

## Contempt: Special Protections For Texas Attorneys

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Generally, any act or omission by an attorney or a party that tends to obstruct or interfere with the administration of justice or that impairs the dignity of the court can be grounds for the big “C”.<sup>i</sup> Moreover, contempt can be classified in several ways, depending on where the contempt occurs, it may be either direct or constructive and regardless of the nature of any underlying legal action from which the contempt arises, it may be either criminal or civil. A direct contempt occurs within the presence of the court and a constructive (or indirect) contempt occurs outside the court's presence. In Texas, any party to the litigation, or the court, can initiate contempt proceedings to determine whether the direct or constructive behavior constitutes a contempt of court. Contempt proceedings are considered quasi-criminal regardless of the nature of the underlying action.<sup>ii</sup> While the proceeding is not strictly governed by the Code of Criminal Procedure, it requires similar due process protections as criminal proceedings, except in very limited circumstances.<sup>iii</sup> If after notice and hearing the alleged contemnor is found guilty, section 21.002 of the Texas Government Code vests a court with authority to punish for contempt.<sup>iv</sup>

The court's contempt power is considered an inherent power for the exercise of its jurisdiction and the enforcement of its lawful orders.<sup>v</sup> The Texas Supreme Court has held that a court's power to punish for contempt is not only an inherent power but an essential element of judicial independence and authority.<sup>vi</sup> A court may punish an attorney for contempt for bringing a fictitious suit or filing a fictitious pleading for the purpose of securing an advisory court opinion, or for making a statement in a pleading that the attorney knows to be groundless and false for the purpose of securing a delay of the trial of the cause. Additionally, discovery abuse may be punished as a contempt, as may personal criticism of opposing counsel during argument. Judicial enforcement of contempt can be characterized as attempting a balance between the duty of an attorney to represent clients zealously with the court's need to maintain a functioning courtroom.

Although the contempt power is an essential power of a court, it is a power that courts should use sparingly.<sup>vii</sup> Texas courts have generally not been willing to allow the contempt power to be used to punish attorneys whose practices do not meet the court's standards in terms of effective assistance of counsel.<sup>viii</sup> Likewise, because an attorney is sometimes caught between the conflicting demands of two or more courts, a judge should hesitate to hold an attorney in contempt for minor instances of lateness when the attorney has multiple appearances to juggle, even if the conflict is not handled in the most professional manner.<sup>ix</sup> Accordingly, Texas Appellate courts have reversed contempt convictions when conduct, even if improper, did not truly interfere with the workings of the court.<sup>x</sup> While not all attorney misconduct is contemptuous, an attorney may be fined or incarcerated if found in contempt and, thus, a Texas lawyer should be aware of all available protections in defending a contempt charge.

Under section 21.002 (d) of the Texas Government Code there exist special protections for officers of the court which differs from that which pertains to others accused of contempt of court.<sup>xi</sup> Although in most cases this section of the code is invoked by an attorney appearing before the court, the statute pertains to all officers of the court, not merely lawyers.<sup>xii</sup> However, the statute is inapplicable if an officer of the court is not acting in that capacity. Hence, an attorney appearing before the court as a witness rather than as counsel is not acting as an officer of the court and cannot invoke the statutory protections.<sup>xiii</sup> If applicable, an officer of the court who is accused of contempt may file a motion in the offended court to be released on his own personal recognizance pending a determination and to have an independent judge determine guilt or innocence.<sup>xiv</sup> Upon proper motion, the presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign an independent judge to determine the guilt or innocence of the officer of the court.<sup>xv</sup> A sufficient pleading should set out the statutory basis for the motion; should establish that the alleged contemnor is an officer of the court; and should allege relevant facts to support a request for relief under the section 21.002 (d).

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<sup>i</sup> See generally, *Ex parte Gibson*, 811 S.W.2d 594, 596 (Crim. App. 1991) (en banc), per curiam; *Ex parte Krupps*, 712 S.W.2d 144, 149 (Crim. App. 1986); *Ex parte Norton*, 191 S.W.2d 713 (1946); *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

<sup>ii</sup> See *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986); *In re Houston*, 92 S.W.3d 870, 876 (Tex. App.-Houston [14th Dist.] 2002, orig. proceeding); see also *Cadle Co. v. Lobingier*, 34 S.W.3d 598, 601 (Tex. App.-Fort Worth 2000, pet. denied).

<sup>iii</sup> See, e.g., *Ex parte Sanchez*, 703 S.W.2d 955 (Tex. 1986).

<sup>iv</sup> See TEX. GOV'T CODE 21.022 (b), (c) (punishment ranging from a fine of \$100 or less and/or confinement for not more than three days in the justice or municipal courts, to a fine of \$500 or less and/or confinement for not more than six months for all other courts).

<sup>v</sup> See TEX. GOV'T CODE § 21.001 (a).

<sup>vi</sup> See *In re Gabbai*, 968 S.W.2d 929, 931 (Tex. 1998) (per curiam); *Ex parte Pryor*, 800 S.W.2d 511, 512 (Tex. 1990).

<sup>vii</sup> *Gompers v. Bucks Stove & R. Co.*, 221 U.S. 418, 450, (1911).

<sup>viii</sup> See, e.g., *Ex parte Jacobs*, 664 S.W.2d 360, 364 (Crim. App. 1984) (counsel's refusal to voir dire or strike jurors not punishable by contempt).

<sup>ix</sup> See, e.g., *Ex parte Butler*, 372 S.W.2d 686, 687 (Crim. App. 1963) (attorney who had two docket calls at same time in same building, before two courts of equal but different jurisdiction, should not have been held in contempt for being 10 to 20 minutes late to one court); see also *Richardson v. State*, 288 S.W. 2d 500 (Crim. App. 1956).

<sup>x</sup> See, e.g., *Ex parte Curtis*, 568 S.W.2d 363, 366-367 (Crim. App. 1978) (remarks of attorney regarding bias of judge were not disruptive); *In re Greene*, 213 F.3d 223, 225 (5th Cir. [Tex.] 2000) (when attorney fails to appear or makes delayed appearance, conduct that is subject to sanction is not absence or delay itself but rather failure to provide sufficient justification); see also *In re Monroe*, 532 F.2d 424, 425-426 (5th Cir. [Tex.] 1976) (absence from trial due to murder trial in another jurisdiction, misunderstanding of rules, and withdrawal of local counsel, was not sufficiently egregious to justify contempt).

<sup>xi</sup> See TEX. GOV'T CODE § 21.002(d); see also TEX. GOV'T CODE § 82.061.

<sup>xii</sup> See *Ex parte Hughes*, 759 S.W.2d 118, 119-120 (Tex. 1988) (district court clerk is entitled to protection of statute); see also *Ex parte Griffiths*, 711 S.W.2d 225, 226-227 (Tex. 1986) (receiver is officer of court entitled to protection of statute).

<sup>xiii</sup> See *Ex parte Howell*, 488 S.W.2d 123, 126 (Crim. App. 1972) .

<sup>xiv</sup> See TEX. GOV'T CODE § 21.002(d).

<sup>xv</sup> *Id.*