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DEALING WITH A DOUBLE-EDGED SWORD: A PRACTICAL GUIDE TO CONTEMPT LAW IN MINNESOTA

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“Those who have studied the contempt power and its exercise by the courts are unanimous on only one point - since its inception the law of contempt of court has been in a state of confusion that neither court nor legislature has been able to eliminate.”¹

I. INTRODUCTION

A court’s ability to protect litigants and uphold the dignity of its own process through use of the contempt power dates back to ancient times.² Nonetheless, no area of law has so consistently confounded practitioners and the judiciary. Contempt of court has been referred to as “a mysterious and indefinable offense and as easy to commit as it is liable to speedy and de-

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1. Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 681 (1981) (citations omitted).

2. RONALD GOLDFARB, *THE CONTEMPT POWER* 11-13 (1963).

served punishment.”³ Leaving an exhaustive survey of the area to scholars, this article attempts to chart a practical course for Minnesota judges and practitioners through the murky waters of contempt law, in hopes that some of the major obstacles can be avoided.

II. HISTORY OF CONTEMPT

The exercise of contempt power has a long and illustrious history.⁴ Contempt proceedings have been documented from the 10th century, when they were used to enforce the monarch’s sovereign rights.⁵ Reported Minnesota decisions on contempt are of more recent vintage and a more plebeian nature. However, a Minnesota Supreme Court opinion issued in 1889 reveals a well-developed understanding of the use of contempt.⁶ The contempt power has evolved over time, and courts now view it as an inherent and necessary device in the administration of law and order.⁷

Although the inherent power analysis has occasionally been criticized,⁸ a state legislature’s authority to regulate judicial contempt appears unclear.⁹ The law of contempt has been developed by the courts, and they will continue to bear primary responsibility for administering and refining it.

The contempt power is employed for three purposes:

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3. EDWARD DANGEL, CONTEMPT § 41, at 14 (1939).
 4. See generally SIR JOHN CHARLES FOX, THE HISTORY OF CONTEMPT OF COURT (1972); GOLDFARB, *supra* note 2, at 11-13.
 5. GOLDFARB, *supra* note 2, at 11-13.
 6. See *In re Fanning*, 40 Minn. 4, 4, 41 N.W. 1076, 1077 (1889).
 7. *Young v. United States ex rel. Vuitton Et Fils, S.A.*, 481 U.S. 787, 798 (1987); *Michaelson v. United States ex rel. Chicago, St. P., Mpls., & Om. Ry.*, 266 U.S. 42, 65 (1924). While the power of Minnesota courts to exercise contempt power is expressly granted by statute, contempt power is said to exist independently of statutory authority. See MINN. STAT. §§ 588.01-.20 (1990 & Supp. 1991); *In re Welfare of R.L.W.*, 309 Minn. 489, 491, 245 N.W.2d 204, 205-06 (1976).
 8. See generally Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924) (arguing that the contempt practices of many jurisdictions exceed constitutional limitations); see also *Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968) (providing historical overview of criminal contempt; concluding that examination should rest on constitutional analysis).
 9. Some courts, including the Minnesota Supreme Court, have refused to recognize legislative attempts to regulate contempt power. See *State v. Binder*, 190 Minn. 305, 313, 251 N.W. 665, 668 (1933); see also *State v. Morrill*, 16 Ark. 384, 384-85 (1855); *State v. Shumaker*, 164 N.E. 408, 409-10 (Ind. 1928).

- (1) to punish an individual for violating a court's order or interfering with judicial proceedings;
- (2) to coerce an individual to comply with a court order; and
- (3) to provide damages to a party injured by the contemnor's acts in violation of an order.¹⁰

In each case, identifying the purpose to be served is essential because the court's imposition of penalties and sanctions, as well as the requisite procedures to be followed, are constrained by the purpose of the proceedings.¹¹

III. DISTINGUISHING CIVIL AND CRIMINAL CONTEMPT

The primary source of confusion in contempt law stems from attempts to distinguish civil and criminal contempt. In Minnesota, the courts have broad statutory authority to punish those committing contempt,¹² but the statutes do not define civil and criminal contempt.¹³ Whether contempt proceedings are civil or criminal depends upon the court's purpose in responding to alleged misconduct rather than the nature of the misconduct itself.¹⁴ A reviewing court should focus on the lower court's response, not on the underlying conduct of the parties or the characterization of proceedings by the parties and trial judge.¹⁵

The United States Supreme Court, in its first attempt to clarify the distinction between criminal and civil contempt, prophetically noted, "It may not be always easy to classify a particular act as belonging to either one of these two classes."¹⁶ The Court initially tried to differentiate between civil and criminal contempt by examining the interest to be protected and determining whether a private party or the court's dignity benefitted from the sanction.¹⁷ Because a sin-

10. *United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947).

11. *See generally* 17 AM. JUR. 2D *Contempt* §§ 3-6, 77-78, 104-113 (1990).

12. MINN. STAT. § 588.02 (1990).

13. *But see* MINN. STAT. § 588.20 (1990) (categorizing diverse types of behavior as criminal contempt, without explanation).

14. *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. Ct. App. 1987); *see also* *Knajdek v. West*, 278 Minn. 282, 285, 153 N.W.2d 846, 848 (1967); *Red River Potato Growers Ass'n v. Bernardy*, 128 Minn. 153, 156, 150 N.W. 383, 384 (1915); *In re Nelson*, 408 N.W.2d 618, 621 (Minn. Ct. App. 1987).

15. *Shillitani v. United States*, 384 U.S. 364, 369 (1966); *see infra* note 20.

16. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 329 (1904).

17. *Id.* at 328; *see also In re Fanning*, 40 Minn. 4, 41 N.W. 1076, 1077 (1889)

gle act may simultaneously offend the court's authority and injure a party, this definitional approach proved inadequate.¹⁸

Although the definitional approach, which sought to identify the interest at stake, was not entirely satisfactory, the court was reluctant to abandon it completely. The Court attempted to refine the distinction between civil and criminal contempt by shifting the focus subtly to the purpose of the court and away from the interest to be vindicated.

It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt, then 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.¹⁹

Courts and commentators have had great difficulty applying these tests to distinguish between civil and criminal contempt.²⁰ Consequently, numerous alternative tests have been proposed.²¹ Ultimately, the federal appellate courts have abandoned the definitional approach and shifted their attention to the nature of the sanction imposed upon the contemnor.²² Because the application of federal constitutional protections turns on the characterization of a contempt pro-

(holding that a contempt order has "a double aspect" of punishment and coercing compliance).

18. For example, refusal to pay court-ordered child support or maintenance injures the intended recipient, but may also be seen as a challenge to the court's authority. Therefore, a single act may be properly classified as either civil or criminal contempt. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Besette*, 194 U.S. at 329; *Lopiparo v. United States*, 222 F.2d 897, 898 (8th Cir. 1955); see also *GOLDFARB*, *supra* note 2, at 53 (noting that the greatest percentage of cases could fall into either category, depending on the discretion of the judge).

19. *Gompers*, 221 U.S. at 441.

20. *GOLDFARB*, *supra* note 2, at 67. The frustration of judges and practitioners at the state and federal levels caused by the difficulty in distinguishing civil from criminal contempt is understandable.

[O]ne widely used rule illustrates the confusion on this topic: the designation by the court trying the contempt of whether the proceeding is for civil or criminal contempt is not dispositive, and in fact, is usually a minor consideration on appeal.

Diana J. Vogt, Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement: Hicks v. Feiock*, 22 CREIGHTON L. REV. 163, 169 (1988) (emphasis in original) (citing *Shillitani v. United States*, 384 U.S. 364, 369 (1966)). In effect, the appellate courts disregard the trial court's designation because it is so often in error.

21. Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 239 (1971).

22. See Vogt, *supra* note 20, at 169.

ceeding as civil or criminal, and because that characterization is a question of federal law,²³ this shift has inevitably affected the state courts' review of contempt proceedings. The controlling test incorporates the "purpose" test and is ostensibly simple: contempt is criminal when the relief imposed is a definite term of imprisonment or a fine payable to the court;²⁴ contempt is civil when the contemnor can purge the contempt by performance of an affirmative act required by the court.²⁵

Some commentators still argue that the claimed distinctions between civil and criminal contempt are "more apparent than real"²⁶ Nonetheless, because the required procedures vary significantly, a trial court which fails to determine whether the proceedings are civil or criminal in nature faces the inevitable prospect of committing reversible error.²⁷ If the court's purpose is to vindicate its authority and punish the contemnor for past behavior, it must conduct a criminal contempt proceeding and may impose a fixed, unconditional sanction.²⁸ If the court's purpose is to vindicate the rights of an opposing party by coercing compliance with an order, the court must comply with all procedural prerequisites for civil contempt and craft a sanction of indefinite duration, to be lifted upon compliance.²⁹ In either civil or criminal contempt proceedings, the court may impose fines or imprisonment.³⁰

When faced with a party's violation of an order, the court may, depending on what it is trying to accomplish, have the option of pursuing either type of contempt. The most common situation involves a party's failure to pay spousal maintenance or child support. If the conduct is offensive to the state

23. Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 630 (1988).

24. *Id.* at 632-33.

25. *Id.*

26. *E.g.*, Edward G. Mascolo, *Procedural Due Process and the Reasonable Doubt Standard of Proof in Civil Contempt Proceedings*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 245, 246 (1988).

27. Skinner v. White, 505 F.2d 685, 689-90 (5th Cir. 1974) (reversing contempt conviction where trial court did not determine whether proceeding was for criminal or civil contempt).

28. *See, e.g.*, McCrone v. United States, 307 U.S. 61, 64 (1939); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911); Bessette v. W.B. Conkey Co., 194 U.S. 324, 328 (1904); Minnesota State Bar Ass'n v. Divorce Assistance Ass'n, 311 Minn. 276, 285, 248 N.W.2d 733, 741 (1976); *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. Ct. App. 1987).

29. Hopp v. Hopp, 279 Minn. 170, 173, 156 N.W.2d 212, 216 (1968).

30. *See* MINN. STAT. § 588.02 (1990).

as a whole and the court wishes to punish the obligor and deter future misconduct, then criminal contempt is proper.³¹ If the court's purpose is to make the obligor comply with the judgment and decree or an order for support, then civil contempt proceedings are proper.³² Even in civil proceedings, the court may order imprisonment or a fine, but the party must be able to avoid or purge the sanction by compliance with the pre-existing obligation.³³

Criminal contempt may be appropriate where a previous court order was intended to enforce a party's rights but another party's misconduct effectively defeats that intent. If the contemnor may still perform, then coercive civil contempt is proper. However, if the party's rights have been irrevocably defeated by the contemnor's action, coercive contempt is ineffective. Since imposition of a sanction in such cases would have no remedial aspect, criminal contempt is appropriate.³⁴

IV. DIRECT OR CONSTRUCTIVE CONTEMPT?

The distinction between direct and constructive contempt is a less important distinction. Nonetheless, the issue has led to considerable confusion. Direct contempt usually refers to conduct that occurs in the court's immediate presence and is disruptive of the dignity of courtroom proceedings.³⁵ Constructive contempt usually refers to conduct that occurs outside the court's direct view or immediate presence.³⁶ Some acts, however, such as perjury³⁷ or an attorney's failure to

31. See *Peterson v. Peterson*, 278 Minn. 275, 278, 153 N.W.2d 825, 828 (Minn. 1967); *Gardner v. Conway*, 234 Minn. 468, 473, 48 N.W.2d 788, 792 (1951). But see *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 637-38 (1988) (distinguishing the obligor's burden of proof to establish inability to pay in civil contempt proceedings from the state's burden in criminal contempt proceedings).

32. *Minnesota State Bar Ass'n*, 311 Minn. at 285, 248 N.W.2d at 741.

33. See *id.* at 285, 248 N.W.2d at 741; *Hopp*, 279 Minn. at 175, 156 N.W.2d at 217; *In re Nelson*, 408 N.W.2d 618, 621 (Minn. Ct. App. 1987).

34. See *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. Ct. App. 1987); *Swift & Co. v. United Packing House Workers*, 228 Minn. 571, 572, 37 N.W.2d 831, 832 (1949).

35. MINN. STAT. § 588.01, subd. 2 (1990).

36. *Id.* at subd. 3.

37. See *In re Welfare of E.J.B.*, 466 N.W.2d 768 (Minn. Ct. App. 1991) (holding witness' alleged perjury not clearly direct contempt because proof of perjury requires going beyond what judge observes in court); see also J.A. Bock, Annotation, *Perjury or False Swearing as Contempt*, 89 A.L.R.2d 1258 (1963).

make a required court appearance,³⁸ are not easily categorized as direct or constructive.

Classifying contempt as direct or constructive allows the court to distinguish relatively rare conduct which may be punished summarily³⁹ from more common conduct which gives rise to specific procedural rights.⁴⁰ These procedural rights must be observed prior to a finding of contempt and the imposition of sanctions.⁴¹ Once again, the court must determine the purpose of its response to the conduct. Even if the conduct occurs in the immediate presence of the court, the court must determine whether it is punishing a completed act to preserve the court's authority or whether it is attempting to coerce a party to change its conduct.⁴² In short, even though the distinction between civil and criminal contempt does not restrict the court's ability to respond summarily to acts occurring in its immediate presence, the distinction will control the sanction to be imposed.

Constructive contempt also may be civil or criminal. However, because the conduct does not occur in the presence of the court, record evidence is always required to establish the

38. See *Knajdek v. West*, 278 Minn. 282, 153 N.W.2d 846 (1967). This particular offense has been the subject of both serious and not-so-serious discussions:

It is not always immediately clear whether a contempt is committed in the court's presence; for example, when an attorney fails to appear before the court at the appointed time, troubling metaphysical questions arise; is the contemptuous nonappearance made in the court's presence? If not, where? Is the nonappearance out of the court's presence? If so, is the offense repeated each time he appears somewhere else? Quite sensibly the courts have answered—"well, yes and no."

Jack S. Nordby, *There are No Bad Judges: Random Thoughts on the Aesthetics of Criminal Contempt*, HENNEPIN LAW., Nov.-Dec. 1974, at 8. See generally John E. Theuman, Annotation, *Attorney's Failure to Attend Court, or Tardiness, as Contempt*, 13 A.L.R.4TH 122 (1982) (analyzing state and federal cases considering the liability of an attorney and punishment for contempt for failure to appear in court).

39. See MINN. STAT. § 588.03 (1990).

40. See, e.g., *In re Welfare of E.J.B.*, 466 N.W.2d 768, 770 (Minn. 1991) (holding that criminal contempt requires criminal procedural safeguards).

41. E.g., *Peterson v. Peterson*, 278 Minn. 275, 278, 153 N.W.2d 825, 828 (1967); *In re Welfare of A.W.*, 399 N.W.2d 223, 226 (Minn. Ct. App. 1987).

42. For instance, if a witness refuses to answer questions after being sworn, he or she may be adjudged guilty of criminal contempt. MINN. STAT. § 588.20, subd. 6 (1990). If the court believes the witness is likely to answer if subject to incarceration, the witness may be adjudged to be in civil contempt and confined until compliance with the court's order to answer. In either case, the conduct constitutes direct contempt. However, the court must determine the purpose of the sanction and elect to treat the conduct as an act of direct criminal contempt or direct civil contempt.

circumstances of constructive contempt.⁴³ In cases involving constructive contempt, the distinction between civil and criminal contempt assumes even greater importance. While all cases of constructive contempt mandate a hearing and may not be resolved summarily, the type of further proceeding and sanction to be imposed differs substantially between civil and criminal cases. As soon as an allegation of constructive contempt is made, the court must determine the specific purpose of further proceedings, and decide whether to pursue the matter as a civil or criminal contempt.

V. CIVIL CONTEMPT

Civil contempt provides a speedy, efficient, and flexible means of enforcing one individual's adjudicated rights against another. It is, in effect, an enforcement remedy benefitting a party.⁴⁴ A civil contempt order issues as part of a pending action.⁴⁵ Thus, if the main action is dismissed or cannot be sustained, all civil contempt proceedings end also.⁴⁶ Although the court's authority to employ civil contempt is broad, there are specific limitations on the exercise of that authority. In the landmark case of *Hopp v. Hopp*,⁴⁷ the Minnesota Supreme Court identified eight distinct principles which limit civil contempt powers. A valid civil contempt order requires:

- (1) that the court have jurisdiction over the subject matter and the contemnor;
- (2) a clear definition of the acts to be performed;
- (3) notice of the acts to be performed and time to comply;
- (4) an application by the party seeking enforcement, with specific grounds for complaint;
- (5) a hearing, after due notice, to afford the nonperform-

43. See *Peterson*, 278 Minn. at 278, 153 N.W.2d at 828 (holding that contempt trial is necessary to establish record of circumstances surrounding constructive contempt).

44. Because civil contempt proceedings enforce a party's rights under an existing order, they are stayed by the posting of a supersedeas bond in connection with an appeal from the underlying order. James E. Sutherland & Irvin C. Iverson, *Constructive Civil Contempt in Minnesota: Guidelines*, BENCH & BAR, Jan. 1969, at 5, 9. In the absence of a bond or other stay, the trial court retains jurisdiction to enforce an order during the pendency of an appeal, and contempt proceedings may be pursued even while the contemnor challenges the underlying order in a separate appeal.

45. See *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry.*, 92 F. Supp. 352, 354 (D. Minn. 1950).

46. *Id.*; see also *Proper v. Proper*, 188 Minn. 15, 18-19, 246 N.W. 481, 482 (1933).

47. 279 Minn. 170, 156 N.W.2d 212 (1968).

- ing party an opportunity to show compliance or the reasons for failure;
- (6) a formal determination by the court of failure to comply and a determination whether conditional confinement will aid compliance;
 - (7) an opportunity for the nonperforming party to show inability to perform despite good faith effort; and
 - (8) the contemnor's ability to gain release through compliance or a good faith effort to comply.⁴⁸

Although the *Hopp* guidelines appear to establish a simple checklist of procedures, Minnesota courts and litigants continue to struggle with their application. The court in *Hopp* decried "delay and formalism" in civil contempt proceedings;⁴⁹ nonetheless, its decision requires explicit findings on each of the eight criteria.⁵⁰ Most civil contempt proceedings involve constructive contempt, so that summary adjudication is improper. Therefore, some delay is inevitable as hearings are scheduled and noticed. The failure of litigants and trial courts to address each element of *Hopp* frequently compels a remand, resulting in even greater delay.⁵¹

As a preliminary matter, the ordering court must have jurisdiction over both the subject matter and the alleged contemnor.⁵² In addition, the conduct required of the contemnor must be clearly identified in an existing order or decree.⁵³ The alleged contemnor must have had notice of the required conduct and a reasonable time to comply.⁵⁴ Failure to comply must be brought to the court's attention by the enforcing party, who must state with specificity the grounds for

48. *Id.* at 174-75, 156 N.W.2d 216-17; see also *Walz v. Walz*, 409 N.W.2d 39, 40 (Minn. Ct. App. 1987).

49. *Hopp*, 279 Minn. at 174, 156 N.W.2d at 216.

50. *Id.* at 174-75, 156 N.W.2d at 216-17.

51. See, e.g., *Walz*, 409 N.W.2d at 40-41.

52. *Hopp*, 279 Minn. at 174, 156 N.W.2d at 216.

53. See, e.g., *Mikoda v. Mikoda*, 413 N.W.2d 238, 244 (Minn. Ct. App. 1987) (citing *Hopp*, 279 Minn. at 174, 156 N.W.2d at 216) (holding that trial court did not err in failing to find appellant in contempt where divorce decree allegedly violated was ambiguous as to acts to be performed).

Not all violations of a court order are punishable by contempt. For instance, an order for the delivery of property is enforceable by execution and not by contempt. *Burgardt v. Burgardt*, 474 N.W.2d 235, 236-37 (Minn. Ct. App. 1991) (noting, however, that "Minnesota courts . . . have explicit statutory authority to use contempt proceedings to enforce maintenance and child support obligations").

54. *Hopp*, 279 Minn. at 174, 156 N.W.2d at 216.

complaint.⁵⁵

After being notified of the alleged noncompliance, the court must give the alleged contemnor notice of a hearing at which he or she will have an opportunity to establish that they actually complied with the existing order or to give reasons for the failure to comply.⁵⁶ A court has no authority to find a person in constructive civil contempt until he or she has appeared before the court, either voluntarily or involuntarily, and has been examined.⁵⁷ If the party accused of contempt fails to appear at a noticed hearing, the court may order him or her arrested immediately and held until the hearing, or the court may elect to continue the matter and again order appearance.⁵⁸

After securing the alleged contemnor's appearance, the court must determine, first, whether the person failed to comply with a prior court order; and, second, whether conditional confinement is reasonably likely to produce compliance in part or in full.⁵⁹

Once the court has found a failure to comply, the contemnor may assert an inability to perform.⁶⁰ The contemnor has the burden of production on this issue.⁶¹ The contemnor must establish more than a lack of present resources or will to discharge the obligations; his or her capacity and past performance must be considered.⁶²

After a duly noticed hearing at which the trial court has taken record evidence on each of the *Hopp* factors and con-

55. *Id.*

56. *Id.*

57. MINN. STAT. §§ 588.09-.10 (1990); *Clausen v. Clausen*, 250 Minn. 293, 296-99, 84 N.W.2d 675, 678-80 (1957); *cf. Smoot v. Smoot*, 329 N.W.2d 829, 832 (Minn. 1983) (finding hearing requirement met where the contemnor has submitted an affidavit admitting to the contempt).

58. MINN. STAT. § 588.04 (1990); *Westgor v. Grimm*, 381 N.W.2d 877, 880 (Minn. Ct. App. 1986) (holding that trial court erred by finding appellant in contempt without first securing his presence); *see also* MINN. STAT. § 588.08 (1990).

59. *Tatro v. Tatro*, 390 N.W.2d 461, 464 (Minn. Ct. App. 1986) (citing *Hopp*, 279 Minn. at 175, 156 N.W.2d at 217).

60. *United States v. Rylander*, 460 U.S. 752, 757 (1983).

61. *Id.*; *Hurd v. Hurd*, 63 Minn. 443, 445, 65 N.W. 725, 729 (1896) (holding that defendant has burden of proof to show inability to satisfy court order).

62. *Hopp v. Hopp*, 279 Minn. 170, 175-77, 156 N.W.2d 212, 217-18 (1968) (citing *State ex rel. Houtchens v. District Court*, 199 P.2d 272, 275 (Mont. 1948); 2 WILLIAM T. NELSON, *NELSON ON DIVORCE AND ANNULMENT* § 1625, at 435-36 (F. Reed Poore et al. eds., 2d ed. 1961)).

cluded that a finding of contempt is appropriate, the court has at least two distinct choices. It may adjudicate the individual in contempt and fashion an immediate sanction, or it may choose to issue a conditional contempt order, giving the party one more opportunity to avoid incarceration.⁶³ Mindful of the supreme court's caution about excessive delay in enforcing support obligations,⁶⁴ a court may conclude that further delay is unacceptable. If so, the court may direct the contemnor's immediate incarceration and specify the conditions for release.

As with any civil contempt sanction, the contemnor must always have "the keys to the jail cell" in his or her pocket.⁶⁵ In setting the conditions for release, the court must determine that it is in the contemnor's power to perform the conditions and obtain release.⁶⁶ The court need not insist upon complete compliance, but may specify that the contemnor be released upon partial performance, such as payment of a portion of support arrearages. In some cases, the courts have released contemnors upon their submission of, and commitment to, a plan for satisfying the breached obligation.⁶⁷ If the court has concluded that the contemnor has the ability to satisfy the obligation in full, the court may insist upon complete performance.⁶⁸

Although the primary purpose of a civil contempt sanction is to coerce compliance with an existing obligation, the court may impose additional obligations if the contemnor's misconduct has prejudiced the party whose rights the court was seeking to enforce. Under those circumstances, the contemnor may be liable to the party for costs and expenses, including reasonable attorney fees.⁶⁹ The court may require the contemnor to comply with the preexisting obligation and to pay the

63. See *Knutson v. Zenk*, 413 N.W.2d 593, 597-98 (Minn. Ct. App. 1987); see also *Tell v. Tell*, 383 N.W.2d 678, 684 (Minn. 1986); *Biscoe v. Biscoe*, 443 N.W.2d 221, 225 (Minn. Ct. App. 1989).

64. *Hopp*, 279 Minn. at 174, 156 N.W.2d at 216.

65. *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. Ct. App. 1989).

66. See MINN. STAT. § 588.12 (1990).

67. *Hopp*, 279 Minn. at 175, 156 N.W.2d at 217 (stating that in some cases, a confined party should be able to effect release by agreement to comply as directed); see also *Maher v. Maher*, 393 N.W.2d 190, 195 (Minn. Ct. App. 1986) (holding contemnor could purge contempt and secure vacation of remaining sentence upon scheduled payments of unpaid obligations).

68. See MINN. STAT. § 588.12 (1990) (providing that court may imprison contemnor until act performed).

69. See MINN. STAT. § 588.11 (1990); see also *Time-Share Sys., Inc. v. Schmidt*, 397 N.W.2d 438, 441 (Minn. Ct. App. 1986).

additional award of costs and fees to purge the contempt.⁷⁰

The party seeking enforcement of a contempt order must submit affidavits which detail the initial default and the failure to comply with any purging conditions.⁷¹ That party must also participate in the court hearings. To require the obligee to incur these expenses without hope of reimbursement would, in effect, diminish the value of the underlying obligation. The inclusion of an allowance of costs and fees does not convert the proceeding to a criminal contempt, and such awards are merely ancillary to the civil contempt sanction of confinement, although they may not be avoided by compliance with the conditions which effect the contemnor's release.

Frequently, Minnesota's courts will elect to adjudge a party in contempt but will stay confinement and afford the party an additional opportunity to purge the contempt prior to the imposition of that sanction.⁷² Such "conditional" contempt orders represent the court's prediction that the clear threat of incarceration may be sufficient to coerce meaningful compliance. A conditional contempt order must address all of the *Hopp* criteria and is proper only if the court concludes that incarceration is reasonably likely to induce performance.⁷³

The conditions set forth in a conditional contempt order will resemble the conditions for release that accompany a civil contempt order imposing immediate incarceration, and they are subject to the same restraints. A proper conditional civil contempt order will find that the obligor has defaulted despite the ability to comply and that confinement is likely to induce compliance.⁷⁴ The order will stay incarceration on condition that the obligor performs, or partially performs, prior to a specified date. Such an order is particularly useful if the court finds that the contemnor had the ability to meet his or her obligations at a prior time but does not have the resources, at the time he or

70. *Time-Share Sys.*, 397 N.W.2d at 441.

71. See *Campbell v. Motion Picture Mach. Operators*, 151 Minn. 238, 242, 186 N.W. 787, 789 (1922) (holding that award must be based on proof of actual damages).

72. See, e.g., *Knutson v. Zenk*, 413 N.W.2d 593, 598 (Minn. Ct. App. 1987) (holding that trial court did not abuse its discretion in staying consequences of civil contempt).

73. See, e.g., *Gustafson v. Gustafson*, 414 N.W.2d 235, 237-38 (Minn. Ct. App. 1987) (holding that trial court's order vacating stay of execution and enforcing contempt order was neither arbitrary nor unreasonable).

74. *Id.*

she comes before the court, to remedy the entire default immediately. Under those circumstances, the court may afford the contemnor a further opportunity to purge the contempt prior to incarceration.

The most common defect in conditional contempt orders issued by the trial courts in Minnesota is the existence of a condition that the obligor meet *future* obligations for a certain period, to avoid incarceration.⁷⁵ Since the conditional contempt order most often arises in the context of a civil proceeding, its purpose, like any final order in a civil contempt proceeding, is to coerce compliance with a preexisting obligation.⁷⁶ The payment of future obligations does nothing to purge the prior failure to perform, and it has the improper effect of premising a contempt sanction on conduct which has not occurred when the court issues its finding of contempt. The civil contempt sanction must be limited to coercing compliance with the preexisting obligation; any effect on future performance is a salutary by-product.

If a court has issued a conditional contempt order, affording the contemnor an additional opportunity to purge the contempt and avoid incarceration, any failure to purge will occur outside the presence of the court. Accordingly, the party seeking enforcement must bring the failure to purge before the court by submission of an affidavit.⁷⁷ The court may not provide for automatic confinement upon a breach of the conditions of the stay.⁷⁸ The contemnor is entitled to a further hearing on the failure to purge.⁷⁹

The scope of the second hearing is limited to the contemnor's ability to comply with the purge conditions during the period since the finding of contempt. The initial findings are

75. Although no published opinion addresses this issue, the court of appeals has encountered this issue in numerous petitions for extraordinary relief. Petitions for mandamus or prohibition are resolved most often by unpublished order of the special term panel, without full briefing or opinion.

76. See *supra* note 67.

77. See *Clausen v. Clausen*, 250 Minn. 293, 298, 84 N.W.2d 675, 679 (1957).

78. *Mahady v. Mahady*, 448 N.W.2d 888, 891 (Minn. Ct. App. 1989) (holding that trial court must determine that obligor failed without excuse to comply with purge conditions before finding obligor in contempt).

79. See, e.g., *id.*; *Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. Ct. App. 1987) (finding that contemnor afforded at least two opportunities to show compliance or to present reasons for failure to purge).

neither relitigated nor subject to collateral attack.⁸⁰ The contemnor bears the burden of establishing a reasonable excuse for failure to comply with the purge conditions, but the trial court must make an explicit finding that the contemnor had the ability to comply.⁸¹

In addition to the notice and hearing aspects enumerated in *Hopp*, the Minnesota Supreme Court has enlarged the procedural protection in constructive civil contempt proceedings. A nonperforming party has a right to legal counsel at a point in the proceeding that "incarceration is a real possibility."⁸²

Until recently, imprisonment for civil contempt was not subject to any statutory limits.⁸³ However, in 1988, Congress sought to curtail apparent abuses by imposing an eighteen month limitation on imprisonment for civil contempt.⁸⁴ Once a civil contempt sentence has been announced, the only way the imprisoned contemnor may obtain release, other than by compliance with the previous order, is to remain in prison long enough to demonstrate that imprisonment will not have the desired coercive effect.⁸⁵ Determining when that point has been reached is solely within the sentencing court's discretion.⁸⁶

80. Because a conditional contempt order is not final or appealable, the initial findings will be subject to appellate review on appeal from a final contempt order, issued after a "second stage" hearing. See *Mahady*, 448 N.W.2d at 891. Nonetheless, the trial court may properly limit the scope of the second hearing to the behavior of the contemnor since the issuance of the conditional contempt order.

81. *Id.* at 890-91; *Zieman v. Zieman*, 265 Minn. 190, 193 n.5, 121 N.W.2d 77, 80 n.5 (1963).

82. *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984). While the supreme court in *Cox* recognized the right to counsel stemming from both the United States and Minnesota Constitutions, the issue was not decided on constitutional grounds. Rather, the court relied on its "supervisory powers to ensure the fair administration of justice . . ." *Id.*; see also *Walz v. Walz*, 409 N.W.2d 39, 40 (Minn. Ct. App. 1987).

83. *Dobbs*, *supra* note 21, at 26.

84. See 28 U.S.C. § 1826(a)(2) (1988). Congress passed this federal statute largely in response to the incarceration of Dr. Elizabeth Morgan when she refused to reveal the location of her daughter, alleging that her ex-husband was sexually abusing the child. See *Morgan v. Foretich*, 521 A.2d 248 (D.C. 1987). Interestingly, early commentators advocated confinement for life for failure to comply with a court order. See generally, Paul G. Kauper, Comment, *Equity - Contempt - Duration of Imprisonment*, 36 MITCH. L. REV. 1016, 1018 (1938).

85. See generally Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185 (1991).

86. See, e.g., *Minnesota State Bar Ass'n v. Divorce Assistance Ass'n*, 341 Minn. 276, 286, 248 N.W.2d 733, 741 (1976) (noting "admittedly broad discretion" of trial

VI. CRIMINAL CONTEMPT

As noted previously, the purpose of criminal contempt proceedings is to vindicate the authority of the court by punishing a person for past conduct.⁸⁷ The Minnesota legislature has identified a variety of acts which constitute criminal contempt.⁸⁸ Some of the acts occur in the presence of the court during court proceedings and constitute direct contempt, which may be punished summarily. For instance, disorderly or "insolent" behavior tending to interrupt proceedings or to impair the respect due the court may be dealt with immediately, without a further hearing, because the facts are known to the court and will appear on the record.⁸⁹ If the purpose of the court's sanction is to punish behavior which has already occurred, and to exercise its authority over the courtroom, a finding of direct criminal contempt is appropriate.⁹⁰

Acts constituting criminal contempt which occur outside the presence of the court are classified as constructive criminal contempt. Disobedience of a direct court order or subpoena, or the publication of "a false or grossly inaccurate report" of court proceedings, must be brought to the court's attention because it does not occur in the immediate view of the court.⁹¹

As a prerequisite for an adjudication of constructive criminal contempt, there must be a clear definition of the acts to be performed.⁹² Criminal contempt punishes a show of disre-

court where contemnor acts "contumaciously, in bad faith, and out of disrespect for the judicial process").

87. See, e.g., *id* at 285, 248 N.W.2d at 741.

88. MINN. STAT. § 588.20 (1990). See generally 8 DUNNELL MINN. DIGEST *Contempt* § 1.01 (4th ed. 1990).

89. MINN. STAT. §§ 588.03, 588.20(1) (1990); State *ex. rel.* Russell v. Ives, 60 Minn. 478, 479, 62 N.W. 831, 832 (1895) (providing that the trial court must issue an order reciting the events which occurred in its presence).

90. Peterson, 278 Minn. at 280, 153 N.W.2d at 830.

91. MINN. STAT. § 588.20(4), (7) (1990); MINN. R. CIV. P. 45.07.

92. Although there is little case law on point, due process considerations would seem to require that a party held in direct criminal contempt should also be advised of the potential consequences of his or her conduct. However, since ignorance of the law is no excuse, and the purpose of summary adjudications of criminal contempt is to assert the court's authority over pending proceedings, it is unlikely that an appellate court would reverse a finding of direct contempt which followed, without warning, from conduct which clearly evidenced a lack of respect for the trial court. See *In re Jenison*, 265 Minn. 96, 103, 120 N.W.2d 515, 520, *vacated on other grounds* 375 U.S. 14 (1963). See generally Annotation, *Lack of Notice to Contemnor at Time of Contemptuous Conduct of Possible Criminal Contempt Sanctions as Affecting Prosecution For Contempt in Federal Court*, 76 A.L.R. FED. 797 (1986).

spect to the court, and it is limited to clearly defined obligations owed to the court. The court will not use criminal contempt to enforce obligations owed by one party to another, nor will it impose sanctions without adequate notice of the nature of the obligation imposed by the court.⁹³

A criminal contempt action is distinct from its underlying action.⁹⁴ The public alone charges the defendant in a criminal contempt proceeding.⁹⁵ If an accused contemnor had the ability to conform his or her conduct but failed to do so, punishment to the extent permitted by statute is appropriate, without regard for the contemnor's current ability to comply.⁹⁶

Criminal contempt constitutes a misdemeanor,⁹⁷ and the alleged contemnor is entitled to the procedural safeguards applicable to other criminal prosecutions.⁹⁸ The alleged contemnor is entitled to a written complaint⁹⁹ and a jury trial,¹⁰⁰ may testify on his or her own behalf,¹⁰¹ and may assert the right against self incrimination.¹⁰² The prosecutor must establish the elements of the contempt beyond a reasonable doubt.¹⁰³ The contemnor also may not be placed in double jeopardy.¹⁰⁴ Since contempt is punishable by incarceration, the alleged contemnor has the right to counsel, including the right to appointed counsel for indigent defendants.¹⁰⁵

93. *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. Ct. App. 1987).

94. *E.g.*, *Zieman v. Zieman*, 265 Minn. 190, 193-94, 121 N.W.2d 77, 80 (1963).

95. *Russell v. United States*, 86 F.2d 389, 392 (8th Cir. 1936).

96. *See Clausen v. Clausen*, 250 Minn. 293, 299, 84 N.W.2d 675, 680 (1957); *Wenger v. Wenger*, 200 Minn. 436, 442, 274 N.W. 517, 520 (1937).

97. MINN. STAT. § 588.20 (1990).

98. *Peterson v. Peterson*, 278 Minn. 275, 277, 153 N.W.2d 825, 827 (1967); *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. Ct. App. 1987).

99. MINN. R. CRIM. P. 2.01.

100. *See Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974) (holding that the Sixth Amendment right to a jury trial is invoked if contempt sentence is greater than six months).

101. *Krmpotich v. Krmpotich*, 227 Minn. 567, 569, 35 N.W.2d 810, 811 (1949) (refusing to allow contemnor to testify if reversible error).

102. *State ex rel. Sandquist v. District Court*, 144 Minn. 326, 330, 175 N.W. 908, 909 (1919).

103. *State v. Binder*, 190 Minn. 305, 311, 251 N.W. 665, 668 (1933).

104. *Yates v. United States*, 355 U.S. 66, 74-75 (1957). The prohibition against double jeopardy has specific application to a witness who refuses to answer repeated questions. While each refusal evidences a lack of respect for the court, the contemnor is protected by Minnesota's prohibition against multiple prosecutions for a single behavioral incident. MINN. STAT. § 609.035 (1990 & Supp. 1991); *In re Armentrout*, No. C6-91-1505, 1992 WL 15913 (Minn. Ct. App. Feb. 4, 1992).

105. MINN. R. CRIM. P. 5.02, subd. 2.

Misdemeanors generally are punishable by imprisonment not exceeding ninety days and a fine not exceeding \$700.¹⁰⁶ This limitation applies to the specific types of contumacious behavior defined in Minnesota Statutes section 588.20. However, acts of constructive criminal contempt may be punished by imprisonment not exceeding six months and a fine not exceeding \$250.¹⁰⁷ The statutory maximum may be imposed for each count of contempt arising from a separate behavioral incident.¹⁰⁸ While the statutes authorize substantial penalties for criminal contempt, those penalties are reserved for cases of direct contempt and for constructive contempt which harms a party.¹⁰⁹ If an act of constructive criminal contempt has not defeated or prejudiced the rights of a party to an action, the court may not incarcerate the contemnor or impose any fine exceeding \$50.¹¹⁰

VII. APPELLATE REVIEW

Although the characterization of the proceedings in the trial court is not binding on the appellate court,¹¹¹ that characterization will govern the timing of any appeal and will define the parties to the action.¹¹²

Because a civil contempt proceeding is considered part of the original cause of action involving the same parties, the federal courts treat a contempt citation as an interlocutory order. Consequently, a civil contempt order cannot be appealed through the usual appellate channels until the entire cause of action ends.¹¹³ In Minnesota, the concept of finality controls. If a non-party is adjudged to be in contempt, they need not await the outcome of the action. Since the rights of non-parties will not be determined by the judgment, they have an immediate right to appeal.¹¹⁴

A conditional civil contempt order, or one which directs consequences only if the contemnor fails to purge the contempt, is

106. MINN. STAT. § 609.03(3) (1990).

107. MINN. STAT. § 588.10 (1990).

108. *Codispoti v. Pennsylvania*, 418 U.S. 506, 514 (1974); *Yates*, 355 U.S. at 74-75.

109. See MINN. STAT. § 588.02 (1990).

110. MINN. STAT. § 588.02 (1990).

111. See *supra* note 20.

112. JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 717 (1985).

113. See *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936).

114. *United States v. Pfizer*, 560 F.2d 326, 332-33 n.10 (8th Cir. 1977).

not final or appealable.¹¹⁵ Similarly, a contempt order which reserves both the conditions for purging the contempt and imposition of sanctions for later determination is not appealable.¹¹⁶ However, if a contempt order imposes fines, costs, or attorney fees without conditions by which the contemnor could purge the contempt, it is a final order and appealable.¹¹⁷

A criminal contempt citation may be appealed without regard for any underlying action because the contempt proceeding constitutes a separate cause of action. A final adjudication of criminal contempt is appealable regardless of the stage of any underlying cause of action.¹¹⁸ While older cases required that criminal contempt proceedings be reviewed by certiorari,¹¹⁹ a direct appeal may now be taken from any criminal contempt conviction.¹²⁰

The court of appeals receives many inquiries from counsel regarding the appropriate way to obtain a stay of a contempt sanction pending appeal. In a case involving criminal contempt, the contemnor must first apply to the trial court.¹²¹ If the trial court refuses to permit release pending appeal, it must state the reasons for its denial on the record.¹²² In the event of a denial, the contemnor may make a motion for release to the court of appeals once an appeal has been filed and jurisdiction has vested.¹²³ Counsel may not rest upon conclusory statements but must establish that the appellant is unlikely to flee if the appeal fails, that the contemnor will not commit a serious crime or intimidate witnesses if free during the appeal, and

115. *Tell v. Tell*, 383 N.W.2d 678, 685 (Minn. 1986) (holding defendant had right to appeal from contempt order included in trial court's final judgment); *Becker v. Becker*, 300 Minn. 512, 513, 217 N.W.2d 849, 850 (1974) (holding defendant in contempt for failure to pay child support); *Rohrman v. Moore*, 423 N.W.2d 717, 721 (Minn. Ct. App. 1988) (holding defendant in contempt for nonpayment of child support despite not being served with order to show cause).

116. *Johnson v. Johnson*, 439 N.W.2d 430, 431 (Minn. Ct. App. 1989).

117. *Time-Share Sys., Inc. v. Schmidt*, 397 N.W.2d 438, 440 (Minn. Ct. App. 1986); see MINN. R. CIV. APP. P. 103.03(e).

118. *Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1922).

119. See, e.g., *Gardner v. Conway*, 234 Minn. 468, 473-74, 48 N.W.2d 788, 792 (1951).

120. See MINN. R. CRIM. P. 28.02, subd. 2(1). The appeal must be taken within 10 days. *Id.* subd. 4(3). The sentence, however, is not appealable as a matter of right. A contemnor must seek discretionary review if challenging the sentence. *Id.* subd. 2(3).

121. *Id.* subd. 7(3).

122. *Id.*

123. *Id.*

that the appeal is not frivolous or taken for delay.¹²⁴ A motion for release pending appeal will be expedited but will not be handled on an emergency basis.¹²⁵ The court shall consider whether the defendant would serve the entire sentence before an appeal could be decided.¹²⁶

The procedure in civil contempt cases is similar to the procedure in criminal contempt cases. The filing of an appeal does not result in an automatic stay. However, the contemnor, like any civil appellant, may move the trial court to establish a supersedeas bond to stay enforcement pending a decision on the appeal.¹²⁷ The focus in a civil case is upon the financial risk to the respondent caused by waiting to enforce the contempt order until the appeal is decided. If the trial court awarded costs or fees, the appellant must post a bond to insure payment, plus damages which may be awarded on appeal.¹²⁸ An appellant may move the appellate court to reduce the supersedeas bond established by the trial court.¹²⁹ If the trial court has ordered incarceration to induce compliance, the respondent is unlikely to suffer *financial* damage from a delay in enforcement, and no supersedeas bond will be required.¹³⁰ In most cases, a trial court will stay a civil contempt incarceration order if counsel requests it by proper motion and addresses the applicable provisions.

When reviewing contempt proceedings, the appellate court must first determine, by examining the sanction imposed by the trial court, whether to apply standards for criminal or civil contempt.¹³¹ Thereafter, the court reviews the procedural is-

124. *Id.* subd. 7(2); *State v. McKinley*, 424 N.W.2d 586 (Minn. Ct. App. 1988).

125. *State v. Johnson*, 447 N.W.2d 605, 608 (Minn. Ct. App. 1989). Counsel are frequently aware that the client faces incarceration for criminal contempt on a specific date, and should be prepared to make a motion for release and address the relevant criteria when the sentence is announced. In cases involving summary punishment for direct contempt, such advance preparation is not always possible, but the court of appeals will not overlook a failure to seek relief in the trial court.

126. MINN. R. CRIM. P. 28.02, subd. 7(1).

127. MINN. R. CIV. APP. P. 108.01, subd. 1.

128. *Id.* subd. 3.

129. *Sisto v. Housing & Redev. Auth.*, 258 Minn. 391, 395, 104 N.W.2d 529, 532 (1960).

130. See MINN. R. CIV. APP. P. 108.01, subds. 2, 6.

131. *In re Welfare of E.J.B.*, 466 N.W.2d 768, 769 (Minn. Ct. App. 1991).

Whether contempt is civil or criminal is determined by the court's purpose in responding to the alleged misconduct The purpose of civil contempt is to coerce future compliance "Criminal contempt is to preserve the authority of the court by punishing past misconduct."

sues, without deference to the trial court's decisions on the process due the contemnor.¹³² Finally, if necessary, the court reviews "the evidence submitted to determine whether the trial court's order . . . was arbitrary and unreasonable or whether it finds support in the record" ¹³³

The underlying factual findings are subject to reversal only if clearly erroneous.¹³⁴ The trial court's decision to invoke the contempt powers is subject to reversal only if the appellate court finds an abuse of discretion.¹³⁵ A finding of direct contempt, based on the trial court's firsthand observation of the contemnor's conduct, will be reversed only if the trial court acted "capriciously, oppressively, or arbitrarily."¹³⁶ The rare contempt order justifying a finding that the trial court has abused its discretion is, more often than not, affected by procedural errors requiring reversal,¹³⁷ so that few contempt orders are reversed solely on the ground that the trial court abused its discretion in imposing a contempt sanction.

VIII. CONCLUSION

The power to enforce the decisions of the courts and to impose order in courtroom proceedings is expressed in the power to hold individuals in contempt. The contempt power is an effective, extraordinary remedy. But a decision to draw the double-edged sword from its scabbard requires careful attention to procedure and unequalled focus in crafting an appropriate sanction.

Whether presented to the court by a party's motion to hold another in contempt or by conduct disrespectful to the court, a trial judge must initially determine the specific purpose of in-

Id. (citations omitted) (quoting *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. Ct. App. 1987)).

132. Procedural errors account for a large share of appellate reversals of contempt orders. See, e.g., *E.J.B.*, 466 N.W.2d at 769; *A.W.*, 399 N.W.2d at 225.

133. *Meisner v. Meisner*, 220 Minn. 559, 560-61, 20 N.W.2d 486, 488 (1945); see also *Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. Ct. App. 1987) ("The only objective in exercising civil contempt powers in dissolution cases 'is to secure compliance with an order presumed to be reasonable.'") (quoting *Hopp v. Hopp*, 279 Minn. 170, 173, 156 N.W.2d 212, 216 (1968)).

134. MINN. R. CIV. P. 52.01.

135. See *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986).

136. *In re Jenison*, 265 Minn. 96, 103, 120 N.W.2d 515, 520, *vacated on other grounds*, 375 U.S. 14 (1963).

137. See *In re Welfare of A.W.*, 399 N.W.2d 223 (Minn. Ct. App. 1987).

voking the contempt power. Most contempt proceedings will involve an allegation of constructive contempt, and great care must be taken to insure that the alleged contemnor is afforded the procedures commensurate with the civil or criminal nature of the action. Even in cases involving direct contempt subject to summary treatment, a failure to identify the purpose of a contempt sanction increases the risk that imposition of an improper sanction will require reversal.

Armed with an understanding of purpose and procedures, trial judges and practitioners seeking to employ the power of contempt can avoid Damocles' sense of impending disaster, confident that they wield the ancient sword with a greater understanding of its strengths and its limitations.

