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Contempt in General

Definition

- ▶ Contempt is an act in disrespect of the court or its processes, or that obstructs the administration of justice, or tends to bring the court into disrepute.
- ▶ *Singleton v. Commonwealth*, 52 Va. App. 665 (2008).

Inherent power

- ▶ The power to punish for contempt is inherent in, and as ancient as, courts themselves. It is essential to the proper administration of the law, to enable courts to enforce their orders, judgments and decrees, and to preserve the confidence and respect of the people without which the rights of the people cannot be maintained and enforced.
- ▶ *Carter v. Commonwealth*, 2 Va. App. 392 (1986).

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Generally Applicable Rules of Professional Conduct

► Preamble:

- A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

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Generally Applicable Rules of Professional Conduct

► 3.1 Meritorious Claims And Contentions.

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

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Generally Applicable Rules of Professional Conduct

▶ 3.8 Additional Responsibilities Of A Prosecutor

- ▶ A lawyer engaged in a prosecutorial function shall:
 - (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
 - (b) not knowingly take advantage of an unrepresented defendant;
 - (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
 (continued on next slide)

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Generally Applicable Rules of Professional Conduct

▶ 3.8 Additional Responsibilities Of A Prosecutor, Continued

- ▶ A lawyer engaged in a prosecutorial function shall:
 - ...
 - (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
 - (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

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Direct v. Indirect

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Describes the location where the behavior that is alleged to be contemptuous occurred

Direct Contempt

- ▶ Contempt that occurs in the presence of the Judge.
- ▶ The Judge is his/her own best witness of what occurred.
(*Scialdone, US. V. Marshall*)

Indirect contempt

- ▶ Contempt that takes place outside the presence of the Court.
- ▶ One or more essential elements of the contempt are not directly observed.

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Summary v. Plenary

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Describes the legal process required
before finding the behavior contemptuous

Summary Contempt

- ▶ When a judge determines contempt without process.
- ▶ Is **ONLY** allowed when the contempt is **DIRECT**.
- ▶ Is *limited* to 18.2-456 grounds

Plenary Contempt

- ▶ When a judge determines contempt after notice, right to counsel, evidence presented.
- ▶ Can be used for any type of contempt

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Criminal v. Civil

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Describes the nature of the relief sought
after finding contemptuous behavior

Criminal Contempt

- ▶ Purpose is *punitive*
- ▶ The outcome is designed to preserve and vindicate the power and dignity of the court.

Civil Contempt

- ▶ Purpose is *curative (or remedial)*
- ▶ The outcome is designed to enforce the orders of the court and make the injured party whole.

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Criminal Contempt Specifics

- ▶ Prosecuted by the Commonwealth Attorney (*generally - see slide 19 for exceptions*)
- ▶ Elements:
 - ▶ (1) Existence of a Court Order or Allegation of Misconduct. The Court order must be indefinite terms as to the duties imposed or the command expressed. (*Micheals v. CW, 32 Va. App. 601 (2000)*).
 - ▶ (2) Act(s) by defendant that violate a court order OR are contemptuous.
 - ▶ (3) The act(s) were Intentional or Willful.
- ▶ BOP: Beyond a Reasonable Doubt

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Criminal Contempt Specifics, Cont'd

- ▶ Punishments for *Summary* Contempt:
 - ▶ Maximum of \$250 fine
 - ▶ Maximum of 10 days in jail
- ▶ Punishments for Contempt after *Plenary* Proceeding:
 - ▶ Some statutes specify limits. Where no limits are specified:
 - ▶ Up to \$500 fine and/or up to 6 months in jail is considered “petty” contempt and no right to a jury trial attaches.
 - ▶ OVER \$500 fine and/or OVER 6 months in jail is considered more “serious” contempt and entitles a defendant to a jury trial.

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Civil Contempt Specifics

- ▶ Prosecuted by the Complainant (or their counsel)
- ▶ Elements:
 - ▶ (1) Existence of Court Order. “The order must be in definite terms as to the duties...imposed...and the command must be expressed rather than implied.” (*Winn*).
 - ▶ (2) Respondent’s Actual Knowledge of Order. (*Kidd v. Virginia Safe Deposit & Trust*, 113 Va. 612 (1912)).
 - ▶ (3) Respondent’s Violation of Order. Willfulness is not an element. The absence of specific intent to violate an order does not relieve the respondent of the consequences of civil contempt. (*Leisge*). However, *voluntary* action is required (*Street*).
- ▶ BOP: Clear and Convincing Evidence

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Civil Contempt Specifics, Cont’d

- ▶ Punishments for Civil Contempt of Affirmative Duties:
 - ▶ Coercive:
 - ▶ Jail sentence of any period (up to 12 mo) can be imposed so long as respondent can do something to end the jail sentence.
 - ▶ The contemnor must be given an opportunity to purge the contempt: “he carries the keys of his prison in his own pocket.” *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).
 - ▶ NOTE: Suspension of a fine is considered a criminal penalty, so not permitted in civil contempt cases (*International Union*).
 - ▶ Compensatory:
 - ▶ Sanctions to compensate a complainant for losses sustained due to respondent’s contemptuous behavior (and proven by complainant).
 - ▶ The Court may impose sanctions to compensate the aggrieved party (*Rainey*), even if the Court does not specifically find contempt (*Sullivan*).

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Civil Contempt Specifics, Cont'd

- ▶ Punishments for Civil Contempt for Prohibited Actions:
 - ▶ Coercive:
 - ▶ Jail sentence of any period is not allowed.
 - ▶ Compensatory:
 - ▶ Sanctions only allowed to compensate a complainant for losses sustained due to respondent's contemptuous behavior (and proven by complainant).
 - ▶ The Court may impose sanctions to compensate the aggrieved party (*Rainey*), even if the Court does not specifically find contempt (*Sullivan*).
 - ▶ NOTE: Suspension of a fine is considered a criminal penalty, so not permitted in civil contempt cases (*International Union*).

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- ▶ The same act or omission may constitute both civil and criminal contempt. *Powell v. Ward*, 15 Va. App. 553 (1993).
- ▶ The court should clarify at the outset of the hearing whether the proceedings are criminal or civil. Failure to do so could be reversible error on appeal.

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Relevant OES Forms for Plenary Contempt Proceedings

<h3>Criminal Forms</h3> <ul style="list-style-type: none"> ▶ DC-635 Motion for Show Cause Summons or Capias ▶ DC-360 Show Cause Summons ▶ DC-361 Capias: Attachment of the Body 	<h3>Civil Forms</h3> <ul style="list-style-type: none"> ▶ DC-635 Motion for Show Cause Summons or Capias ▶ DC-481X Show Cause Summons
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Who “Prosecutes” The Contempt Charge?

<h3>Criminal Contempt</h3> <ul style="list-style-type: none"> ▶ <i>Direct Criminal Contempt</i> is prosecuted by the judge, in a summary proceeding. ▶ <i>Indirect Criminal Contempt</i> is prosecuted by: <ul style="list-style-type: none"> ▶ The Commonwealth Attorney OR ▶ The complainant, or counsel hired by the complainant, if the Commonwealth Attorney is not involved and the Court consents. (<i>Cantrell</i>) 	<h3>Civil Contempt</h3> <ul style="list-style-type: none"> ▶ Civil Contempt is prosecuted by the complainant. ▶ Attorneys can be retained by complainants to handle the “prosecution.”
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Can an attorney represent a client to prosecute a criminal contempt AND a civil matter?

- ▶ NO
- ▶ *Cantrell v. Commonwealth*
 - ▶ It is a conflict of interest for a “private prosecutor” to have a civil interest in the case where they are bound to impartially apply criminal law.
- ▶ Rule of Professional Responsibility 3.4:
A lawyer shall not:
 - (i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

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Examples of Ethical Considerations in Cases Involving Contempt

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The Case of the Document Debacle

- ▶ In the midst of a criminal trial involving a Yahoo internet chat room, Attorney Specter offered an exhibit to the Judge that was purported to be the Yahoo rules for use of the chat room. The copy included a copyright date of 2006, but the crime was alleged to have occurred in 2005. The judge rejected the exhibit on that basis - only the 2005 rules were applicable in this case.
- ▶ A short time later, Attorney Specter submitted another exhibit purported to be the Yahoo rules from 2005. The Court noted that this exhibit looked exactly like the prior exhibit except without the copyright date. When the court asked about its authenticity, Attorney Specter said his client's father had printed it out not long after his son's arrest in 2005.
- ▶ The Judge was not convinced. She paused the proceedings, called in Attorney Specter's secretary, Donna, his law partner, Attorney Pearson, and his intern Mike. She asked each of them questions under oath, sent them back to the office to obtain additional evidence for her to review, and then asked more questions. She held Attorney Specter and Attorney Pearson in summary contempt.

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What kind of contempt?

- ▶ **Direct or Indirect?**
- ▶ **Summary or Plenary?**
- ▶ **Criminal or Civil?**

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What kind of Contempt?

- ▶ Indirect
- ▶ Plenary
- ▶ Criminal

Direct contempt occurs when the contemptible conduct is committed in the presence of the court, when all of the essential elements of the offense are personally observed by the judge.

NOTE: Circumstances will undoubtedly arise when a trial court observes the essential elements of the contemptible conduct, but nonetheless needs to ask questions to clarify some detail.

~ *Scialdone v. Commonwealth*, 279 Va. 422 (2010)

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Rules of Professional Conduct

3.3: Candor Towards the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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The Case of the Sore Loser

- ▶ The day following the trial of a criminal matter, Attorney Gambini had his client deliver a letter to the Judge during a recess.
- ▶ The letter referred to the Judge as “Your Honor” throughout.
- ▶ The letter requested that the Judge agree to recuse himself, stating in part:
 - ▶ “I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant, but I was mistaken.”
 - ▶ “I do not want to have to take the steps necessary to enforce the foregoing request, the need for which, in my mind, as a lawyer, and an honest man, is apparent.”
 - ▶ “My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor’s dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor’s pleasure with respect to the matters herein presented, so that further steps may be avoided.”

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The Case of the Sore Loser, cont’d

- ▶ Eleven days after receiving the letter, the Court issued a show cause summons and both Attorney Gambini and defendant were brought before the Court.
- ▶ During the “hearing” the judge repeatedly stated that the defendants needed to state any defense they had at that time, as he was not going to postpone the matter because the facts were within the personal knowledge of the court.
- ▶ The judge held them both in summary contempt.

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What kind of contempt?

- ▶ Direct or Indirect?
- ▶ Summary or Plenary?
- ▶ Criminal or Civil?

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What kind of contempt?

- ▶ Indirect
- ▶ Plenary
- ▶ Criminal

The US Supreme Court said: “Due process of law...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...”

~ *Cooke v. U.S.*, 267 U.S. 517 (1925)

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Rules of Professional Conduct

▶ Rule 3.5 Impartiality And Decorum Of The Tribunal

- ▶ (e) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
 - ▶ (1) in the course of official proceedings in the cause;
 - ▶ (2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer;
 - ▶ (3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or
 - ▶ (4) as otherwise authorized by law.
- ▶ (f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

▶ Rule 8.2 Judicial Officials

- ▶ A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualification or integrity of a judge or other judicial officer.

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The Case of the Client Considering Contempt

- ▶ Attorney Florrick represents Nina, who has been ordered to allow her son Joey (age 4) and daughter Janey (age 10) to go visit their father for three weeks during the Summer.
- ▶ Nina is afraid to send Joey, because he cannot swim, father has an un-fenced pool in his backyard and has a history of not watching the children closely.
- ▶ She asks Attorney Florrick if she can send Janey but not Joey, since her fears are reasonably based on her history with father.
- ▶ What can Attorney Florrick advise her?

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Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

...

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

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What kind of contempt could Nina be found guilty of?

- ✓ Indirect
- ✓ Plenary
- ✓ Civil

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The Case of the Coercive Counselor

- ▶ Attorney Keating represents a party in a civil case. Settlement negotiations have been lengthy and unfruitful. Costs are growing and trial is looming.
- ▶ The client advises Keating that he has discovered some dirt on the other party, dirt that could result in the party being charged with a crime. He wants Keating to utilize this information during settlement negotiations to incentivize the other party to settle the matter on his terms.
- ▶ Can Keating ethically use the dirt for negotiation purposes?

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Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

...

- (i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

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What kind of contempt could Keating be found guilty of?

Contempt “is an act in disrespect of the court or its processes, or which obstructs the administration of justice.”

~ *Morrissey v. Commonwealth*, 16 Va. App. 172 (1993)

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What kind of contempt could Keating be found guilty of?

- ✓ Indirect
- ✓ Plenary
- ✓ Criminal

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The Case of the Late Lawyer

- ▶ Attorney Galloway works for a small firm that maintains some control over her calendar, booking her at multiple courts in one day, which often results in her appearing late for hearings.
- ▶ Despite her constant & sincere apologies, a judge holds her in contempt one day because she did not appear by the time the matter was called.

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What contempt could Galloway be found guilty of?

- ✓ Direct OR indirect
- ✓ Summary OR plenary
- ✓ Criminal OR civil

“The fact that appellant contacted a fellow officer to inform the court that he would be late, as well as the fact that he was late by only nine minutes, *mitigate* the gravity of the offense but do not alter the fundamental problem: appellant was late without a valid excuse after repeated warnings to appear on time.”

~ *Abdo v. Commonwealth*, 64 Va. App. 486 (2015)

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What ethical considerations are implicated in this scenario?

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Rules of Professional Conduct

Rule 1.3: Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

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Rule of Professional Conduct

Rule 6.2 Accepting Appointments

- ▶ A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
 - (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
 - (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
 - (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

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Failures to Appear - Multiple Options

The Court has two different remedies when a defendant fails to appear before the Court. Instead of issuing a Show Cause alleging contempt, the defendant can be charged under Va. Code Section 19.2-128.

Per Va. Code Section 19.2-129, the Court can only choose one of these remedies - not both.

- ▶ Virginia Code Section 19.2-128:
 - (B) Any person (I) charged with a felony offense or (ii) convicted of a felony offense and execution of sentence is suspended...who willfully fails to appear before any court as required shall be guilty of a Class 6 Felony.
 - (C) Any person (I) charged with a misdemeanor offense or (ii) convicted of a misdemeanor offense and execution of sentence is suspended...who willfully fails to appear before any court as required shall be guilty of a Class 1 misdemeanor.

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The Case of the Sneaky Parent

- ▶ Lennie is the father of two children who were the subject of a custody dispute. The Courthouse where the custody trial is taking place has a posted order that no cell phones are allowed inside the courthouse unless authorized.
- ▶ During the trial, the courtroom deputy notices Lennie has a cell phone on his lap. The deputy confiscates the phone. Lennie says the phone is his father's, who is out in the waiting area. The deputy sees that the phone is recording.
- ▶ At the conclusion of the trial, the deputy alerts the judge of the situation.
- ▶ Lennie's attorney, Jack McCoy, denies any knowledge of his client having the phone.

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The Case of the Sneaky Parent

- ▶ What type of contempt by Lennie:
 - ▶ Direct or Indirect?
 - ▶ Summary or Plenary?
 - ▶ Criminal or civil?
- ▶ What about Lennie's father?
 - ▶ What if Lennie's father was authorized to have the phone because he was a government employee?
- ▶ What about attorney McCoy?

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What ethical considerations apply to attorney McCoy?

- ▶ Rule of Professional Conduct 8.4 - Misconduct
 - ▶ It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law

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Appeals

Criminal Contempt

- ▶ Any person convicted of criminal contempt by a District Court has the right to appeal the decision to Circuit Court, then to COA.

Civil Contempt

- ▶ Any person convicted of civil contempt by a District Court has the right to appeal the decision to Circuit Court, then to COA.
- ▶ When a person is found *not* guilty, or the charge is dismissed with prejudice, the parties do NOT have the right to appeal. (*Jenkins v. Mehra*, 281 Va. 37, (2011))

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- ▶ You can have no influence over those for whom you have underlying contempt.
- ▶ Martin Luther King, Jr.