 305 Ga. App. 755, 700 SE2d 717 (2010)];
C. Motion and show cause order personally served on said individual.

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6. Does evidence show by a preponderance of the evidence that contemnor knowingly violated court order? If contemnor has appeared, court should probably order immediate compliance to best of contemnor's ability and order complete compliance within ten days. If contemnor did not appear, proceed to contempt order.

7. Order should specify method by which defendant may purge him/herself of contempt.

8. Instruct Sheriff to bring contemnor before court ASAP upon arrest.

# CHAPTER 9 - CONTEMPT

Citations: STATUTES

Court Rules are enforceable by statutory authority [OCGA 15-1-5].

Failure to pay money ordered - may not imprison when denies money in his/her power or control unless jury trial on issue [OCGA 15-1-46].

Grounds for imposition of summary punishment [OCGA 15-1-4].

Power to enforce order in the Court's immediate presence or so close thereto as necessary to prevent disturbance or hindrance of its proceedings [OCGA 15-1-3].

Power to compel obedience to Court's judgments and orders [OCGA 15-1-3] (such as post-judgment interrogatories and turnover orders in foreclosure actions).

Sheriff liable for contempt of court or damages for (1) making a false return, (2) neglecting to arrest a defendant, (3) neglecting to levy on property of Defendant, (4) neglecting to pay over to plaintiff money collected, (5) neglecting to make proper return of writ, execution or other process [OCGA 15-13-2; 15-16-10].

Subpoena may be enforced by contempt [OCGA 24-10-25] after issuance by clerk with signature and seal but otherwise in blank [OCGA 24-10-20] provided served within a reasonable time, no less than 24 hours prior, and filed with the court 6 hours prior to required appearance [OCGA 24-10-25].

Citations: CASES

Accepting criminal case set for trial in four days, filing leave of absence, moving through associate counsel for continuance, and leaving state for vacation before trial date is indirect criminal contempt [In re Spruell, 227 App. 324, 489 SE2d 48 (1997), 237 App. 259, 515 SE2d 190 (1999)].

Action within judge's immediate presence - Expert testimony by witness as to market value is contemptuous act within judge's immediate presence by attorney when attorney previously instructed expert witness (out-of-court) to consider evidence barred by order in limine in calculating market value of property and cross-examination by opponent and court establishes instruction. Therefore contempt was subject to summary contempt adjudication [In re Longino, 254 App. 366, 562 SE2d 761 (2002) (this case permits an unusually broad reach for summary adjudication)].

Appeal - Direct appeal is allowed where punishment is imposed for contempt, if suspended pending an opportunity to purge, may be appealed then or at imposition [American Medical Security Group, Inc. v Parker, 284 Ga. 102; 663 SE2d 697 (2008); Harrell v. Federal Payables, Inc., 284 App. 395, 397(1), 643 SE2d 875, 877 (2007); OCGA 5-6-34(a)(2)]. A "finding" of contempt is not appealable where only punishment is outside of contempt powers [Parker (discovery sanction striking answer); *but see* Dowdy v. Palmour, 251 Ga. 135, 141(1), 304 SE2d 52 (1983)].

Attorney fees - Prohibited in cases of criminal contempt. [DeKalb Co. v. Bolick, 249 Ga. 843, 295 SE2d 92 (1982)]. Allowable ***only*** where expressly authorized in civil contempt cases. [Rapaport v. Buckhead Coach, Inc., 234 App. 363, 506 SE2d 690 (1998); Minor v. Minor, 257 Ga. 706; 362 SE2d 208 (1987)].

Attorney conflict - Failure to timely communicate attorney conflict may justify finding of contempt, especially when there is other evidence suggesting evasiveness [In re Holt, 262 App. 730, 586 SE2d 414 (2003)].

Attorney - mootness/seriousness - *Attorney* contemnor paying fine (after oral bond request denied) does not make contempt moot given serious professional consequences [In re Hatfield, 290 App. 134, 658 SE2d 871 (2008); *see* Dowdy v. Palmour, 251 Ga. 135, 141(1), 304 SE2d 52 (1983)(only finding). With non-attorney, case moot when sentence served [Johnson v. State, 306 Ga.App. 844, 702 SE2d 920 (2010)].

Attorney non-appearance - Attorney without notice to appear beyond statement at calendar call that case would be reached "at some point" not in contempt for non-appearance despite notice personally given to client to appear [In re Davis, 265 App. 290, 593 SE2d 740 (2004).

Attorney placed on one hour call, arriving two hours and five minutes after first call to his office, fifty-five minutes after reciving notice, and half hour after estimated time of arrival, found in wilful contempt of court [In re Omole, 258 App. 725, 574 SE2d 912 (2002)] (other cases suggest less than three hours notice for cases on-call may be insufficient).

Such failures to appear have been sometimes held to be direct contempt subject to summary adjudication [In re Omole, 258 App. 725, 574 SE2d 912 (2002)] and sometimes held to be indirect criminal contempt [In re Thomas, 174 App. 476, 330 SE2d 412 (1985); *accord*, In re Spruell, 227 App. 324, 489 SE2d 48 (1997), 237 App. 259, 515 SE2d 190 (1999); *compare* Apoian v. State, 313 Ga.App. 800, 723 SE2d 35 (2012) (similar behavior of failure to respond to subpoena cannot be handled as direct summary contempt)].

Attorney unprepared for criminal case [In re: Adams, 292 Ga. 617, 740 SE2d 134 (2013) (analyzed facts and upheld contempt finding].

Civil contempt - remedy includes incarceration until money replaced which was taken through misrepresentation (by implication) to court [In re Orenstein, 265 App. 230, 593 SE2d 690 (2004)].

Direct Civil Contempt - Failure to obey judge's direction during trial (to surrender photos that witness was questioned about) can warrant civil contempt remedy

(incarceration until order complied with) with summary contempt procedure similar to that followed in direct criminal contempt [Harvey, 219 App. 76, 464 SE2d 34 (1995)].

Double Jeopardy analysis - [U.S. v. Dixon, 509 U.S. 2849 (1993)].

"Encouraging violation of order" cannot normally be contempt where encouragement is by non-lawyer against whom order was not directed or who wasn't served with copy of order [*See* In re Harris, 289 App. 334, 657 SE2d 259 (2008); In re Hadaway, 290 App. 453, 659 SE2d 863 (2008)].

Erroneous orders - the decisions in this area are confusing. Although it has been stated that "in every case where a person is charged with contempt of court for alleged violations of a court's order, the legal correctness of the underlying order may be challenged on appeal" [Sechler Family Partnership v. Prime Group, 255 App. 854, 856 (1), 567 SE2d 24 (2002); The Atlanta Journal-Constitution v. Jewell, 251 App. 808, 809 (1) (555 SE2d 175) (2001)], this actually appears to apply only to interlocutory orders which cannot be directly appealed [Franklin v. Gude, 259 App. 521 (2003) (interlocutory order could not be challenged ***after*** direct appeal which did not raise issue); Brinkley v. Flatt, 256 App. 263, 568 SE2d 95 (2002) (unappealed, final unconstitutional visitation order could not be challenged in contempt proceeding)].

Failure to remain at **calendar call** when directed by court is **direct** contempt subject to summary punishment [In re Brant, 230 App. 283, 493 SE2d 321 (1998); Booker, 195 App. 561, 394 SE2d 791 (1990)]. Booker discusses whether conduct heard over telephone is within direct sensory perception of judge and subject to direct contempt treatment but case does not provide precedent on that matter; safer practice would be to treat as **indirect** contempt..

Falsification of documents produced for Request for Production is contempt [Dogan v. Ga. DHR, 278 App. 905, 630 SE2d 140 (2006)].

Financial inability to comply - "'Inability to pay is a defense only where the contemnor demonstrates that he has exhausted all resources and assets available and is still unable to secure the funds necessary to enable compliance with the court's order. He must show clearly that he has in good faith exhausted all the resources at his command and has made a diligent and bona fide effort to comply with the order of the court, and that he cannot borrow sufficient funds to comply with the obligation.' Furthermore, inability to pay caused by the contemnor's own misconduct is not a defense to criminal contempt." (Citations omitted.) [Affatato v. Considine, 305 Ga. App. 755, 700 SE2d 717 (2010) (delay in borrowing money in part - order violated included attorney fee payment for discovery sanction); *see* In re: Bowens, 308 Ga.App. 241, 706 SE2d 694 (2011) (sheriff claimed financial inability to comply (low budget) with court's transport orders - evidence inadequate and should have appealed transport order if in good faith)]. This authority is also relevant to financial inability to comply with criminal sentences and imposition of other discovery sanctions. Of course, court would have ***discretion*** to consider inability in mitigation which is inadequate for a defense.

Georgia Supreme Court cases establish that contempt power is constitutionally based -- i.e., Magistrate is **not** limited to the above statutory grounds although statutory limits on length of sentence do apply [e.g., Bradley, 111 Ga. 168, 36 SE2d 630 (1900)].

Grant of immunity - Immunity requires written request, finding of public interest, and perhaps a hearing, in absence contempt invalid [In re Long, 276 App. 306, 623 SE2d 181 (2005)].

Harassment of juror outside courthouse **indirect**, not direct, contempt. Must give notice of hearing, time to prepare, afford right of counsel, and not rely on hearsay [McDaniel, 202 App. 409; 414 SE2d 536 (1992)].

Inherent authority to supervise sheriff re: attendance of parties and witnesses, opportunity to consult with counsel, and security arrangements impacting fair trial [Brown, 288 App. 859, 655 SE2d 704 (2007)].

Insults to opposing counsel may be contempt [Johnson, 258 App. 33, 572 SE2d 669 (2002) (called prosecutor "absolute liar"); In re George, 206 App. 462, 463-464(1), 425 SE2d 882 (1992) ("take it outside")].

Lying to court - Attorney misrepresenting status of motion is guilty of contempt: e.g., incorrectly stating to judge's secretary and in letter that previous judge had ruled against adverse party when no ruling had yet been made [Washburn, 219 App. 428, 465 SE2d 459 (1995) (indirect criminal contempt)], misrepresenting efforts to obtain witness for trial [In re Earle, 248 App. 355 (2001)].

Misrepresenting consent of opposing party is contemptuous - remedy may include replacement of money in lieu of incarceration [In re Orenstein, 265 App. 230, 593 SE2d 690 (2004) (implied consent by reference to motion of "parties")]

Mistrial - Contempt by attorney does not warrant mistrial in criminal case ***over defendant's objection*** unless "it is ***impossible*** to proceed with the trial without injustice to the defendant...." [Johnson, 258 App. 33, 572 SE2d 669 (2002)]. Improper mistrial acquits defendant (double jeopardy).

Money judgments (non-domestic) and most other orders directing payment of money are not enforceable through contempt [Hill v. Paluzzi, 261 App. 123, 581 SE2d 730 (2003); *but see* In re Orenstein, 265 App. 230, 593 SE2d 690 (2004) (rectification of contemptuous conduct)].

No statute of limitations - There is no statute of limitations on contempt [In re Friedman, 257 App. 688, 572 SE2d 48 (2002); see Bales v. Bales, 156 Ga. 679, 681(3), 119 SE 635 (1923) (over seven years)].

Recusal required where attorney allegedly lies in response to court's question [In re Schoolcraft, 274 App. 271, 617 SE2d 241 (2005)], not if misrepresentation is to party [Dogan v. Ga. DHR, 278 App. 905, 630 SE2d 140 (2006)].

Remedy for contempt by prosecutor may include condition of dead docketing or trying case in order to purge contempt [In re Earle, 248 App. 355 (2001)].

Refusal to proceed to trial is direct criminal contempt allowing summary adjudication [In re Willis, 259 App. 5, 576 SE2d 22 (2002) (3rd continuance request refused due to no showing complete compliance with OCGA 17-8-25); Barlow, 237 App. 152, 153 SE2d 273 (1999) (e.g., turned back on jury and announced lack of readiness at every stage)] as is refusal by criminal defense attorney to actively participate after order to do so [Lee, 283 App. 369, 641 SE2d 615 (2007)].

Repeated interruptions or snide remarks after warning contempt [Johnson, 258 App. 33, 572 SE2d 669 (2002)].

Right to counsel - In ***indirect criminal contempt*** case where defendant is incarcerated, defendant has full panoply of rights to counsel associated with criminal trial: to advise him of rights, to appointment of counsel, if indigent, to obtain record of waiver of right to counsel, etc. [Merritt, 261 App. 597, 583 SE2d 283 (2003)] . Much of the language in Merritt is broad enough to include ***direct criminal contempt***, but Merritt does not discuss or overrule the cases allowing a ***summary proceeding*** when the hearing is ***immediate*** [In re Longino, 254 App. 366; 562 SE2d 761 (2002)] (See **9.22**). Neither should Merritt be extended to civil contempt, since civil contempt is only authorized when the defendant has the capacity to escape incarceration by compliance with the court's order.

Sheriff's liability for contempt for failure to serve arrest warrants - analyzing when a sheriff may be found in contempt for lack of due diligence [Heard v. Callaway, 51 Ga. 314 (1874); Smith, 205 App. 857, 424 SE2d 45 (1992)].

Subpoena - Failure to appear is indirect contempt, however, and witness is entitled to notice and hearing prior to finding [Apoian v. State, 313 Ga.App. 800, 723 SE2d 35 (2012) (treating police officer's failure to appear as summary contempt a denial of due process)].

Subpoena may be enforced by contempt despite absence of seal and signature of clerk if issued by the clerk [Brantley, 147 App. 569, 249 SE2d 365 (1978)].

Summary contempt adjudication permissible when (1) announcement of contempt and hearing on punishment are both immediate (2) announcement of contempt is immediate and punishment is delayed to end of proceeding but contempt is not directed toward the judge and the judge does not become involved in the controversy [Dowdy v. Palmour, 251 Ga. 135, 141-142(2), 304 SE2d 52 (1983); [In re Longino, 254 App. 366, 562 SE2d 761 (2002) (this case permits an unusually broad reach for summary adjudication)].

Unconditional punishment (where contemnor can not end punishment by compliance with order) of necessity is criminal contempt and requires finding of guilt beyond reasonable doubt [Schmidt v. Schmidt, 270 Ga. 461, 510 SE2d 810 (1999)].

Violation of order in limine not considered conduct directed toward the judge [In re Longino, 254 App. 366, 562 SE2d 761 (2002)].

## 9.5 FORMS

### 9.51 ORDER - Direct Criminal Contempt

_____ COUNTY STATE COURT

In Re: _____

CONTEMPT ORDER
DIRECT CRIMINAL CONTEMPT

Whereas the above captioned contemnor has committed acts which interfered with or obstructed the business of this Court, or have impaired due respect for the authority, justice, and dignity of this court to wit: _____

_____

_____

_____

_____

_____

_____

It further being found beyond a reasonable doubt that said contemnor committed said acts and committed them in the immediate presence of this Court; _____

_____

_____

_____

_____

Said contemnor is hereby found to have committed Direct Criminal Contempt and it is therefore;

ORDERED that said contemnor be:

(a) Committed to the common jail of _____ County for ____ days;

(b) Ordered to pay fines of $ _____;

This _____ day of _____, 20___

_____
Judge

**9.52** RULE NISI NOTICE - Indirect Criminal Contempt

STATE COURT OF _____ COUNTY

IN RE: _____

RULE NISI
INDIRECT CRIMINAL CONTEMPT

Whereas the above captioned alleged contemnor is alleged to have committed acts which interfered with or obstructed the business of this Court, or to have impaired due respect for the authority, justice, and dignity of this Court to wit: _____
_____
_____

Now therefore it is hereby ORDERED that said contemnor be served forthwith with a copy of this Rule Nisi and appear before this Court at _____o'clock ___m. on the ___ day of _____, 20 __ there to show cause if any he have why he/she should not be held in contempt of Court. Hearing will be held in Room _____ of the _____ County _____ located at _____.

Said accused contemnor may bring legal counsel to said hearing if desired.

So ordered this _____ day of _____, 20___.

_____
Judge

I hereby certify that said accused contemnor has been personally served by me with a copy of this Rule Nisi at _____o'clock __m. on the ____day of _____ 20 __.

_____
Deputy Sheriff

**9.53** ORDER - Indirect Criminal Contempt

STATE COURT OF _____ COUNTY

IN RE: _____

CONTEMPT ORDER
INDIRECT CRIMINAL CONTEMPT

Whereas, the above captioned contemnor was alleged to have committed acts which interfered with or obstructed the business of this Court, or to have impaired due respect for the authority, justice, and dignity of this court, to-wit: _____
_____
_____
_____ ;

And whereas, said contemnor was served with a Rule Nisi stating a date, time and place of a hearing to be held before this Court for accused contemnor to show cause why he/she should not be held in contempt;

And whereas, the accused contemnor was informed that he/she might bring legal counsel to said hearing;

And whereas, said hearing was held and contemnor did not show cause why he/she should not be held in contempt, but evidence was presented showing beyond a reasonable doubt that the contemnor did knowingly and willfully commit said acts of contempt.

NOW, THEREFORE, the Court finds beyond a reasonable doubt that said contemnor is guilty of Indirect Criminal Contempt and it is hereby

ORDERED that said contemnor be:

(a) committed to the common jail of _____ County for _____ days;
(b) be fined in the amount of $ _____.

This _____ day of _____, 20___.

_____
Judge, State Court
of _____ County

**9.54** RULE NISI - Indirect Civil Contempt

STATE COURT OF _____ COUNTY

IN RE:_____

RULE NISI
CIVIL CONTEMPT

Whereas the above captioned alleged contemnor is believed to have violated an ORDER of this Court, said order attached as Exhibit I hereto, and

Whereas it is believed that said alleged contemnor possessed actual knowledge of the existence of said order and the contents thereof;

Whereas it is believed that said order is sufficiently defined to place alleged contemnor on notice of what conduct is prohibited;

Whereas it is believed that said alleged contemnor was able to comply with said order but that he willfully failed to do so by:

_____

_____

Now therefore it is hereby ORDERED that said contemnor be served forthwith with a copy of this Rule Nisi and appear before this Court at _____o'clock __ m. on the ___day of _____, 20__ there to show cause if any he have why he/she should not be held in contempt of Court. Hearing will be held in Room ____ of the _____ County _____ located at _____ .

Said accused contemnor may bring legal counsel to said hearing if desired.

So ordered this ___ day of _____, 20____.

_____
Judge, State Court of
_____ County

I hereby certify that said accused contemnor has been personally served by me with a copy of this Rule Nisi at ____ o'clock __.m. on the ___ day of _____, 20___.

_____
Deputy Sheriff

**9.55** ORDER - Indirect Civil Contempt

STATE COURT OF _____ COUNTY

IN RE: _____

ORDER
CIVIL CONTEMPT

Whereas the above captioned contemnor was alleged to have committed acts in violation of a lawful ORDER of this Court said order attached hereto as Exhibit I, and said acts being that accused did _____
_____
_____

And whereas accused contemnor was served with a Rule Nisi scheduling a hearing date time and place there to show cause why he should not be found in Contempt of Court;

And whereas said hearing was held and evidence considered establishing that accused contemnor did perform the acts described above and that said acts were in violation of this Courts Order attached. Said evidence further established that the accused contemnor did have actual knowledge of the existence of said Order and that said Order did impose duties upon him. That the accused contemnor was able to comply with said Order but did wilfully fail to do so.

Whereas all the above was established at the Rule Nisi hearing by a preponderance of the evidence.

Now therefore this Court finds that contemnor is in Civil contempt of the Court.

It is hereby ORDERED that said contemnor is to be held in the common jail of _____ County or fined in the amount of $ ___ until he purges himself of contempt by
_____
_____
_____

Upon satisfactory evidence present to the Court that contemnor has purged himself of contempt, the Court shall order release of the contemnor.

So ordered this _____day of _____, 20 ___

_____
Judge