

Indiana Contempt Procedure

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Direct Criminal Contempt –Ind. Code § 34-47-2

Characteristics

- Behavior occurs within the presence of the court.¹
- Judge witnesses behavior first-hand.
- Conduct:
 - Behavior disrupts proceedings; or
 - Witness refuses to take an oath or testifies in a demeaning or disruptive manner unless refusal is based upon privilege.²
 - Intimidating, threatening, assaulting, or attempting to influence a witness.

Procedures

- Judge should deal with contempt behavior immediately and summarily.
- Proceedings are commenced by and before judge who witnessed contemptuous behavior.³
- Sanctions can occur at later time as long as judge is able to maintain authority and dignity of court.⁴
- Make a record:
 - Specifically, describe the conduct witnessed.
 - Specifically describe the disruption to court proceedings caused by the conduct (to establish necessity of immediate action).
 - Allow contemnor to explain any extenuating circumstances that may justify the contemptuous behavior.
- Entry of judgment:
 - Proof beyond reasonable doubt not required.⁵
 - Punishment: reasonable determinate sentence or fine (without jury trial or waiver, 180-day maximum).⁶
 - Produce written record of proceeding signed by judge:
- Judges statement of individual's conduct;
 - Individual's answer or explanation;
 - Affidavits of others who witnessed events; and
 - Entry of judgment.

Indirect Criminal Contempt –Ind. Code § 34-47-3

Best practice: If questioning whether the direct or indirect procedure should be used, err on the side of caution, and use the indirect procedure.

Characteristics

- Willfulness
- Deliberate intention to either⁷:
 - Disobey or interfere with process of lawful order
 - Influencing, intimidating, or injuring a witness, or
 - Providing a false or inaccurate report of a case.⁸
- Conduct occurs outside judge's presence, or judge's knowledge of incident is not first-hand or immediate.⁹

Procedures

- New, separate cause of action.
- Action is prosecuted in name of State.¹⁰
- Rule to Show Cause is required.
- Requires appointment of special judge.¹¹
- Due Process Requirements:
 - Service of Rule to Show Cause and Order to Appear;¹²
 - Representation by Counsel;¹³
 - Rights advisement;
 - When indigent, court-appointed counsel;
 - A sentence exceeding six months invokes the right to trial by jury.¹⁴
- Standard of proof: The evidence must show that contemnor acted with willful and intentional disobedience.¹⁵
- Defendant – Ind. Code § 34-47-3-6
 - Defendant is required to answer Rule to Show Cause.
 - If defendant fails to appear or refuses to answer, trial court may proceed to attach and punish defendant for contempt.
- Defenses:
 - Inadequate notice as to facts constituting contempt.¹⁶
 - Inability to obey (burden of proof is on defendant).¹⁷
 - Inability to pay (burden of proof in on defendant).¹⁸
- Sanctions:
 - Fine;

- Imprisonment;¹
- Fine and imprisonment;
- Reasonable sanction at the judge's discretion.

Civil Contempt –Ind. Code § 34-47-3

Characteristics

- Intentional act or omission that violates the terms of a court order made for the benefit of the opposing party.
- The offense is made against the opposing party, not against the dignity of the court.
- The objective is to coerce contemnor into compliance.

Procedure

- Filed in the same civil matter out of which it arises.¹⁹
- Initiated by verified motion.
 - Motion must specifically identify the command or prohibition language in the trial court's order that is alleged to be violated.²⁰
 - Motion must specifically describe behavior that violates the court's order.
 - Motion must be accompanied by affidavits of aggrieved person (if facts are not stated in verified motion) and witnesses to the behavior, if applicable.²¹
- Due Process rights:
 - Service of Rule to Show Cause and Order to Appear
 - Ind. Code § 34-47-3-5 lists requirement for Rule to Show Cause
 - Contemnor should be ordered to appear rather than noticed to appear.
 - Court does not have jurisdiction over matter until proper service is established.
 - Right to counsel
 - Advisement of right
- Appointment of counsel when defendant is indigent:
 - Required when possibility of incarceration exists.²²
 - When physical liberty is not at stake, case by case determination.²³
- Remedy
 - No punitive remedy – Imprisonment is appropriate only when it is clearly coercive to compel compliance.²⁴

¹ Multiple acts of contempt that form a single contemptuous episode should receive a single punishment of not more than six months, unless there is a jury trial. [Mockbee v. State, 80 N.E.3d 917, 923 \(Ind. Ct. App. 2017\)](#)

- Imprisonment order must specify that jail term ceases when contemnor complies with order.
- Order cannot anticipate future contempt.²⁵
- Order cannot punish for past contempt.²⁶
- Award of attorney fees and damages are recoverable if related to the damage suffered by moving party.²⁷
- Damage award must be supported by evidence.²⁸

Witness – Failure to Appear for Testimony Ind. Code § 34-47-1 & Trial Rule 45(F)

Characteristics

- Witness fails to appear in court on the date and time given in the notice to appear.
- Proof of personal service of subpoena either by sheriff's return or by affidavit of person who completed service.
- **Note:** prepayment of witness fees may be required if witness is required to appear in county outside his/her county of residence.

Procedure

- Evidence that witness was personally served with subpoena is required, copy service is not sufficient:
 - Sheriff's return following service by sheriff; or
 - Affidavit of person who completed service.
- A court may proceed against a person who fails to appear as a witness for contempt of court as though Ind. Code § 34-47-2 (direct contempt) and Ind. Code § 34-47-3 (indirect contempt) were not in force.²⁹

Best Practices

- Before ordering attachment, the court should inquire as to whether anyone has information that might justify the witness' non-appearance.
- As an alternative to attachment, the court can continue the trial or hearing and issue a Rule to Show Cause using the indirect contempt procedure.

¹ *State v. Hetzel*, 552 N.E. 2d 31, 34 (Ind. 1990); see also *Warr v. State*, 877 N.E. 2d 817 (Ind. Ct. App. 2007); *Rice v. State*, 874 N.E. 2d 988 (Ind. Ct. App. 2007).

² *Fowler v. State*, 829 N.E. 2d 459, 470 (Ind. 2005) (citing *Bryant v. State*, 256 Ind. 587, 589, 271 N.E.2d 127, 128 (1971); *McIntyre v. State*, 460 N.E.2d 162, 165 (Ind.Ct.App.1984).

³ *Johnson v. State*, 426 N.E.2d 104, 106 (Ind. Ct. App. 1981), cited with approval by *Lehman v. State*, 777 N.E.2d 69 (Ind. Ct. App. 2002).

⁴ *Smith v. State* 893 N.E.2d 1149 (Ind. Ct. App. 2008).

⁵ *Skolnick v. State*, 180 Ind. App. 253, 274, 388 N.E.2d 1156, 1170 (1979).

⁶ *Holly v. State*, 681 N.E.2d 1176, 1177–78 (Ind. Ct. App. 1997). (citing *Codispoti v. Pennsylvania*, 418 U.S. 506, 511, 94 S. Ct. 2687, 2691, 41 L.Ed.2d 912 (1974) and *Cheff v. Schnackenberg*, 384 U.S. 373, 380, 86 S. Ct. 1523, 1526, 16 L.Ed.2d 629 (1966)).

⁷ *Hancz v. City of South Bend*, 691 N.E.2d 1322 (Ind. Ct. App. 1998).

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- ⁸ *McCormack v. Lemond*, 274 Ind. 505, 413 N.E.2d 228 (1980); *In re Contempt of McLaren*, 850 N.E.2d 400 (Ind. 2006); *In re Contempt of Fox*, 796 N.E.2d 1186 (Ind. 2003); *In re Hatfield*, 607 N.E.2d 384 (Ind. 1993); *In re Cowen*, 539 N.E.2d 24 (Ind. 1989); *In re Toomey*, 532 N.E.2d 608 (Ind. 1989); *LaGrange v. State*, 153 N.E.2d 593 (Ind. 1958); *Curtis v. State*, 625 N.E.2d 496, 498 (Ind. Ct. App. 1993); *In re Nasser*, 644 N.E.2d 93 (Ind. 1994).
- ⁹ *In re Nasser*, 644 N.E.2d 93 (Ind. 1994).
- ¹⁰ *Allison v. State*, 187 N.E.2d 565, 570 (Ind. 1963); *In re Crumpacker*, 431 N.E.2d 91 (Ind. 1982).
- ¹¹ See I.C. § 34-47-3-7 for procedure for the nomination of special judge; *Davidson v. State*, 836 N.E.2d 1018 (Ind. Ct. App. 2005).
- ¹² *Peterson v. State*, 468 N.E.2d 556, 558 n.1 (Ind. Ct. App. 1984). See I.C. § 34-47-3-5 for specific requirements for Rule to Show Cause pleading.
- ¹³ *Cooke v. United States*, 267 U.S. 517 (1925).
- ¹⁴ *Holly v. State*, 681 N.E.2d 1176 (Ind. Ct. App. 1997) (citing *Codispoti v. Pennsylvania*, 418 U.S. 506, 511, 94 S. Ct. 2687, 2691, 41 L.Ed.2d 912 (1974) and *Cheff v. Schnackenberg*, 384 U.S. 373, 380, 86 S. Ct. 1523, 1526, 16 L.Ed.2d 629 (1966)).
- ¹⁵ *Jones v. State*, 847 N.E.2d 190, 199 (Ind. Ct. App. 2006).
- ¹⁶ *Showalter v. Brubaker*, 650 N.E.2d 693, 701 (Ind. Ct. App. 1995).
- ¹⁷ *State ex rel. Thrasher v. Hayes*, 177 Ind. App. 196, 204, 378 N.E.2d 924, 929 (1978); *Thomas v. Woollen*, 255 Ind. 612, 614, 266 N.E.2d 20, 22 (1971).
- ¹⁸ *Smith v. Indiana State Bd. of Health*, 158 Ind. App. 445, 303 N.E.2d 50 (1973).
- ¹⁹ *State ex rel. McMinn v. Gentry*, 229 Ind. 615, 100 N.E.2d 676, 678 (1951); *Denny v. State*, 203 Ind. 682, 182 N.E. 313, 321 (1932).
- ²⁰ *Hays v. Hays*, 216 Ind. 62, 22 N.E.2d 971, 972 (1939); *Nicholas v. Nicholas*, 482 N.E.2d 770, 771 (Ind. App. 1985).
- ²¹ *Hays v. Hays*, 216 Ind. 62, 22 N.E.2d 971 (1939).
- ²² *In re Marriage of Stariha*, 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987).
- ²³ See *In re Marriage of Stariha*, 509 N.E.2d 1117, 1120 (Ind. Ct. App. 1987) (citing *Lassiter v. Department of Social Services* (1981), 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640, and *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18).
- ²⁴ *Branum v. State*, 822 N.E.2d 1102 (Ind. Ct. App. 2005); *Pickett v. Pelican Service Associates*, 495 N.E.2d 245, 247 (Ind. Ct. App. 1986); *Denny v. State*, 203 Ind. 682, 182 N.E. 313 (1932).
- ²⁵ *Thomas v. Woollen*, 255 Ind. 612, 266 N.E.2d 20, 23 (1971); *Caito v. Indianapolis Produce Terminal, Inc.*, 162 Ind. App. 590, 320 N.E.2d 821, 826-27 (1974).
- ²⁶ *Flash v. Holtsclaw*, 789 N.E.2d 955 (Ind. Ct. App. 2003); *Hancz v. City of South Bend*, 691 N.E.2d 1322 (Ind. Ct. App. 1998); see also *KLN v. State*, 881 N.E.2d 39 (Ind. Ct. App. 2008).
- ²⁷ *Denny v. State*, 203 Ind. 682, 182 N.E. 313, 318 (1932); *Thomas v. Woollen*, 255 Ind. 612, 266 N.E.2d 20, 22 (1971).
- ²⁸ *City of Gary v. Major*, 822 N.E.2d 165 (Ind. 2005).
- ²⁹ I.C. § 34-47-1-1(c)