

HOW TO ETHICALLY HOLD SOMEONE IN CONTEMPT AND AVOID REVERSAL

BY

**CHIEF JUDGE MICHAEL P. GIBBONS
NEVADA COURT OF APPEALS**





OVERVIEW

CODE OF JUDICIAL CONDUCT

R 1.2 – PROMOTING CONFIDENCE IN THE JUDICIARY

“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.”

CODE OF JUDICIAL CONDUCT

R. 2.2 – IMPARTIALITY AND FAIRNESS

- “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”
- objective, open-minded
- accommodative to self-represented litigants

CODE OF JUDICIAL CONDUCT

R 2.3 BIAS, PREJUDICE, HARASSMENT

- (A) A judge shall perform duties without bias or prejudice
- (B) A judge shall not use words or conduct manifesting bias, prejudice or harassment, based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socio economic status, or political affiliation; nor permit others under the court's control to do so
- (C) A judge shall require lawyers to refrain from these behaviors

CODE OF JUDICIAL CONDUCT

R 2.6 RIGHT TO BE HEARD

- “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”
- See *also* NRS 50.115(1) “the judge shall exercise reasonable control over the mode of interrogating witness and presenting evidence:” to ascertain truth, effectively use time, and prevent harassment or embarrassment

CODE OF JUDICIAL CONDUCT

R. 2.8 – DECORUM AND DEMEANOR

(A) “A judge shall require order and decorum in proceedings before the court.”

(B) “A judge shall be patient, dignified, and courteous [to all]... and shall require similar conduct of...others subject to the judge’s direction and control....”

WHAT NOT TO DO...



AUTHORITY TO HOLD SOMEONE IN CONTEMPT

- Criminal – NRS 199.340 (misdemeanor)
- Civil – NRS 22.010, 22.030, 22.100



TYPES OF CONTEMPT

CIVIL CONTEMPT - NRS 22.010

- **Disorderly, contemptuous, or insolent behavior toward judge / master / arbitrator while performing duties in court or chambers**
- **Breach of peace, boisterous conduct**, or violent disturbance in the presence of the court, or in its immediate vicinity, **tending to interrupt the due course of proceedings**
- **Disobedience or resistance to any lawful writ, order, rule, or process issued at chambers**
- Disobedience of subpoena / refusing to be sworn or answer questions
- Rescuing person or property in custody of officer “by virtue of an order or process” of court or judge “at chambers”
- Disobeying order regarding contact with jurors
- “Abusing” court process / proceedings
- Falsely pretending to act under authority of court order / process

CRIMINAL CONTEMPT – NRS 199.340

- **Disorderly, contemptuous or insolent behavior committed during sitting of court**
 - In court's immediate view / presence; and
 - Directly tending to interrupt its proceedings or impair due respect to its authority
- Same as above to referee if conducting a hearing / trial
- Same as above if in presence of jury or inquest or other proceeding authorized by law
- Breach of peace directly tending to interrupt proceedings of court, jury, or referee
- **Willful disobedience or resistance to lawful process or court mandate**
- Stubborn and unlawful refusal to be sworn as witness or answer legal and proper interrogatories
- Publication of false / grossly inaccurate report of court proceedings
- Acting as attorney or officer of court without authority

DISTRICT COURT RULES

APPLICABLE LOCAL RULES

- **First** Judicial District (Carson City/Storey County): FJDCR 1.12 Sanctions
- Failure to comply with any applicable law, rule or order of the court, court may impose sanctions including *civil or criminal contempt* and attorney fees
- **Second** Judicial District (Washoe County): WDCCR 21 Sanctions
- Failure to comply with these rules, can result in *contempt* and attorney fees
- **Third** Judicial District (Lyon County): T.J.D.C.R. 11 Sanctions
- Failure to comply with these rules, DCR, NRCR, SCR, or statutes, court may impose *contempt* and attorney fees
- **Fourth** Judicial District (Elko County): 4JDCR 22 Sanctions
- Failure to comply with these rules, NRCR, DCR, SCR, or Nevada law, court may impose *contempt* and attorney fees

DISTRICT COURT RULES

APPLICABLE LOCAL RULES

- **Seventh** Judicial District (Eureka, White Pine, and Lincoln Counties): 7JDCR 17 Sanctions
- Failure to comply with these rules, NRCP, DCR, SCR, or Nevada law, court may impose *contempt* and attorney fees
- **Eighth** Judicial District (Clark County): EDCR 5.102(m); 5.219, 7.60 Sanctions
- 5.219: Intentional or negligent conduct, that's obviously frivolous, unnecessary or unwarranted, or unreasonably and vexatiously multiples the proceedings, or fails to prepare, appear, comply with these rules, or order or directive of the court = attorney fees (but *not contempt*)
- 7.60: If FTA without just excuse or because of failure to give reasonable attention to the matter = attorney fees (but *not contempt*)

DISTRICT COURT RULES

APPLICABLE LOCAL RULES

- **Ninth** Judicial District (Douglas County): NJDCR 23 Sanctions
- Failure to comply with these rules, SCR, **NRAP**, NRCP, DCR, or orders and statutes, court may impose *contempt* and attorney fees
- **Tenth** Judicial District (Churchill County): 10JDCR 1.13 Sanctions
- Failure to comply with any applicable law, rule of order of the court, court may impose sanctions including *civil or criminal contempt* and attorney fees
- **Eleventh** Judicial District (Lander, Mineral, and Pershing Counties): 11JDCR 1.13 Sanctions
- Failure to comply with any applicable law, rule of order of the court, court may impose sanctions including *civil or criminal contempt* and attorney fees

NRS 18.010

AWARD OF ATTORNEY FEES

2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party
- (a) When the prevailing party has not recovered more than \$20,000; or
 - (b) Without regard to the recovery sought, **when the court finds** that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party **was brought or maintained without reasonable ground or to harass** the prevailing party.

WHAT NOT TO SAY TO A JUDGE



CONTEMPT PROVISIONS IN THE NRCP

- Most NRCPs discussing contempt do not distinguish between civil and criminal contempt
 - See, e.g., NRCP 16(f) and 16.1(e)(3)(A), which refers to NRCP 37(b) for sanctions
 - NRCP 37(b)(1): “If a party...fails to obey an order to provide or permit discovery...the court may issue further just orders that may include the following:
 - (G) **treating as contempt** of court the failure to obey any order except an order to submit to a physical or mental examination.”
- Discovery rule for financial disclosure specifies that the contempt be *civil* in nature.
 - See, e.g., NRCP 16.2(g)(2): “Sanctions may include an order **finding the violating party in civil contempt of court....**”

CIVIL V. CRIMINAL CONTEMPT – KEY DIFFERENCES

	Civil	Criminal
Purpose	Coerce or compel future behavior Benefit the other party	Punish offender for past behavior Vindicate the court's authority
Right to counsel	Determined on case-by-case basis and the type of contempt	Yes, unless imprisonment is not possible
Penalty	Up to a \$500 fine and/or 25 days incarceration and/or reasonable expenses incurred by other party including attorney fees Conditional or indeterminate	Misdemeanor penalties Unconditional or determinate
Can be purged?	Yes	No
Burden of proof	Clear & convincing	Beyond a reasonable doubt

DIRECT V. INDIRECT CONTEMPT

SEE NRS 22.030 AND NRS 199.340

Direct

- Act committed in the immediate view and presence of the court

Indirect

- Act not committed in the immediate view and presence of the court
- Jurisdiction if there is a written, signed, and filed underlying order

CIVIL INDIRECT CONTEMPT

NRS 22.030(3)

General Rule

NRS 22.030(3): If indirect civil contempt, court that issued the underlying order cannot preside at the contempt trial *over defendant's objection*

Exceptions

NRS 22.030(3)(a): The underlying judgment or decree was entered by a predecessor 10 years or more before the contempt proceedings for violation of that judgment or decree was filed

NRS 22.030(3)(b): Any family law case described in NRS 3.223(1), whether or not a family court has been established in that judicial district

CIVIL DIRECT v. INDIRECT CONTEMPT

WHY DOES IT MATTER?

Direct Contempt

- Summary adjudication is appropriate
- Oral order is enforceable
- However, oral order must be reduced to writing promptly
 - Recite facts constituting the contempt **clearly and with specificity**
 - Find the person committed contempt; allow statement before punishment imposed
 - Set forth the punishment clearly



CIVIL DIRECT v. INDIRECT CONTEMPT

WHY DOES IT MATTER? (CONTINUED)

Indirect

- Summary adjudication is not appropriate
- Facts constituting contempt must be raised in an affidavit or master's statement of facts. NRS 22.030(2)
- Underlying written order must be enforceable
- Oral order is not enforceable
 - Exceptions:
 - Administrative orders
 - Emergency orders where a party does not gain an advantage

CIVIL DIRECT V. INDIRECT CONTEMPT – LEVEL OF PROCEDURAL PROTECTION NEEDED

	Direct Contempt	Indirect Contempt
High procedural protection (possibly a jury trial, counsel required)	Serious criminal penalty to be imposed	Criminal contempt sanctions to be imposed Complex underlying order needing extensive, reliable fact-finding
Medium procedural protection (notice and hearing required)	Time lag between contemnor's act and court taking action on sanctions	When contemnor's actions are discrete and facts readily ascertainable (e.g., failure to pay a judgment)
Low procedural protection (summary adjudication)	Petty offenses, immediately sanctioned by court (little need for fact-finding)	N/A

Source: Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821 (1994)

HOW TO CONDUCT A DIRECT CONTEMPT HEARING



WHAT WENT WRONG?



WHAT NEEDS TO BE IN UNDERLYING ORDER FOR CIVIL INDIRECT CONTEMPT?

The underlying order must:

- Spell out details of compliance in **clear**, **specific**, and **unambiguous** terms so the person knows his duties and obligations
- Written, signed by judge, filed and served

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Brandon McDonald
CLERK OF THE COURT

DECD
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DISTRICT COURT, FAMILY DIVISION
CLARK COUNTY, NEVADA

JOHNNY SANCHEZ-LOSADA,
Plaintiff,
vs.
SINEITH MELINKOFF,
Defendant.

CASE NO: D-13-484744-D
DEPT NO: 1

STIPULATED DECREE OF DIVORCE

This cause having been submitted to this Court for decision pursuant to Chapter 125 of the Nevada Revised Statutes, based upon the mutual agreement of the Plaintiff, JOHNNY SANCHEZ-LOSADA, by and through his attorneys of record, BRANDON McDONALD, ESQ., of FAMILY LAW CENTERS, and Defendant SINEITH MELINKOFF in Proper Person, and after reviewing the pleadings and papers on file, the Court finds as follows:

1. That the Court has complete jurisdiction in the premises, both as to the subject matter thereof as well as the parties hereto;
2. That the Plaintiff JOHNNY SANCHEZ-LOSADA has been domiciled in the State of Nevada for more than six (6) weeks preceding the commencement of this action and are bona fide residents of the State of Nevada.

☐ Other ☒ Acknowledged
☐ Domestic Violence Petition ☒ Trial/Paid Waiver
☐ Summary Judgment ☒ Written Judicial Finding
☐ Default Judgment ☐ With Judicial Finding
☐ Trial/Contest ☐ By ADR
☐ Trial/Disputed ☐ Judgment Reached by Trial
☐ Judgment After Trial Start

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WHAT NEEDS TO BE IN CIVIL DIRECT CONTEMPT ORDER?

- Facts constituting contempt – with specificity
- Finding that contemnor is in contempt of court
- The punishment
 - With purge terms that are clear, specific and unambiguous (w/o purging language it probably becomes criminal contempt)

WHAT NEEDS TO BE IN A CIVIL INDIRECT CONTEMPT ORDER?

- Facts constituting contempt – with specificity
- Finding of willful noncompliance
 - Contemnor had ability to comply with order being enforced
 - If unable to comply, contemnor did not cause the reason for that inability
 - Burden of proving inability to comply is on contemnor
- The punishment
 - With purge terms that are clear, specific, and unambiguous and ability to pay if jailed (*Foley and Rodriguez infra*)



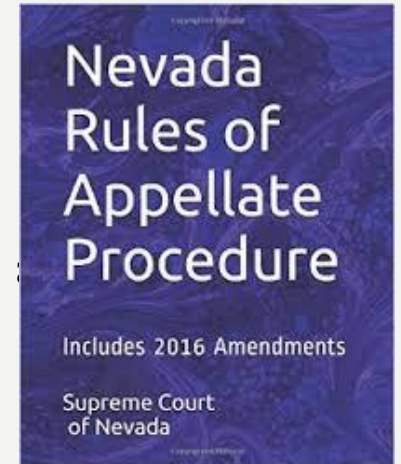
APPELLATE REVIEW

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CASES

APPELLATE REVIEW OF CONTEMPT ORDERS

- Contempt orders are not appealable unless allowed by rule or statute
 - If contempt finding or sanction is included in an order that is otherwise appealable, the contempt order is also appealable
 - Standard of review for appeals: Abuse of discretion
- Writs are preferable to appeals in civil contempt cases
 - District court retains jurisdiction over the order while writ is pending; This allows district court to modify order as changing circumstances warrant
- Writs may be issued:
 - To control manifest abuse of discretion (e.g., underlying order doesn't prohibit the conduct at issue)
 - When court exceeds its jurisdiction (e.g., finding indirect contempt without having proper affidavit)
- Standard of review for writs: Deferential; Level of deference depends on type of writ used





HOWEVER



ALLEGATIONS BY THE MICH. JUDICIAL TENURE COMMISSION

- “ •Failed to act in a patient, dignified, and courteous manner;
- Displayed improper demeanor;
- Used a raised and/or angry voice;
- Laughed at the children and was sarcastic”

JUDGE GORCYCA CENSURED

- The [Michigan Supreme Court](#) ordered Judge Lisa Gorcyca to be publicly censured, a less severe punishment than the JTC recommended. The court's ruling said that her "demeaning and disparaging remarks" directed at the children amounted to judicial misconduct, but that some of the other allegations made by the JTC were "mere legal errors made in good faith and with due diligence."

TURNER v. ROGERS

564 U.S. 431 (2011)



Facts

- Turner ordered to pay child support
- Found in civil contempt 5 times (paid 4 times, jailed for 6 months 5th time)
- After 5th contempt, still in arrears and OSC issued
- After OSC hearing, Turner found in contempt.
 - Incarcerated 1 year, could be purged by payment of arrears

Issue

Does the 14th Amendment's Due Process Clause require the State to **provide counsel** at a civil contempt hearing to an indigent person?

TURNER v. ROGERS

(CONTINUED)

Holding

Sometimes. Counsel is not required if:

- The other party is pro se
- The State has alternative safeguards in place that ensure a fundamentally fair determination of the contemnor's ability to pay
 - Notice to contemnor that “ability to pay” is a critical issue
 - Ability to elicit relevant financial information (e.g., a financial disclosure form)
 - Hearing where contemnor can respond to statements / questions re: his financial status
 - **Express finding by court that contemnor has ability to pay**
 - Other alternatives that safeguard fundamental fairness of proceeding



TURNER v. ROGERS

(CONTINUED)

Lessons Learned

- Counsel may be required even if civil contempt hearing
- Determine whether counsel is needed at outset of contempt hearing
- Focus on ability to pay
 - Address issue at the hearing and give contemnor opportunity to respond
 - Make clear findings regarding contemnor's ability to pay

RODRIGUEZ
V.
EIGHTH JUDICIAL DIST. COURT
120 NV 798, 102 P.3D 41 (2004)

Facts

- Rodriguez owed \$10,000+ in child support arrears
- District court denied request for appointed counsel
- District court found Rodriguez in contempt and ordered 25 days in jail
- Purge clause = payment of \$10,000 toward the arrearages

RODRIGUEZ V. EIGHTH JUDICIAL DIST. COURT [CONT'D]

Key Holdings

- District court has discretion to appoint counsel in civil contempt cases, when defendant faces jail time
- When determining whether to appoint counsel, court must balance the private interests at stake, the government's interest and the risk that procedures used will lead to erroneous decisions
 - Using this test, usually appointed counsel not required in child support arrears case because the legal and factual issues are not complex, government interest is high, and defendant has the “keys to his freedom.”

RODRIGUEZ V. EIGHTH JUDICIAL DIST. COURT [CONT'D]

Note

Court expressed concern about Rodriguez's ability to pay the purge amount, as no specific findings on this point

- Important because purge clause was key to finding civil contempt instead of criminal contempt

LEWIS v. LEWIS

132 NEV. 453, 373 P.3D 878 (2016)

Facts

- Underlying order: Pay future child support and take child to tutoring classes
- Dad failed to obey order
- Contempt order:
 - 80 days incarceration, stayed if dad follows all future court orders
 - No purge clause
- Court modified custody based in part on dad's failure to follow court orders (*Sims*)



LEWIS v. LEWIS

[CONTINUED PANEL DECISION]

Key Holdings

- The contempt order was criminal in nature
- Because order was criminal, dad had right to counsel during contempt hearing
- District court abused its discretion by modifying custody based on dad's failure to follow orders (*Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993))

Lessons Learned

- District courts generally cannot consider parent's failure to follow orders when determining best interest in modification proceeding
- Civil Contempt orders **must have purge clause** to be civil in nature even if intent of court is to compel future compliance

FOLEY V. FOLEY

NO. 69997, 2018 WL 6807187 (NEV. DEC. 21, 2018)

- Hearing Master appointed to address arrears and enforcement
- Recommended \$2,000 purge amount + 10 day incarceration for failure to pay
- Vacated by Nev. S. Ct. because district court failed to make specific findings (*Rodriguez*) whether appellant was able to pay purge amount, especially when Appellant said he only had \$119



FOLEY V. FOLEY
NO. 82569-COA, 2022 WL 354503 (NEV. CT. APP. FEB. 4, 2022)

- After remand, district court directed the child support hearing master to consider contempt determination and to make findings regarding appellant's ability to pay
- Master again recommended appellant be held in contempt, that he should serve 25 days incarceration
- With neither party objecting, it was adopted pursuant to NRS 425.3844, so the district court may not have seen the order
- Appellant filed an appeal regarding ongoing inability to pay child support and a defective second contempt order

FOLEY V. FOLEY
NO. 82569-COA, 2022 WL 354503 (NEV. CT. APP. FEB. 4, 2022)

- Court of Appeals reiterated Nevada Supreme Court order: to comport with due process in contempt hearings, the district court **must make specific findings**, which master failed on remand [and district court did not review]
- Further, by not including a purge amount, the order suggested the nature of the contempt was no longer civil, but criminal

FOLEY V. FOLEY

NO. 82569-COA, 2022 WL 354503 (NEV. CT. APP. FEB. 4, 2022)

- Court of Appeals vacated the order and remanded to determine ability to pay as well as to clarify the type of contempt being instituted due to a lack of purge clause
- District Court must consider appellant's request for appointed counsel, especially if the proceedings are criminal
- A party may be entitled to counsel in civil contempt proceedings in some circumstances (see *Turner and Rodriguez*)

BOHANNON v. EIGHTH JUDICIAL DIST. COURT 2017 WL 1080066 (MAR. 21, 2017)

Facts

- 2 orders:
 - Nov. 14, 2013:
 - Mom held in 10 counts of contempt
 - 160 days of incarceration, stayed 3 years if mom refrained from alcohol / drugs and not willfully violate court orders
 - July 19, 2015:
 - Mom ordered to “participate” in patch testing program
- Mom had 2 “dirty” patches
- Court orally found mom in contempt and lifted stay for 30 of the 160 days



BOHANNON
V.
EIGHTH JUDICIAL DIST. COURT
[CONTINUED]

Key Holdings

- The district court had jurisdiction
 - The affidavit established a prima facie case
- The order was for criminal contempt
 - The purpose was to punish mom for disobeying underlying order
- The district court abused its discretion by holding mom in contempt
 - The underlying order was ambiguous
 - District court applied wrong standard of proof
 - **Correct standard: Beyond a reasonable doubt**

BOHANNON V. EIGHTH JUDICIAL DIST. COURT (CONTINUED)

Lessons Learned

- Decide if want to use civil or criminal contempt to enforce underlying orders
- Make findings and orders clear; if civil contempt, make the purge conditions clear
- Use correct standard of proof

The Footnotes

- The supreme court “encourages” district courts to enter written contempt orders
 - Written orders facilitate appellate review
 - Written orders help ensure contempt power used “with care and circumspection”
- Court noted “potentially important public policy considerations” regarding imposition of jail time as sanction in family law cases

DCFS v. EIGHTH JUDICIAL DIST. COURT

120 NEV. 445, 92 P.3D 1239 (2004)

Facts

- District court orally ordered DCFS to release child from mental health facility
- DCFS did not immediately comply
- District court held DCFS in contempt

Key Holding

- Contempt order was not effective because the underlying order was not written and filed with the clerk

Lesson Learned

- Reduce underlying orders to writing immediately if the order is time-sensitive



**DCFS
V.
EIGHTH JUDICIAL DIST. COURT
(CONTINUED)**

Reasons for Holding

- Until written and filed, the decision is “impermanent”
- Oral orders are subject to interpretation
- Those not at hearing can’t determine the court’s mandate
- Need details of compliance to be clear so can determine whether contempt occurs

Exceptions to Written Order Requirement

- Orders re: case management issues, scheduling, administrative matters, or emergencies that don’t allow party to gain an advantage
- Direct contempt

**CAPLOW
V.
EIGHTH JUDICIAL DIST. COURT
72 NEV. 265, 302 P.2D 755 (1956)**



Facts


- District court entered final judgment ordering Caplow to cancel or surrender notes
- Caplow filed an appeal but did not request a stay of execution of the judgment
- District court entered OSC re: contempt when Caplow did not surrender the notes
- Service of the underlying order and the motion for OSC served on Caplow's attorney

**CAPLOW
V.
EIGHTH JUDICIAL DISTRICT COURT
72 NEV. 265, 302 P.2D 755 (1956)**



Key Holdings

- Since no stay of execution, court could enforce the judgment while appeal pending
- Contempt proceedings were incidental to a pending case
Therefore, service on attorney was sufficient



**WHAT'S ON THE
INTERNET...
IT CAN ONLY
GET WORSE**

BEFORE WE GO...



PROVED THE JUDGE RIGHT



SOVEREIGN CITIZEN - DON'T ENGAGE



JUDGE FRANK CAPRIO – YOUTUBE STAR



BENCH CONTEMPT CHECK LIST

Check list is in conference materials

- Key points covered by check list:
 - Civil or criminal contempt?
 - Does the court have jurisdiction?
 - Was notice proper?
 - Steps for conducting hearing
 - Order contains required elements

Check List for Contempt

What is the purpose of contempt order? Punish (criminal contempt) or secure compliance (civil contempt)?

If criminal contempt

1. Burden of proof = beyond a reasonable doubt
2. Counsel is required unless waived

If civil contempt

Burden of proof = clear and convincing evidence

Civil Indirect contempt

1. Does the court have jurisdiction?
 - a. What is the underlying order?
 - i. Can judge hear the contempt motion under NRS 22.030?
 - b. Written?
 - c. Signed?
 - d. Filed?
 - e. Terms of compliance in clear, unambiguous terms?
 - f. If part of a divorce decree, was portion at issue merged? (Must be merged to be enforceable order.)
2. Notice?
 - a. Did contemnor have notice of underlying order?
 - b. Did contemnor have notice of OSC?
 - c. Was notice of OSC properly served? (Service on contemnor's attorney is ok.)
3. Contempt proceeding
 - a. Did contemnor have opportunity to be heard?
 - b. Is counsel necessary? If so, is counsel present or waived? Let counsel or party speak on the substantive issue, and the consequences before they are imposed.
 - c. Findings of contempt
 - i. Include willful failure to perform and had ability to perform
 - d. Prescribe behavior and sanction - clear and specific
 - e. Purge clause - clear, unambiguous terms of action (e.g., pay \$500 by cashier's check to other party)
4. Contempt order contents
 - a. Written, signed and filed
 - b. Findings of fact constituting contempt - clear, unambiguous
 - c. Finding of contempt
 - d. Sanction and purge clause - clear, specific, unambiguous (e.g. 25 days in jail but you may be released as soon as you pay \$500 by cashier's check to the other party)

Civil and Criminal direct contempt order

1. Act committed in immediate view or presence of court or judge
2. Recite facts constituting contempt
3. Find person guilty of contempt
4. Prescribe sanction/punishment and purge clause in specific, clear language (if no purge clause, or generally, if sanction exceeds 25 days in jail, it will be criminal contempt)
5. If oral order, reduce to writing "promptly"

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QUESTIONS?