

Hon. George T. Anagnost is the Presiding Judge of the Peoria Municipal Court.

Avoid the Woodshed

A Contempt of Court Primer

Contempt of court has been likened to Proteus, the mythic sea god who could assume a variety of shapes. The allusion is an apt one. At a glance, the contempt power may show itself anywhere from statutes that ensure the safety of hot-water boilers¹ to the rules on federal bankruptcy.² The contempt defendant may be an uncooperative litigant, a recalcitrant witness, a false-swearing juror, an unyielding newspaper reporter, a late-for-court attorney, or even a former U.S. president. In short, the law of contempt is vast and, like its namesake, protean.

This article offers a brief overview of the basic categories and contours of the law of contempt. To do this, we journey to two ports of call.

First, we look at a recent decision from the Tenth Circuit Court of Appeals³ and its analysis of the U.S. Supreme Court decision in *International Union, UMWA v. Bagwell*⁴; and second, we revisit the Arizona Supreme Court decision in *Ong Hing v. Thurston*,⁵ a leading case on contempt, and explore its analysis of certain Arizona statutory provisions on contempt.⁶

FTC v. Kuykendall

“Did Your Honor Say 39 MILLION Dollars?”

The Kuykendalls owned and operated a group of telemarketing corporations that promoted magazine subscriptions. In 1996, after an agency investigation and the filing of a formal complaint, the FTC, the corporations and the Kuykendalls entered into a permanent injunction settlement agreement regulating solicitation and subscription sales. In 2002, due to continued consumer complaints regarding sales and billing practices, the FTC filed a motion to show cause to hold the companies and the Kuykendalls in contempt for persistent violations of the permanent injunction.

After a lengthy evidentiary hearing, the district court judge found numerous violations by the corporations and the Kuykendalls, held them in contempt, and imposed civil contempt

sanctions of \$39 million. On appeal to the Tenth Circuit, a three-judge panel reversed the trial court. It held that, due to the enormity of the sanction, the defendants were entitled to a jury trial on the contempt allegations. It also held that the FTC must prove the damage quantum by the higher “clear and convincing” standard. The FTC then sought further review of the panel ruling.

En banc, the Tenth Circuit reversed the three-judge panel and held that (a) in civil contempt matters, there was no “high end” entitlement to trial by jury, and (b) the burden of proof to show contempt liability was “clear and convincing,” but compensatory damages need only be shown by a preponderance of the evidence.⁷

International Union, UMWA v. Bagwell

Contempt Both Civil and Criminal, and the Right to Trial by Jury

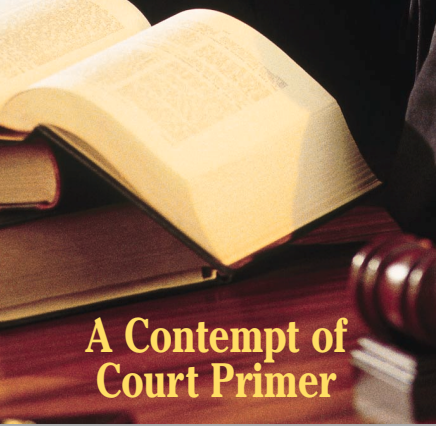
To reach its conclusions, the *Kuykendall* court relied on the U.S. Supreme Court decision in *Bagwell*, a leading contempt case in which Justice Blackmun noted the “elusive distinction” between civil and criminal contempt.

Bagwell involved state court contempt proceedings in a labor dispute between two Virginia mining companies and their union workers. To keep matters under control during litigation, the trial court issued an injunction prohibiting obstruction of access to the workplace. Due to numerous violations, the trial court judge eventually levied \$64 million in contempt penalties against the unions, which penalties were labeled “civil and coercive” in nature.

The plot thickened when the parties settled the underlying dispute and withdrew from the action. On its own motion, the court appointed a special commissioner to collect a \$52 million portion of the fines, reasoning that compensation was still payable to redress the Commonwealth and the two counties in which the unlawful activities occurred.

The Virginia Supreme Court affirmed. In their writ of certio-





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rari to the U.S. Supreme Court, the unions claimed a right to trial by jury on the contempt charges. The Court agreed with the unions and reversed, holding that, because the nature of the sanctions was punitive, not compensatory, the proceed-

ings were “criminal” and the defendants were entitled to a jury trial on the contempt allegations.

As the Court noted, whether contempt is civil or criminal turns on the purpose of the sanction involved. Civil contempt, being “remedial” and for the benefit of a complainant, confines the contemnor indefinitely pending compliance with an affirmative command such as an order to pay alimony, surrender property or make a conveyance.⁸ In contrast, criminal contempt punishes a completed disobedience by way of a fixed jail sentence or a flat, unconditional fine that cannot be reduced or purged through compliance.⁹

As for the right to a trial by jury to determine the factual basis of the contempt, the Court held that the right to trial by jury necessarily flowed from the “serious” penalty¹⁰ that might be imposed. True, courts must possess the inherent power to punish acts that show disrespect for the administration of justice and the dignity of the law. But the judge must be restrained from abusing his or her judicial authority; the method of avoiding that abuse is trial by jury.

Applying these principles, the Virginia court erred by not holding a jury trial on the claimed misconduct.

Back to *Kuykendall* ...

Connecting back to *Kuykendall*, the Tenth Circuit opined that a careful reading of *Bagwell* showed that the Court’s focus was on the nature of the proceeding and the relief being sought, not the size of the amount of the sanction. In *Kuykendall*, the FTC ultimately sought consumer relief, and the contempt proceeding was therefore civil in nature. As a civil matter, there was no right to trial by jury. Although the sanction being sought was an extraordinary amount, it derived from the corporations’ gross receipts and was consistent with damage formulas used in similar situations.¹¹

As to the requisite burdens of proof, the court reaffirmed federal case law that the “clear and convincing” standard applied to the liability portion of the contempt proceeding, but the damages portion need only be determined by a preponderance of the evidence.¹²

Ong Hing v. Thurston

Contempt Arizona-Style

Ong Hing is Arizona’s landmark case regarding contempt. Consistent with *Bagwell* and *Kuykendall*, *Ong Hing* articulates the basic distinction between “civil” and “criminal” contempt. In addition, *Ong Hing* explains the other key distinction in contempt: “direct” versus “indirect” contempt.

The facts in *Ong Hing* involved a shareholder dispute over voting control of a corporation. To contest the results of an annual meeting election, one shareholder group retained attorney Ong Hing to obtain a temporary restraining order to stay acceptance of the vote counts. Shortly thereafter, the corporation filed its own action and request for a TRO to preserve the election results.

By chance, two different superior court divisions were involved in issuing the two TROs. The judge in the first case appointed a special master to oversee an upcoming shareholders’ meeting and issued a stay prohibiting any interference with the master’s actions. In apparent defiance of that stay, Ong Hing’s associate sought a new TRO before a different superior court judge that enjoined the master from performing his duties. When this was brought to the first judge’s attention, Ong Hing was ordered to report to court.

Upon his arrival, and without providing him with notice or opportunity to prepare any defense, the court summarily found Ong Hing in contempt and imposed a \$500 fine payable within 48 hours to avoid 15 days in jail. There being no automatic right of appeal, Ong Hing sought a writ of prohibition from the Arizona Supreme Court.¹³

Without reaching the merits of Ong Hing’s claim that there was no contempt, the Arizona Supreme Court granted relief on procedural grounds. The failure to provide the lawyer with notice and an opportunity to prepare a defense was error; the Court remanded the case back to superior court for a new contempt hearing. To support its decision, the Court first set forth the four categories of contempt: criminal, civil, direct and indirect:

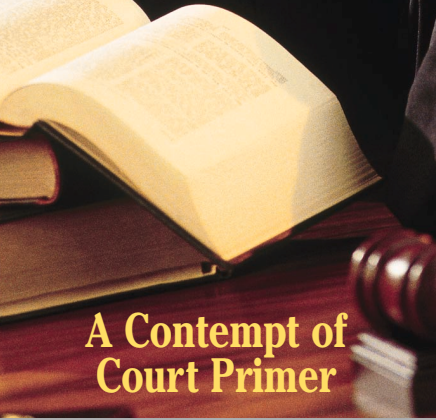
Criminal contempt is the commission of a disrespectful act directed at the court itself which obstructs justice. ... Civil contempt is the disobedience of a court order directing an act for the benefit or advantage of the opposing party to the litigation. ... Direct contempt is an act committed in the presence of the court or so near thereto as to obstruct the administration of justice. ... and constructive or indirect contempt is an act committed outside the presence of the court.¹⁴

The Court next explained why it was necessary to differentiate “direct” from “indirect” contempt: Direct contempt may be adjudicated summarily; indirect contempt requires advance notice of the charge, an opportunity to be heard, and the right to present testimony in response.

Against this backdrop, the Court reasoned its way to the conclusion that Ong Hing’s situation qualified as “indirect” and “criminal” contempt—indirect because the alleged misconduct did not occur in the presence of the citing judge, and criminal because any misconduct was an affront to the court’s administration of justice.

Clear Guidelines or Murky Areas

As a practical matter, A.R.S. § 12-864, with its incorporation of “common law” usages, is the workhorse of the law of contempt (see the sidebar on page 17). Whether initiated by a party-litigant seeking enforcement of court orders or by the court itself to ensure compliance with its process, it is the very act of disobedience that brings the issue to the court’s attention; it is the very act



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of disobedience that induces a party or the court to see that an order is being enforced.

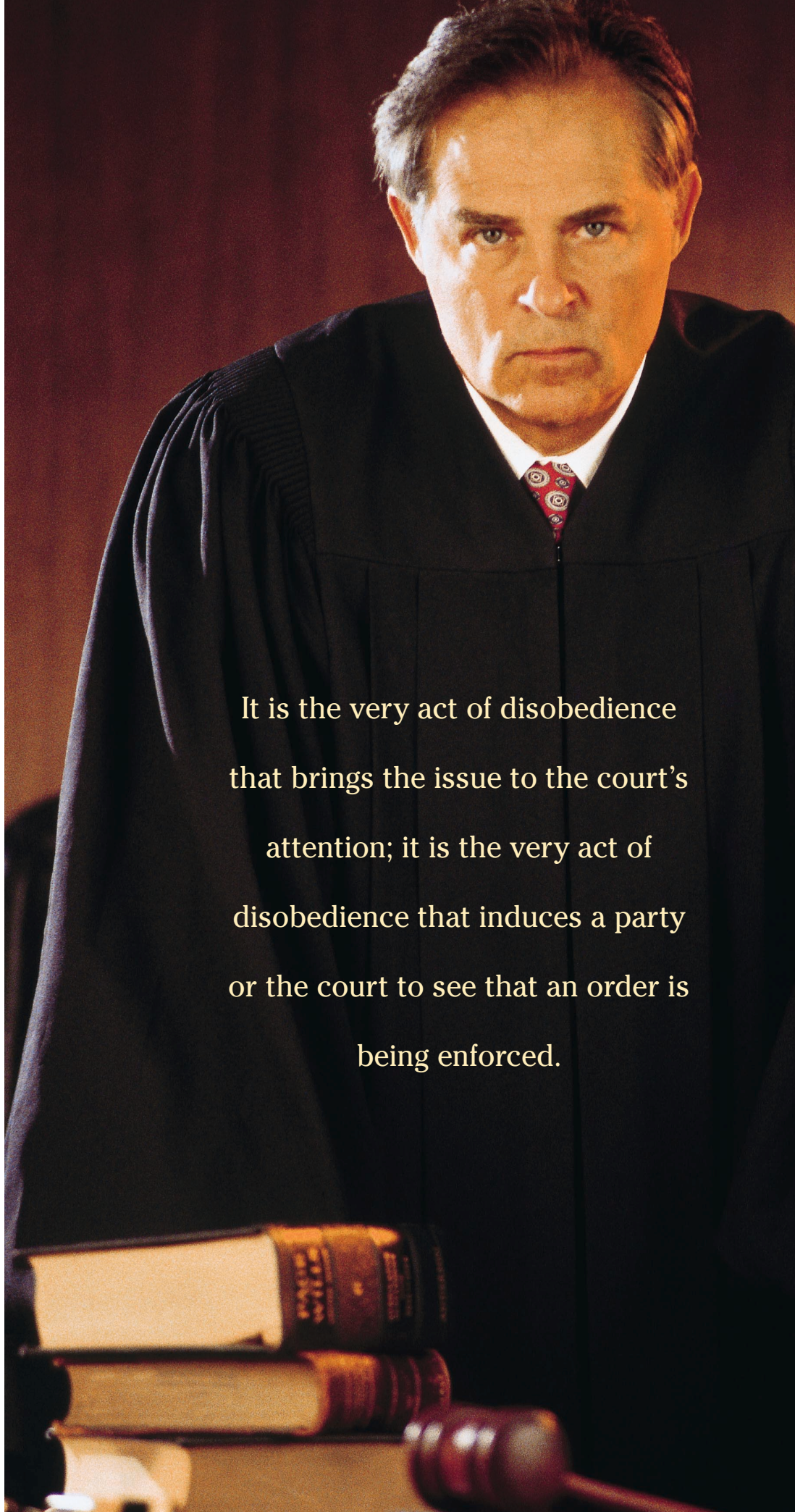
Ostensibly, the situation becomes murky when the court's notifications and orders do not delineate what type of contempt is involved, whether a party may purge the contempt or how incarceration may apply. Before we complete our review of this topic, perhaps some examples of where the law of contempt does not appear to fit into a smooth fabric are appropriate.

The Right to Counsel. Many defendants are cited into court for nonpayment of fines or noncompliance with requirements to attend anger management classes or undergo substance abuse evaluations. Judges disagree whether a defendant is entitled to court-appointed counsel when going forward with such criminal contempt hearings.

As a general rule, a defendant is entitled to court-appointed counsel when facing the risk of incarceration. In *State v. Betts*,¹⁵ the court of appeals held there was reversible error when the trial court did not ascertain whether the defendant could afford counsel before proceeding with an indirect criminal contempt hearing for improper communication with a juror.

To what extent *Betts* is followed statewide in criminal court practice is unclear. That a noncomplying defendant can purge the contempt charge by paying the fine arrearage, for example, suggests a type of civil contempt and therefore no right to counsel. However, again recalling from *Ong Hing* that civil contempt is party-initiated, the question then becomes the basis of a court's authority to initiate a

—continued on p. 18



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ARIZONA'S CONTEMPT STATUTES

In analyzing the four basic types of contempt, *Ong Hing v. Thurston*¹ also examined A.R.S. §§ 12-861 through 864, which set forth certain procedural requirements for contempt proceedings.

Section 12-861 creates and defines a specific type of criminal contempt that involves doing a prohibited act that is itself a type of crime (*e.g.*, trespassing onto adjoining property after being ordered not to do so). Sections 12-862 and -863 connect back to § 12-861 by setting forth the procedure that must be followed to initiate § 12-861-type violations. Finally, § 12-864 stands apart from the three preceding sections and restates a court's inherent power to punish direct and indirect contempts not otherwise addressed by the other three provisions. More specifically, under § 12-864, direct and "constructive" (indirect) contempts committed by the failure to obey an order or judgment may be punished "in conformity to the practice and usage of the common law."²

Criminal Contempts That Are Also Crimes Themselves

Section 12-861 is definitional: A person who willfully disobeys a lawful order by doing a forbidden act, which act itself is a criminal offense, is subject to a criminal contempt proceeding.

Section 12-862(A) describes how an order to show cause proceeding may commence. The claimed contempt must be under oath or the subject of an information filed by the county attorney. Section 12-862(B) provides that the person charged with contempt shall be allowed sufficient time to prepare a return and then adds a curious "escape clause" for the benefit of the alleged contemnor: A trial on the violation shall be set by the court if "by the return the alleged contempt is not purged."

The ability of an alleged contemnor to avoid a criminal contempt citation by purging the violation is analytically inconsistent with the principles set forth in *Ong Hing* and *International Union v. Bagwell*.³ There are no reported cases interpreting

how this language applies or what types of situations might make it applicable.

Section 12-863 sets forth the procedure for the trial itself:

- The contemnor has the right to trial by jury.
- A finding of guilt is a class-2 misdemeanor.
- Any assessed fine shall be paid to the clerk of the court or the injured party.
- A party has the right to appeal, with the appeal staying execution of sentence.

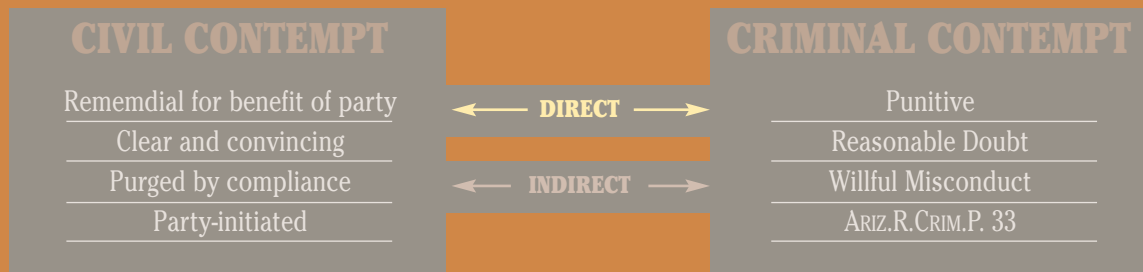
A.R.S. § 12-861 enunciates the general rule as to the state of mind required to prove criminal contempt. The actor's conduct must be "willful." In contrast, as for the intent necessary to commit a civil contempt, it appears that courts do not require any requisite mental state beyond that needed to consciously perform the conduct giving rise to the civil contempt allegation.

"Common Law" Contempt

Section 12-864, as noted previously, stands apart from the other three statutory provisions by essentially preserving the "common law" power of a court to maintain trial decorum and obedience to its orders. Thus, direct and indirect misconduct not otherwise covered by § 12-861 may be dealt with in accordance with the "practice and usage" of the common law.⁴

Nevertheless, it should be noted that a court's inherent "common law" contempt power must still remain within the bounds of due process case law described elsewhere in this article. *Bagwell* and *Ong Hing* both announce an important rule of law: The summary adjudication of indirect contempt is illegal.⁵ Moreover, as to a court's "common law" authority to compel payment of a debt by way of a civil contempt proceeding, the constitutional prohibition against imprisonment for debt also should be kept in mind.⁶

All that having been said, and drawing on the principles discussed, perhaps this diagram is helpful.



endnotes

1. 101 Ariz. 92 (1966).

2. A.R.S. § 12-864.

3. 512 U.S. 821 (1994).

4. Arizona, like many states, has a "reception" statute providing for the applicability of the common law to the extent consistent with the natural conditions of the state, the necessi-

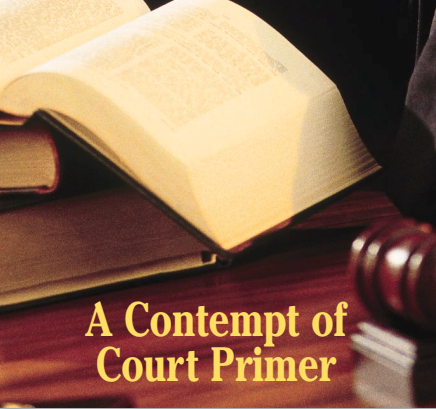
ties of the people, established customs, the U.S. and Arizona Constitutions, and statutory law. See A.R.S. § 1-201.

The development of the common law is traceable to the rise of royal courts during the reign of Edward I during the 13th Century. Enforcement of a citizen's duty to

obey a writ and to "do right and justice" necessarily carried the King's power to hold a person in contempt for any noncompliance. See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 156 (5th ed. 1956).

5. See *e.g.*, *Bagwell*, 512 U.S. at 833.

6. See ARIZ. CONST. art. 2, § 18.



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civil contempt-type proceeding of its own accord.¹⁶

Failure to Appear for Jury Duty. By all accounts, failing to show up for jury duty should be classified as a type of criminal contempt because the juror's nonattendance impairs the admin-

istration of the court process and the use of court resources. Also, as mentioned previously, "direct" contempts are by definition committed in the presence of the court.

A.R.S. § 21-334 deals with the punishment of a juror who willfully fails to answer a jury summons. Curiously, per the statute, a juror who fails to appear may be "attached" for "direct contempt" and subject to a \$500 fine.¹⁷ Why juror nonattendance is defined as a "direct" contempt is confusing, and such a designation adds nothing to applicable law. The "direct" label, being a factual impossibility, could not excuse the court from the due process requirements of the criminal contempt burden of proof of reasonable doubt, the presumption of innocence or the right to trial by jury afforded by Rule 33 of the Rules of Criminal Procedure if the fine imposed exceeded \$300.

Nonpayment of Criminal Fines and Restitution. A.R.S. § 13-810 deals with a defendant's obligation to pay fines, jail costs or restitution as part of a criminal sentence. The statute allows the state, victim or the court *sua sponte* to cite the defendant for contempt for such nonpayment.

Again, recalling that criminal contempt is punitive in nature and requires a showing of "willful" disobedience, the statute's wording is awkward. A.R.S. § 13-810(C) provides that if the court finds the defendant willfully failed to comply, the defendant may be incarcerated until the amount due is paid. The inclusion of this "purge" language means that the contempt is civil in nature, and the "willfulness" requirement should be irrelevant.

In addition, keeping in mind that § 13-810 appears to categorize nonpayment of a fine or other assessment as a type of purgable "civil" contempt, we again encounter the source of a court's own authority to compel performance through the contempt power. Such inherent authority seems to run contrary to the principle articulated in *Ong Hing* that civil contempt proceedings are for the benefit of a party and are therefore initiated by a party, not the court.¹⁸

Statutory Nullification of Double Jeopardy Safeguards. As mentioned previously, A.R.S. §§ 12-861 through -864 deal with contempt proceedings. An additional provision in the contempt statutes, A.R.S. § 12-865, is noteworthy. It rounds out the statutory procedures in two ways.

First, it imposes a one-year statute of limitation to initiate contempt proceedings.¹⁹ Second, § 12-865(B) states that a proceeding for contempt shall not bar a criminal prosecution for the same act.²⁰ Subparagraph (B) appears to fly in the face of constitutional law and the U.S. Supreme Court decision in

United States v. Dixon.²¹

The facts in *Dixon* began with his arrest for murder. At arraignment he was released on bond with a requirement that he not commit "any criminal offense." While awaiting trial, he was re-arrested and indicted for possession of cocaine with intent to distribute. On the basis of this new offense, the trial court held a contempt proceeding at which police officers testified to the drug transaction, and Dixon was sentenced to 180 days in jail. The trial court then granted his motion to dismiss the indictment on double jeopardy grounds.

The U.S. Supreme Court affirmed the dismissal and held that the Double Jeopardy Clause barred a subsequent prosecution where the same elements of the offense had been previously used to establish the criminal contempt violation. Rejecting the notion that the violation of the release order itself added a new "element" to the situation, the Court's analysis was that the same elements of the cocaine violation were those used to make out the offense for which he was held in contempt.²²


Against this background, the validity of A.R.S. § 12-865(B) is far from clear. Ostensibly, the statute would pass constitutional muster under *Dixon* if it were interpreted to mean that a subsequent criminal prosecution would not be barred if the new matter involved additional or different elements. However, if new charges are or are not barred by double jeopardy as a matter of constitutional law, a statutory pronouncement one way or the other under § 12-865(B) should be legally irrelevant.

The Rules of Evidence. Another aspect of trial procedure might be noted. Rule 1101(b) of the Rules of Evidence defines the types of cases in which the rules of evidence apply. In general, the rules apply to all civil and criminal matters. Excepted from rule applicability, however, are "contempt proceedings in which the court may act summarily."²³

On the one hand, what should be done when improper behavior has occurred in front of the judge? Adherence to the formal rules of evidence in subsequent summary contempt hearings would be counterproductive when measured against the greater need to empower the tribunal to vindicate its authority.

On the other hand, removing evidentiary standards as to foundation, interrogation of witnesses, hearsay or relevance creates the risk that the same trial judge who is claiming misconduct may not dutifully exercise the calmness and temperament needed to ensure that the contempt hearing will be conducted in a fair and just manner. In any event, the mandate of Rule 1101 is self-evident: The rules of evidence apply to all indirect contempt proceedings.

Conclusion

This article outlines some of the key concepts involved in the law of contempt. If you are interested in your own self-study on that law, you may find the Internet of value. A brief surfing of the Net shows how pervasive and diverse contempt proceedings are throughout all levels of courts in all types of matters. Being conversant with this area of practice should be important to any trial attorney or judge. 

Endnotes on p. 64 →

1. See A.R.S. § 23-478.
2. See FED.R.BANKR.P. 9020.
3. *Federal Trade Commission v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004).
4. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994).
5. 101 Ariz. 92, 416 P.2d 416 (1966).
6. A.R.S. §§ 12-861–865.
7. 371 F.3d at 763. The court ruled that the FTC’s evidence against some of the Kuykendalls individually did not meet the clear and convincing burden and dismissed the case against them, but it allowed the action to proceed as to the other defendants on remand.
There do not appear to be any reported Arizona cases formally announcing the burden of proof in civil contempt matters. The “clear and convincing” standard as to liability appears to be the Arizona rule.
8. 512 U.S. at 828-829.
9. *Id.* at 828-830. *Bagwell* set forth other scenarios as to when contempt matters were “criminal” in nature and required a separate opportunity to be heard. For example, a flat fine, even as little as \$50, is criminal if the contemnor cannot reduce or avoid the fine through future compliance. On the other hand, a fixed fine would be civil and purgable if suspended pending future compliance. *Id.* at 829.
10. In *Bagwell*, the Court found the \$52 million sanction clearly punitive and “serious” in amount. It declined to state a dollar amount that would differentiate a petty amount that could be imposed by a court without resort to trial by jury. The Court did note in passing that under federal law a petty offense may include a fine up to \$5,000 for an individual, \$10,000 for non-individuals. *See Bagwell*, 512 U.S. at 837; *see also* 18 U.S.C. § 1(3).
Rule 33, ARIZ.R.CRIM.P., sets forth the procedure for criminal contempt proceedings and prescribes a right to trial by jury for any sanction over \$300 or six months imprisonment or both. Also, Rule 33.4 provides that the trial judge should be disqualified from conducting the contempt hearing where the misconduct involved a gross disrespect or personal attack on the trial judge’s character or if the trial judge’s conduct was integrated with the alleged misconduct.
11. 371 F.3d at 753.
12. *Id.* at 767.
13. The writ of prohibition was one of the interlocutory appellate remedies replaced by the “special action” in the 1970s. Regarding appellate review of contempt orders, civil contempt orders may be reviewed by special action, or, if the contemnor is incarcerated, by habeas corpus. *See Van Baalen v. Superior Court*, 508 P.2d 771 (Ariz. Ct. App. 1973).
14. 101 Ariz. at 98.
15. 406 P.2d 229 (Ariz. Ct. App. 1965).
16. The distinction here should be obvious. The state, as a separate branch government, may commence civil contempt proceedings to enforce orders to which it is a party. As a nonparty, the court’s authority to initiate contempt enforcement proceedings may involve a different calculus of issues.
17. A.R.S. § 21-334.
18. *See* 101 Ariz. at 99.
19. A.R.S. § 12-865(A).
20. *See* A.R.S. § 12-865(B) (“The proceeding for contempt or a satisfied judgment thereon shall not bar a criminal prosecution for the same act.”).
21. 509 U.S. 688 (1993). In *Dixon*, the Court also referred to its holding in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (in nonsummary criminal contempt matters, the defendant is to be accorded the presumption of innocence, proof beyond a reasonable doubt and the privilege against self-incrimination).
22. It should be noted that *Dixon* included a co-petitioner from another case involving a defendant with similar double jeopardy claims. Defendant Michael Foster was found to have violated an order of protection taken out by his wife by assaulting her while the order was in force. He was later indicted for assault with intent to kill. Because the new charge involved elements different from violating the order of protection and simple assault, his double jeopardy claims were rejected. *See* 509 U.S. at 700-703.
23. *See* Rule 1101(b), ARIZ.R.EVID.