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ARTICLE

CLARIFYING CONTEMPT IN CIVIL CASES: APPROPRIATE USES IN FLORIDA

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I. INTRODUCTION

Contempt is a remedy available to address improper behavior by parties, witnesses and counsel.[2] The laws about contempt have been recognized as "elusive" and "a mess,"[3] and prior articles endeavored to explain

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[2] In addition to the general confusion about what type of contempt is involved in a given case and what the relevant procedures are, in light of the number of cases in which counsel is accused of contempt, it is critical for counsel to understand the rules applicable to contempt to both represent clients and to protected oneself.

[3] *See* William F. Chinnock & Mark P. Painter, *The Laws of Contempt of Court in Ohio*, 34 U. TOL. L. REV. 309, 349 (2003).

the applicable law and suggest changes to the law.[4] This Article explores and clarifies how contempt applies in Florida, when contempt may be appropriate, the type of contempt applicable, and the procedure to be followed when a party, witness, or counsel is held in contempt in civil litigation.[5] Rights of the accused are explained, as are nuances in the law that counsel should know before seeking or defending against contempt.

Considerable confusion is reflected in the reported opinions,[6], as courts frequently do not explicitly or accurately state the type of contempt involved in a given case.[7] Courts also mischaracterize the type of contempt

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[4] *See generally id.*; Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 426-27 (2000); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1098 (1993).

[5] This Article focuses on contempt imposed where the underlying action is civil rather than criminal. There are additional rules applicable to specific types of proceedings which are mentioned but not fully analyzed in this Article. The reader may need to consult these rules in a given case. An example is FLA. FAM. L.R.P. 12.615, which generally governs civil contempt in support matters related to family law cases. That rule and the cases based on contempt in family law matters could easily constitute a separate article. *See* FLA. FAM. L.R.P. 12.615 (amended 2012).

[6] *See* Parisi v. Broward Cnty., 769 So. 2d 359, 364 (Fla. 2000) (referencing the "'somewhat elusive" distinction between civil and criminal contempt); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911) (addressing whether the contempt judgment was civil or criminal).

[7] *See* Gay v. McCaughan, 105 So. 2d 771, 773-74 (Fla. 1958), *aff'd after remand*, 114 So. 2d 170 (Fla. 1959). In *McCaughan*, the court was asked to rule on the dissolution of a contempt order entered years earlier against an individual who sought appointment of a curator for her grandmother's property. *Id.* at 773. The issue posed was whether the trial court had jurisdiction to enter a contempt order based on the granddaughter's actions after a curator was appointed, as those actions interfered with the curator's efforts to take control of the grandmother's out-of-state property. *Id.* at 774. The court stated, "it is difficult to see how, in any event, the alleged conduct of appellant could have constituted a civil contempt remedial in nature and triable in the principal action, as opposed to a criminal contempt or transgression of the authority of the court itself, which under our law is treated as an independent positive proceeding." *Id.* In that case the Florida Supreme Court did not have a copy of the contempt order. *See id.*; *see also* Blechman v. Dely, 138 So. 3d 1110, 1113 (Fla. Dist. Ct. App. 2014) (noting possession of copy of indirect contempt order). In *Blechman*, the trial judge orally stated that the personal representative of the estate would be held in indirect civil contempt for failure to obey a court order, but the written order stated that the personal representative was guilty of indirect criminal contempt for the same conduct. 138 So. 3d at 1113. The decedent's son served both as personal representative of the estate and as trustee of the trust which was the remainder beneficiary of the estate. *Id*. at 1112-13. The trust bestowed certain financial benefits on decedent's girlfriend following decedent's death. *Id*. The personal representative/trustee was ordered to pay those benefits, despite his representation to the court that the estate lacked sufficient wealth to fund the remainder gift to the trust and thus the trust lacked funds to satisfy the distributions to the beneficiary. *Id.* at 1113. The beneficiary first obtained a court order requiring the personal representative to distribute to the trust and the trustee to pay the beneficiary, and then obtained an order holding the personal representative/trustee in contempt for failure to comply with the court's prior order. *Id.* The court's contempt order stated that the personal representative could purge by filing an accounting and transferring the estate assets to a new personal representative. *Id.* In *Mueller*, the former personal representative of a decedent's estate was held in contempt, but the opinion failed to specify the type of contempt imposed. *See* Mueller v. Butterworth, 393 So. 2d 1158, 1159 (Fla. Dist. Ct. App. 1981). In addition, in *Shook v. Alter*, the

involved.[8] One consequence reflected by reported opinions is a high incidence of reversals of contempt judgments on appeal; this predicament is not unique to Florida.[9]

Part 1 of this Article explains the types of contempt that exist and why the distinctions matter. Part 2 sets forth the procedure to be followed to obtain a conviction for direct criminal contempt. Part 3 describes the procedure applicable in indirect criminal contempt cases. Penalties available for criminal contempt are detailed in Part 4. Part 5 of the Article explains procedures applicable when civil contempt is asserted. Part 6 of the Article illustrates application of civil contempt in estate, trust and guardianship cases. Remedies available on a finding of civil contempt are addressed in Part 7, whereas Part 8 focuses on review of judgments of contempt.

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appellate court concluded "that although the trial court thought it was holding appellant in civil contempt, it was in actuality criminal contempt which the court was imposing." 729 So. 2d 527, 527 (Fla. Dist. Ct. App. 1999). As a consequence of the trial court's misunderstanding, proper procedures were not followed resulting in a reversal on appeal. *See id*. *Taylor v. Searcy Denney Scarola Barnhart & Shipley, P.A.*, also presents an example of a trial court holding counsel in indirect civil contempt for violating an injunction and imposing a fine when the case involved an alleged indirect criminal contempt. *See* 651 So. 2d 97, 98-99 (Fla. Dist. Ct. App. 1994). Additionally, where a trial court failed to specify whether individuals were held in civil or criminal contempt, because they were ordered to pay a fine, the order included no purge provision, and there was no indication that the fine was compensatory or related to any damages suffered by the party filing the contempt motion, the court concluded that the fine was imposed as a punishment and the trial court adjudicated indirect criminal contempt. *See* Lindman v. Ellis, 658 So. 2d 632, 634 (Fla. Dist. Ct. App. 1995). Similarly in *Keitel v. Keitel*, a former husband moved for both civil contempt and indirect criminal contempt against his former spouse, when she moved from Florida to New York with the parties' minor son. 716 So. 2d 842, 843 (Fla. Dist. Ct. App. 1998). The title of the trial court's order entered referenced indirect criminal contempt, and the substance of the order did not expressly state the type of contempt imposed. *Id*. Because the order included a purge provision if the former wife returned to Palm Beach County or petitioned the court for modification, the appellate court determined that the contempt was indirect civil contempt. *See id*. at 843-44.

[8] *See* Plank v. State, 190 So. 3d 594, 607 (Fla. 2016) (holding trial court erroneously found defendant in direct criminal contempt when indirect criminal contempt was appropriate).

[9] *See* Goldberg v. Maloney, No. CIV. 4:03-2199, 2011 WL 864922, at *1, 4 (N.D. Ohio Mar. 10, 2011) (discussing 6th Circuit's disagreement with district court on issue of contempt on remand), *aff'd*, 692 F.3d 534 (6th Cir. 2012). An attorney was convicted of direct criminal contempt by a judge in a probate proceeding and a sanction was imposed requiring his repayment of funds of several estates plus incarceration for three consecutive 180 day periods. *Id*. at *1. His wrongful conduct included attempts to suborn perjury by witnesses and his failure to adhere to court orders requiring him to repay sums, including fees, improperly taken from decedents' estates. *Id*. The defendant initially sought habeas corpus on the basis that he did not receive adequate notice of all charges asserted by the probate judge in the contempt order, as the perjury allegations did not appear in the judge's order to show cause and the order to show cause did not indicate whether the contempt asserted was criminal or civil. *Id*.

II. TYPES OF CONTEMPT

"[D]etermining whether the contempt proceedings are civil or criminal is critical to the court and to the parties because the nature of the contempt both determines the procedures for adjudication [and the rights of the accused,] and sets the parameters for the sanctions that can be imposed."[10]

When counsel seeks imposition of contempt and drafts proposed judgments of contempt, counsel should be careful to expressly state the type of contempt involved, and to assure that proper procedures are followed, and the rights of the accused are preserved. "The purpose of the contempt power is to provide the trial court with the authority to enforce its orders expeditiously and efficiently, to maintain order and dignity in court proceedings, and to punish acts which obstruct the administration of justice."[11] Contempt exists when an intentional act or willful failure to act interferes with a court's ability to function or administer justice.[12] "[U]sing profanity to refer to the trial court clearly constitutes contemptuous conduct."[13] However, there is no clear delineation as to what conduct is contumacious.[14] The public interest served by the law of contempt of court has been described by judges as follows:

> The individual's right to a fair trial before a court of law is fundamental in a free society governed by a civilized system of justice. It is a basic tenet of such a society, and critical to the assurance of public faith in the rule of law and the proper administration of justice, that a right to a fair trial is essential. The law of contempt of court supports these truths providing sanctions against misbehaviors that would undermine the guarantees of a fair trial, result in disrespect for the

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[10] *Parisi*, 769 So. 2d at 364.

[11] Aaron v. State, 345 So. 2d 641, 642 (Fla. 1977), *cert. denied*, 434 U.S. 858 (1977); *see also* Weinberg v. Weinberg, 137 So. 3d 600, 603 (Fla. Dist. Ct. App. 2014) (noting Florida courts have inherent power to hold parties in contempt to ensure justice). "[C]ourts have long possessed authority to enforce judgments by the exercise of their contempt powers." Tarantola v. Henghold, 233 So. 3d 508, 510 (Fla. Dist. Ct. App. 2017).

[12] Merrill Lynch Tr. Co. v. Alzheimer's Lifeliners Ass'n, 832 So. 2d 948, 954 (Fla. Dist. Ct. App. 2002).

[13] Woodie v. Campbell, 960 So. 2d 877, 878 (Fla. Dist. Ct. App. 2007).

[14] *See* Dudley, *supra* note 3, at 1029. For example, an attorney who appeared at a court hearing after having an alcoholic drink did not engage in contemptuous conduct when she properly represented her client in a respectful manner. Edge-Gougen v. State, 182 So. 3d 730, 732-33 (Fla. Dist. Ct. App. 2015). "Repeated disregard of court orders and lack of candor by a party toward the Court justifies findings of either civil contempt or indirect criminal contempt so long as lawful procedures and conditions adhere." Lo v. Lo, 878 So. 2d 424, 426 (Fla. Dist. Ct. App. 2004).

> rule of law, and cause lack of public confidence in the administration of justice. 'It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.'[15]

"Courts are concerned not only with conduct that is likely to cause interference with justice, but also with conduct that might undermine confidence" in the judicial system.[16] A person who violates a court order may be held in contempt, even if on appeal the underlying court order violated is held to have been improper and set aside.[17] If a trial court's order violated was erroneous because it was legally or factually incorrect, it may still form the basis for contempt.[18] When a trial court's order is alleged to be

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[15] Chinnock & Painter, *supra* note 2, at 310 (citation omitted).

[16] *Id*. at 311.

[17] *See* Walker v. Wallace, 357 So. 3d 708, 709 (Fla. Dist. Ct. App. 2023) (holding court properly ordered contempt, irrespective of whether underlying order was erroneous); United States v. United Mine Workers of Am., 330 U.S. 258, 294 (1947). In *United Mine Workers*, defendants were held in civil and criminal contempt for violating a court order granting injunctive relief precluding a strike. 330 U.S. at 269. Reversal of the contempt order was not required, even if the lower court erroneously granted the injunction. *Id*. at 294-96; *see also* Dolman v. United States, 439 U.S. 1395, 1397 (1978) (noting a criminal conviction for contempt may be valid despite validity of underlying order). The same conclusion is reached if the trial court's order is upheld on appeal, although the attorney held in contempt believed the order was invalid. *See* Taylor v. Searcy Denney Scarola Barnhart & Shipley, P.A., 651 So. 2d 97, 98 (Fla. Dist. Ct. App. 1994). In *Taylor*, an attorney employed by the Searcy Denney firm represented a woman in a medical malpractice action. *Id*. at 98-99. The associate left the firm and the client wanted him to continue representation. *Id*. at 98 n.1. A motion to substitute Mr. Taylor and his new employer as counsel for plaintiff in the malpractice case was filed. *Id*. at 101. In the malpractice case the judge declined the request of Searcy Denney that Mr. Taylor be precluded from communicating with the client. *Id*. Searcy Denney commenced a separate action in which the firm sought and obtained an injunction ex parte precluding Mr. Taylor from communicating with the client. *Id*. When Mr. Taylor continued to communicate with the client despite the injunction, the trial court held him in indirect civil contempt and imposed a compensatory fine of $1,700,000.00. *Id*. at 102-03. The injunction ended prior to the finding of contempt and after Mr. Taylor's motion to be substituted as counsel was granted. *Id*. at 98. Because the injunction was no longer in effect, contempt could not have been to coerce compliance with a court order. *Id*. at 98-99. As the procedures required to support a finding of indirect criminal contempt were not complied with, the contempt order was reversed. *Id.* at 98; *see also* Carnival Corp. v. Beverly, 744 So. 2d 489, 494, 496 (Fla. Dist. Ct. App. 1999) (reiterating counsel who violates order relating to trial conduct commits direct criminal contempt even if erroneous). The court stated, "[c]ounsel's perception of the correctness of the trial court's ruling is no excuse for engaging in contemptuous behavior and disregarding the court's order." *Carnival*, 774 So. 2d at 496 (quoting Soven v. State, 622 So. 2d 1123, 1125 (Fla. Dist. Ct. App. 1993)). "If counsel believes a trial court ruling is incorrect, the remedy is to challenge those rulings at the appellate level." *Id*.

[18] *See* Abdo v. Abdo, 320 So. 3d 791, 795 (Fla. Dist. Ct. App. 2021) (differentiating effect of void orders from erroneous ones). If the underlying court order allegedly violated was invalid and the trial court adjudicated civil contempt, the civil contempt order may cease having effect. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911).

unconstitutional or otherwise invalid, the proper procedure to avoid contempt is to challenge it on appeal and not to violate it.[19] However, if the trial court's order is void because it is issued by a court lacking jurisdiction over the parties and subject matter, its violation may not justify a finding of contempt.[20]

Contempt may be civil or criminal.[21] Civil contempt may include aspects of criminal contempt and vice versa.[22] The same behavior may simultaneously constitute both civil and criminal contempt.[23] Civil contempt arises when a party in a civil action fails to adhere to a court order.[24] "The purpose of civil contempt is to compel a party to comply with a court order or to compensate a movant for losses sustained as a result of the contemnor's conduct."[25] The ability to impose consequences for civil contempt is derived

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[19] *See* Walker v. Birmingham, 388 U.S. 307, 313-15 (1967) (noting individuals were held in contempt for violating injunction precluding protest, without challenging validity of injunction).

[20] *See Abdo*, 320 So. 3d at 795. In *Abdo*, the defendant was held in civil contempt for violation of a court order requiring him to return to plaintiffs certain assets owned by out of state entities. *Id*. at 794. It was not established that the defendant had access to or the ability or authority to control and return the assets, and the appellate court had previously ruled that the trial court lacked jurisdiction over the out of state entities. *Id*. at 795. The out of state entities were not parties to the lawsuit. *Id*. at 794. The trial court could not properly circumvent the jurisdictional deficiency by ordering defendant to return the corporate assets absent proof that he had the ability to comply with the order. *Id*. at 794.

[21] *See* Chinnock & Painter, *supra* note 2, at 311. There is authority for the proposition that contempt proceedings include both civil and criminal characteristics. *See id*.

[22] *Gompers*, 221 U.S. at 441.

[23] *See* United States v. United Mine Workers of Am., 330 U.S. 258, 298-99 (1947) ("The same acts may justify a court in resorting to coercive and to punitive measures.").

[24] Keul v. Hodges Blvd. Presbyterian Church, 180 So. 3d 1074, 1078 (Fla. Dist. Ct. App. 2015). "[T]he purpose of a civil contempt proceeding is to obtain compliance on the part of a person subject to an order of the court.'" Blechman v. Dely, 138 So. 3d 1110, 1114 (Fla. Dist. Ct. App. 2014) (quoting Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985)); *see* Shook v. Alter, 729 So. 2d 527, 528 (Fla. Dist. Ct. App. 1999) (recognizing that "the primary purpose of a civil contempt proceeding is to compel future compliance with a court order"). As there was no order entered directing counsel to take any action, there could be no civil contempt. *See Shook*, 729 So. 2d at 528.

[25] Elliott v. Bradshaw, 59 So. 3d 1182, 1184 (Fla. Dist. Ct. App. 2011).

from the court's inherent authority to compel compliance with its orders,[26] and is also reflected in a Florida statute.[27]

In contrast, criminal contempt is imposed as a punishment pursuant to court rules[28] for failure to comply with a court's order.[29] Thus, the purposes of civil and criminal contempt differ. However, "the stated purpose of a contempt sanction is not determinative of whether a contempt sanction is civil or criminal."[30]

Where the court's primary purpose is to punish, the contempt is criminal, and where the purpose is to compel compliance with a court order, the contempt is civil.[31] In determining the primary purpose of the contempt

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[26] *See* Parisi v. Broward Cnty., 769 So. 2d 359, 363 (Fla. 2000). "Broad, discretionary contempt powers provide the courts with the 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'" *Id*. (quoting Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821 (1994)); *see* Bessette v. W.B. Conkey Co., 194 U.S. 324, 327 (1904) (noting power to punish is inherit in all courts); Shillitani v. United States, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.") (citations omitted). For a detailed history and analysis of the contempt powers of the court and whether the courts have the inherent power to punish for contempt, please see the following cited article. *See* Emile J. Katz, *The "Judicial Power" and Contempt of Court: A Historical Analysis of the Contempt Power as Understood by the Founders*, 109 CALIF. L. REV. 1913, 1913 (2021).

[27] *See* FLA. STAT. § 38.22 ("Every court may punish contempts against it whether such contempt be direct, indirect, or constructive, and in any such proceeding the court shall proceed to hear and determine all questions of law and fact.").

[28] FLA. R. CRIM. P. 3.830, 3.840.

[29] *See In re* Rasmussen's Est., 335 So. 2d 634, 635 (Fla. Dist. Ct. App. 1975) ("A criminal contempt proceeding is instituted solely to vindicate the authority of the court to punish for conduct offensive to the public in violation of a court order."); *see also Blechman*, 138 So. 3d at 1114; Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985); *Shook*, 729 So. 2d at 528; *Elliott*, 59 So. 3d at 1184.

[30] *Parisi*, 769 So. 2d at 364 (citing Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827-28 (1994); Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 441 (1911). In *Shillitani*, the court elaborated:

> The fact that both the District Court and the Court of Appeals called petitioners' conduct "criminal contempt" does not disturb our conclusion [that civil contempt was involved]. Courts often speak in terms of criminal contempt and punishment for remedial purposes. It is not the fact of punishment but rather its character and purpose that often serve to distinguish [civil from criminal contempt].

384 U.S. at 368 (citations omitted). Where sentences of incarceration were intended to coerce, as evidenced by the fact that incarceration would terminate when defendant complied with the court order, the contempt is civil. *See id*. at 368-70.

[31] *Shillitani*, 384 U.S. at 370. In *Shillitani*, the defendant was imprisoned for contempt for refusal to answer questions before a grand jury, and sentenced to two years of imprisonment, with the prison sentence to be terminated at such time as defendant answered the questions posed. *Id*. at 365. Because the defendant could avoid incarceration by answering questions the contempt was civil. *Id*. The primary purpose is the focus, as sanctions may have incidental effects. *See id*.

order, whether the defendant failed to do an act required under a court order or violated a court order by doing a prohibited act may be considered.[32] "The distinction between refusing to do an act commanded—remedied by imprisonment until the party performs the required act; and doing an act forbidden—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."[33]

> It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa.

Gompers, 221 U.S. at 443; *see also* D.H. v. T.N.L., 191 So. 3d 943, 945 (Fla. Dist. Ct. App. 2016) (addressing indirect civil contempt in father's dependency case without prior determination of ability to pay).

[32] *Gompers*, 221 U.S. at 442. The Court stated:

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases [of civil vs. criminal contempt]. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of any order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished with no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operated, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

Id. at 442-43.

[33] *Id.* at 443. In *Bajcar*, due to the trial court's failure to expressly state which form of contempt the court was applying, the appellate court was required to "determine whether the contempt hearing, and the writ of bodily attachment issued at the conclusion of the hearing, constituted a civil or criminal contempt." Bajcar v. Bajcar, 247 So. 3d 613, 616 (Fla. Dist. Ct. App. 2018). In *Bajcar*, a father was held in contempt by the trial court and a writ of bodily attachment was issued when the mother claimed that, contrary to the court's order, the father took the minor child to Poland where a divorce action was pending and did not return the child to Florida or allow the mother

It is not always easy to determine whether contempt asserted is criminal or civil. This is particularly true as civil and criminal contempt may be tried in one proceeding,[34] and there may be multiple contempt motions made and orders entered in one case.[35] One factor to consider in making this determination is whether the contempt proceeding occurs in the original action in which a court order was violated, or whether an independent criminal case was instituted.[36] "Proceedings for civil contempt are between the original parties and are instituted and tried as part of the main cause . . . . On the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not part of the original cause."[37] Another factor to consider is whether a court order was previously entered which the defendant is accused of violating.[38] When there is no prior court order that an individual is accused of violating or with which the court is encouraging compliance, the contempt is criminal rather than civil.[39] This factor is not alone determinative, as violation of a court order may also result in criminal contempt. A "court's suggestion that appellant might be facing incarceration did not necessarily suggest a finding of criminal contempt because incarceration may be used in civil contempt to coerce compliance with a court order."[40]

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contact with the child. *Id*. After stating the differences between civil and criminal contempt, the court concluded that the contempt involved was indirect criminal contempt. *Id.* at 617.

[34] *See* United States v. United Mine Workers of Am., 330 U.S. 258, 298-301 (1947). The Court stated that the better practice was to try civil and criminal contempt separately to "avoid obscuring the defendant's privileges in any manner," but recognized that "mingling of civil and criminal contempt proceedings must nevertheless be shown to result in substantial prejudice before a reversal will be required." *Id*. at 299-300. Prejudice is avoided where the rights accorded to defendants in criminal contempt proceedings are adhered to. *Id.* at 300-01.

[35] *See* Weinberg v. Weinberg, 137 So. 3d 600, 601-03 (Fla. Dist. Ct. App. 2014) (demonstrating that there were at least five motions for contempt filed against trustee).

[36] *Gompers*, 221 U.S. at 445-46 (differentiating contempt proceedings in original actions from independent criminal contempt cases).

[37] *Id*. at 445.

[38] *See* Shook v. Alter, 729 So. 2d 527, 528 (Fla. Dist. Ct. App. 1999). In *Shook*, an attorney was held in contempt by a trial court despite the lack of entry of any prior order being violated. *Id*. In that case an attorney represented a plaintiff in a trust litigation. *Id*. Plaintiff's counsel notified the financial institution in which trust assets were on deposit that litigation was pending and transfers to the former trustee as a fiduciary or individually would be actionable. *Id*. Thereafter the court entered an order removing any restrictions on the trust funds on deposit, following which defendants asked plaintiff's attorney to rescind his prior letter. *Id*. When counsel declined to do so, the trial court found him in civil contempt and imposed a fine payable in part to each defendant. *Id*. The fine was imposed as a penalty for criminal contempt, because it was not related to any prior court order violated by the attorney and was not reflective of damages suffered by defendants. *Id*.

[39] Plank v. State, 190 So. 3d 594, 606 (Fla. 2016); *Shook*, 729 So. 2d at 528; Ramos v. North Star Ent. Firm, LLC, 295 So. 3d 803, 807 (Fla. Dist. Ct. App. 2020).

[40] Young v. Wood-Cohan, 727 So. 2d 322, 324 (Fla. Dist. Ct. App. 1999).

A further distinction is that contempt may be direct or indirect. Direct contempt results when the objectionable conduct occurs in the presence of the court.[41] All acts constituting the contemptuous conduct must occur in the presence of the judge and be observed by the judge for there to be direct criminal contempt.[42] For example, perjured testimony may constitute direct criminal contempt only if perjury is admitted or undisputed.[43] "One may be held in direct contempt of court for falsely testifying before the court even though the statute of limitations would bar a prosecution for perjury."[44] When the judge relies on additional evidence not directly observed by the trial judge, the proceeding is no longer direct criminal contempt but becomes indirect criminal contempt.[45] Thus, when a judge relies in part on agreements or documents signed outside of court to determine that a witness committed perjury, any contempt would be indirect as all events forming the basis of any contempt did not occur in the court.[46] Direct criminal contempt

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[41] *In re* Rasmussen's Est., 335 So. 2d 634, 635 (Fla. Dist. Ct. App. 1975). To illustrate, when an individual involved in an estate administration proceeding repeatedly interrupts counsel and the court during a hearing, makes derogatory statements during the hearing, and continues this behavior despite warnings from the judge to cease, her behavior constitutes direct criminal contempt. *See* Woodward v. State, 238 So. 3d 290, 292-94 (Fla. Dist. Ct. App. 2018).

[42] Pole v. State, 198 So. 3d 961, 966-67 (Fla. Dist. Ct. App. 2016) (finding no direct contempt where judge used outside testimony of husband's behavior). Where a trial court concluded that a witness' testimony conflicted with written agreements and the agreements were created outside of court and were in dispute in the litigation, not all facts on which contempt was based occurred in the presence of the judge and direct criminal contempt was not applicable. *Ramos*, 295 So. 3d at 808. In a paternity and dependency action, where a judge ordered the mother to sign passport documents for the minor children and the mother did not complete the task outside the courtroom as quickly as the judge would have liked, because the actions required were to occur outside the courtroom the contempt was indirect rather than direct criminal contempt. *See* Flore v. Athineos, 9 So. 3d 1291, 1292 (Fla. Dist. Ct. App. 2009).

[43] *Ramos*, 295 So. 3d at 803.

[44] Chavez-Rey v. Chavez-Rey, 213 So. 2d 596, 599 (Fla. Dist. Ct. App. 1968).

[45] Plank v. State, 190 So. 3d 594, 607 (Fla. 2016). In *Plank*, the trial court incarcerated a prospective juror who appeared for jury duty intoxicated based on direct criminal contempt. *Id.* at 608 (Pariente, J., concurring). The judge observed the prospective juror sleeping during jury selection. *Id*. at 606-07. That fact alone was not sufficient to warrant a finding of direct criminal contempt. Additional relevant facts were that the other prospective jurors reported that he smelled of alcohol, that when questioned he stated he was a drunk, that it was difficult for other jurors to wake him during voir dire, that the judge ordered a breathalyzer test, that the test was conducted out of the judge's presence, and the test reflected that he was intoxicated. *Id*. at 597. Because many facts leading to a finding of contempt occurred outside of the judge's presence, the correct finding was for indirect criminal contempt. *Id*. at 607. As defendant was entitled to be represented by counsel in an indirect criminal contempt case if incarceration for six months or more was possible, his conviction was reversed. *Id*.

[46] Ramos v. North Star Ent. Firm, LLC, 295 So. 3d 803, 808-09 (Fla. Dist. Ct. App. 2020).

occurs when a witness is ordered to return to court with documents to be produced and the witness appears in court without the documents.[47]

Disagreements may arise about whether the objectionable conduct occurred in the presence of the judge and if it was intended to disrupt court proceedings. When during a recess from trial an attorney sent a confidential letter to the judge, the contents of the letter were contemptuous, but the contempt did not occur in open court and did not constitute direct contempt.[48] "[T]o warrant a finding of direct criminal contempt, the conduct must demonstrate that the accused intended to hinder or obstruct the administration of justice."[49] Direct criminal contempt may exist when the conduct occurring in the court's presence is "calculated to lessen the court's authority or dignity."[50] Thus, the two requirements for direct criminal contempt are that the conduct occur in the judge's presence and that there be an imminent threat to the administration of justice.[51] When there is doubt about whether criminal contempt is direct or indirect, the decision should favor indirect contempt affording the accused greater rights.[52]

Indirect contempt involves conduct occurring outside of the court's presence.[53] "An indirect contempt generally is a contumacious act primarily

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[47] Young v. Wood-Cohen, 727 So. 2d 322, 323-24 (Fla. Dist. Ct. App. 1999).

[48] Cooke v. United States, 267 U.S. 517, 536 (1925) (involving appeal of criminal contempt judgment imposed by federal trial court).

[49] 11 FLA. JUR. 2d Contempt § 4 (West 2023); *see also* FLA. R. CRIM. P. 3.830, 3.840.

[50] Phelps v. State, 236 So. 3d 1162, 1163 (Fla. Dist. Ct. App. 2018). "A direct contempt generally is a contumacious act primarily directed at the court, rather than the opposing party, and usually is punished as criminal contempt." Chinnock & Painter, *supra* note 2, at 321.

[51] *See Cooke*, 267 U.S. at 517 (discussing direct contempt); *In re* Oliver, 333 U.S. 257, 275-76 (1948). A judge has personal knowledge sufficient for direct criminal contempt when the conduct occurs in the judge's immediate presence and the judge personally observes the conduct. *Oliver*, 333 U.S. at 274-75. In addition, as set forth in *Plank* and *Bryant*, an individual screaming and shouting statements adverse to the court in the hallway of the courthouse was not direct criminal contempt, both because the statements were not made in the presence of the judge, and they were not intended to disrupt court proceedings. *See* Plank v. State. 190 So. 3d 594, 601 (Fla. 2016); Bryant v. State, 851 So. 2d 823, 824 (Fla. Dist. Ct. App. 2003).

[52] Pole v. State, 198 So. 3d 961, 967 (Fla. Dist. Ct. App. 2016).

[53] *Oliver*, 333 U.S. at 274. A person who makes false representations in court at a hearing in an estate administration proceeding that a decedent's home was vacant when the person was occupying the home with her son is an example of indirect contempt, as the individual's residence in the home did not occur in the presence of the court. Woodward v. State, 238 So. 3d 290, 293 (Fla. Dist. Ct. App. 2018). In *Woodward*, the judgment of indirect criminal contempt was reversed on appeal, as the transcript of the hearing during which the statements about occupancy of the home were allegedly made did not include the statements asserted. *Id*. Further, where a trial court held a trustee in contempt and ordered the trustee to file a full accounting within five days or to pay a sanction of $500.00 per day and the trustee failed to comply, the trust beneficiaries sought a judgment holding the trustee is indirect criminal contempt. Weinberg v. Weinberg, 137 So. 3d 600, 603 (Fla. Dist. Ct. App. 2014).

directed at the opposing party rather than the court, and usually is punished as civil contempt."[54] Use of profanity in the court when heard by the judge and disruptive to court proceedings may constitute direct contempt, whereas if the judge does not hear the statement or the statement has no effect on court proceedings there is no contempt.[55] The use of profanity in court, even if heard by the judge, is not always contemptuous behavior.[56] An example of indirect criminal contempt is where after the Florida Supreme Court enters an order enjoining an individual from engaging in the unauthorized practice of law the individual continues to engage in that behavior.[57] Indirect contempt may also occur when a prospective juror appears in court intoxicated and repeatedly interrupts the judge, the prospective juror admits imbibing alcohol and witnesses attest to his being under the influence.[58] Counsel's failure to appear at mediation after a court orders both parties and their counsel to appear may also constitute indirect contempt, as the failure does not occur in the judge's presence.[59] Where a party is ordered to take a drug test and return to the courtroom and fails to do so, any contempt is indirect as his

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[54] Chinnock & Painter, *supra* note 2, at 321.

[55] Woodie v. Campbell, 960 So. 2d 877, 878-79 (Fla. Dist. Ct. App. 2007). In *Woodie*, the court held there was no direct criminal contempt when a trial judge did not hear a defendant's mother call the judge a "stupid bitch" in the court, and thus there was no effect on the court proceedings. *Id*.; *see also* 11 Fla. Jur. 2d Contempt § 4 (West 2023) (noting requirement of court's actual observation of contemptuous conduct).

[56] *See* Martinez v. State, 339 So. 2d 1133, 1134 (Fla. Dist. Ct. App. 1976). In that criminal case, the judge held the defendant in direct criminal contempt after the defendant responded to a judge's statement "[t]hat's a bunch of bull shit." *Id.* In affirming the conviction, the appellate court explained:

> We do not hold that every profane utterance made in the courtroom is automatically contemptuous. By the same token, we do not hold that profanity is an essential ingredient to a conviction for contemptuous statements. The challenged statements must be viewed in the context in which they were made. If it appears that they are insulting to the judge or degrade the dignity of the court, they may be deemed contemptuous. A reduction in the authority of our courts or in the respect to which they are due is bound ultimately to have an adverse effect upon the quality of justice.

Id. at 1135.

[57] *See* Florida Bar v. Schramek, 670 So. 2d 59, 60 (Fla. 1996); Florida Bar v. Hughes, 824 So. 2d 154, 155 (Fla. 2002). These two cases involved criminal contempt asserted under Florida Bar Rule 10-7.2(a)(1), rather than under the Florida Rules of Criminal Procedure. *See Schramek*, 670 So. 2d at 59-61; *Hughes*, 824 So. 2d at 156.

[58] *See* Pole v. State, 198 So. 3d 961, 968 (Fla. Dist. Ct. App. 2016); Plank v. State, 190 So. 3d 594, 608 (Fla. 2016).

[59] Fredericks v. Sturgis, 598 So. 2d 94, 96 (Fla. Dist. Ct. App. 1992). An attorney's failure to appear at a court proceeding is indirect criminal contempt. *See* Lowe v. State, 468 So. 2d 258, 259 (Fla. Dist. Ct. App. 1985).

failure to adhere to a court order involved actions to occur outside of court.[60] A party who fails to appear at a court hearing after being ordered to do so may be found guilty of indirect criminal contempt.[61]

The procedures and punishments imposed for direct as opposed to indirect criminal contempt differ.[62] "[T]he rights to which a contemnor is entitled, the quantum of proof necessary to convict, and the nature of the punishment that may be administered upon a determination of guilt are all dependent on the type of contempt at issue."[63] Strict compliance with the applicable procedures is required to avoid reversal on appeal.[64] While state statutes set forth the procedures applicable in state court cases, federal cases reveal the minimum constitutional rights applicable in contempt cases.[65] Persons accused of indirect criminal contempt "are entitled to the same constitutional due process protections afforded criminal defendants in more

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[60] White v. Junior, 219 So. 3d 230, 232 (Fla. Dist. Ct. App. 2017).

[61] State v. Diaz De La Portilla, 177 So. 3d 965, 966-67 (Fla. 2015). The Court explained why failure to appear could not constitute direct criminal contempt as follows:

> [T]reating a failure to appear as direct criminal contempt does not fulfill the purpose of this narrow form of contempt, which applies when a contemptuous act occurs in the presence of the court, is an affront to the court, disrupts and frustrates an ongoing proceeding, and requires immediate action to vindicate the authority of the court. Direct criminal contempt should not be employed where time is not of the essence. Where contempt is based on an individual's failure to appear, the trial court would still be required to conduct a hearing at a later date, when the alleged contemnor is present, to conform to the due process requirements of rule 3.830. Immediate action to preserve the court's order and authority is simply not possible where the disruptive misconduct is failure to appear.

Id. at 973 (citations omitted). In addition, the trial court would not necessarily know if the individual's failure to appear was willful, and proof of intent is a required element of criminal contempt. *Id*.

[61] Parisi v. Broward Cnty., 769 So. 2d 359, 365 (Fla. 2000). Other rules pertaining to civil or criminal contempt may apply in specific types of cases. *See* FLA. R. JUV. P. 8.286 (addressing procedures for criminal and civil contempt, respectively, in dependency cases); FLA. FAM. L.R.P. 12.615 (applying to contempt in support matters in family law cases).

[63] *Plank*, 190 So. 3d at 605.

[64] *See* Phelps v. State, 236 So. 3d 1162, 1164 (Fla. Dist. Ct. App. 2018) (reversing direct criminal contempt for court's failure to issue order to show cause to accused). This affords the accused an opportunity to present evidence of excusing or mitigating circumstances. *See id.*

[65] United States v. Dixon, 509 U.S. 688, 696 (1993) ("[C]onstitutional protections for criminal defendants . . . apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions."). Numerous Supreme Court cases address the rights of an individual accused of contempt. *Id*. at 704. While many of those cases involved contempt arising in Federal Courts governed by the Federal Rules of Criminal Procedure, several are cited throughout this article to reflect the rights required to be provided to the accused.

typical criminal proceedings."[66] In criminal contempt proceedings proof beyond a reasonable doubt is required.[67] The defendant is presumed innocent.[68] The defendant has a right to counsel,[69] the right not to incriminate oneself, and the right to a jury trial if incarceration in excess of six months is involved.[70] The accused does not enjoy the same rights when accused of direct criminal contempt, "because the direct criminal contempt power is essential to protect the courts in the discharge of their functions."[71]

The procedures to be followed for a judgment of contempt to be obtained and the sanctions available to be imposed differ based on the type of

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[66] *Parisi*, 769 So. 2d at 364 (involving environmental damages and county's action to seek injunction); Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985) (addressing contempt in post-divorce case where one former spouse failed to pay overdue child support).

> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

Cooke v. United States, 267 U.S. 517, 535 (1925). *Cooke* involved allegations of contempt arising against an attorney due to the content of a letter submitted by counsel to the presiding judge in litigation relating to a corporate bankruptcy. *See id*.

[67] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); *Bowen*, 471 So. 2d at 1479; *Parisi*, 769 So. 2d at 364.

[68] *Gompers*, 221 U.S. at 444.

[69] *See* Pole v. State, 198 So. 3d 961, 966-67 (Fla. Dist. Ct. App. 2016) (failing to afford right to counsel to accused of indirect criminal contempt constitutes reversible error).

[70] *See* Bloom v. Illinois, 391 U.S. 194, 197 (1968). In *Bloom*, an attorney in Illinois drafted and executed a Last Will and Testament for a testator after the testator's death, on the request of the testator's nurse, and sought admission of that Will to probate. *Id*. at 210. When charged with criminal contempt the attorney timely filed a motion requesting a jury trial and the motion was denied. *Id*. The attorney was tried and convicted of criminal contempt and sentenced to imprisonment for two years. *Id*. His conviction was reversed because he was denied his constitutional right under the Sixth Amendment to a jury trial. *Id*. While the Court distinguished between "serious" criminal contempt and "petty offenses," it did not in *Bloom* state a bright line test to enable one to distinguish between the two. *Id*. at 211. However, the Court stated that a two year sentence reflects a serious rather than a petty crime. *Id*. What constitutes a "petty offense" as opposed to a "serious" crime was clarified in *Baldwin*, where the Court stated that an offense is not petty if imprisonment in excess of six months is a contemplated outcome. Baldwin v. New York, 399 U.S. 66, 69 (1970). If a defendant is sentenced to multiple terms of incarceration for multiple criminal contempts in one proceeding, and the contempts are tried in one trial, a jury trial is required on defendant's request if the total terms of incarceration imposed to be served consecutively exceed six months. Attwood v. State, 687 So. 2d 271, 272-73 (Fla. Dist. Ct. App. 1977), *appeal dismissed*, 696 So. 2d 342 (Fla. 1977), *cert. denied,* 552 U.S. 887 (1997). An exception applies where there are repeated acts of direct criminal contempt committed during one trial and prompt action by the judge is needed to avoid an obstruction of justice. *Attwood*, 687 So. 2d at 273.

[71] *In re* Terry, 128 U.S. 289, 305-06 (1888); Plank v. State, 190 So. 3d 594, 601 (Fla. 2016).

contempt involved.[72] The conduct of the accused may qualify for civil or criminal contempt[73] or both.[74]

> [C]ontempt of court actions [may] involve one or more of the following scenarios: (1) disobedience of court orders (most indirect contempts); (2) disruptions in open court (most direct contempts); (3) obstruction of court's processes (blocking of service of execution of judgment); (4) refusal of witness to testify or produce evidence; (5) attempt to obstruct, influence, or intimidate judge, witnesses, or jurors; (6) fraud upon the court (witness or evidence tampering, perjury, forgery, alteration of records); (7) misconduct of court officers, jurors, or witnesses; (8) symbolic acts which invade the court's respect and dignity; and, (9) out-of-court statements and publications which attempt to influence judge or jurors.[75]

For a court to hold an individual in contempt, the court must have jurisdiction over the individual alleged to have engaged in impermissible behavior.[76] The court does not necessarily retain jurisdiction of a party who instituted the underlying civil action. For example, where an individual initially instituted suit seeking appointment of a curator of her grandmother's person and property, and after a curator was appointed allegedly interfered with the curator's ability to take possession of property of the grandmother located outside of Florida, after appointment of the curator the court no longer retained jurisdiction over the petitioner and could not properly hold the petitioner in contempt for the alleged interference.[77]

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[72] *Parisi*, 769 So. 2d at 364.

[73] *In re* Rasmussen's Est., 335 So. 2d 634, 636 (Fla. Dist. Ct. App. 1975).

[74] *Parisi*, 769 So. 2d at 363-64.

[75] Chinnock & Painter, *supra* note 2, at 311-12 (footnote omitted).

[76] Gay v. McCaughan, 105 So. 2d 771, 774-75 (Fla. 1958); *see also* Aurora Bank v. Cimbler, 166 So. 3d 921, 927 (Fla. Dist. Ct. App. 2015). In *Aurora Bank*, after a final consent judgment was entered in a mortgage foreclosure case, a trial court erroneously continued to consider whether mortgagee and its counsel should be held in civil contempt. 166 So. 3d at 927.

[77] *McCaughan*, 105 So. 2d at 771. The attorney for the petitioner had petitioner institute suit seeking appointment of a curator although petitioner lacked standing under applicable law to do so. *Id*. The party seeking a finding of contempt did not arrange for the former petitioner to be served with process in a contempt proceeding, and the former petitioner was not situated in the State of Florida. *Id*. Petitioner's attorney in that case unsuccessfully sought contempt against the former petitioner for her failure to pay his attorney's fees. *Id*. The court recognized that the "right to recover fees against one's client, in the proceeding in connection with which services are rendered, is solely incident to the enforcement of an equitable charging lien against a fund or res created by such services." *Id*. at 773. Because there was no lien in the case and no res created by counsel, the

Criminal contempt in Florida is generally governed by FLA. R. CRIM. P. 3.830 and 3.840. Statutes and other court rules authorize courts to punish or impose consequences for contempt. FLA. STAT. § 38.22 generally authorizes courts to punish contempt. FLA. PROB. R. 5.440(d) subjects a removed personal representative to contempt proceedings for failure to file an accounting or to deliver all estate assets and records to the remaining or successor personal representative. FLA. R. JUV. P. 8.285 and 8.286 set forth procedures prerequisites to a finding of criminal or civil contempt, respectively, in dependency cases.[78] FLA. FAM. LAW. R.P. 12.615 governs civil contempt findings in family law cases when a spouse or former spouse fails to pay court ordered support.[79] FLA. R. CIV. P. 1.380(b)(1) authorizes a finding of contempt of court if a deponent refuses to answer questions or produce documents requested in discovery, despite the entry of a court order to do so. FLA. R. CIV. P. 1.380(b)(2)(D) authorizes a finding of contempt for failure to obey any other discovery orders set forth in the rule.

Contempt may be an appropriate sanction when a party fails to appear at a properly set deposition, serve answers to interrogatories, or respond to a request for inspection.[80] In the guardianship context, FLA. STAT. § 744.367(5) provides that a judge may impose sanctions including contempt

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client could not be held in contempt for failure to pay her counsel's legal fees without prior institution of an adversary proceeding. *Id*. No such proceeding had been instituted; hence it was improper for the court to hold the former petitioner in contempt. *Id*.

Prior to the ruling in this case the petitioner, a New York resident, hired counsel to seek her and another relatives' appointment as guardian of the person and property of her grandmother. Gay v. Heller, 252 F.2d 313, 314 (5th Cir. 1958). The granddaughter alleged that the grandmother lived in New Jersey, where she had created a trust, and was only temporarily in Florida. *Id*. at 314. Contrary to the granddaughter's request, the attorney allegedly misrepresented the applicable law, sought appointment of himself as curator and did not seek appointment of a guardian, although another independent person was appointed curator. *Id*. The attorney then represented the curator, who was accused of having sold the grandmother's property for far less than its value. *Id*. To add insult to injury, the attorney obtained a court order requiring the granddaughter to pay his $10,000.00 legal fee, and when payment was not forthcoming, obtained a court order holding the granddaughter in criminal contempt sentencing her to jail for 60 days. *Id*. The granddaughter did not appeal the state court decision, and instead filed a complaint in federal court to invalidate the state court judgment. *Id*. at 314-15. Whereas the trial court dismissed the complaint, the federal appellate court held that plaintiff stated a cause of action. *Id*. at 317. The granddaughter who was the former petitioner eventually instituted suit against her attorney seeking damages for his improper behavior, including but not limited to his obtaining a void contempt order against her. Gay v. McCaughan, 272 F.2d 160, 161 (5th Cir. 1960).

[78] *See* Children's Home Soc'y of Fla. v. K.W., 315 So. 3d 129, 130 (Fla. Dist. Ct. App. 2021) (reversing a civil contempt fine imposed due to failure to comply with Rule 8.286). Those rules impose requirements similar to other statutes, such as the inclusion of purge provisions and a finding that the contemnor has the present ability to comply. *See id*.

[79] *See* FLA. R. CIV. P. 3.830, 3.840. In family law cases, criminal contempt is governed by FLA. R. CIV. P. 3.830 and 3.840. FLA. FAM. LAW R.P. 12.615(a).

[80] FLA. R. CIV. P. 1.380(d).

for failure of a guardian of the property to timely file the annual guardianship report. Failure of a guardian to provide financial records requested by the court's auditor may result in a finding of contempt.[81] Contempt is also available as a sanction if a removed guardian of property fails to fulfill his or her obligations to file accountings or turn over assets and guardianship records.[82] The behavior of a party may constitute more than one type of contempt.[83] Where rules other than FLA. R. CIV. P. 1.380, 3.830 and 3.840 are applicable they must be complied with. The procedures in the other rules and statutes are generally analogous to the provisions of those rules.

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[81] FLA. STAT. § 744.3685. The statute provides:

> (1) If a guardian fails to file the guardianship report, the court shall order the guardian to file the report within 15 days after the service of the order upon her or him or show cause why she or he may not be compelled to do so.
> (2) If a guardian fails to comply with the submission of records and documents requested by the clerk during the audit, upon a showing of good cause by affidavit of the clerk which shows the reasons the records must be produced, the court may order the guardian to produce the records and documents within a period specified by the court unless the guardian shows good cause as to why the guardian may not be compelled to do so before the deadline specified by the court. The affidavit of the clerk shall be served with the order.
> (3) A copy of an order entered pursuant to subsection (1) or subsection (2) shall be served on the guardian or on the guardian's resident agent. If the guardian fails to comply with the order within the time specified by the order without good cause, the court may cite the guardian for contempt of court and may fine her or him. The fine may not be paid out of the ward's property.

Id.

[82] FLA. STAT. § 744.517. The statute provides:

> If a removed guardian of the property fails to file a true, complete, and final accounting of his or her guardianship; to turn over to his or her successor or to the ward all the property of his or her ward and copies of all records that are in his or her control and that concern the ward; or to pay over to the successor guardian of the property or to the ward all money due the ward by him or her, the court shall issue a show cause order. If cause is shown for the default, the court shall set a reasonable time within which to comply, and, on failure to comply with this or any subsequent order, the removed guardian may be held in contempt. Proceedings for contempt may be instituted by the court, by any interested person, including the ward, or by a successor guardian.

Id. *In re Guardianship of Whit*e presents an example of a case in which a ward whose capacity was restored instituted suit against the former guardian, the ward's spouse and sought among other things, to have the former guardian held in contempt for failure to remit all guardianship assets to the ward. 140 So. 2d 311, 312 (Fla. Dist. Ct. App. 1962)

[83] *See* Woodward v. State, 238 So. 3d 290, 291 (Fla. Dist. Ct. App. 2018) (noting in estate administration proceeding trial court accused individual of direct and indirect criminal contempt).

A. Direct Criminal Contempt – The Procedure

"A [direct] criminal contempt may be punished summarily only if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court."[84] FLA. R. CRIM. P. 3.830 imposes strict procedural requirements to be followed before a judgment of direct criminal contempt is imposed.[85] First, the perpetrator needs to be informed by the judge of the accusation[86] of contempt and offered an opportunity to explain why his or her conduct was not contemptuous.[87] "That notice must include a statement regarding whether the hearing during which the defendant is to show cause is one for civil or criminal contempt."[88] Second, the perpetrator must be offered the opportunity to "present evidence of excusing or

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[84] FLA. R. CRIM. P. 3.830; Plank v. State, 190 So. 3d 594, 601 (Fla. 2016); *In re* Rasmussen's Est., 335 So. 2d 634, 635 (Fla. Dist. Ct. App. 1975). When criminal contempt "was committed in the presence of the court while it was in session, the use of summary contempt was considered an inherent judicial power necessary to maintain order in the court and to protect the court's dignity." Carnival Corp. v. Beverly, 744. So. 2d 489, 494 (Fla. Dist. Ct. App. 1999). Where an attorney had an alcoholic drink at lunch prior to attending a court hearing, performed properly at the hearing, did not engage in any improper behavior, and the judge did not smell alcohol on the attorney, any contempt would have been indirect. *See* Edge-Goughan v. State, 182 So. 3d 730, 732 (Fla. Dist. Ct. App. 2015).

[85] FLA. R. CRIM. P. 3.830. The rule was amended effective April 1, 2021, to require entry of a judgment as opposed to an order. *Id.* Cases referenced in this article decided prior to the rule change generally refer to an order of contempt.

[86] *See Edge-Gougen*, 182 So. 3d at 733 ("When the court is shifting from treating an attorney as an advocate to treating the attorney as a defendant [in a contempt case], the attorney is entitled to be notified so that he or she may act accordingly."). The trial judge's failure to inform the attorney that she became a defendant in a criminal contempt proceeding violated counsel's due process rights. *Id*.

[87] FLA. R. CRIM. P. 3.830(a); *see also In re* Oliver, 333 U.S. 257, 275 (1948) (involving witness held in contempt in secret grand jury proceeding conducted under Michigan law). An example of direct criminal contempt is where during the course of a hearing in an estate administration an interested party is asked questions under oath and repeatedly refuses to answer them despite the court directing her to do so and engages in other disruptive behavior. *Woodward*, 238 So. 3d at 290. The defendant repeatedly interrupted attorneys and the judge, despite warnings to refrain from doing so, and had to be ordered by the judge to leave the courtroom. *Id*. at 292. The defendant erroneously claimed that the court's failure to have a court reporter present and to provide a transcript of the hearing precluded a finding of direct criminal contempt. *Id*. at 293. The appellate court disagreed and affirmed the finding of direct criminal contempt imposing a fifteen-day jail sentence. *Id.*; *see also Carnival*, 744 So. 2d at 497; Manzaro v. D'Allesandro, 283 So. 3d 335, 336 (Fla. Dist. Ct. App. 2019); *Edge-Gougen*, 182 So. 3d at 733. In *Edge-Gougen*, an attorney representing a defendant in court was wrongly convicted of criminal contempt for imbibing alcohol prior to attending the court hearing, as the judge neglected to inform counsel that contempt was being considered. *See* 182 So. 3d at 733. Filing a motion alleging that a witness committed civil contempt is not adequate to put the witness on notice that he is accused of criminal contempt. *See* Young v. Wood-Cohan, 727 So. 2d 322, 323-24 (Fla. Dist. Ct. App. 1999).

[88] *Wood-Cohan*, 727 So. 2d at 324.

mitigating circumstances."[89] An evidentiary hearing is generally required prior to a determination of direct criminal contempt.[90] Direct criminal contempt requires proof of defendant's intent beyond a reasonable doubt.[91] Third, if the judge determines that the individual is guilty of contempt, a "judgment of guild of contempt shall include a recital of those facts on which the adjudication of guilt was based" and expressly state that Rule 3.830 was compiled with.[92] The sentence imposed must be stated in open court.[93]

Because direct criminal contempt is observed by the judge, the judge acts of his or her own volition without the need for a motion by a party. In direct criminal contempt cases, the judge has substantial power, as the judge may be the accuser and victim, the prosecutor, and the fact finder.[94] In criminal contempt proceedings, "defendants are not entitled to the full panoply of due process rights typically afforded to criminal defendants."[95] While "due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation", there is an exception to the rule

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[89] FLA. R. CRIM. P. 3.830(b); Phelps v. State, 236 So. 3d 1162, 1163 (Fla. Dist. Ct. App. 2018). Where a witness who allegedly provided perjured testimony was not afforded an opportunity to present evidence of excusing or mitigating circumstances prior to a finding that he was guilty of direct criminal contempt, reversal was warranted. Ramos v. North Star Ent. Firm, LLC, 295 So. 3d 803, 807-08 (Fla. Dist. Ct. App. 2020).

[90] FLA. R. CRIM. P. 3.830. *But see Manzaro*, 283 So. 3d 335, 336 (Fla. Dist. Ct. App. 2019). In the divorce case *Manzaro*, the father stood up, approached opposing party and counsel in an aggressive manner, caused the court to fear physical violence was about to occur, and when deputies attempted to physically remove the father from the court, his outbursts continued. 283 So. 3d at 336. The court recognized that in light of the circumstances, it was not realistic to expect the trial judge to comply with the rule's requirements without jeopardizing the safety of persons in the courtroom. *Id*. Despite understanding the trial judge's actions, the failure to offer the father an opportunity to present excuses or reasons why he should not be held in contempt required reversal of the direct criminal contempt. *Id*.

[91] M.J. v. State, 202 So 3d 112, 113 (Fla. Dist. Ct. App. 2016). In that case a juvenile attending a delinquency hearing involving his brother was accused of violating a courtroom policy against use of a cell phone to photograph or film court proceedings. *Id*. While the juvenile had his cell phone out in clear view, there was no proof that he was filming the proceedings and he claimed that he had a video on his phone he was anxious to share with the judge; hence, his conviction was reversed. *Id*. at 114. In addition, in *Edge-Gougen*, the proof of intent was lacking where counsel had an alcoholic drink during lunch, after which she learned that she had a court hearing, she attended the court hearing and performed properly, but the judge held her in contempt for failing a breathalyzer test. 182 So. 3d at 730.

[92] FLA. R. CRIM. P. 3.830(c).

[93] FLA. R. CRIM. P. 3.830(e). Should there be a danger to safety of persons in the courtroom, the defendant may be temporarily detained and removed from the courtroom. *See id*.

[94] Phelps v. State, 236 So. 3d 1162, 1163 (Fla. Dist. Ct. App. 2018)

[95] *Id.*

where direct criminal contempt exists.[96] The exception applies if immediate action by the judge is required to properly administer justice, maintain order in the court, or to "prevent 'demoralization of the court's authority' before the public."[97] To assure that defendants are afforded due process, the procedures mandated prior to a finding of direct criminal contempt must be strictly adhered to, and failure to comply with all procedures is fundamental error.[98] In indirect criminal contempt cases where the punishment on conviction may be incarceration for less than six months, the accused does not have a right to counsel.[99]

Due to the judge's need to act promptly in cases of direct criminal contempt, presence of a court reporter at the hearing at which the impermissible conduct occurred is not required.[100] Particularly where the contempt consists of personal criticism or attack on the individual judge, if it is possible to do so without interfering with the proceedings, a judge may wish to have the contempt proceeding assigned to another judge to avoid the appearance of personal retribution by the judge.[101] When direct criminal contempt arises in a civil case, rather than a criminal prosecution, it is up to the parties in the case rather than the court to provide a court reporter if one is desired.[102] There is authority supporting the view that a direct criminal contempt must be reversed on appeal if there is insufficient evidence, including a transcript,

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[96] *In re* Oliver, 333 U.S. 257, 275 (1948).

[97] *Id*. *In re Oliver* involved a denial of due process to a witness in a Michigan state secret grand jury proceeding, where a judge held the witness in direct criminal contempt for alleged false statements made before the grand jury. *Id*.

> [T]he very absence of the usual constitutional protections for an individual charged with direct criminal contempt and the extraordinary power to summarily punish an individual found in direct criminal contempt to incarceration for a period of up to six months without an attorney highlights what has been emphasized in our jurisprudence. Namely, courts must exercise restraint in using this power, especially where incarceration is being considered or imposed. The purpose of permitting a court to act immediately in cases of direct criminal contempt is that the misconduct of an individual in front of the court could interfere with the court's inherent authority to carry out its essential responsibilities.

Plank v. State, 190 So. 3d 594, 604-05 (Fla. 2016); *see* Emanuel v. State, 601 So. 2d 1273, 1274 (Fla. Dist. Ct. App. 1992).

[98] *Emanuel*, 601 So. 2d at 1274. A fundamental error will be addressed and corrected by the court, whether or not timely raised by a party. *Id*.

[99] *Plank*, 190 So. 3d at 600.

[100] Woodward v. State, 238 So. 3d 290, 293-94 (Fla. Dist. Ct. App. 2018).

[101] Cooke v. United States, 267 U.S. 517, 539 (1925). The Court suggested that the judge who observed the contempt retain jurisdiction of the case if the judge determines that the purpose of the improper conduct was to cause the judge to recuse himself or herself. *Id*.

[102] *Woodward*, 238 So. 3d at 293-94.

showing that the trial court complied with all procedural requirements.[103] Although there is no requirement that a party secure the services of a court reporter, if improper conduct by an adversary or witness is anticipated, or if an appeal is contemplated, better practice would be to have a court reporter present.

B. Indirect Criminal Contempt – The Procedure

Clearly defined procedures must likewise be followed before a judgment is entered for indirect criminal contempt.[104] Strict compliance with these procedures is required.[105] The procedure may be initiated by a judge on his or her own motion.[106] The judge may also act based on an affidavit of any person having knowledge of the facts constituting a contemptuous act or omission.[107] In either case the judge issues an order to show cause to the defendant requiring the defendant to establish why he or she should not be found in criminal contempt of court.[108]

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[103] Pole v. State, 198 So. 3d 961, 965-66 (Fla. 2016). The absence of a transcript or complete record of the criminal contempt proceedings resulting when a husband sued for dissolution of marriage appeared in court intoxicated led to reversal of the conviction. *See id*.

[104] *See* Florida Bar v. Hughes, 824 So. 2d 154, 160 (Fla. 2002). While most cases referenced herein were instituted under FLA. R. CRIM. P. 3.840, Florida Bar Rule 10-7.2 sets forth analogous procedures to protect a defendant's due process rights when an individual is to be held in contempt due to engaging in the unauthorized practice of law in Florida after entry of an order precluding him from doing so. *See Hughes*, 824 So. 2d at 160 (providing example of compliance with due process under Florida Bar's procedures).

[105] Blechman v. Dely, 138 So. 3d 1110, 1114 (Fla. Dist. Ct. App. 2014). Strict adherence to the requirements is lacking and a judgment of indirect criminal contempt reversed, where the order to show cause was legally insufficient because it relied on an unsworn motion for the purpose of setting forth allegations. *Id*. at 1114-15. The sworn affidavits in the record were not incorporated into the show cause order. *Id*. The order itself contained only one legally sufficient allegation-that the receiver was not allowed to exercise the voting rights. *Id.* Second, the sentence was not pronounced in open court and [the accused] was not present. *See* Lindman v. Ellis, 658 So. 2d 632, 634 (Fla. Dist. Ct. App. 1995). There, the court reversed the contempt judgment because the fine was excessive and proof beyond a reasonable doubt was lacking. *Id*. at 634. *Lindman* involved a mortgage foreclosure, and the court entered an order authorizing the appointed receiver to vote for 28 condominium units. At the meeting the secretary for the condominium association refused to accept the proxy votes as the ballots did not comply with law. *Id*. at 634. Similarly, where a trial court failed to issue an order to show cause, relied on an unsworn motion not supported by an affidavit, the individual alleged to have committed contempt was not informed of possible criminal penalties, and his counsel was not given adequate time to prepare for a hearing held on four hours' notice, there was a failure to comply with applicable procedures. *See* Bajcar v. Bajcar, 247 So. 3d 613, 618 (Fla. Dist. Ct. App. 2018). As a result, the accused's petition for writ of certiorari was granted and the writ of bodily attachment issued by the trial court was quashed. *Id*.

[106] FLA. R. CRIM. P. 3.840(a).

[107] *See id*.

[108] *See id.*; Elliott v. Bradshaw, 59 So. 3d 1182, 1184 (Fla. Dist. Ct. App. 2011).

"[W]here the trial court, *sua sponte,* issues a show cause order, the order must be supported by either a sworn motion, a sworn affidavit, sworn testimony or other evidence that gives the judge adequate knowledge of the event in question."[109] The defendant in the contempt proceeding must have been served with a copy of the court order the individual is accused of violating.[110] The order to show cause must include the "essential facts constituting the criminal contempt."[111]

Merely stating in an order to show cause that defendant knowingly and intentionally failed to comply with a court order, even if it references the order violated or incorporates that order by reference, is not sufficient to meet this standard.[112] Attorneys may be bound by court orders issued to their

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[109] Hudson v. Marin, 259 So. 3d 148, 161 (Fla. Dist. Ct. App. 2018). Information provided under oath by a person with personal knowledge of the facts is required to support an order to show cause in an indirect criminal contempt case. *Id*. In *Hudson*, one ground for granting relief was that the judge issued the order to show cause without an affidavit or sworn testimony. *Id*.

[110] *In re* Contempt Adjudication of Weiner, 278 So. 3d 767, 768 (Fla. Dist. Ct. App. 2019). In a post-divorce family law case, the former husband's current wife was not served with a copy of the court order entered requiring the former husband to keep case information off social media and to prevent family members from posting information related to the case on social media. *Id*. Thereafter, the court issued an order to show cause to the former husband's current wife as to why she should not be held in indirect criminal contempt for failure to comply with the prior order never served on her. *Id*. at 768-69. The failure to serve the initial court order on the wife violated her due process rights and precluded an indirect criminal contempt finding. *Id*. at 769. Misconduct other than violation of a court order may constitute grounds for a finding of indirect criminal contempt. *See* Plank v. State, 190 So. 3d 594, 614 (Fla. 2016 (illustrating where prospective juror drove to court for jury service while intoxicated grounds existed for finding of indirect criminal contempt).

[111] FLA. R. CRIM. P. 3.840(a). Where the order to show cause does not sufficiently state the facts which allegedly constitute contempt, the order of criminal contempt entered thereafter is invalid. *See* Blechman v. Dely, 138 So. 3d 1110, 1115 (Fla. Dist. Ct. App. 2014). The judge's order should clearly indicate whether the contempt is civil or criminal. *See id*. at 1114. In *Blechman*, the trial court's order stated that the personal representative should show cause "as to why he should not be held in contempt of court and for other sanctions for failure to comply with this Court's November 21, 2011 Order." *Id*. at 1113. That language did not sufficiently state the specific facts which constituted contempt. *Id*. at 1114. The facts claimed to constitute indirect criminal contempt must be established as true. *See id*. A judgment of indirect criminal contempt entered against an individual alleged to have falsely stated during a court hearing that decedent's residence was empty when she and her son were occupying the residence was overturned on appeal, because the transcript of the hearing at which the statements were allegedly made did not reflect the statements. *See* Woodward v. State, 238 So. 3d 290, 293 (Fla. Dist. Ct. App. 2008); *see also* Levine v. State, 320 So. 2d 764, 765 (Fla. Dist. Ct. App. 2021) (reversing judgment of indirect criminal contempt due to lack of essential facts stated in order).

[112] *See Levine*, 320 So. 2d at 764. In that case defendant, an attorney, neglected to fulfill his obligations to plaintiffs whom he was retained to represent in civil litigation. *See id*. ("He ignored trial court orders. He failed to attend a case management conference. He conducted no discovery. He did not comply with two mediation orders."). The trial judge, on the judge's own initiative, initiated an indirect criminal contempt proceeding against counsel. Despite counsel's claim that medical problems accounted for his behavior, he was found guilty of indirect criminal contempt,

clients, which if violated by the attorney subject counsel to a finding of indirect criminal contempt.[113] The order to show cause must set the date, time and place of hearing and must afford the defendant adequate time to prepare his defense.[114]

To support a finding of indirect criminal contempt for violation of a court order, the order violated must expressly state the actions required or precluded.[115] What the court intended to direct or preclude, and the spirit or purpose of the court's order are not the determining factors.[116] In addition to proof that the precise terms of a court order were violated, proof beyond a reasonable doubt is required that the accused intended to violate the order.[117]

Failure to strictly adhere to the procedures set forth above is grounds for an appellate court to reverse an order of indirect criminal contempt.[118] In a guardianship proceeding the ward, who was the daughter of the initial

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and sentenced to pay a fine and to serve a term of probation. *See id.*; *see also Contempt Adjudication of Weiner*, 278 So. 3d at 767 (finding show cause order inadequate when it failed to state what prior court order stated).

[113] *See* Clover v. State, 199 So. 3d 1052, 1056 (Fla. Dist. Ct. App. 2016). In *Clover*, an attorney representing a party in a family law case was held in indirect criminal contempt for violating a court order precluding her client from disseminating or sharing his spouse's confidential medical records. *Id*. at 1056. The attorney contacted the Florida Department of Law Enforcement and disclosed information reflecting that the wife was doctor shopping, based on which the wife was arrested. *Id*. at 1054. The attorney's argument that contempt was improper because the order was directed only to her client was rejected. *Id*. at 1056.

[114] FLA. R. CRIM. P. 3.840(a). Serving the order to show cause on the accused one day before the contempt hearing is not adequate notice. *See Contempt Adjudication of Weiner*, 278 So. 2d at 767. When adequate notice is not given and the trial court nevertheless incarcerates the defendant after a finding of indirect criminal contempt, the judgment will be reversed, and a writ of habeas corpus granted. *Id.*

[115] *See* Haas v. State, 196 So. 3d 515, 528 (Fla. Dist. Ct. App. 2016). A finding of indirect criminal contempt against a non-party is erroneous when a final judgment incorporates a mediated settlement agreement in a suit to enforce a real estate sale contract, the judgment does not preclude a sale to a third party if the party who agreed to purchase neglects to timely do so, and after the purchaser defaults a third party purchases the property. *Id*. at 528.

[116] *See id*. Counsel could not be held in indirect criminal contempt for failure to return documents in violation of a court order requiring return of documents marked Confidential or Attorneys Eyes Only when the documents counsel retained did not bear those markings. *Id*. Adequate proof of intent to violate a court order requiring documents to be sealed was lacking, when counsel's motion to seal documents to be filed with the court was denied with prejudice by the court. *Id*.

[117] *Id*. at 523.

[118] *See* Neher v. Neher, 659 So. 2d 1294, 1296 (Fla. Dist. Ct. App. 1995). In that case a ward in a guardianship proceeding sought to have the guardian held in direct criminal contempt. The trial court determined that the guardian committed indirect criminal contempt. *Id*. at 1296. The appellate court considered whether the guardian had committed either civil contempt or indirect criminal contempt and concluded that neither contempt was established. *Id*. The order entered by the trial judge sentenced the guardian to ten days in jail and placed her on probation, with the jail sentence to be suspended if the guardian provided 30 hours of community service in Collier County. *Id*.

guardian, sought to have the guardian held in criminal contempt pursuant to Fla. R. Civ. P. 1.380 for not adhering to a court order requiring an accounting, for contacting the ward in violation of a restraining order entered by the court, and for terminating a deposition the court ordered her to attend.[119] The trial court ruled that the guardian was in indirect criminal contempt of court.[120] Because Rule 1.380 only deals with discovery violations and its purpose is to foster compliance with the discovery rules, the guardian could not be held in contempt under its provisions. Not adhering to accounting and restraining orders did not involve discovery violations.

The purpose of Rule 1.380 to encourage compliance with discovery is not furthered by a court holding a party in contempt for terminating a court ordered deposition.[121] The trial court's failure to issue an order to show cause, to request a response from the guardian on the contempt allegation, or to allow the guardian to present evidence of mitigating circumstances reflected a sufficient failure to comply with required procedures to cause a reversal of the trial court's judgment of contempt.[122]

One accused of indirect criminal contempt may file a response to the order to show cause, including a motion to dismiss, a motion for particulars or an answer.[123] However, no response is required.[124] The absence of a response is not an admission of guilt.[125] The defendant is to be arraigned. This may occur at the hearing, or prior to the hearing on defendant's request.[126] If the judge is concerned that the defendant will not appear at the hearing defendant may be arrested.[127]

If the defendant pleads not guilty a hearing is required to be conducted.[128] The presiding judge may conduct the hearing without a prosecutor or other counsel representing the state or the court.[129] The judge may also

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[119] *Id*. at 1295.

[120] *Id.* at 1296.

[121] *Id*.

[122] *Id*.

[123] FLA. R. CRIM. P. 3.840(b). Absent authorization from the judge, all responses to the order to show cause are required to be in writing. *See Id*.

[124] FLA. R. CRIM. P. 3.840(b).

[125] *Id*.

[126] FLA. R. CRIM. P. 3.840(d).

[127] FLA. R. CRIM. P. 3.840(c), (d). If the defendant is arrested bail may be set as in other criminal cases. *Id*.

[128] FLA. R. CRIM. P. 3.840(d).

[129] *Id.*; Parisi v. Broward Cnty., 769 So. 2d 359, 364 (Fla. 2000). However, "[i]f the contempt charge involves disrespect to or criticism of a judge, the judge shall disqualify himself or herself from presiding at the hearing." FLA. R. CRIM. P. 3.840(e). The chief judge then assigns another judge to preside at the hearing. *Id*. Where a judge expects to be called as a witness at the contempt

appoint a prosecuting attorney or an attorney to serve as special prosecutor in the indirect criminal contempt proceeding.[130] There are limits on who may be appointed to serve in this capacity.[131] "[A] court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied."[132] If the attorney who filed the motion for contempt or whose client will benefit from a finding of contempt will be required to testify at the contempt hearing as a witness, he may not be appointed by the court to serve as special prosecutor in that proceeding.[133] "[C]ounsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order."[134] A private attorney appointed to investigate and prosecute contempt must be disinterested.[135]

The defendant is entitled to the rights of a defendant in a criminal proceeding, including the right to counsel.[136] Failure of the trial court to advise defendant of his right to counsel may constitute fundamental error.[137]

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hearing he may recuse himself. *See* Osman v. McKee, 762 So. 2d 950, 951 (Fla. Dist. Ct. App. 2000).

[130] FLA. R. CRIM. P. 3.840(d); *see also* Young v. United States, 481 U.S. 787, 793-801 (1987). In litigation involving trademark infringement, plaintiff claimed that defendants were violating a permanent injunction entered by the court and agreed to by defendants. *Young*, 481 U.S. at 789. Plaintiff's attorneys were improperly appointed a special counsel to investigate and prosecute criminal contempt. *Id*.

[131] Hudson v. Marin, 259 So. 3d 148, 165 (Fla. Dist. Ct. App. 2018).

[132] *Young*, 481 U.S. at 801.

[133] *Hudson*, 259 So. 3d at 165-66. The court relied on FLA. BAR. R. 4-3.7 in reaching its conclusion.

[134] *Young*, 481 U.S. at 790, 808. In *Young*, the defendants were sued for manufacturing and selling counterfeit designer pocketbooks. An injunction precluded them from continuing that behavior. *Id*. at 789-90. Plaintiff's attorneys thought defendants were violating the injunction and arranged a sting operation to ascertain if they were correct. *Id*. at 790-91. In that connection, plaintiff's counsel requested that the court appoint them to investigate and prosecute the contempt, all without notice to defendants. *Id*. at 791-92. Defendants were found guilty of criminal contempt under federal statute. *Id*. at 792.

[135] *Id*. at 809. Appointing counsel for a party interested in the underlying lawsuit to prosecute contempt of the adverse party is a fundamental error, because it undermines confidence in the integrity of the criminal proceeding, requiring reversal of a contempt conviction. *Id*. at 809-10.

[136] FLA. R. CRIM. P. 3.840(d); Plank v. State, 190 So. 3d 594, 596, 604 (Fla. 2016). The defendant is also entitled to "have compulsory process for the attendance of witnesses, and [the right to] testify in his or her own defense." *Id*. at 604. In addition, in *Shook v. Atler*, wherein the trial court, believing it was addressing civil contempt by an attorney, denied him due process rights including the right to counsel. *See* 729 So. 2d 527, 528 (Fla. Dist. Ct. App.). The appellate court determined that the case involved alleged criminal contempt and the denial of due process rights warranted a reversal on appeal. *Id*.

[137] *See* Mayo v. Mayo, 260 So. 3d 497, 500 (Fla. Dist. Ct. App. 2018) (noting failure to advise defendant of right to counsel warranted reversal in part). In *Mayo*, the defendant requested leave to locate counsel, but the trial court denied such request, forcing the defendant to proceed pro se.

The defendant is entitled to due process, and the Fifth Amendment Constitutional right against self-incrimination.[138] The burden of proof required for conviction is beyond a reasonable doubt.[139] When criminal contempt involves the potential sanction of incarceration for more than six months, defendant has a right to trial by jury.[140]

After the hearing a written judgment signed by the judge is to be entered.[141] The order signed by the judge must state the factual basis for contempt consistent with the judge's oral ruling.[142] If the judge finds the defendant guilty of indirect criminal contempt, the facts justifying that conclusion are to be included in the judgment.[143] The judgment must also include a finding that either the defendant has the ability to comply with the court's order underlying the contempt and willfully refuses to do so, or that the defendant had that ability but took action to divest himself of the ability to comply.[144] Following a judgment of guilt, the defendant is entitled to present evidence of mitigating circumstances and any reasons why a sentence should not be imposed.[145]

See id. at 499-500. On appeal, the court determined that if the trial court fails to comply with the procedures mandated by Rule 3.840, reversal of a contempt conviction is appropriate even if the defendant does not object to the sufficiency of a show cause order. *See id.* at 499; *see also* FLA. R. CRIM. P. 3.840(d) (stating defendant entitled to representation in criminal contempt cases).

[138] *See* Parisi v. Broward Cnty., 769 So. 2d 359, 364 (Fla. 2000) (reasoning criminal contempt defendants entitled to due process rights).

[139] *Id.* at 365.

[140] *See id.*; *see also* Martinez v. State, 339 So. 2d 1133, 1135 (Fla. Dist. Ct. App. 1976) (indicating right to jury trial does not exist where less than six months imprisonment possible); Aaron v. State, 345 So. 2d 641, 643 (Fla. 1977) (holding no jury trial necessary for imprisonment sentence under six months or any probation sentence).

[141] *See* FLA. R. CRIM. P. 3.840(f) ("There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.").

[142] *See* Cancino v. Cancino, 273 So. 3d 122, 126 (Fla. Dist. Ct. App. 2019) ("To the extent a written contempt order fails to conform to the trial court's oral pronouncements, the contempt order must be reversed . . . because . . . a trial court's oral pronouncement controls over its written order.").

[143] *See* FLA. R. CRIM. P. 3.840(f) (requiring detailed judgment at conclusion of hearing).

[144] *See* Mueller v. Butterworth, 393 So. 2d 1158, 1159 (Fla. Dist. Ct. App. 1981) (detailing circumstances preceding writ of habeus corpus). *Mueller* involved a former personal representative of a decedent's estate who was ordered to return to the estate sums he paid to himself as personal representative and sums he paid to his attorney. *Id.* at 1158. When the personal representative did not comply with the court's order he was incarcerated, and thereafter he filed a petition for a writ of habeas corpus. *Id.* at 1159. Habeas corpus was granted due to the failure of the trial court to determine whether petitioner had or lacked the ability to make the required payments or had divested himself of funds needed to comply with the court's order. *Id.*

[145] *See* FLA. R. CRIM. P. 3.840(g).

C. *Penalties for Criminal Contempt*

Various penalties are available. "Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court."[146] One penalty available is the imposition of a fine.

> In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.[147]

In a criminal contempt case, the fine is payable to the government rather than to an individual party as compensation or expense reimbursement.[148] If a fine cannot be avoided by the defendant complying with a court order, the contempt is criminal in nature.[149] In imposing a fine as punishment for criminal contempt and determining its amount, the court must consider the defendant's financial resources and ability to pay.[150] Fines in criminal contempt cases may be limited by Fla. Stat. § 775.083.[151] "[A]n award of attorney's fees for another party or a court's wasted time in a criminal contempt proceeding is improper."[152]

One found guilty of criminal contempt may be incarcerated. If the defendant deliberately divested himself of assets so as to preclude his ability

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[146] *See* United States v. United Mine Workers of Am., 330 U.S. 258, 302 (1947) (highlighting punitive nature of criminal contempt).

[147] *Id.* at 303 ("Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge.").

[148] *See In re* Christensen Eng'g. Co., 194 U.S. 458, 459 (1904) (holding penalty payable to government to punish and vindicate court authority).

[149] *See* Parisi v. Broward Cnty., 769 So. 2d 359, 365 (Fla. 2000).

[150] *See id.* at 366 (stating court "must consider the financial resources of the contemnor in setting the amount of the fine").

[151] *See* FLA. STAT. § 775.083; *see also* Taylor v. Searcy Denney Scarola Barnhart & Shipley, P.A., 651 So. 2d 97, 98 (Fla. Dist. Ct. App. 1994) (determining Florida statute limits contempt fines). In *Taylor*, on rehearing the court clarified that the fine imposed by the trial court did not reflect damages to the defendant resulting from Taylor's contempt, but rather were damages asserted in the underlying lawsuit. *Id.*

[152] Fredericks v. Sturgis, 598 So. 2d 94, 96 (Fla. Dist. Ct. App. 1992) (noting contempt fine for waste of time improper).

to pay a fine incarceration is still permitted.[153] A sentence of incarceration may be suspended conditioned on the defendant complying with a court order.[154]

An injunction precluding the defendant from engaging in the prohibited behavior may be an appropriate remedy in some circumstances.[155] Where an attorney commits direct criminal contempt during the conduct of a civil trial, the court may disqualify counsel from continuing to represent his client as a sanction.[156] The court may not, however, suspend or disbar an attorney as a sanction for direct criminal contempt.[157]

Another consequence of an indirect criminal contempt conviction is worthy of note. Following conviction the defendant is protected by the Double Jeopardy Clause of the Fifth Amendment to the United States'

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[153] *See* Keul v. Hodges Blvd. Presbyterian Church, 180 So. 3d 1074, 1078 (Fla. Dist. Ct. App. 2015) (holding parties who "intentionally divested [themselves] of the ability to pay" subject to contempt incarceration (citing Elliott v. Bradshaw, 50 So. 3d 1182, 1186 (Fla. Dist. Ct. App. 2011))).

[154] *See* Florida Bar v. Schramek, 670 So. 2d 59, 61 (Fla. 1996) (conditioning suspended sentence on "[defendant] not further violat[ing] the laws or the [order]"). In *Schramek*, the defendant was held in indirect criminal contempt for violating a court order enjoining him from engaging in the unauthorized practice of law. *Id.* at 60. Defendant offered in mitigation of any punishment that although he violated the order on two occasions, he adhered to the order for eighteen months thereafter. *Id.* at 61. The court sentenced defendant to ninety days imprisonment but suspended the last sixty days if defendant continued to abide by the court's order that he not practice law. *See id.* Defendant was also required to pay the Bar's costs. *Id.* at 60; *see also* Florida Bar v. Hughes, 824 So. 2d 154, 161 (Fla. 2002) (suspending attorney's sentence for unauthorized practice of law if defendant stopped practicing and paid fine).

[155] *See id.* at 155-56 (noting prior injunction underlying proceeding). In *Hughes*, the court imposed a continuing injunction precluding defendant from engaging in the unauthorized practice of law as part of the sanction in a case for indirect criminal contempt commenced under FLA. BAR. R. 10-7.2(a) as authorized by rule 10-7.2(e). *See id.* at 155-56. The court held, however, that defendant's prison sentence may be suspended contingent on defendant complying with an injunction, paying a fine and/or performing community service. *Id.* at 160.

[156] *See* Carnival Corp. v. Beverly, 744 So. 2d 489, 495 (Fla. Dist. Ct. App. 1999) (affirming disqualification when "attorney is found guilty of contemptuous conduct"). In *Carnival*, a trial court's determination that counsel for defendant committed contempt by failing to adhere to trial court orders that he cease implying that plaintiff changed her facts after she hired counsel was overturned on appeal. *Id.* at 498 (quashing order disqualifying attorney). The reversal was based on the trial court's failure to sufficiently advise counsel that his actions were unacceptable or to afford counsel a reasonable opportunity to explain his position. *Id.* at 497-98. While agreeing that disqualification of counsel is a remedy available to the court in a contempt case, it is to be used sparingly for two reasons. *Id.* at 495 (explaining rationale for sparing use of disqualification). First, when the attorney's offense would warrant suspension or disbarment, it is too serious for the judge to merely address it in a contempt proceeding; instead, the Florida Bar grievance process or the judiciary's disciplinary process should be used. *Id.* Second, disqualification of an attorney interferes with the important right of litigants to select their own counsel, so "disqualification of a party's chosen counsel is a harsh and drastic sanction and an extraordinary remedy that should be resorted to sparingly." *Id.* at 496.

[157] *Id.* at 495 (affirming trial court's inability to disbar contemptuous attorney).

Constitution from prosecution for any crime requiring proof of the same elements as established in the criminal contempt case.[158] This rule may not apply if the initial proceeding was a summary proceeding for direct criminal contempt.[159]

D. Civil Contempt – The Procedure

Civil contempt is generally only available against parties to the underlying lawsuit.[160] There is authority to the contrary.[161] Civil contempt is generally imposed where a court order is entered on the motion of one party requiring another party to do an act or refrain from doing an act, and the party against whom the order is entered fails to obey the order.[162] A prerequisite to a finding of civil contempt is that there must be a court order expressly requiring a party to do or refrain from doing an act.[163] Contempt must be

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[158] *See* United States v. Dixon, 509 U.S. 688, 696 (1993) ("The same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution.").

[159] *See id.* at 698 n.1 (noting summary contempt may not invoke double jeopardy).

[160] *See* DeMello v. Buckman, 914 So. 2d 1090, 1094 (Fla. Dist. Ct. App. 2005) (determining disinterested corporate director not subject to civil contempt); Shook v. Alter, 729 So. 2d 527, 528 n.1 (Fla. Dist. Ct. App. 1999) ("There is authority that civil contempt cannot be applied against non-parties."); *see also* Lindman v. Ellis, 658 So. 2d 632, 633 n.2 (Fla. Dist. Ct. App. 1995) (recognizing non-parties may not be held in civil contempt).

[161] *See Beverly*, 744 So. 2d at 496 (noting party's attorney subject to contempt as "the trial court possessed the authority to assess compensatory fines against [the attorney] for civil contempt").

[162] *See* Keul v. Hodges Blvd. Presbyterian Church, 180 So. 3d 1074, 1078 (Fla. Dist. Ct. App. 2015) ("Failure to comply with a court order can justify a finding of civil contempt."); *Weinberg*, 137 So. 3d 600, 602 (holding contempt proper after trustee filed insufficient declaration when accounting ordered by court). It is important to assure that a written order signed by the judge was entered. *See* Menke v. Wendell, 188 So. 3d 869, 871 (Fla. Dist. Ct. App. 2015) (clarifying that without court order to be violated, there could be no contempt). Because judges in Florida typically rely on counsel to submit written proposed orders memorializing oral rulings, through neglect or inadvertence no proposed order may be submitted to the judge or signed. *See id.* Absent a written signed order, a transcript of the hearing might be useful to prove what a judge ordered. *See* Osman v. McKee, 762 So. 2d 950, 952 (Fla. Dist. Ct. App. 2000) (articulating reliance on hearing transcript). At a minimum, the absence of a written signed order increases legal work required to seek a civil contempt judgment.

[163] *See DeMello*, 914 So. 2d at 1093-94 (reasoning order "not clear and definite so as to make the party aware of its command" does not suffice as "a clear and unambiguous order"); Kovic v. Kovic, 336 So. 3d 22, 26 (Fla. Dist. Ct. App. 2022) ("A judge cannot base contempt upon noncompliance with something an order does not say" (quoting Oasis Builders, LLC v. McHugh, 138 So. 3d 1218, 1220 (Fla. Dist. Ct. App. 2014))); Godwin v. Godwin, 273 So. 3d 16, 22 (Fla. Dist. Ct. App. 2019) (". . . implied or inherent provisions of final judgment cannot serve as a basis for an order of contempt."); *see also* Reder v. Miller, 102 So. 3d 742, 743 (Fla. Dist. Ct. App. 2012) (recognizing "[f]or a person to be held in contempt of a court order, the language of the order must be clear and precise, *and* the behavior of the person must clearly violate the order." (quoting Paul

based on failure to adhere to precise wording of a court order, not of the court's intent in entering the order.[164]

> [O]ne may not be held in contempt of court for violation of an order or a provision of a judgment which is not clear and definite so as to make a party aware of its command and direction. Prior to assessing contempt sanctions for a violation of a court order, the trial court must first have issued a clear and unambiguous order or otherwise clearly established for the record the standards of conduct required by the court. Implied or inherent provisions of a final judgment cannot serve as a basis for an order of contempt. Courts

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v. Johnson, 604 So. 2d 883, 884 (Fla. Dist. Ct. App. 1992))). *Reder* involved the personal representative of a decedent's estate who sought to have an attorney held in indirect civil contempt. 102 So. 3d at 743. A dispute existed about ownership of real property and the attorney represented the title holder of record. *Id*. The trial court erroneously held the attorney in contempt for allegedly violating three orders. *Id*. at 743-44. However, none of the court orders expressly precluded the attorney's actions. *Id.* (holding failure to comply with judge's intent not reflected in a court order is inadequate to justify contempt finding). Where a court order in a family law case approved a parenting plan providing the minor children were to have reasonable telephone or video-conferencing contact with each parent and neither parent could use the provision to interfere unreasonably with the other parent's time with the children, the former wife was improperly held in indirect civil contempt for refusing to facilitate daily calls with the father when the children were with the mother. *See* Lynne v. Landsman, 306 So. 3d 390, 393 (Fla. Dist. Ct. App. 2020) (determining frequency of call not included in final judgment). The parenting plan did not expressly allow daily calls with one parent when the children were with the other parent, thus the former wife was not on notice of what contact was required due to the wording of the agreement and the failure to define what constituted reasonable contact. *Id.* at 392 (". . . [t]he final judgment is silent as to the frequency or the details of what parent-initiated contact during the other parent's time-sharing was to be . . . . Contempt was simply not the right remedy . . . ."). Similarly, in *Keitel*, where a final judgment of dissolution of marriage initially precluded the former wife with custody of the parties' minor child from moving outside Palm Beach County, after that restriction was vacated she could not be held in indirect civil contempt for moving to New York with the child, even though the move adversely affected the former husband's visitation. *See* Keitel v. Keitel, 716 So. 2d 842, 843 (Fla. Dist. Ct. App. 1998) ("[W]hen a final judgment or order is not sufficiently explicit or precise to put the party on notice of what the party may or may not do, it cannot support a conclusion that the party willfully or wantonly violated that order."). No court order expressly prevented the former wife's relocation with the minor child. *See id.* In addition, in a post-dissolution proceeding, when a court orders all communications between the child and her therapist to remain confidential as provided in Fla. Stat. § 90.503, the child's mother cannot be held in contempt for requesting and obtaining the therapist's records. *See* Bentrim v. Bentrim, 335 So. 3d 706, 708 (Fla. Dist. Ct. App. 2022) (holding ambiguity in court order precluded contempt). Because statute authorized the parent of a minor child to obtain the records and the court's order did not expressly preclude the mother from obtaining the records, the order was not sufficiently clear and specific to justify a contempt ruling. *See id.*

[164] *See Reder*, 102 So. 3d at 743 ("[A] court cannot base a finding of contempt on a violation of the court's intent in issuing the original order 'when that intent was not plainly expressed in the written order.'" (quoting Minda v. Ponce, 918 So. 2d 417, 421 (Fla. Dist. Ct. App. 2006))).

> should be explicit and precise in their commands and should only then be strict in exacting compliance. (citations omitted).[165]

"An essential finding to support civil contempt is the party's intent to violate the court order at issue."[166] The purpose of civil contempt may be to coerce the wrongdoer to comply with a court order or to compensate the party favored by the order for harm suffered due to noncompliance.[167] Punishment is not the objective of civil contempt.[168] One held in civil contempt may be required to return wrongly taken funds[169] and to pay interest, "fines, costs and attorney's fees as sanctions for noncompliance.[170] Where a civil contempt order requires that the party against whom the order is entered compensate the injured party, the party seeking contempt has the burden of proving the harm or damages suffered.[171] The procedures to obtain a civil contempt judgment are less onerous than those applicable to criminal contempt, because in civil contempt the contemnor is afforded a purge provision,

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[165] DeMello v. Buckman, 914 So. 2d 1090, 1093-94 (Fla. Dist. Ct. App. 2005) (internal citations omitted); *see also* Abdo v. Abdo, 320 So. 3d 791, 794 (Fla. Dist. Ct. App. 2021) (holding clear and definite order must precede contempt).

[166] *See* Merrill Lynch Tr. Co. v. Alzheimer's Lifeliners Ass'n, 832 So. 2d 948, 954 (Fla. Dist. Ct. App. 2002) ("An order that does not sufficiently identify the alleged prohibited conduct cannot support a conclusion that a party has intentionally disobeyed it."); Tarantola v. Henghold, 233 So. 3d 508, 510 (Fla. Dist. Ct. App. 2017) (concluding injunction limited to specific service did not justify contempt when defendant provided other services).

[167] *See* Parisi v. Broward Cnty., 769 So. 2d 359, 363 (Fla. 2000) (citing need for compliance with orders as motivation for contempt orders).

[168] *See Abdo*, 320 So. 3d at 794 (reasoning "purpose of civil contempt is to obtain compliance," not punishment).

[169] *See* Larkins v. Mendez, 363 So. 3d 140, 144 (Fla. Dist. Ct. App. 2023) (highlighting probate ruling requiring decedent's son to return improperly spent funds). In *Larkins*, decedent's son was held in civil contempt after he failed to comply with a court order to return funds he withdrew from his deceased father's bank account after the father's death. *Id.* at 143-44. Despite the son's claim, supported by bank documents signed when the account was opened that the account was a joint account with rights of survivorship, the court held that the account was a convenience account under Fla. Stat. § 655.80(1). *See id.* at 143 (noting probate ruling of convenience account). The son was ordered to return the funds withdrawn from the account to the estate and failed to do so. *See id.* at 146 (holding son failed to comply with order but reversing contempt on alternate grounds).

[170] *See* Keul v. Hodges Blvd. Presbyterian Church, 180 So. 3d 1074, 1078 (Fla. Dist. Ct. App. 2015); *see also* Neiman v. Naseer, 31 So. 3d 231, 234 (Fla. Dist. Ct. App. 2010) (requiring payment of legal fees).

[171] *See* Livingston, *supra* note 3, at 353 (outlining required preponderance of evidence burden). "Because their injury is by definition difficult if not impossible to measure in money terms, some plaintiffs may not be able to recover any damages or they may recover less than full compensation." *Id.* at 403.

and if there is compliance with the purge provision sanctions may be avoided.[172]

A motion for civil contempt is filed with the court and served on the party that allegedly violated the court order. A hearing is then held on the motion. The party against whom civil contempt is sought is entitled to notice and an opportunity to be heard.[173] For the contempt motion to be granted, the court must find that the disobedient party not only failed to comply with a court order, but had the ability to comply,[174] or intentionally divested

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[172] *See Parisi*, 769 So. 2d at 364 (requiring civil contempt order to include purge provision). An example of a purge provision was where a trustee was ordered to provide a full trust accounting within five days or pay a $500.00 per diem fine for each day thereafter in which the accounting was not provided. *See* Weinberg v. Weinberg, 137 So. 3d 600, 601 (Fla. Dist. Ct. App. 2014) (noting purging provision in trial court order); *see also* D.H. v. T.N.L., 191 So. 3d 943, 945 (Fla. Dist. Ct. App. 2016) (holding contemnor in civil contempt must comply with order in indirect civil contempt).

[173] *See Parisi*, 769 So. 2d at 364 (noting procedural and constitutional safeguards are inapplicable in civil contempt); *see also* FLA. FAM. LAW. R.P. 12.615(b) (requiring service of contempt motion and notice of hearing on contemnor).

[174] *See* Jensen v. Est. of Gambidilla, 896 So. 2d 917, 920 (Fla. Dist. Ct. App. 2005) (requiring "finding that [contemnor] had the ability to comply with [the order]"); *Parisi*, 769 So. 2d at 365. An argument that a civil contempt judgment only requiring the contemnor to pay funds he lacks ability to pay violated due process, because it only precludes erroneous behavior of those with the ability to pay and thus creates a double standard was rejected. *See D.H.*, 191 So. 3d at 946 (Fla. Dist. Ct. App. 2016) (reversing contempt judgment as court did not determine if contemnor was able to pay). In overturning a contempt judgment against a father in a dependency case for failure of the trial court to determine that he had the ability to pay the support ordered, the court stated:

> Civil contempt proceedings may not be used to create debtors' prisons. An ability to pay requirement is therefore necessary to prevent civil contempt proceedings from losing their remedial character and becoming punitive. Moreover, those who have the ability to pay are not similarly situated with those who do not. Accordingly, we reject the mother's argument that an ability to pay requirement should not apply to contempt proceedings brought to enforce an award of fees imposed as a sanction, as this argument is inconsistent with well-established law on civil contempt.

Id. Similarly, in *Bowen v. Bowen*, a former spouse was improperly incarcerated for civil contempt in a post-divorce proceeding when the trial court failed to find that he had the present ability to pay past due child support. *See* 471 So. 2d 1274, 1275 (Fla. 1985). Despite the former spouse's testimony that he had been laid off from his job and no longer earned sufficient sums to pay the past due child support, the trial court ruled that he was at fault for being unable to pay sums owed, held him in contempt, and sentenced him to five months and 29 days in jail. *Id.* at 1276 (ordering contempt despite inability to pay child support). The purge provision in the court's order enabled him to avoid the prison sentence by paying all child support arrearages plus court costs. *Id.* Because the purge provision required payment of sums the former spouse did not have and he was incarcerated as a result, the contempt was determined by the appellate court to be criminal rather than civil contempt. *Id.* As such, the former spouse had a right to counsel, and denial of that right required a reversal of the contempt judgment. *Id.* at 1277. Where a contempt order is entered against a trustee for failure to comply with a court order mandating distributions by the trustee to beneficiaries and return of the trustee's fee and attorney's fees to the trust, it is not a valid argument

himself of the ability to comply.[175] That the contemnor has the present ability to pay a fine to purge contempt is a finding which must be supported by competent substantial evidence, and not speculation about his ability to sell assets in the future.[176]

When the purpose of civil contempt is to compel compliance with the court's order, the judgment of contempt must include a purge provision explaining the action to be taken to avoid contempt sanctions.[177] The court

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that the trustee "cannot comply with the final judgment because it does not agree with it." Florida Coast Bank of Pompano Beach v. Mayes, 433 So. 2d 1033, 1036 (Fla. Dist. Ct. App. 1983) ("Parties are not free to ignore the command of a court simply because they continue to believe the court's decision against them was wrong. The rule of law would not long prevail in such an atmosphere."). In a proceeding following dissolution of a marriage, a payor spouse could not properly be held in civil contempt for failure to timely pay legal fees to the other former spouse, when the trial court neglected to determine that the payor had the ability to pay, and evidence was introduced that he lacked that ability. *See* Orban v. Rorrer, 279 So. 3d 234, 236 (Fla. Dist. Ct. App. 2019) (recognizing contempt judgment's omission regarding ability to pay warranted reversal). The contempt judgment was also defective for failure to include a purge provision which is required in a civil contempt finding. *Id.* at 237-38.

[175] *See* Mueller v. Butterworth, 393 So. 2d 1158, 1159 (Fla. Dist. Ct. App. 1981) (permitting contempt when contemnor "divested himself of that ability [to comply]").

[176] *See* Elliott v. Bradshaw, 69 So. 3d 1182, 1185-86 (Fla. Dist. Ct. App. 2011) (holding speculative future ability to pay inadequate to justify contempt). In a post dissolution case, a finding of civil contempt against the former husband for non-payment of alimony was reversed and he was ordered released from confinement, where the trial court determined he had present ability to pay based on a future sale of his home. *Id.* The conclusion that he would have funds once he sold a residence was too speculative to support a conclusion that he had the present ability to pay, as there was a question as to whether he could sell his home quickly in the then current real estate market. *Id.*

[177] *See Jensen*, 896 So. 2d at 919 (reversing because neither "civil contempt order nor the record evidence demonstrate that [contemnor] had the present ability to comply"). In *Jensen*, a young woman died survived by her parents. *Id.* at 918. Believing that her daughter died intestate, decedent's mother commenced estate administration and was appointed personal representative. *Id.* In an attempt to protect estate assets and pay estate expenses, the personal representative removed objects from decedent's home, sold them, and used the proceeds to pay funeral expenses. *Id.* Thereafter a will was located naming decedent's boyfriend personal representative and sole estate beneficiary; the mother was removed from her position as fiduciary, and the decedent's boyfriend became personal representative of the estate. *Id.* He then sought the return of estate property taken by decedent's mother. *Id.* While the mother returned the objects she still possessed, she could not return those she sold where proceeds were spent for estate expenses. *Id.* The mother denied possessing certain objects she was accused of taking and disputed the boyfriend's assertion of values of assets. *Id.* (noting mother sold several assets while still personal representative to cover estate debts). The boyfriend moved for civil contempt seeking recovery of the missing objects. *Id.* The trial court's order holding the mother in contempt and ordering her immediate incarceration was overturned on appeal. *Id.* at 920 (reversing contempt judgment). Although the trial court's order allowed the mother to purge by delivering the missing estate property or paying a set sum to the estate, the order did not include a finding that the mother had the present ability to comply with the purge provisions of the order. *Id.* (holding absent determination that mother was able to pay, contempt reversed). In *Keul v. Hodges Blvd. Presbyterian Churc*h, the court recognized that the law of civil contempt prevents incarceration without a finding that the individual has the

must expressly find and state in its judgment that the accused has the present ability to comply with the purge provisions for a civil contempt judgment to be upheld on appeal.[178] This is particularly true when the sanction for the civil contempt is incarceration.[179] The judgment should state the specific facts on which the court based its determination that the contemnor has the ability to comply with the purge provisions. "Trial courts considering probate matters lack the power to use civil contempt to incarcerate a former

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ability to pay the purge amount. 180 So. 3d 1074, 1078 (Fla. Dist. Ct. App. 2015) (determining failure to ascertain ability to purge warranted reversal). If an order fails to include a specific purge provision, the contempt is converted from civil to criminal contempt. *See* 11 FLA. JUR. 2D Contempt § 54 (2022) (noting purge requirement necessary for civil contempt). When a court order fails to state which type of contempt is involved, the absence of a purge provision in a contempt order leads to the presumption that the contempt must have been criminal. *See* Wendel v. Wendel, 958 So. 2d 1039, 1040 (Fla. Dist. Ct. App. 2007) (holding absence of purge provision meant contempt was criminal); *see also* Bank of N.Y. v. Moorings at Edgewater Condo. Ass'n, Inc., 79 So. 3d 164, 167 (Fla. Dist. Ct. App. 2012) (reversing "because the contempt order did not contain a purge provision," meaning contempt was criminal, requiring Constitutional protection).

[178] *See Jensen*, 896 So. 2d at 920 (requiring "affirmative finding that [contemnor] had the ability to" comply with purge provision); Fredericks v. Sturgis, 598 So. 2d 94, 97 (Fla. Dist. Ct. App. 1992) (". . . [B]efore a valid order of incarceration for civil contempt can be entered there must be a finding that the contemnor has the present ability to purge himself of the contempt."); Bowen v. Bowen, 471 So. 2d at 1277 (involving non-payment of past due child support); *D.H.*, 191 So. 2d at 945 (invoking contempt for non-payment of child support in dependency case). FLA. FAM. LAW R.P. 12.615(d) specifies the information which must appear in a judgment of contempt in a family law case, stating:

> An order finding the alleged contemnor to be in contempt shall contain a finding that a prior order of support was entered, that the alleged contemnor has failed to pay part or all of the support ordered, that the alleged contemnor had the present ability to pay support, and that the alleged contemnor willfully failed to comply with the prior court order. The order shall contain a recital of the facts on which these findings are based.

FLA. FAM. LAW R.P. 12.615(d). Purge provisions are required to be included in contempt judgments. *See* FLA. FAM. LAW. R.P. 12.615(e). Failure of the trial court to include all information required by FLA. FAM. LAW R.P. 12.615 in the order of contempt entered requires reversal on appeal. *See* Jacobs v. Jacques, 310 So. 3d 1018 (Fla. Dist. Ct. App. 2020) (reversing for failure to comply with FLA. FAM. LAW R.P. 12.615).

[179] *See* Bowen v. Bowen, 471 So. 2d at 1477 (reversing contempt order). In family court matters, if the former spouse who failed to pay alimony or child support in violation of a court order lacks the ability to pay, even if his actions caused him to be deprived of that ability, he cannot be incarcerated for civil contempt. *See id.* The Supreme Court in *Bowen* suggested that where the former spouse lacks the ability to pay in compliance with a court order, even if that circumstance is due to his actions, the court may require him to seek employment, may order garnishment of his paycheck if he is employed, or may take other actions short of incarcerating the delinquent payor. *Id.* at 1279 (requiring court to "direct [contemnor] to seek employment through Florida State Employment Services"). Where the court determines that incarceration is appropriate, the former spouse may be held in indirect criminal contempt after the court complies with the appropriate procedures. *See id.*; *see also Sturgis*, 598 So. 2d at 97 ("The courts are adamant that before a valid order of incarceration for civil contempt can be entered there must be a finding that the contemnor has the present ability to purge himself of contempt.").

personal representative for failing to return estate property, absent an express finding that the contemnor has the present ability to comply."[180]

A court must exercise its independent judgment in drafting a contempt order.[181] Where a trial judge enters a contempt order drafted by counsel for the party moving for contempt, solicits and adheres to input about the content of that order only from that counsel, the proposed order is not reviewed by the accused's counsel, and the court signs the proposed order on receipt, the order may be reversed due to the judge's apparent failure to exercise independent judgment.[182] A judge should be encouraged to state his or her findings of fact and conclusions of law on the record, prior to entry of an order.[183] To minimize the likelihood of reversal after entry of an order of contempt, various factors should be taken into account by both counsel and the court. These factors include whether all parties were afforded an opportunity to submit proposed orders, whether each party was afforded an

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[180] *Jensen*, 896 So. 2d at 920 (reversing contempt incarceration when court failed to include whether contemnor had ability to comply); *see Keul*, 180 So. 3d at 1078 (affirming indirect civil contempt when no incarceration ordered). *Jensen* provides an example of a situation in which a court order holding a former personal representative in civil contempt was set aside on appeal due to failure of the trial court to both find and state in its order that the former personal representative had the ability to comply with the purge provision. *See* 896 So. 2d at 910. This is consistent with court rulings in other types of litigation. *See* Turner v. Rogers, 564 U.S. 431, 449 (2011) (vacating contempt after trial court failed to determine contemnor could comply). The failure of the trial court to determine that the former husband had the ability to pay sums due, and its determination to the contrary, precluded affirmance of a civil contempt judgment. *Id*. at 437-38.

[181] *See* Larkins v. Mendez, 363 So. 3d 140, 146 (Fla. Dist. Ct. App. 2023) (concluding trial court's failure to exercise independent judgment warranted reversal).

[182] *See id.* In *Larkins*, the contempt order was reversed on appeal for failure of the trial judge to exercise independent judgment in drafting the contempt order. *See id.* at 147. This conclusion resulted at the hearing on contempt, the court noted the trial judge:

> (i) did not make detailed factual findings; (ii) solicited from Mendez what Mendez wished to see in the proposed contempt order; (iii) instructed Mendez to draft and submit the proposed order, allowing Mendez to author the findings of fact and conclusions of law, and to establish the daily fine; (iv) deferred to Mendez whether to include in the proposed order a sixty-day purge provision, as requested by Larkins, Jr.'s' counsel (which was not included); and (v) did not require that Mendez share a draft of the proposed order with Larkins, Jr.'s counsel and, indeed, Mendez did not do so before submission. The probate court then signed the five-page, single-spaced proposed order verbatim ten minutes after receiving it.

Id. at 146-47.

[183] *See id.* at 147 (highlighting failure to make factual finding on record); *cf.* Perlow v. Berg-Perlow, 875 So. 2d 383, 390 (Fla. 2004) (deeming order invalid when "the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment"); King v. Farah & Farah, P.A., 358 So. 3d 1271, 1272 (Fla. Dist. Ct. App. 2023) (adopting proposed judgment verbatim without factual findings or legal conclusions supporting it). While neither *Perlow* nor *King* involved contempt, their reasoning was adopted in *Larkins* and extended to contempt. *See Larkins*, 363 So. 3d at 147.

opportunity to comment on another party's proposed order, the length of the proposed orders, whether the judge made changes to any proposed order, and the length of time expired after the court's receipt of proposed orders before entry of the final order.[184]

A party who fails to comply with a probate court order and then fails to appear at a hearing following an order to show cause may be held in civil contempt.[185] Entry of a written judgment of civil contempt is crucial.[186] For a judgment of civil contempt to be valid and upheld on appeal, the court order allegedly violated must expressly state what the accused was required to do.[187] "When a final judgment or order is not sufficiently explicit or precise

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[184] *See Perlow*, 875 So. 2d at 389 (requiring judges to provide opportunity to object to proposed orders); *King*, 358 So. 3d at 1272 (reversing judgment when judge "specifically advised the parties to not allow one another to see their proposals"). Whether one or both parties submit proposed orders, counsel should assure that any proposed order is submitted to opposing counsel for review and comment. *See King*, 358 So. 3d at 1272. This is particularly true where the judge requests that only one party submit a proposed order. *See Perlow*, 875 So. 2d at 389. The longer the proposed order and the fewer the changes the judge makes in the final order entered, the greater the likelihood that an appellate court will decide that there is an appearance that the trial judge did not exercise independent judgment resulting in a reversal. *See Larkins*, 363 So. 3d at 146-47 (reversing order when judge considered same for only ten minutes).

[185] *See In re* Est. of Nelms, No. CIV. 1996-CP-2005, 2002 Fla. Cir. LEXIS 163, at *1 (Fla. 12th Cir. Jan. 28, 2002). In that case the personal representative's counsel withdrew representation. *Id*. For over a year no estate administration occurred. *Id*. The judge issued an order requiring the personal representative to file a statement regarding creditors and other documents to close the estate. *Id*. The personal representative did not comply. *Id*. The court held the personal representative in contempt, administratively closed the court proceeding for the estate and discharged the personal representative. *Id*. In family law cases, if the alleged contemnor fails to appear, the court may enter an order of contempt, set a reasonable purge amount, and issue a writ of bodily attachment requiring the accused's presence in court to determine if he or she has the ability to pay support and willfully failed to do so. *See* FLA. FAM. LAW. R.P. 12.615(c)(2)(B).

[186] *See* McKee v. Osman, 710 So. 2d 221, 222 (Fla. Dist. Ct. App. 2000) (requiring judges to set forth certain information in orders in writing). In *Osman* the first trial judge verbally ordered that counsel for the personal representative be held in contempt. *Id.* However, that order was not reduced to a signed writing. *Id.* Thereafter, the trial judge recused himself from the case, a second trial judge retired, and a third trial judge determined that she could not readily determine the content of the prior contempt order absent a signed written order. *Id.* After the appellate court directed that the trial judge hold whatever hearings were needed to ascertain what the initial contempt order said she did so. *Id.* (directing trial judge to make factual determination). That did not occur until after the third trial judge ordered mediation, mediation failed, the case was wrongly dismissed, and further motions were made. *See* Osman v. McKee, 762 So. 2d 950, 951 (Fla. Dist. Ct. App. 2000). The outcome was that the attorney for the personal representative was not only held in contempt and required to pay damages, legal fees and costs to the injured party (the estate beneficiary's former spouse), but the appellate court mandated that a copy of its opinion be sent to The Florida Bar due to the attorneys' misconduct. *See id.* at 952 (ordering contemnor to pay costs and fees to injured party and "directing the Clerk of this Court to forward a copy of this opinion to The Florida Bar").

[187] *See* DeMello v. Buckman, 914 So. 2d 1090, 1094 (Fla. Dist. Ct. App. 2005) ("Implied or inherent provisions of a final judgment cannot serve as a basis for an order of contempt."). Where a judgment debtor fails to comply with court orders requiring his appearance in court and at

to put the party on notice of what the party may or may not do, it cannot support a conclusion that the party willfully or wantonly violated that court order."[188] For example, when an order requires payment by one party but does not specify when payment is to be made, the payor cannot be held in contempt for not making payment immediately.[189]

Constitutional rights protected in a criminal contempt proceeding do not always apply in civil contempt. The Fifth Amendment privilege against self-incrimination was held to be inapplicable to the personal representative of a decedent's estate accused of civil contempt and could not justify his refusal to provide estate records in violation of a court order.[190] This conclusion was reached although the personal representative was to be incarcerated until he complied with the purge provision.[191] The court stated "[t]he privilege against self-incrimination is a personal one. The individual and his records are both constitutionally protected. However, this immunity is designed to protect personal documents or papers, or at least those in his possession in a purely personal capacity."[192] Documents pertaining to a decedent's estate in possession of the personal representative are not the fiduciary's personal records.[193] Hence, the privilege does not apply.[194] "To hold otherwise, would permit a fiduciary to neglect his duties, and then to refuse to comply with a court order, which seeks to compel him to comply, by taking the 'fifth'."[195]

The general rule is that the privilege may attach to the personal representative's personal documents but "it does not attach to those documents

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supplementary examination after entry of a money judgment against him, but the civil contempt order requires his incarceration until he "fully pays all fines and attorneys' fees and costs," the contempt judgment is invalid for failure to provide an exact dollar amount to be paid to purge the contempt. Neiman v. Naseer, 31 So. 3d 231, 234 (Fla. Dist. Ct. App. 2010) (requiring purge provision specifically state "the exact dollar amount needed to purge the contempt"). A provision in the contempt judgment requiring compliance with "all terms of this and any other then outstanding Orders of this Court" was likewise deficient for failure to state with specificity how the contempt might be purged. *Id.*

188 *DeMello*, 914 So. 2d at 1093 (holding final judgment must be express directive to warrant contempt).

189 *See* Lawrence v. Lawrence, 384 So. 2d 279, 280 (Fla. Dist. Ct. App. 1980) (demanding order be "sufficiently explicit and precise with reference to the time for payment").

190 *See In re* Rasmussen's Est., 335 So. 2d 634, 636 (Fla. Dist. Ct. App. 1975) (precluding Fifth Amendment privilege when personal representative failed to produce "documents which he was required to prepare or keep in carrying out his fiduciary duties as executor of the estate").

191 *See id.* (noting contempt was civil as it could be purged upon "production of the records").

192 *See id.* (holding self-incrimination privilege not applicable to non-personal documents).

193 *See id.*

194 *See id.*

195 *See Rasmussen's Est.*, 335 So. 2d at 636 (preventing fiduciary from avoiding responsibility through Fifth Amendment privilege).

the [personal representative] is required by law to prepare."[196] This general rule has limited application. A personal representative threatened with criminal prosecution by an estate beneficiary may decline to answer questions about estate administration and provide an estate accounting despite a court order to do so or be held in civil contempt when compliance could subject the personal representative to criminal prosecution.[197] One court recognized that:

> During discovery in a civil case, a litigant may assert the Fifth Amendment privilege when the litigant has reasonable grounds to believe that the response to a discovery request would furnish a link in the chain of evidence needed to prove a crime against the litigant. The Fifth Amendment privilege does not shield every kind of incriminating evidence. Rather it protects only testimonial or communicative evidence, not real or physical evidence which is not testimonial or communicative in nature.[198]

When the personal representative being deposed is asked questions, the answers to which could reasonably provide evidence that she committed a crime, and the beneficiary conducting the deposition states his intent to seek criminal prosecution, the Fifth Amendment applies.

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[196] *See* Pisciotti v. Stephens, 940 So. 2d 1217, 1221 (Fla. Dist. Ct. App. 2006) (explaining self-incrimination privilege typically does not protect documents prepared as fiduciary).

[197] *See id.* (holding personal representative protected by Fifth Amendment when criminal prosecution threatened). In *Pisciotti*, a married woman died leaving her estate to her spouse. *Id.* at 1219. The husband died shortly thereafter leaving his estate to his two children equally. *Id.* His daughter was appointed personal representative of the mother's estate and without court appointment acted as personal representative of the father's estate. *Id.* Decedents' son noted irregularities in the handling of the parents' assets, including checks purportedly signed after his father's death and false statements of the daughter at a court hearing. *Id.* The son sought to remove his sister as personal representative and to compel her to return estate assets. *Id.* During a deposition the personal representative refused to answer questions, following which the son threatened to have her prosecuted criminally. *Id.* (detailing at deposition, "brother stated that he may pursue criminal prosecution"). The son thereafter obtained a court order compelling the personal representative to answer the deposition questions, and when she refused an order holding her in contempt and requiring her to answer questions and provide estate accountings. *Id.* (noting trial court "ordered sister to testify and file a final accounting" of estate). The appellate court held that the trial court order violated the personal representative's Fifth Amendment privilege and was reversed. *Id.* at 1220.

[198] *Id.* at 1220 (applying Fifth Amendment privilege when civil case may lead to criminal prosecution). Because the trial court in *Pisciotti* did not review the questions the son posed in the deposition, and the trial court relied on the decision in *In re Rasmussen's Est.*, it may not have appreciated the potential for self-incrimination if its order was complied with. *See id.* ("Because of the facts and circumstances of this case, we distinguish *Rasmussen*.").

By accepting a fiduciary appointment, the personal representative of a Florida decedent's estate may have waived his or her Fifth Amendment privilege when ordered to provide an estate accounting.[199] An individual who accepts the position of personal representative of an estate, knowing that one task required of the personal representative is the preparation and service of an accounting, waives any Fifth Amendment privilege as an excuse for not providing the accounting.[200] Failure to timely claim the privilege when an estate accounting is sought may also constitute a waiver of the privilege by the personal representative.[201] Similarly, a court appointed guardian waives any Fifth Amendment privilege, and thus may be held in contempt for failure to file court ordered accountings, as required by Fla. Stat. § 744.511, when the guardian is removed from her position.[202]

In a civil contempt proceeding the accused does not generally have a right to counsel under the Sixth Amendment to the United States' Constitution.[203] In a civil proceeding the Due Process Clause may require an indigent defendant to be provided with counsel when fundamental fairness dictates that requirement.[204] The applicable test requires the court to consider

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[199] Goethel v. Lawrence, 599 So. 2d 232, 233 (Fla. Dist. Ct. App. 1992) (addressing writ of habeus corpus). In *Goethel* the former personal representative of a decedent's estate was ordered to prepare and provide an accurate estate accounting. *Id.* When he failed to do so he was held in contempt and imprisoned. *Id.* He filed a petition for a writ of habeas corpus, claiming that he had a Fifth Amendment privilege which excused him from being compelled to provide an accounting. *See id.* (noting Fifth Amendment waived when personal representative accepts appointment "which statutorily requires the rending of such accountings").

[200] *See id.* (noting waiver of Fifth Amendment)

[201] *See id.* (holding privilege waived after "he made numerous prior representations and responses to the court concerning the subject of the accounting without then raising the privilege").

[202] *See* Wright v. Fla. Dept. of HRS, 668 So. 2d 661, 662-63 (Fla. Dist. Ct. App. 1996) (reasoning guardian waives Fifth Amendment protection). Ms. Wright served as guardian for multiple persons. *Id.* at 662. She was removed following allegations that she exploited her wards by improper management of funds, and she was ordered to provide final accountings. *Id.* When she failed to comply, she was properly held in contempt and ordered incarcerated until either she produced the accountings or the expiration of six months. *Id.*

[203] *See* Turner v. Rogers, 564 U.S. 431, 446 (2011) ("[T]he Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened."). *Turner* involved a former husband held in contempt at the trial level for failure to pay court ordered child support. *Id.* at 436-37. The primary issue facing the Court was whether the Fourteenth Amendment Due Process Clause required the state to provide counsel to an indigent defendant in a civil contempt proceeding where the defendant could face incarceration. *Id.* at 435, 442.

[204] *See id.* at 444 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (detailing fairness factors requiring appointment counsel in civil proceedings). In the context of civil contempt in family court for nonpayment of child support, the Court concluded that the Due Process Clause does not require counsel to be provided by the state to an indigent defendant if the opposing parent to whom child support is owed is not represented by counsel, and adequate "substitute procedural safeguards" are provided. *Id.* at 448-49. The substitute procedural safeguards are viewed as significantly reducing the risks of depriving defendant of liberty erroneously:

three factors in determining whether counsel is required to be appointed, including: "(1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."[205] The fact that incarceration may be a sanction imposed for civil contempt does not automatically require the state to provide counsel to an indigent defendant.[206] In a civil contempt proceeding the accused is not generally entitled to a jury trial.[207]

III. APPLICATION OF CONTEMPT IN ESTATE, TRUST AND GUARDIANSHIP CASES

Holding a person in contempt is an extreme action and rarely occurs, particularly in estate, trust and guardianship cases. Multiple motions may be required before an individual ceases his or her improper behavior and a court enters a judgment of contempt and imposes sanctions.[208] Parties, counsel, beneficiaries of non-probate assets, and persons in possession of assets in a fiduciary capacity have, however, had civil contempt judgments entered against them in estate, trust and guardianship cases. Disputes may arise about whether the action taken by the trial judge and the judgment entered held an individual in civil or criminal contempt.[209]

> Those safeguards include (1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.,* those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 447-48. The Court noted the limited application of its holding, expressly directing that it does not apply where the party seeking past due child support is represented by counsel, or the case is unusually complex. *Id.* at 449.

[205] *Turner*, 564 U.S. at 444-45 (listing relevant fairness factors).

[206] *See id.* at 446 (reasoning that the risk of incarceration is not alone determinative of whether counsel is required to be appointed).

[207] *See* Lussy v. John Fenniman, Ltd., 763 So. 2d 1110, 1111 (Fla. Dist. Ct. App. 1999) ("There was no right to trial by jury in *civil* contempt proceedings at common law.").

[208] *See* Weinberg v. Weinberg, 137 So. 3d 600, 601-03 (Fla. Dist. Ct. App. 2014) (detailing numerous contempt motions filed prior to entry of contempt judgment).

[209] *See* Blechman v. Dely, 138 So. 3d 1110, 1112 (Fla. Dist. Ct. App. 2014) (holding purge provision only stated orally by judge converted contempt to criminal, not civil). In *Blechman*, there was no purge provision in the written order; only the court's verbal order said the personal representative could purge the contempt by filing an accounting and turning over the estate assets to a new personal representative. *Id.* The written order entered removed the personal representative,

Wrongful retention or improper delivery of estate assets may justify a finding of civil contempt. An estate beneficiary who withdrew funds from a bank account titled in his and decedent's names after decedent's death was held in contempt when, following a court order determining the account to be a convenience account with no rights of survivorship and requiring the beneficiary to return the sums withdrawn from the account, the beneficiary failed to return the sums withdrawn to the estate.[210] Attorneys representing a personal representative of a decedent's estate may be held in civil contempt for failing to reduce a judge's verbal order to deposit estate assets into the court registry to writing for the judge to sign, and may violate that order by delivering the estate assets to his client while knowing a creditor of the estate's beneficiary sought to collect a debt from the beneficiary's share of the estate.[211] Counsel for a personal representative has been held in contempt for a failure to obey a court order requiring her to provide an estate accounting, and specifically to account for all fees she received from the estate and funds expended to repair a vehicle owned by the estate.[212]

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required the removed personal representative to provide a final accounting and deliver the estate records to the successor within 30 days, and found him "guilty of indirect criminal contempt . . . ." *Id.* at 1113. The absence of an effective purge provision and the removal of the personal representative from that position as punishment caused the appellate court to conclude that indirect criminal contempt rather than civil contempt was at issue. *Id.* at 1114; *see also Weinberg*, 137 So. 3d at 603-04 (holding contempt order procedurally flawed as either criminal or civil contempt).

[210] *See Larkins v. Mendez*, 363 So. 3d 140, 146 (Fla. Dist. Ct. App. 2023) (stating details of court order contemnor failed to comply with).

[211] *See* Osman v. McKee, 762 So. 2d 950, 952 (Fla. Dist. Ct. App. 2000) (affirming two-part contempt for contemnor failing to "submit an order to the court as directed and fail[ing] to deposit the money and close the estate"). Attorney Osman was counsel to the personal representative of a decedent's estate. *Id.* at 951. At a status conference Mr. Osman claimed he could not locate the estate's beneficiary. *Id.* Counsel for the beneficiary's former spouse participated in the status conference, advising the judge and Attorney Osman of her client's claim against the beneficiary's share of the estate for unpaid alimony and child support. *Id.* The judge verbally ordered Attorney Osman to deposit estate assets with the court registry, which Attorney Osman failed to do. *Id.* Attorney Osman instead delivered the estate assets to the beneficiary, while falsely representing that he would deliver them to the court registry, while representing to the court that he had closed the estate. *Id.* The beneficiary's former spouse intervened in the estate proceeding and filed a motion for civil contempt which was granted; Attorney Osman was ordered to pay a sum to the beneficiary's former spouse equal to the past due alimony and child support remaining owed by the estate beneficiary in addition to the former spouse's legal fees and costs. *Id.* at 952 (affirming trial court's contempt order).

[212] *See* Morrison v. Est. of DeMarco, 833 So. 2d 180, 182 (Fla. Dist. Ct. App. 2002) (affirming judgment of contempt for failure to comply with court order). In *Morrison*, counsel represented decedent's adult son who served as personal representative of his father's intestate estate and was the only heir. *Id.* at 181. Two petitions were granted by the court for leave to sell decedent's condominium residence and to distribute the net sale proceeds as the son directed. *Id.* A petition was also filed to declare decedent's condominium homestead, however, no order on that petition was entered. *Id.* at 181 n.1. At the closing on the sale of the condominium counsel was paid $23,500.00 for "notary fees," allegedly with the son's consent. *Id.* at 181. Four months after the

A civil contempt judgment may be properly entered against a personal representative of a decedent's estate who defies a court order to return proceeds of a pay on death account to the estate, when the personal representative obtained those funds benefitting her personally through undue influence.[213] Civil contempt was also properly imposed when a personal representative failed to comply with a court order to produce estate records needed to address questions about whether an estate was properly administered and distributed.[214] An individual interested in an estate was not properly held in indirect civil contempt for allegedly stating in court that decedent's residence was vacant, when she and her son actually occupied the residence, because the transcript of the court hearing did not reflect the statements allegedly made.[215]

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sale, the personal representative retained new counsel who sought an accounting from the first attorney. *Id.* The original attorney neither attended the court hearing at which the motion to compel an accounting was granted, nor produced the accounting within 21 days as ordered by the court. *Id.* Despite counsel's arguments that she earned the $23,500.00 for legal work relating to the estate and in other matters, and that the court lacked jurisdiction as decedent's condominium was homestead and therefore not property subject to administration, the judgment of contempt was upheld on appeal. *Id.* at 182 ("Based on the record before us, appellant has failed to demonstrate that those [notary] fees were unrelated to the probate of the estate and outside the [probate] court's jurisdiction."). Though the court opinion does not expressly state that civil contempt was involved, the procedure followed supports that conclusion. *Id.* at 181 (detailing purge provision requiring accounting with twenty-one days).

[213] *See* Keul v. Hodges Blvd. Presbyterian Church, 180 So. 3d 1074, 1075 (Fla. Dist. Ct. App. 2015) (explaining decedent's intended testamentary disposition). Despite her intended disposition, decedent's caregiver claimed that prior to her death decedent signed forms to name the caregiver and the caregiver's relatives pay on death beneficiaries of decedent's credit union account. *Id.* at 1075-76. Two disinterested witnesses testified that decedent wanted the church to benefit from her wealth remaining at her death. *See id.* at 1075. The trial court ordered the caregiver to return all funds received from the pay on death account to the estate or be held in civil contempt and imposed monetary sanctions rather than incarceration if the caregiver did not comply. *See id.* at 1077-78 (affirming civil contempt order as no incarceration ordered under any theory).

[214] *See In re* Rasmussen's Est., 335 So. 2d 634, 636 (Fla. Dist. Ct. App. 1975) (quashing writ of habeus corpus). After the court proceeding for the estate was closed based on the personal representative's petition representing that administration was completed, questions arose about whether certain gifts were delivered. *Id.* at 635. The circuit court determined that the personal representative failed to deliver a gift to a beneficiary and instead deposited the gift in the personal representative's own account. *Id.* Receipts signed by beneficiaries of other gifts were missing from the court file. *Id.* The court thus ordered the personal representative to produce his estate records. *Id.* The personal representative was initially unable to find his records; once he located them, he declined to produce them based on the Fifth Amendment privilege against self-incrimination. *Id.* The trial court held the personal representative in civil contempt and ordered that he be incarcerated until he produced the records. *Id.* (detailing trial court's incarceration of personal representative).

[215] *See* Woodward v. State, 238 So. 3d 290, 293 (Fla. Dist. Ct. App. 2018) (reversing contempt incarceration when "there is no factual basis" supporting alleged misrepresentations).

A trustee who repeatedly fails to comply with court orders requiring the trustee to provide a proper accounting may be held in civil contempt, but only if proper procedures are followed.[216] If a contempt order entered is defective due to failure to hold a required hearing or make necessary determinations, the judge may remedy that situation by holding a further hearing.[217] A trustee who fails to comply with a final judgment ordering it to pay trust income to beneficiaries, provide accountings, properly administer the trust, return to the trust compensation and legal fees paid by the trust, and pay legal fees advanced by beneficiaries in the trust litigation was held in civil contempt.[218]

A financial institution serving as trustee was not properly held in civil contempt for failing to immediately distribute trust assets to beneficiaries pursuant to a court order determining beneficiaries of the trust and directing the trustee "to make distribution to [the Beneficiaries] in accordance with the Trust."[219] In granting summary judgment determining beneficiaries, the court's order directing distribution of trust assets did not set a deadline by

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[216] *See* Weinberg v. Weinberg, 137 So. 3d 600, 601 (Fla. Dist. Ct. App. 2014) (reversing contempt order due to procedural defects).

[217] *See id.* at 603 (affirming denial of final judgment based on defective contempt order). In *Weinberg*, a man and his second wife created a revocable trust. *Id.* at 601. The trust became irrevocable on the husband's death, at which time certain trust assets were to be distributed to the husband's adult children. *Id.* Instead of complying with the trust's terms, the widow first unsuccessfully attempted to revoke the trust and retain all trust assets for her benefit. *Id.* After the court required the widow to distribute assets to the sons, the decedent's sons requested an accounting. *Id*. When the accounting was not forthcoming, on motion of the sons the trial court ordered the trustee to produce an accounting within thirty days. *Id.* The trustee merely provided an insufficient declaration she signed with copies of trust brokerage account statements attached; the court entered a further order finding the trustee in contempt and ordering the trustee to provide a sufficient accounting within five days or pay $500.00 per day thereafter if the accounting was not timely provided. *Id.* That contempt order was entered after a hearing on uniform motion calendar at which neither the trustee nor her attorney appeared, without a finding that the trustee had the ability to pay the sanction or that the sanction adequately reflected damages. *Id.* The trustee continued to file incomplete accountings and following disqualification of the first judge, a second trial judge continued to sign orders requiring a proper complete accounting but declined to enter a judgment of contempt. *Id.* at 602. Despite affirming the denial of a judgment, the appellate court held that the trustee's repeated disregard of court orders warranted a finding of contempt and imposition of sanctions and directed the second trial judge to hold a further hearing to determine an appropriate sanction. *Id.* at 603.

[218] *See* Fla. Coast Bank of Pompano Beach v. Mayes, 433 So. 2d 1033, 1035 (Fla. Dist. Ct. App. 1983) (affirming imposition of sanction fines despite coercive rather than compensative nature).

[219] *See* Merrill Lynch Tr. Co. v. Alzheimer's Lifeliners Ass'n, 832 So. 2d 948, 950 (Fla. Dist. Ct. App. 2002) (detailing underlying action resulting in order directing trustee to distribute assets pursuant to original trust). The underlying action involved whether the charitable beneficiaries named in the deceased settlor's original trust agreement or the charity named in a trust amendment were the proper beneficiaries of the trust. *Id.* The court invalidated the trust amendment and ruled in favor of the initially named charities. *Id.*

which distribution was to occur; when the trustee did not immediately distribute remaining trust assets the prevailing beneficiaries sought and were granted a judgment of contempt against the trustee for failure to comply with the court's order.[220] The court recognized the general rule that when an order does not specify a period of time for compliance, it is assumed that the performance is required on issuance, but noted that failure of an ordered party to comply immediately is not grounds for contempt when the order specifies no time period.[221]Because the trustee promptly began the process to distribute trust assets while complying with procedures mandated by Florida trust law, the trustee lacked the required intent to violate a court order and could not be held in contempt.[222]

A removed trustee could not properly be held in indirect civil contempt when a court order requiring her to deposit rent received by the trust from an out of state property into the court registry was not complied with, as the tenant, a corporation owned by the removed trustee's husband, ceased paying rent.[223] Although the removed trustee was an officer and director of the corporate tenant, no court order expressly required her or the corporation to pay rent or collect rent.[224] Where the fiduciary of a decedent's estate

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[220] *See id.* at 951. Instead of immediately distributing trust assets, the trustee followed normal trust administration procedure, preparing documents and accounting within one month of the order. *See id.* The trustee also provided documents for beneficiaries to sign and return to approve the accounting and release the trustee from liability, to enable the trustee to distribute trust assets prior to the six-month deadline for beneficiaries to object to the accounting. *Id.* at 953-54. Instead of signing and returning the documents to expedite trust distribution the beneficiaries sought to hold the trustee in contempt. *Id.* at 954 (describing beneficiaries' motion for contempt).

[221] *See id.* at 953-54. In *Merrill Lynch*, the court specifically held that while a general rule requiring timely performance is assumed, not complying immediately does not warrant a finding of contempt. *Id.* at 953.

[222] *See id.* at 953 ("While [trustee] did not distribute the Trust assets upon this court's mandate, [trustee] did begin the distribution process as mandated by Florida law."). The court in *Merrill Lynch* further noted that "[a]n essential finding to support contempt is the party's intent to violate the court order at issue." *Id.* at 954; *see also* Power Line Components, Inc. v. Mil-Spec Components, Inc, 720 So. 2d 546, 548 (Fla. Dist. Ct. App. 1998) ("In addition, intent to disobey a court order is one of the necessary elements of contempt."). As Merrill Lynch began the process to distribute the trust assets as required by law, the appellate court held that the requisite intent was lacking. *Merrill Lynch*, 832 So. 2d at 954.

[223] *See* DeMello v. Buckman, 914 So. 2d 1090, 1093 (Fla. Dist. Ct. App. 2005) (describing underlying contempt motions following trustee's failure to pay rent).

[224] *See id.* at 1092 (noting order removed trustee but failed to include direction to pay rent). *DeMello* involved litigation resulting when parents created trusts and designated one of their two daughters to serve as trustee after the parents' deaths, with their two daughters as the only beneficiaries. *See id.* at 109 (describing creation of trust). The daughter not serving as trustee sued her sister "alleging breach of trust and fiduciary duty, specific performance, accounting, personal liability for self-dealing, willful conduct" and sought removal of the trustee, which the court granted. *Id.* The sole remaining trust asset was a commercial property in Connecticut, which had been leased by the deceased settlors to a business owned by the removed trustee's spouse. *Id*. at 1092-

obtained a court order requiring grantees named in a deed to return decedent's real estate to the estate, the grantees could not be held in contempt for failure to return the property to the estate when no deed was presented to them to sign.[225] Where on the request of the personal representative of a decedent's estate a judge ordered two business associates of decedent to remit payment from any assets they might hold in trust for the benefit of decedent's child or to state that they held no such funds, and the business associates filed a sworn response stating that they held no such funds, a civil contempt order entered against them was overturned on appeal.[226] A ward's adult son was held in indirect criminal contempt when, after an emergency temporary plenary guardian was appointed, the son removed the ward from the State of Florida without notice or authorization to do so.[227]

IV. REMEDIES IN CIVIL CONTEMPT

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained."[228] The purpose of the sanction dictates the factors the court must consider in setting the amount of any fine imposed:

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93 (detailing removed trustee's management interest in trust's tenant). The trial court's order removing the trustee required her to deposit further rent payments from the corporation into the trust's account. *Id.* at 1092 (restating trial court order). A second court order was thereafter entered requiring the Connecticut real estate to be titled in the names of both beneficiaries and immediately listed for sale, this time requiring all rents to be deposited with the court registry. *Id.* Plaintiff then successfully sought a court order requiring the removed trustee to deposit rent with the court registry. *Id.* at 1093 (granting request to deposit rent payment with registry). Following repeated attempts to coerce the removed trustee into depositing rent, including five motions for contempt and sanctions, the trial court eventually held the removed trustee in indirect civil contempt. *Id.*

[225] *See* State *ex rel.* Everette v. Petteway, 179 So. 666, 673 (Fla. 1938) ("The petition below for rule to show cause why the defendants should not be punished for contempt does not show that a deed like that called for in the final decree was presented to the defendants . . . ."). For the defendants' contempt judgment to be upheld, it would have been necessary for the defendants to have an opportunity to sign the document requested by the court; the fact that no document was presented to them warranted reversal of the contempt. *See id.*

[226] *See* Altaba v. Lanciotti, 698 So. 2d 400, 401 (Fla. Dist. Ct. App. 1997) (reversing contempt in light of evidence that contemnors had no improperly held benefits).

[227] *See In re* Guardianship of Graham, 963 So. 2d 275, 277 (Fla. Dist. Ct. App. 2007) (holding ward's adult son in contempt when son "surreptitiously took [ward] from the residence where she had been placed by the guardian and moved her to California").

[228] United States v. United Mine Workers of Am., 330 U.S. 258, 303-04 (1947) (stressing dual purpose of contempt and sanctions); *see* Dep't of Children and Families v. State Atty, Fourth Judicial Circuit, 343 So. 3d 1251, 1254 (Fla. Dist. Ct. App. 2022) (noting contempt may "be intended to both coerce and punish," having characteristics of civil and criminal contempt).

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of the complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy. But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the desired result.[229]

Where a party is found in civil contempt, the court may order that party to pay attorney's fees incurred in the contempt proceeding to the injured party.[230] Incarceration may be imposed as a sanction for civil contempt, provided that the accused may avoid incarceration by complying with the purge provisions.[231] The term of incarceration may not exceed the time

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[229] *United Mine Workers of Am.*, 330 U.S. at 304 (footnotes omitted) (reasoning fines payable to aggrieved party when contempt remedial, or court when contempt coercive). A compensatory fine in civil contempt must be in an amount determined by the trial court to be reasonably related to the damages suffered by the injured party. *See* Langbert v. Langbert, 409 So. 2d 1066, 1068 (Fla. Dist. Ct. App. 1981). The trial court's imposition of a substantial per diem fine until the contemnor complied with the court order absent a determination of financial harm suffered by the injured party required reversal. *See id.*

[230] *See* Neiman v. Naseer, 31 So. 3d 231, 234 (Fla. Dist. Ct. App. 2010); Nical of Palm Beach, Inc. v. Lewis, 981 So. 2d 502, 507 (Fla. Dist. Ct. App. 2008) ("If a party is found in contempt, it is proper for the court to compensate the injured party by assessing attorney's fees for the contempt proceedings." (quoting *Levine v. Keaster*, 862 So. 2d 876, 880 (Fla. Dist. Ct. App. 2003))). *Goknar v. Goknar* involved siblings litigating about a family trust. *See* 363 So. 3d 1145, 1146-47 (Fla. Dist. Ct. App. 2023). The court ordered the trust beneficiaries, a brother and his two sisters, to each return $100,000.00 to the trust. *Id.* at 1146. When the brother failed to comply, his sisters sought and obtained a court order holding him in contempt. *Id.* (describing events leading to motion for contempt). As a sanction the court required him to pay his sisters' legal fees, which led to continuing litigation about the amount of those fees; the sisters sought "fees on fees" under the inequitable conduct doctrine. *Id.* at 1149-50 (noting sisters requested fees for litigation disputing amount of previous fees). Because the brother was not given notice in the contempt order that these additional fees might be imposed and the trial court did not include sufficient specific factual findings as to why recovery of those fees was appropriate, the "fees on fees" were not payable by the brother. *Id.* at 1150 (reversing contempt award).

[231] *See* Shillitani v. United States, 384 U.S 364, 370 (1966) ("Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance.") (citations omitted); *see also* Parisi v. Broward Cnty., 769 So. 2d 359, 365 (Fla. 2000) (indicating incarceration suggests contempt is criminal, not civil); *Shillitani*, 384 U.S. at 371 ("[T]he justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order."). In *Shillitani*, the defendant was incarcerated due to civil contempt for failure to testify at a grand jury proceeding, with a purge provision that he would be released if he testified. *See* 384 U.S. at 365.

within which defendant has to comply with the court order violated.[232] Fines may be imposed with the same caveat.[233] "An example of a valid coercive fine is a per diem fine imposed each day the contemnor fails to comply with the court's order, but when the contemnor complies with the underlying order, the requirement to pay the additional fines will be purged."[234]

In civil contempt a fine may be payable to the party injured by the failure to obey a court order.[235] If a court imposes a fine as a sanction for civil contempt the contemnor's financial resources and ability to pay must be considered in determining the amount of the fine.[236] Where a bonded fine is required by the court to assure future performance by the contemnor, the court must first consider the contemnor's financial resources to ascertain if contemnor has the ability to pay for the bond.[237] If the purpose of imposition of a fine in civil contempt is to compensate the party in whose favor the order was entered for damages resulting from failure to comply, the amount of the actual loss suffered must be determined.[238]

V. REVIEW OF CONTEMPT JUDGMENTS

A contempt judgment of a trial court may be reviewed; when and how that judgment is subject to review warrants further consideration.[239] Final orders are appealable, including criminal contempt convictions,[240]and separate final judgments from which an immediate appeal may be taken

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[232] *See Shillitani*, 384 U.S. at 371-72 (reversing two-year incarceration as duration of sentence continued after "the grand jury ceased to function").

[233] *See Parisi*, 769 So. 2d at 365. In *Dep't of Children and Families v. State Atty, Fourth Judicial Circuit*, 343 So. 3d at 1254, a per diem coercive sanction unrelated to actual damages set forth in a contempt order with no purge provision could not be upheld.

[234] *Parisi*, 769 So. 2d at 365 (deeming contempt civil when fine includes purge provision).

[235] *See* Menke v. Wendell, 188 So. 3d 869, 873 (Fla. Dist. Ct. App 2015) ("Fines for civil contempt may be imposed either as . . . . a compensatory contempt sanction intended to compensate for losses sustained as a result of the contempt . . . . In imposing a fine as a compensatory sanction, the amount of the fine must be based on evidence of the injured party's actual loss.").

[236] *See* United States v. United Mine Workers of Am., 330 U.S. 258, 304 (1947) (noting court imposing contempt fine must "consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant").

[237] *See Parisi*, 769 So. 2d at 367 (criticizing use of "bonded fine [as] an invalid coercive civil contempt sanction").

[238] *See id.* at 366 (reversing bonded fine where injured party "did not submit any evidence to establish that the amount of the sanction was related to damages suffered").

[239] *See* Roland F. Chase, *Appealability of Contempt Adjudication or Conviction*, 33 A.L.R.3d 448, 448 (1970) (analyzing appealability of contempt nationwide).

[240] Fla. R. App. P. 9.110.

regardless of the status of the underlying case.[241] In contrast, a finding of civil contempt against a party is generally appealable only on conclusion of the underlying lawsuit.[242] Non-final orders in civil cases may be appealed to the District Court of Appeal only as specified in Fla. R. Civ. P. 9.130, unless they meet the standards for issuance of an extraordinary writ. Whether an order or judgment is final is not always obvious.[243] Generally, an order must resolve or dispose of the issues presented in a case to be final.[244] Judgments of contempt against non-parties are generally final orders.[245] Where a non-final trial court judgment qualifies for immediate appeal, the party against whom it is entered may have the option of waiting until a final order is entered in the case to appeal.[246] In criminal cases, Fla. R. App. P. 9.140 addresses when nonfinal orders may be appealed.

Disputes between the districts about whether the proper procedure is to seek certiorari or to appeal the non-final order have been resolved.[247] All Florida district courts which have addressed the matter now agree that "pre-judgment contempt orders are appealable nonfinal orders only if the ordered

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[241] *See* Fla. R. App. P. 9.110 (describing appellate procedure for review of final orders; *In re* Christensen Eng'g Co., 194 U.S. 458, 461 (1904) (holding immediate appeal of criminal contempt order when fine payable to court, not injured party); Hudson v. Marin, 259 So. 3d 148, 158 (Fla. Dist. Ct. App. 2018) ("[A] defendant found in indirect criminal contempt of court may seek relief from the contempt order on direct appeal."). *See also* Sandstrom v. State, 309 So. 2d 17 (Fla. Dist Ct. App. 1975) (affirming direct criminal contempt conviction for attorney violating court order to wear tie in court).

[242] *See* Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 608 (1907) (holding civil contempt not immediately appealable).

[243] *See* Muszynski v. Muszynski, 325 So. 3d 105, 105-06 (Fla. Dist. Ct. App. 2020) (noting alleged contemnor not actually sanctioned, only "warned [contemnor] of the potential for sanctions if he did not comply in thirty days; hence the order was not a final order and was not immediately appealable").

[244] *See* Matthew J. Conigliaro, *Orders Subject to Review*, APP. FL-CLE §§ 16.4 and 16.5 (Fla. Bar 11th ed. 2020) (noting FLA. R. APP. P. 9.170 governs appeals of contempt in probate and guardianship proceedings).

[245] *See* Conigliaro, *supra* note 243, at § 16.5G; *see also* Dep't of Children and Families v. State Atty, Fourth Judicial Circuit, 343 So. 3d 1251, 1253 (Fla. Dist. Ct. App. 2022) ("Because the Department was a non-party in the underlying criminal case, the contempt order requiring it to pay the Sheriff's Office constitutes a final appealable order.").

[246] *See* FLA. R. APP. P. 9.130(a)(3)-(5) (outlining situations in which orders are appealable).

[247] *Compare* Sears v. Sears, 617 So. 2d 807, 809 n.1 (Fla. Dist. Ct. App. 1993) (considering review of contempt order as certiorari), *with* Langbert v. Langbert, 409 So. 2d 1066, 1067 (Fla. Dist. Ct. App. 1981) (expressing uncertainty as to proper review of contempt orders). In *Pisciotti v. Stephens*, the personal representative held in contempt sought certiorari review, which the court treated as an appeal of a non-final order. *See* 940 So. 2d 1217, 1219 (Fla. 4th Dist. Ct. App. 2006); *see also* Altaba v. Lanciotti, 698 So. 2d 400 (Fla. Dist. Ct. App. 1997) (reversing contempt order against estate's debtors on certiorari). *But see* Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 607-08 (1907) (holding civil contempt judgment could not be appealed until final determination in action).

sanction falls within the subsections of Florida Rule of Appellate Procedure 9.130(a)(3).[248] Contempt order are not included in the rule specified.[249]

> The method of reviewing a civil contempt order differs depending on whether it is a post or pre-judgment contempt order. Post-judgment contempt orders are reviewed as final appeals. For pre-judgment contempt orders, two scenarios exist. In the first scenario, if the party found in contempt is taken into custody, then the proper method for seeking review is a petition for a writ of habeas corpus . . . . The second scenario [is] where the party found in contempt has not been taken into custody . . . . Rule 9.130(a)(3) provides an exhaustive list of nonfinal orders that can be appealed to the district courts of appeal. Contempt orders are not included in the list.[250]

The Fourth District receded from its position in *Langbert*, *Emerald Beach Way LC v. Thornton*, and other cases allowing interlocutory appeal of civil contempt orders entered against parties prior to final resolution of the litigation. *See* Decius v. Decius, 366 So. 3d 1092, 1095 (Fla. Dist. Ct. App. 2023). Now all districts which have ruled agree that pre-judgment contempt orders are not nonfinal appealable orders but may be reviewed by a petition for certiorari. *See id.*; *100 Emerald Beach Way LC,* 341 So. 3d at 348 (explaining view of First, Second, Third and Fifth Circuits). *100 Emerald Beach Way LC* involved a dispute about an easement. *Id.* The trial court held defendant in contempt for violating an injunction precluding certain access by it to the easement property. *Id.* A monetary fine was imposed payable if there were further violations of the injunction precluding prohibited use of the easement property. *Id.* at 349.

[248] *Decius*, 366 So. 3d at 1093. In this marital dissolution action, the husband failed to comply with a discovery order and was held in civil contempt. *Id.* at 1093-94. The husband was to be incarcerated for 30 days unless he provided the documents sought in discovery prior to that time. *Id.* The husband appealed raising the question of whether a pre-judgment contempt order was immediately appealable. *Id.* The court ruled that a pre-judgment contempt order against a party is a non-final order not property immediately appealable under Fla. R. App. P. 9.130(a)(3). *Id*. at 1095-96.

[249] *Id*. at 1093.

[250] *Decius*, 366 So. 3d at 1094 (citation omitted). The court's reasoning in joining the view adopted by other districts was the following:

> By its plain terms, Rule 9.130 restricts which nonfinal orders may be reviewed by appeal. Rule 9.130(a) states that appeals to the district courts of appeal of nonfinal orders are '*limited"* (emphasis added) to those listed in subsections (A) to (G). By setting forth an exhaustive list, any category of case not listed in (A) to (G) must be excluded. . . . By using the word 'limited' to describe the breadth of our jurisdiction, Rule 9.130(a)(d) must be read restrictively. But it is not the text alone that compels this conclusion. We also find that a restrictive reading of Rule 9.130(a)(3) promotes judicial economy because "appellate review of nonfinal judgments serves to waste court resources and needlessly delays final judgment."

Id. at 1095 (citations omitted).

Where appeal is available, certiorari is not.[251] "A civil contempt order entered in an ongoing proceeding may be subject to certiorari review."[252] Where one against whom a civil contempt judgment is entered improperly appeals rather than requesting certiorari, the appellate court may treat the matter as a request for certiorari review.[253] "To be entitled to certiorari review, the petitioner must show that the contested order departs from the essential requirements of the law and that it results in material injury for the remainder of the case that cannot be corrected on post judgment appeal."[254] Where the defendant convicted of indirect criminal contempt is incarcerated, a petition for writ of habeas corpus rather than a petition for a writ of certiorari might be filed.[255]

> A judgment of [civil] contempt comes to the appellate court clothed in a presumption of correctness and will not be overturned unless a clear showing is made that the trial court either abused its discretion 'or departed so substantially from

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[251] *See* Dep't of Children and Families v. State Atty, 343 So. 3d 1251, 1254 (Fla. Dist. Ct. App. 2022) ("Common law certiorari is not available when the petitioner has an adequate remedy at law.").

[252] *See* Tarantola v. Henghold, 233 So. 3d 508, 510 (Fla. Dist. Ct. App. 2017) (treating review as certiorari review); *Decius*, 366 So. 3d at 1096 ("Rule 9.030(b)(2)(A) allows for certiorari jurisdiction as to nonfinal order 'other than as prescribed by rule 9.130.' Thus, Rule 9.030(b)(2)(A) serves as a catch-all for those nonfinal orders which do not fall under the provisions of Rule 9.130(a)(3).").

[253] *See* FLA. R. APP. P. 9.040(c) (outlining jurisdictional limits to appeal); Erskine v. Erskine, 344 So. 3d 566, 570 (Fla. Dist. Ct. App. 2022) (stating grounds for appeal); *Decius,* 366 So. 3d at 1096. In *Erskine*, a husband appealed a nonfinal trial court judgment of civil contempt imposed for his alleged improper use of a retirement account constituting marital property to satisfy a court ordered payment to his spouse. *Erskine*, 344 So. 3d at 570. Because there would be no irreparable harm to the husband if he waited until a further appealable nonfinal order or a final order was entered in the matrimonial case the appeal was dismissed. *See id.* at 571. The opposite is also true; an improper petition seeking certiorari may be treated by the appellate court as an appeal. *See Dep't of Children and Families*, 343 So. 3d at 1253 (treating writ of certiorari as appeal); Shook v. Alter, 715 So. 2d 1082, 1083 (Fla. Dist. Ct. App. 1998) ("Because this is a final order, so far as Shook is concerned, we conclude that review of this order should be by appeal, not by certiorari.").

[254] *See Tarantola*, 233 So. 3d at 509 (describing violation of covenant not to compete as contemptuous conduct). The trial court granted plaintiff a preliminary injunction which defendant allegedly violated, imposing a $1,640.00 per diem fine until the defendant doctor took various actions to purge, including taking down her website, informing patients about treatments she could not provide, taking down an advertising billboard and ceasing to refer patients to her other office where she could provide prohibited treatment. *Id.* at 509-10. Due to the potential effects on the relationship between defendant and her patients, she met the standard for certiorari. *Id.* at 510.

[255] *See In re* Contempt Adjudication of Weiner, 278 So. 3d 767, 768 (Fla. Dist. Ct. App. 2019) (addressing contempt review on certiorari as contemnor incarcerated); White v. Junior, 219 So. 3d 230, 233 (Fla. Dist. Ct. App. 2017) (granting writ of habeas corpus when contemnor deprived of rights). There is no assurance that the trial court will grant a stay of the judgment or sentence while the appeal is pending. *See White*, 219 So. 3d at 233 n.2.

> the essential requirements of the law as to have committed the fundamental error.'[256]

A different standard of review applies when a party is held in contempt for failure to adhere to a court order and the court order does not expressly direct or prohibit the questioned behavior.[257] In that case the standard of review is legal error.[258] Otherwise, "[a] trial court's decision to sanction an attorney for trial misconduct is reviewed under an abuse of discretion standard."[259] "[A] trial court's discretion is limited by rules, statutes, and case law, and a trial court abuses its discretion when its ruling is based on an erroneous view of the law."[260] Where a trial court finds a party in indirect civil contempt without first expressly determining that the party had the ability to comply, "the court departed so substantially from the essential requirement of law as to have committed fundamental error" warranting reversal of the contempt judgment.[261] When a party was held in indirect civil contempt for actions not expressly precluded in a court order approving a marital settlement agreement allegedly violated, a de novo standard of review applied.[262]

Similarly, an order of direct criminal contempt is reviewed on appeal for an abuse of discretion by the trial court.[263] Absent a record of the criminal

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[256] *See* Merrill Lynch Tr. Co. v. Alzheimer's Lifeliners Ass'n, 832 So. 2d 948, 953 (Fla. Dist. Ct. App. 2002) (quoting Northstar Invs. & Dev. Inc. v. Pobaco, Inc., 691 So. 2d 565, 566 (Fla. 5th Dist. Ct. App. 1997)) (reviewing multiple contempt orders); *see also* DeMello v. Buckman, 914 So. 2d 1090, 1093 (Fla. Dist. Ct. App. 2005) (confirming deference given to trial court in review of contempt); Larkins v. Mendez, 363 So. 3d 140, 146 n.6 (Fla. Dist. Ct. App. 2023) ("The contempt order is reviewed for an abuse of discretion.").

[257] *See* Cancino v. Cancino, 273 So. 3d 122, 126 (Fla. Dist. Ct. App. 2019). Where a party is held in indirect civil contempt for failing to do an act no court order expressly required the party to do, "the standard of review is legal error, not abuse of discretion." *DeMello*, 914 So. 2d at 1093 (reasoning standard is legal error "when a final judgment or order is not sufficiently explicit or precise to put party on notice"); Reder v. Miller, 102 So. 3d 742, 744 (Fla. Dist. Ct. App. 2014) (reviewing contempt on abuse of discretion or fundamental error).

[258] *See Cancino*, 273 So. 3d at 126 (noting legal error when written order "fail[s] to conform" to oral order).

[259] Carnival Corp. v. Beverly, 744 So. 2d 489, 493 (Fla. Dist. Ct. App. 1999) (reasoning trial court is in best position to determine whether sanctions are appropriate).

[260] *Reder*, 102 So. 3d at 744 (reviewing contempt based on court's intent rather than wording of order is error of law standard).

[261] *See* D.J. v. T.N.L., 191 So. 3d 943, 946 (Fla. Dist. Ct. App. 2016) ("[A] court's failure to scrupulously follow the mandates of a procedural rule enacted to ensure that the due process rights of alleged contemnors are protected meets the standards of fundamental error.").

[262] *See* Lynne v. Landsman, 306 So. 3d 390, 392 (Fla. Dist. Ct. App. 2020) (reviewing de novo when contempt "based upon noncompliance with something an order does not say").

[263] *See* Phelps v. State, 236 So. 3d 1162, 1163 (Fla. Dist. Ct. App. 2018) (analyzing criminal contempt sanction on abuse of discretion standard); Ramos v. North Star Ent. Firm, LLC, 295 So.

contempt proceedings, a judgment of criminal contempt may be reversed on appeal.[264] An appeal of a criminal contempt conviction is not rendered moot merely because defendant served his sentence by the time the appeal was heard.[265] Where an individual is held in direct criminal contempt due to his behavior in the courtroom, sentenced to jail time, and served that time before his conviction for contempt is overturned on appeal, the trial court has options about how to thereafter proceed.[266] One alternative is for the trial court to hold a hearing complying with the requirements of Rule 3.830.[267] Another option is for the trial court to withdraw "its direct criminal contempt charge and vacate the direct criminal contempt adjudication."[268]

Not every contempt judgment is ripe for immediate appeal on entry. Where a trustee was held in contempt but the trial judge retained jurisdiction to determine the fine to be imposed, the interlocutory order was not yet appealable.[269] An order entered against a trustee who is the defendant in a trust litigation to show cause as to why he should not be held in contempt is a nonfinal order not subject to interlocutory appeal under FLA. R. APP. P. 9.130(a)(3).[270]

The review on appeal is dependent on the record available and provided to the appellate court. Where appeal is anticipated, counsel should arrange for the trial court proceedings to be transcribed, as the transcript is to be provided to the appellate court.[271] Absent a transcript, a statement of evidence and proceedings may be prepared, provided that the requirements of FLA. R. APP. P. 9.200(b)(5) are complied with.[272]

3d 803, 807 (Fla. Dist. Ct. App. 2020) ("The standard of review of a direct criminal contempt conviction is abuse of discretion.").

[264] *See* FLA. R. CRIM. P. 3.721; Pole v. State, 198 So. 3d 961, 965 (Fla. Dist. Ct. App. 2016) (treating review as abuse of discretion when criminal contemnor was late and intoxicated at hearing).

[265] *See* Mayo v. Mayo, 260 So. 3d 497, 499 n.2 (Fla. Dist. Ct. App. 2018).

[266] *See* Manzaro v. D'Alessandro, 283 So. 3d 335, 336 (Fla. Dist. Ct. App. 2019) (detailing potential options on remand).

[267] *See id.* (requiring new hearing if proceeding with contempt).

[268] *See id.* (noting court may withdraw contempt charges and conviction altogether).

[269] *See* Weinberg v. Weinberg, 137 So. 3d 600, 603 (Fla. Dist. Ct. App. 2014) (explaining why appeal was premature).

[270] *See* Giller v. Giller, 338 So. 3d 999, 1000 (Fla. Dist. Ct. App. 2022) (dismissing appeal of show cause order as nonfinal).

[271] *See* FLA. R. APP. P. 9.200(a)(1) (describing evidentiary record to be presented on appeal).

[272] *See* FLA. R. APP. P. 9.200(b)(5) (providing record to compile if no transcript available); *see also* Jacobs v. Jacques, 310 So. 3d 1018, 1020 (Fla. Dist. Ct. App. 2020) (noting failure to provide complete record may result in appellate court not considering statement).

> The statement shall be served on all other parties, who may serve objections or proposed amendments to it within 15 days of service. Thereafter, the statement and any objections

Absent issuance of a stay by the trial court, a party held in contempt must comply with the monetary provisions of the court's order while an appeal is pending.[273] Under FLA. R. APP. P. 9.310(b)(1) the posting of a supersedeas bond by a party held in contempt without the authorization of the trial court, where the trial court denied a stay, does not stay execution of the monetary portions of a final judgment.[274] In limited situations it may also be possible to obtain a writ of prohibition precluding contempt.[275] "[P]rohibition is an extraordinary, preventative remedy that is generally granted to prohibit a lower tribunal from acting in excess of its jurisdiction."[276] "[P]rohibition will lie to prevent a hearing from going forward on an order to show cause where the factual basis underlying the show cause order, if taken as true, could not constitute contempt."[277] If the contempt proceeding being conducted by the trial court violates due process, prohibition may be available as a remedy following the issuance of an order to show cause.[278] "[P]rohibition will lie to prevent a contempt proceeding from going forward at a hearing before a judge that should be disqualified."[279] For example, when a trial court issued an order to show cause why a non-party to a lawsuit should

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> or proposed amendments shall be filed with the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

FLA. R. APP. P. 9.200(b)(5).

[273] *See* Fla. Coast Bank of Pompano Beach v. Mayes, 433 So. 2d 1033, 1034-35 (Fla. Dist. Ct. App. 1983) (affirming payment of coercive fine despite appeal pending).

[274] *Id.* at 1034 (declining to automatically stay contempt punishment during appeal).

[275] *See* Hudson v. Marin, 259 So. 3d 148, 158 (Fla. Dist. Ct. App. 2018) (granting prohibition when show cause order was "invalid as to the petitioners").

[276] *See id.* (prohibiting contempt proceeding when "attorney appointed by the trial court to serve as the special prosecutor at the contempt hearing should be disqualified").

[277] *See id.* (applying prohibition doctrine). In *Hudson*, a party in a mortgage foreclosure proceeding was ordered to produce documents at a deposition; when the party failed to do so, the judge issued an order to show cause as to why counsel for the party should not be held in indirect criminal contempt. *Id.* at 153-55. Counsel sought a writ of prohibition which was granted by the appellate court, as order to show cause was not supported by any sworn affidavit or testimony and there was no evidence that counsel advised her client not to produce the documents in compliance with the court's order. *Id.* at 160-62. There was no evidence that the attorneys "acted in a manner to embarrass, hinder, or obstruct the court in the administration of justice or calculated to lessen the court's authority and dignity." *Id.* at 161 (internal quotations omitted); *see also* Carrington Mtge. Servs., LLC v. Nicolas, 343 So. 3d 605, 609-10 (Fla. Dist. Ct. App. 2021) (acknowledging rare circumstance when prohibition granted, as actions "could not constitute contempt or court." (quoting Eubanks v. Agner, 636 So. 2d 596, 597 (Fla. Dist. Ct. App. 1994))).

[278] *See Carrington Mtge. Servs.*, 343 So. 3d at 610 (analyzing prohibition when contempt order did not "comport[] with due process, [was] improperly based on hearsay, arises from an unauthorized [FLA. R. CIV. P.] Rule 1.540 motion, and involves factual dispute that is not material").

[279] Hudson v. Marin, 259 So. 3d 148, 159 (Fla. Dist. Ct. App. 2018) (acknowledging extremely limited circumstances when prohibition applicable).

not be held in indirect criminal contempt, and the court order the non-party was accused of violating did not preclude the behavior in question, a writ of prohibition would issue.[280]

VI. CONCLUSION

Contempt should be employed sparingly. At times it is an appropriate tool to end misbehavior by a party, witness or attorney in litigation. Contempt is likely to be sought amid frustration, anger and other emotions generated by improper behavior in contested litigation. Despite the context, to avoid unnecessary expense and delay, counsel seeking a contempt judgment and a judge entering a contempt judgment, even on the court's own initiative, need to proceed cautiously and adhere to appropriate procedures. To benefit the parties effectively and to assure proper administration of justice, the information in this Article is intended to enable counsel to control their and their client's behavior to avoid assertions of contempt, in addition to employing contempt properly when the need arises.

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[280] *See* Tsokos v. Sunset Cove Invsts., 936 So. 2d 667, 667 (Fla. Dist. Ct. App. 2006) (granting prohibition when alleged contemnor facially committed no contempt). In *Tsokos*, a judgment pursuant to a mediated settlement entered required Sunset Cove to close a purchase agreement within three months. *Id.* at 668. When the three-month time limit expired, the plaintiff sold the property to Tsokos, a non-party to the suit. *Id.* Thereafter the original buyer, Sunset Cove, moved to hold Tsokos in indirect criminal contempt for disobedience and interference with the final judgment. *Id.* at 668. The writ of prohibition was granted, because the trial court's judgment did not expressly preclude a sale of the property to Tsokos when Sunset Cove failed to comply with the agreement. *Id.* at 670 (". . . [H]ere the final judgment did not prohibit a third party [Tsokos] from purchasing the real estate in question.").