

Procedural Issues

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 the 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 (MC).
- Action is prosecuted in name of State.
- Rule to Show Cause is required.
- Requires appointment of special judge, unless the indirect contempt grows out of willfully resisting, hindering, delaying, or disobeying any lawful proceed or order of court¹⁰.
- Due Process Requirements:
- Service of Rule to Show Cause and Order to Appear;¹¹

Representation by Counsel;¹²

- Rights advisement;
- When indigent, court-appointed counsel;

A sentence exceeding six months invokes the right to trial by jury.¹³

- Standard of proof: The evidence must show that the contemnor acted with willful and intentional disobedience.¹⁴
- 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 the defendant for contempt.

- Defenses:

Inadequate notice as to facts constituting contempt.¹⁵

Inability to obey (burden of proof is on defendant).¹⁶

Inability to pay (burden of proof is on defendant).¹⁷

- 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.

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 \(Ind. Ct. App. 2017\)](#).

Procedure

- Filed in the same civil matter out of which it arises.¹⁸
- 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.¹⁹

- 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.²⁰

- 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.²¹

When physical liberty is not at stake, case by case determination.²²

- Remedy

No punitive remedy – Imprisonment is appropriate only when it is clearly coercive to compel compliance.²³

- Imprisonment order must specify that jail term ceases when contemnor complies with order.

Order cannot anticipate future contempt.²⁴

Order cannot punish for past contempt.²⁵

Award of attorney fees and damages are recoverable if related to the damage suffered by moving party.²⁶

Damage award must be supported by evidence.²⁷

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.²⁸

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).

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- 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).
- 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 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).
- ¹¹ *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.
- ¹² *Cooke v. United States*, 267 U.S. 517 (1925).
- ¹³ *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)).
- ¹⁴ *Jones v. State*, 847 N.E.2d 190, 199 (Ind. Ct. App. 2006).
- ¹⁵ *Showalter v. Brubaker*, 650 N.E.2d 693, 701 (Ind. Ct. App. 1995).
- ¹⁶ *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).
- ¹⁷ *Smith v. Indiana State Bd. of Health*, 158 Ind. App. 445, 303 N.E.2d 50 (1973)
- ¹⁸ *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).
- ¹⁹ *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).
- ²⁰ *Hays v. Hays*, 216 Ind. 62, 22 N.E.2d 971 (1939).
- ²¹ *In re Marriage of Stariha*, 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987)
- ²² 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).
- ²³ *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).
- ²⁴ *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).
- ²⁵ *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).
- ²⁶ *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).
- ²⁷ *City of Gary v. Major*, 822 N.E.2d 165 (Ind. 2005)
- ²⁸ I.C. § 34-47-1-1(c)