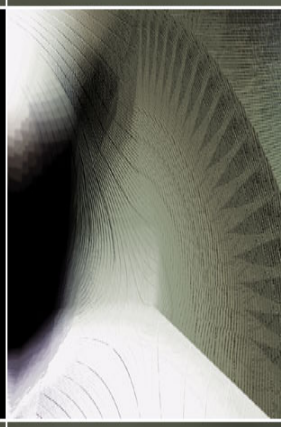
Family Law Contempts 2013 Bench Book



By Stephen A. Kolodny

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UPDATED: JULY, 2013

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This article is now a substantially revised and rewritten version of the article originally prepared by my friend, Commissioner Herbert S. Ross (deceased), a great Family Law Judicial Officer and friend of lawyers, and maintained by me in his memory.

I. IN GENERAL - WHAT IS A FAMILY LAW CONTEMPT PROCEEDING?

Family Law Contempt proceedings are either a criminal proceeding seeking punitive relief or a civil proceeding seeking remunerative relief, at the election of the moving party. If the election to proceed as a civil Contempt is not made, it appears that the Court should treat it as a criminal matter, imposing the higher burden of proof on the moving party. Although there is no specific case authority, nor statutory provision requiring this approach, the literal interpretation of ***Hicks v. Feiock (1988)*** 485 U.S. 624, 108 S.Ct. 1423 would seem to mandate this method of procedure. Although *see* ***County of Santa Clara v. Sup. Ct. (Rodriguez) (1992)*** 2 Cal.App.4th 1686, 1693.

A. Quasi-Criminal

1. "Quasi-Criminal" is probably no longer a valid phrase when discussing family law Orders to Show Cause re Contempt after the United States Supreme Court raised our level of consciousness in ***Hicks v. Feiock***, *supra.*

2. Prior to 1988, Contempt proceedings were classified as "quasi-criminal" in nature because the Citee was afforded only some of the constitutional protections which are guaranteed to the criminally accused. This artificial distinction was eliminated by the United States Supreme Court in ***Hicks v. Feiock***, *supra.*

B. The *Hicks v. Feiock* Approach - A Contempt Is Either Civil Or Criminal, Depending Upon the Relief Sought

1. In ***Hicks v. Feiock***, the Supreme Court stressed that criminal penalties can never be imposed upon a person who has been denied criminal protections. *Id.* at 631-634. Further, the United States Supreme Court held that shifting the burden of persuasion in a criminal proceeding by use of a statutory presumption "would violate the due process clause because it would undercut the state's burden to prove guilt beyond a reasonable doubt." *Id.* at 625.

2. Thus, the first critical question in any Contempt is whether the proceeding is "civil" or "criminal." This decision governs the conduct of all phases of the proceedings, not just the "sentence." The election of a "civil remedy" must be made at the outset of the proceeding, perhaps by a statement in the

initiating Order to Show Cause. However, a criminal Contempt is not completely governed by the criminal statutes.

3. This determination (civil or criminal) is not based upon the pleadings or any label assigned to the proceeding by counsel, it is based upon the relief sought to be imposed upon the alleged Contemner.

4. As discussed at length in ***Hicks v. Feiock***, *supra*, at 624, Family Law Contempts must now be approached with a clear view of the end result because from that the Court will establish: (a) how the proceeding is to be conducted, (b) whether or not ***Code of Civil Procedure ("CCP") § 1209.5*** presumptions (or others) may be used, (c) the issues of who has what burden of proof, and (d) what kinds of orders the Court may make in the event a Contempt adjudication is made. However, in view of ***In re Ivey (2000)*** 85 Cal.App.4th 793, 102 Cal.Rptr.2d 447, even some of these concepts have, from a practical point of view, been discarded in child and spousal support Contempts.

C. Civil v. Criminal Remedies

In 1992, the Sixth District, in a well-reasoned, clearly and simply written opinion concerning the right to counsel, stated, following the concepts of ***Hicks v. Feiock,*** "The clearest predicate for a conclusion that an indigent litigant will be entitled to appointed counsel as a matter of due process will be a determination that the litigant may lose his or her physical liberty if he or she loses the litigation." ***Santa Clara (Rodriguez)***, *supra*, at 1693. "Where personal freedom is at stake, a due process basis for appointment of counsel is established without consideration of other possible determinants." *Id.* at 1694. California Courts have repeatedly held, usually for purposes of identifying the Citee's constitutional rights, that because of the potential penalties, a Contempt proceeding is "criminal in nature." *Id.* at 1695. The United States Supreme Court in ***Hicks v. Feiock*** stated that a Contempt is civil whenever a conditional sentence is imposed. If the Contemner can purge the Contempt sentence by performing a specified act within his or her control, the Contempt is civil. Conversely, if the Contemner is given an unconditional sentence, or a sentence which cannot be purged by subsequent acts, the Contempt is criminal; however, this does not preclude the imposition of a sentence and the granting of summary probation.

1. Civil Contempt

a. As defined by the United States Supreme Court:

(1) In a civil Contempt the Contemner "can end the sentence and discharge himself at any moment by doing what he had previously refused to do." ***Hicks v. Feiock***, *supra*, at 633, quoting ***Gompers v. Bucks Stove and Range Co. (1911)*** 221 U.S. 418, 433, 31 S.Ct. 492.

(2) "[A] conditional penalty . . . is civil because it is specifically designed to compel the doing of some act." ***Hicks v. Feiock***, *supra*, at 630.

(3) In a civil Contempt, the punishment is remedial and for the benefit of the complainant. ***Hicks v. Feiock***, *supra*, at 631, quoting ***Gompers***, *supra*, at 441.

(4) If the relief provided is a fine, it is remedial when it is paid to the complainant. ***Hicks v. Feiock***, *supra*, at 632.

(5) Even if the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the Court's order." ***Hicks v. Feiock***, *supra*, at 632, quoting ***Gompers***, *supra*, at 442.

2. Criminal Contempt

a. As defined by the United States Supreme Court:

(1) In a criminal Contempt, the Contemner "cannot undo or remedy what has been done [or] . . . shorten the term by promising not to repeat the offense." ***Hicks v. Feiock***, *supra*, at 632, quoting ***Gompers,*** *supra*, at 442.

(2) An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in character." ***Hicks v. Feiock***, *supra*, at 633, quoting ***Penfield Co. v. SEC (1947)*** 330 U.S. 585, 593, 67 S.Ct. 918, 922.

(3) A proceeding is for criminal Contempt if "the sentence is punitive, to vindicate the Court's authority." ***Hicks v. Feiock***, *supra*, at 631.

(4) It is "punitive if the sentence is limited to unconditional imprisonment for a definite period." ***Hicks v. Feiock***, *supra*, at 631.

(5) The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the Contemner is physically required to set foot in jail, but whether the Contemner can avoid the sentence imposed, or purge it, by complying with the terms of the original order. ***Hicks v. Feiock,*** *supra*, at 631-632.

b. Reasonable Doubt Standard

(1) As to whether or not Contempts are a special class of crime, the United States Supreme Court leaves no doubt that in a criminal proceeding, guilt must be proved beyond a reasonable doubt and that this rule applies to Contempt proceedings.

D. Procedural Requirements

1. Informed Consent

a. ***Hicks v. Feiock***, *supra*, at 1431, also reaffirms another principle of law which is universally applied to criminal cases but has often been ignored in "quasi-criminal" Contempt cases -- informed consent and awareness of rights. ***Boykin v. Alabama (1969)*** 395 U.S. 238, 242.

b. Although our Courts regularly advise Citees of the possibility of a jail sentence, basic criminal burdens of proof and their right to counsel, this author believes the following are also required, particularly if the Citee is being charged with criminal Contempt:

(1) Notice of the right to a speedy trial and a very specific waiver of that right if the "speedy trial" rules are not followed;

(2) Notice of the maximum possible sentences;

(3) Written waivers of all constitutionally protected rights, or alternatively, a clear waiver of the "on the record"; and

(4) Written authorization for counsel to proceed in the Citee's absence, with all rights set forth in said document.

c. ***Penal Code ("PenC") § 977(a)*** provides that in "all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only," unless it is a domestic violence case, in which case personal presence is required.

d. ***PenC § 977(b)***, which pertains to felony matters, contains a statutory waiver form, the language of which [slightly augmented by this author] is:

> Waiver of Defendant's Personal Presence. The undersigned defendant, having been advised of his or her right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the Court to proceed during every absence of the defendant that the Court may permit pursuant to this waiver, and hereby agrees that his or her interest is represented at all times by the presence of his or her attorney the same as if the defendant were personally present in Court, and further agrees that notice to his or her attorney that his or her presence in Court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place.
>
> This waiver must be in writing and filed with the Court.

e. In addition, with regard to arraignment, this author believes that the following information needs to be contained in the waiver to be taken from the defendant, in writing:

> (1) A full and complete disclosure of the charges against the citee, (2) the potential consequences, including the possible sentence, that can be imposed upon a plea of guilty or a finding of guilt, (3) the constitutional right to confront and cross-examine all witnesses against him, (4) the constitutional right to present evidence in his favor at trial, (5) the constitutional right to either testify himself or personally remain silent at the trial, (6) the constitutional right to a speedy trial, (7) the constitutional right to a public trial, (8) the constitutional right to have witnesses subpoenaed to testify in his behalf and to obtain evidence which might exonerate the citee, (9) the constitutional right to have a qualified lawyer represent him at all stages of the proceedings and that said lawyer may be of the citee's own choosing or the court shall have appointed counsel represent the citee if the citee is unable to afford counsel. *See* ***Mills v. The Municipal Court (San Diego) (1973)*** 10 Cal.3d 288, 295, 296.

f. The written waiver should expressly state, probably in the form of a declaration, that the Citee,

> does, except for the right to be represented by an attorney, knowingly and intelligently waive each and every one of the citee's rights as set forth in the waiver. Careful procedure would require the citee to initial each substantive paragraph of the waiver and also have the lawyer sign a declaration stating that all those rights were fully and completely explained to the citee and the lawyer believes that the citee understood the rights and knowingly and intelligently waived them. *See*, ***Mills***, *supra*, at 295, 296.

g. Notice of right to jury trial is now required if the Court might consider a possible sentence of 180 days or more. If counsel is filing a case that has the possibility of 180 or more days of sentence, it is suggested, on the face of the Order to Show Cause re Contempt, that it be specifically stated that no sentence in excess of 180 days will be requested so that there can be no issue raised about a jury trial.

(1) In the aftermath of ***Mitchell v. Sup. Ct. (1989)*** 49 Cal.3d 1230, and ***In re Kreitman (1995)*** 40 Cal.App.4th 750, it is clear that if a sentence of 180 days, or more, is within the discretion of the Trial Court, there must be advice of, and a waiver of, the right to a jury trial if the Contempt hearing is to proceed in a Family Law Court without a jury.

(2) "A contemner sentenced to more than 180 days in jail has a federal constitutional right to be tried by a jury. The trial transcript demonstrates petitioner was not advised of his right to a jury trial. Civil contempt proceedings are quasi-criminal because of the penalties which may be imposed. This being the case, a waiver of a contemner's right to a jury trial must be express. Since the petitioner did not expressly waive his right to a jury trial, the sentence must be reversed." *Id.* at 754. [Emphasis added]

E. The Aftermath of *Hicks v. Feiock*

1. The United States Supreme Court remanded ***Hicks v. Feiock*** for a determination as to whether the Contempt proceeding was civil or criminal based upon the "new" guidelines and this decision is set forth in ***In re Feiock (1989)*** 215 Cal.App.3d 141. The California Appellate Court noted two potential problems with the Supreme Court's approach:

a. First, neither the parties nor the Court knows what type of proceedings (civil or criminal) they are involved with until judgment is pronounced. This surely would produce innumerable logistical nightmares, not to mention due process notice problems. *Id.* at 145.

b. “More importantly, because the consequences of a ‘civil’ Contempt are potentially greater than those of a ‘criminal’" one, the procedural protection in those cases should be the same or stronger. Child support cases provide a perfect example, [A] criminal Contempt conviction results in no more than a five-day jail term and a $1,000 dollar fine for each Contempt, while a civil Contemner theoretically may be imprisoned indefinitely pending compliance” assuming the Court finds present ability to comply with the conditional portion of its order that would allow for termination of the incarceration. *Ibid at fn.5.*

2. Even though ***Hicks v. Feiock***, *supra*, at 630-632, makes clear that the nature of the proceeding is determined by the relief imposed, counsel should always advise the Court whether the intent is to proceed as a civil or criminal Contempt. Counsel might consider making this declaration of position on the face of the Order to Show Cause re Contempt to avoid any due process/notice issue.

3. Note that at least one Court has determined that any Contempt proceeding brought on the Judicial Council Order to Show Cause re Contempt Form, **Form FL-410**, is per se criminal in nature. In ***Santa Clara (Rodriguez),*** *supra*, at 1693, the Court reasoned that the use of the form renders the Contempt a criminal proceeding because of the language which appears on the form, "possible penalties include jail sentence."

4. Although ***Ivey*** has obviated the need to prove ability to pay as part of the *prima facie* case of Contempt for support and attorneys' fees (for it is a recent order), counsel should always subpoena records to establish financial ability to pay so that you can introduce evidence to establish the burden of proof in a criminal proceeding and you can be prepared to present evidence against the defense of inability to pay. Please note ***Evidence Code ("EvC") § 1561*** provides as follows:

a. The records (which must be transmitted in strict compliance with the statute) shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of ***EvC § 1560***, the records were delivered to the attorney or the attorney's representative for copying at the custodian's or witness's place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

b. If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in ***EvC § 1560.***

c. Where the records described in the subpoena were delivered to the attorney or his or her representative for copying at the custodian's or witness's place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative stating that the copy is a true copy of all the records delivered to the attorney or his or her representative for copying.

d. Compliance with ***EvC § 1270*** *et seq.* is also required.

(1) It is suggested that you verify the affidavit of the Custodian of Records before appearing in Court and attempting to introduce the records.

F. Revocation of Probation and Prior Conduct of Probation

1. Probation revocation is available for any future violation of the conditions of probation, whether civil or criminal. The burden of proof for revocation is lesser than for an original Contempt adjudication – it is a "preponderance of the evidence." ***Moss v. Sup. Ct. (Ortiz) (1998)*** 17 Cal.4th 396, 71 Cal.Rptr.2d 215.

2. Past conduct should always be relevant to the issue of criminal sentencing since punishment is one of the objects of conviction.

II. THE ELEMENTS OF CONTEMPT AND PROOF THEREOF

A. Non-Support and Non-Attorney Fee Contempts

1. It used to be said that in order to establish a *prima facie* case of Contempt, it is necessary to establish the following facts. ***In re Liu (1969)*** 273 Cal.App.2d 135; ***Board of Supervisors v. Sup. Ct. (1995)*** 33 Cal.App.4th 1724, 1736:

a. A lawful order of the Court was made;

b. The Citee had knowledge of the order;

c. The Citee had the ability to comply with the order; and

d. The Citee willfully disobeyed the order.

2. Now, the foregoing essentially only applies to non-support and non-attorney fee cases. ***Ivey***, *supra*, at 801.

B. Support and Attorney Fee Contempts of Recent Origin

1. The elements of a *prima facie* case for Contempt of a child support order recently made, now are:

a. A Court of competent jurisdiction made an order compelling a parent to furnish support;

b. Proof that the order was filed and served; and

c. The Citee did not comply with the order.

2. Where the order is a family law order for payment of child support and the Family Law Court has already recently determined the alleged Contemner's ability to pay the underlying order, ability to comply with the order is not an element of the Contempt. Rather, inability to pay is an affirmative

defense, which must be proven by the alleged Contemner. ***Ivey***, *supra,* at 798. *See also* ***In re Koehler (2010)*** 181 Cal.App.4th 1153, 1170 fn. 8 (the Court recognized that there is an exception to the general rule that ability is an element of Contempt: in child support Contempts, ability is an affirmative defense).

3. Ability to pay child support becomes an element of the Contempt only when the alleged Contempt occurs many years after the underlying order. ***Ivey***, *supra,* at 799.

a. The original adjudication of a party's ability to pay was not sound proof of that fact ten years afterwards when the Contempt order was made. ***Mery v. Sup. Ct. (1937)*** 9 Cal.2d 379.

C. Family Support Orders

1. In 1984, the Legislature recognized existing enforcement problems relating to "Family Support" orders by enacting former ***Civil Code ("CC") § 4811(d)***, now ***Family Code ("FC") § 4501***.

2. Family support orders "are enforceable in the same manner and to the same extent as a child support order." ***FC § 4501***.

3. ***FC § 4501*** language permits use of the concepts of ***Moss*** and ***Ivey*** for Contempt enforcement of family support orders, thus ability to pay is no longer an element of the *prima facie* case in a case with a recent order, and inability to pay is a defense.

D. Spousal Support Orders

1. In ***Ivey,*** the Second District Court of Appeal recognized that ***CCP § 1209.5*** removes the burden of proof on the moving party to prove ability as an element of Contempt in child support cases. However, in ***Koehler,*** *supra,* at 1170, fn. 8, the Court indicated that ability must be proven in all Contempt cases except child support based Contempts. In ***Koehler,*** the First District Court of Appeal reversed the lower Court's discovery based Contempt orders in part because the moving party did not provide "substantial evidence that petitioner had the ability to comply with the order." *Ibid.* The Court recognized one exception to the general rule that the moving party has the burden to prove ability to pay in Contempt proceedings, stating that the moving party does not have this burden in child support based Contempts. *Ibid.*

2. Formerly, it was thought by this writer that the Court's holding in ***Ivey*** indicated that the moving part may not have the burden of proof on ability to pay in spousal support based Contempts as well as child support cases, but the Court's holding in ***Koehler*** casts doubt on whether the Court's holding in ***Ivey*** will also apply in spousal support based Contempts in the future. However, it is important to note that while ***Ivey*** involved a family law Contempt, ***Koehler*** did not. Rather, ***Koehler*** arose out of the a family law context, but involved a discovery based Contempt, and stands for the proposition that the moving party should state facts that establish each element of a Contempt, including ability, in all cases except child support based Contempts.

E. Visitation Orders

1. In the absence of evidence to the contrary, it has been held that a custodial parent has no ability to compel her fourteen-year-old daughter to have visitation with her father. The Court did not reach the issue of whether ability to comply would be demonstrated to the trier of fact because the child was

younger and/or the custodial parent exercised absolute control over the child, although a long line of dependency Court cases would seem to support that logic. ***Coursey v. Sup. Ct. (1987)*** 194 Cal.App.3d 147.

F. Lawful Order

1. The existence of a lawful order is still required, even for a child support Contempt.

2. No Contempt may lie for the failure or refusal to obey an unlawful order. ***Oskner v. Sup. Ct. (1964)*** 229 Cal.App.2d 672. Further, the rule is well settled in California that a void order cannot be the basis for a valid Contempt judgment. ***In re Colin Scott Berry (1968)*** 68 Cal.2d 137, 147 - 149; ***People v. Gonzales (1996)*** 12 Cal.4th 804, 818 and 819; ***Davidson v. Sup. Ct. (Mendota) (1999)*** 70 Cal.App.4th 514, 82 Cal.Rptr.2d 739. A Contempt order cannot be based on an invalid judgment. ***Davidson (Mendota)***, *supra*; ***In re Misener (1985)*** 38 Cal.3d 543, 558; ***Moore v. Kaufman (2010)*** 189 Cal.App.4th 604.

3. The Court may proceed with a Contempt proceeding based upon the violation of an interlocutory or *pendente lite* order even though the proceedings are dismissed after the offending act occurred. ***Morelli v. Sup. Ct. (1969)*** 1 Cal.3d 328; ***Ex Parte Robbins (1931)*** 212 Cal. 534, 299 P. 51.

4. Although a judgment supersedes a *pendente lite* order, that fact does not bar Contempt proceedings with respect to violations of the *pendente lite* order which occurred while the provisions of the *pendente lite* order were in effect. ***Washington v. Washington (1958)*** 163 Cal.App.2d 129, 131, 329 P.2d 115.

5. Contempt will not lie for refusal to obey a visitation or custody order which conflicts with the orders of a Court with greater or paramount jurisdiction. ***In re William T. (1985)*** 172 Cal.App.3d 790. The jurisdiction of the Dependency Court and its orders supersede the orders of the Family Law Court.

G. Knowledge of The Order

1. Knowledge of the order is still required, even for a child support Contempt under ***Moss*** and ***Ivey.***

2. It is not necessary to show that the Citee was served with a copy of the order, or was familiar with all of its terms, if it is shown that the Citee had knowledge of the existence of the order and that portion thereof which Citee is alleged to have violated. ***Application of Sigesmund (1961)*** 193 Cal.App.2d 219; ***People (Stein) v. Sup. Ct. (1965)*** 239 Cal.App.2d 99.

3. In ***People v. Conrad (1997)*** 55 Cal.App.4th 896, 64 Cal.Rptr.2d 248, an injunction was ordered against a group of abortion protestors. A second group of unrelated protestors, who knew of the existence of the original injunction and wanted to challenge its validity on First Amendment grounds, decided to protest the very same abortion clinic which caused the injunction to be ordered. The Court held that a nonparty to an injunction is subject to the Contempt power of the Court when, with the knowledge of the injunction, the nonparty violates its terms with or for those who are restrained.

4. Knowledge of the order by the attorney representing the Citee (by presence in the Courtroom or by being served with the order) creates a permissive inference that the Citee had knowledge

of the order sufficient to sustain a Contempt in the absence of evidence overcoming the inference. ***Ivey**, supra,* at 793, 802; ***Mossman v. Sup. Ct. (1972)*** 22 Cal.App.3d 706, 711; ***In re Imperial Insurance Co. (1984)*** 157 Cal.App.3d 290, 203 Cal Rptr. 664.

a. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." ***Ivey**, supra,* at 803. Permissive inferences are appropriate in civil and criminal Contempt proceedings. ***Ivey**, supra,* at 802.

b. "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." ***Ivey**, supra,* at 803. "The use of a mandatory presumption in a criminal case is unconstitutional whether the presumption is conclusive or rebuttable." *Id.* at 804. *See also* ***United States v. Grigsby (2000)*** 85 F.Supp.2d 100.

5. The better practice is to always serve the order on the person against whom Contempt enforcement may later be desired. A signed Notice and Acknowledgment of Receipt of service should also suffice so long as the signature can be authenticated. If obtained, the Notice and Acknowledgment should be filed with the Clerk and a conformed copy maintained by the lawyer.

H. Ability to Comply

1. ***Moss*** was the first California Supreme Court case to disapprove the ***Feiock*** "wrinkle" in a child support case and hold that "ability to comply" is no longer an element of the *prima facie* case for child support Contempts since that time. In ***Ivey*** the Court has extended its holding by stating that "ability to pay" is not an element of the *prima facie* case for all support (spousal and child) and attorney fee Contempts.

a. ***Ivey*** establishes that inability to pay support and/or attorney fees is an affirmative defense to be proven by the preponderance of the evidence presented by the alleged Contemner. The Supreme Court disapproved the prior holding in ***Feiock*** concerning the burden of proof on the "ability" issue.

b. ***Ivey,*** which confirms the holding in ***Moss,*** stated that although ***Feiock*** correctly recognized that ability to pay is not an element of the Contempt offense, but a matter of affirmative defense, ***Feiock*** is wrong in holding that the alleged Contemner need only raise the issue of ability to pay and then the petitioner must prove the "ability" beyond a reasonable doubt to sustain a Contempt adjudication. Because ability to pay is not an element of the support and attorney fee Contempt offenses, ***Moss*** disapproved that holding of ***Feiock***. As ***Ivey*** acknowledges, the elements of support and attorney fee Contempts are only a valid Court order, the alleged Contemner's knowledge of the order, and noncompliance. If the petitioner proves those elements beyond a reasonable doubt the support and attorney fee Contempt is established. To prevail on the affirmative defense of inability to comply with the support order, the alleged Contemner must now prove "inability" by a preponderance of the evidence. ***Ivey,** supra,* at 801. Uncontradicted testimony of "inability" probably constitutes a preponderance of the evidence so you must be prepared to prove ability to protect your client against a specious defense.

c. The ***Moss*** Court held that there was no constitutional impediment to the Legislature's creation of a Contempt offense for failure to support a child where ability to pay is not an element of the

Contempt. According to ***Moss,*** and now confirmed by ***Ivey,*** the ability of the obligor to pay the amount of support ordered was determined by the Court at the time the order was made. The obligor has the opportunity to offer evidence on the question of ability to pay and to challenge the order in the appellate Court. The obligor is also afforded the opportunity to seek modification of the order if circumstances change making compliance difficult or impossible. The Supreme Court reasoned that since the Contempt penalty for failure to comply is limited to five days in jail or $1,000 fine for each monthly payment that is not made in full, and unlike most other regulatory offenses, the Contemner may escape liability by establishing the affirmative defense of inability to pay, the omission of the element of willfulness does not offend constitutional due process. This logic and reasoning was followed in ***Ivey.***

2. Child Support Orders

a. ***CCP § 1209.5*** provides either a statutory presumption affecting the burden of producing evidence or a statute authorized permissive inference (called by the Court of Appeal and U.S. Supreme Court "shifting of the burden of persuasion") which is part of the basis for the holding of our Supreme Court in ***Moss***. ***Ivey*** calls it a permissive inference and removes ability as an element of Contempt altogether.

(1) ***CCP § 1209.5*** was designed, at a time of different thinking, to shift the burden of proof or persuasion on ability to pay and willfulness in child support cases where an order was made and there was clear proof of knowledge of the order. ***Moss*** absolutely removes any doubt on this subject and ability and willfulness are matters for affirmative defense, not the *prima facie* case. ***Moss,*** *supra,* at 426; ***Ivey,*** *supra,* at 798.

b. ***CCP § 1209.5*** provides as follows:

> When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his child, proof that [1] the order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof [2] that the parent did not comply with the order is *prima facie* evidence of a contempt of court. [Emphasis added.]

c. Before ***Moss*** and ***Ivey,*** when ability and willfulness were thought to be elements of the *prima facie* case, two very specific proof requirements had to be established as a condition precedent to the use of the burden shifting presumption or statute authorized permissive inference of ***CCP § 1209.5***. Those conditions precedent, as set forth below, were then believed to be part of the *prima facie* case and, when established, resulted in ability and willfulness becoming affirmative defenses to be proven by a preponderance of the evidence. We now know through ***Moss***, *supra,* at 401, 428 and ***Ivey,*** *supra,* at 798, that ability and willfulness are not part of the *prima facie* case but are affirmative defenses.

(1) Proof that the order was made and filed.

(a) Proof of the making and filing of an order is handled by merely requesting that the Court take judicial notice (***EvC § 452(d)***) of the order or judgment as contained in the Court's file. Upon proper request, the Court must take judicial notice of its orders as contained in the official Court file.

i) Although better practice would be to give notice of intent to request judicial notice prior to the hearing date (***EvC § 453***) by so stating in the Order to Show Cause re Contempt itself that such a request is being made, no such notice is required.

(b) Invalidity of the order is a matter of affirmative defense.

(2) Proof that Citee was served with the order or that the Citee was present in Court when it was made.

(a) As a matter of practice, prudence requires that any order obtained for child support, that is not made in the presence of the support paying spouse, be personally served upon the payor. In any event, an element of the *prima facie* case is proof of knowledge of the order, proof beyond a reasonable doubt. ***Moss***, *supra,* at 427. ***Ivey*** now confirms a permissive inference that knowledge of the lawyer is knowledge of the client.

i) If service is by a registered process server, the filing of a properly executed Proof of Service is *prima facie* evidence that the service occurred. ***EvC § 647***. If a registered process server is not used, testimony of the server will be required. However, if service is an issue, live testimony will almost certainly be required.

(b) Sending the order/judgment to opposing counsel, or the party, and getting back a Notice and Acknowledgment of Receipt of service, if signed by the party, will provide the necessary proof of service for the invocation of the ***CCP § 1209.5*** presumption (which can still be used if a civil Contempt) and/or satisfaction of the burden of proof on the knowledge issue. Service in this manner is the equivalent of personal service. ***CCP § 415.30***.

(c) Knowledge of the lawyer creates a permissive inference of knowledge by the client. ***Ivey,*** *supra,* at 802. ***Mossman***, *supra,* at 711; ***Imperial Insurance,*** *supra,* at 301. However, this does not provide the basis for the invocation of the ***CCP § 1209.5*** presumptions and may cause a burden of proof problem in the face of any denial of service or knowledge. The burden of proof on the issue of knowledge is "beyond reasonable doubt." If nothing else, do a formal service of the order on counsel, by mail with a proof of service that is filed with the Court. At least, this will satisfy the burden of proof on the *prima facie* case, and, if not disputed, will be all that is required.

(d) An order made at an Order to Show Cause hearing is effective upon pronouncement. If it can be proved that the Citee was present in Court at that time, and the order was effective forthwith, this element of the burden of proof will be satisfied.

(e) A support order which is contained in a judgment is almost never made in the presence of the Citee because the judgment is not effective until it is signed and filed. ***CRC 3.1590(a)*** and ***(b)***. Therefore, all judgments must be served upon the party to be charged to obtain the benefits of ***CCP § 1209.5*** or establish the knowledge element.

(f) Although knowledge of the order may be shown by various means, unless shown that the Citee was in Court at the time the order was pronounced, or that it was served upon the Citee, the presumption/inference burden of proof shifting provided by ***CCP § 1209.5*** will not apply.

i) Please note that ***In re Lawatch (1961)*** 189 Cal.App.2d 646, and ***Martin v. Sup. Ct. (1971)*** 17 Cal.App.3d 412, 417, and all the other reported cases authorizing use of the ***CCP § 1209.5*** presumption in criminal Contempts are no longer constitutionally valid theories, although the effect of ***Moss*** is to effectively validate their holdings because after satisfaction of the valid order and knowledge conditions, and evidence of noncompliance, the burden to put on an affirmative defense shifts to the Citee.

d. The *due process* issue was recently addressed in ***Malek v. Koshak (2011)*** 200 Cal.App.4th 1540, a Second District decision filed November 22, 2011, where it was held that an order for restitution, made as part of the sentence upon a Contempt adjudication for which no prior notice had been given in the pleadings, was a deprivation of the Citee's rights of due process. The teaching of ***Malek*** is that the Order to Show Cause re Contempt must ask for restitution if that is something you are going to request of the Court upon an adjudication of Contempt. In the absence of such notice, an order of restitution would result in a deprivation of property without proper notice.

e. Recent Orders

(1) Since it is assumed that when the Court makes an order, it was then within the ability of the party to comply with that order, if the act of alleged Contempt is committed close to the time of the making of the order in question, then ability to comply will be established by permissive inference and inability to comply will be a matter of defense. ***Ivey,*** *supra*, at 798. ***Sigesmund,*** *supra*, at 219; ***Sorell v. Sup. Ct. (1967)*** 248 Cal.App.2d 157; ***Mossman***, *supra*, at 706.

(2) The aforementioned permissive inference will not apply when there has been a substantial passage of time between the making of the order and the events alleged to constitute the Contempt. ***Mery***, *supra*, at 379; ***Sigesmund***, *supra*, at 224; ***Sorell***, *supra*.

(3) ***Sorell*** contains a good, logical discussion and citable authority as to why a Court should not draw an inference of ability to comply when there has been a substantial amount of time, which passed since the making of the order allegedly violated.

f. Ability to Pay

(1) Even though the Citee is unable to pay the full amount of the order, if the Citee fails to pay that portion of the order which is within the Citee's ability to pay, the Citee may be adjudged in Contempt. ***Lyon v. Sup. Ct. (1968)***, 68 Cal.2d 446.

(2) Since ***FC § 4011*** requires the support paying spouse to make child support payments "before payment of any debts owed to creditors," it should be sufficient (to establish a *prima facie* case on the "ability issue" in a child support Contempt and to rebut an affirmative defense of lack of ability) to subpoena, and have admitted into evidence, bank records to show deposits and balances at or near the date the defaulted payment was due or other records (mortgage payment records, car loans or leases, credit cards, etc.) showing any other payments by the obligor before fully paying the child support obligation.

g. Disability Pay

(1) A state may enforce child support orders against a veteran's disability pay. ***Rose v. Rose (1987)*** 481 U.S. 619, 107 S.Ct. 2029, holds that the ***Child Support Enforcement Act, 42 U.S.C. § 659(a)***, specifically excluding Veterans Administration disability benefits from attachment, means only that a veteran's disability benefits are exempt from attachment while in the actual possession of the Veterans Administration, but once the benefits are delivered to the veteran, state Courts can require that they be used to satisfy a child support order. Receipt of disability pay will be an element that can be considered on the issue of ability to pay.

h. Unemployment

(1) Unemployment probably is no longer a defense. Contrary to a long line of cases, ability to earn will now support a Contempt adjudication. Although a Court cannot base its conclusion that a parent has the ability to comply based on testimony that he has occasional odd jobs, a "well dressed" appearance and occasional payments of utility bills while living at home has supported a Contempt adjudication. ***Moss***, *supra,* at 403.

(2) A Trial Court can constitutionally impose a Contempt sanction on a parent who willfully fails to seek employment in order to avoid payment child support. In fact, there is no need to establish anything other than the "willful failure to seek and accept available employment that is commensurate with his or her skills and ability" to sustain a Contempt conviction in a child support case. *Id.,* at 400. In ***Moss***, the Court concluded that there was "no constitutional impediment to imposition of a contempt sanction on a parent for violation of a judicial child support order when the parent's financial ability to comply with the order is the result of the parent's willful failure to seek and accept available employment that is commensurate with his or her skills and ability." *Id.,* at 400. The ***Moss*** Court stated that a Court order for a parent to support a child, compliance with which may require that the parent seek and accept employment, does not bind the parent to any particular employer or form of employment or otherwise affect the freedom of the parent and this rationale removes the Contempt punishment from the arena of involuntary servitude arguments. ***Moss***, *supra,* at 408.

I. Willful Disobedience of The Order

1. Although no longer an element of the *prima facie* case in a support Contempt, willful noncompliance is still an element to be proven in all other Contempts. Willfulness may also influence the Court in sentencing issues.

2. The conduct must be "willful" in the sense that it is inexcusable. ***Little v. Sup. Ct. (1968)*** 260 Cal.App.2d 311; ***Oliver v. Sup. Ct. (1961)*** 197 Cal.App.2d 237.

3. Reliance upon advice of counsel is not a defense to the willfulness of the conduct. ***In re Bongfeldt (1971)*** 22 Cal.App.3d 465, 476; ***City of Vernon v. Sup. Ct. (1952)*** 38 Cal.2d 509, 241 P.2d 243; ***Ex Parte Vance (1891)*** 88 Cal. 281, 26 P. 118; ***McFarland v. Sup. Ct. (1924)*** 194 Cal. 407.

4. An attorney may be held in Contempt for advising a client to disobey a Court order. ***Bongfeldt,*** *supra,* at 465.

5. Basically, the willfulness element is supplied by the proof of all the other elements; at that point, lack of willfulness becomes a matter of defense. The word "willfully," as used in criminal statutes, implies a purpose or willingness to commit the act, ***PenC § 7(1)***, and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is doing and is a free agent.

III. TYPES OF ORDERS FOR WHICH A CONTEMPT PROCEEDING IS PROPER

A. Family Law Orders

1. Most family law orders for the payment of support or fees are enforceable by Contempt unless the remedy would violate the Constitutional prohibition against imprisonment for a debt. ***U.S. Const., 8th Amend.*** Most family law orders, but not payments to equalize property distributions, are considered to be duties imposed by law, rather than monetary debts and are Contempt enforceable.

B. Child Support Orders

1. Basic child support orders fall within the proper scope of a Contempt proceeding. ***CCP § 1209.5.***

2. Pre-January 1, 1970 Stipulated Orders

a. If the child support is part of a pre-January 1, 1970 order that is based upon an integrated marital settlement agreement, please refer *infra* to **Section III. F.** for special considerations.

b. Although probably not applicable any longer, said material could now only apply to support orders for a dependent child beyond age eighteen.

3. The law imposed obligation to support a child exists "as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first." ***FC § 3901***. This statute applies to all support agreements or judgments entered after March 4, 1972.

4. ***FC § 3910*** imposes an obligation on the father and mother equally "to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means."

a. The ***Lieberman*** rule applies to support for exceptional children as provided for in ***FC § 3910***. ***In re Marriage of Lieberman (1981)*** 114 Cal.App.3d 583, 586, and ***FC § 3910***, referred to in ***FC § 4011***, provide for continuation of support for exceptional children beyond the ***FC § 3910*** period, in the family law case, and, when made a family law order, that order is subject to Contempt proceedings at all times that such an order is in effect.

b. ***FC § 3587*** specifically provides for full judicial enforcement of stipulated child support orders for adult children.

5. An order for child support beyond the age of minority, which is based upon the agreement of the parties, is within the jurisdiction of the Court and is properly subject to a Contempt proceeding. *See also* ***Lieberman****, supra,* at 586*;* ***FC § 3901***; ***FC § 3587***.

a. Except as specifically provided in ***FC § 3901***, ***FC § 3910*** and ***FC § 3587***, the Court has no jurisdiction to order child support beyond age eighteen. In the absence of a stipulation for the Court to do so, no such order is Contempt punishable.

b. Although ***Lieberman*** provides that a non-stipulated Court-imposed child support order beyond the age of minority is not Contempt punishable, the dicta of that case specifically provides that the stipulated agreement of the parties, which thereupon becomes an order of the Court, may be enforced by the Court. This dicta is now statutory law. ***FC § 3901*** and ***FC § 3587***.

6. **CAUTION!** Except in the case of a dependent child, when drafting child support orders that are to continue beyond the age of minority, extreme care must be used in drafting the language of the order. If the order is not stated to be specifically based upon the stipulation of the parties, it probably will not be Contempt punishable.

7. Since 1994, child support has included amounts due counties for reimbursement of public assistance or otherwise under their child support enforcement obligations. And it includes arrearages (fixed amounts that are no longer ongoing or not modifiable or not terminable). Counties may enforce such obligations in the same manner as a custodial parent, including enforcement by Contempt. ***Monterey County v. Banuelos (2000)*** 82 Cal.App.4th 1299, 98 Cal.Rptr.2d 710.

C. Family Support Orders

1. A family support order "is enforceable in the same manner and to the same extent as a child support order." ***FC § 4501***.

2. The language of ***FC § 4501*** almost certainly means that the holdings of ***Moss*** apply to family support order Contempts.

D. Spousal Support Orders

1. Basic spousal support orders are the proper subject for a Contempt proceeding. ***Moss***, *supra*.

2. Pre-January 1, 1970 Stipulated Orders.

a. Although it would be quite unusual to now encounter such a situation, if the spousal support order is part of a pre-January 1, 1970 stipulated order based upon an integrated marital settlement agreement, please refer *infra* to **Subsection F.** for specific considerations.

E. Orders for Payment of Debts As an Element of Support

1. ***FC § 2023*** provides that "[o]n a determination that payment of an obligation of a party would benefit either party or a child for whom support may be ordered, the court may order one of the parties to pay the obligation, or a portion thereof, directly to the creditor."

2. In ***Bushman v. Sup. Ct. (1973)*** 33 Cal.App.3d 177, 181, the husband was ordered by the Court to make *pendente lite* mortgage payments on the community business property and he refused to do so. The Court of Appeal, in affirming the Contempt adjudication, said the issue was "whether the mortgage payments were debts within the definition of ***Bradley v. Sup. Ct. (1957)*** 48 Cal.2d 509, 310 P.2d 634, and ***In re Fontana (1972)*** 24 Cal.App.3d 1008, or whether they were and are part of and by way of spousal support." At page 181, quoting ***In re Hendricks (1970)*** 5 Cal.App.3d 793, the Court found the payments to be a form of "support accountability" and referred to what is now ***FC § 2023***, authorizing the Court to order payments "directly to a creditor. . . upon a determination that payment of an obligation of a party would benefit either party or a minor child . . . ."

3. It is important to focus upon the requisite statutory condition "[on] a determination . . . ." for Contempt purposes, particularly by way of defense. If the minute order does not contain the necessary findings called for by ***FC § 2023***, the Contempt should not lie. However, in ***Bushman***, the necessary finding was inferred.

4. ***Feiock*** holds that no inference is permitted in a criminal Contempt. This being the clear law, it would seem that the order for payment to a third party must contain the requisite finding to be a support order that is Contempt enforceable rather than merely the order for payment of a debt.

5. Per ***Ivey,*** *supra*, at 793, the use of a mandatory presumption in a criminal case is unconstitutional whether the presumption is conclusive or rebuttable. However, a mandatory presumption may be reconfigured as a permissive inference for use in a criminal case. *Id.* at 804.

6. ***FC § 2023*** orders present more difficult proof problems. The third party, to whom the payment was ordered but not made, will have to testify as to the nonpayment; anything else would be hearsay.

F. Support Orders Based Upon Settlement Agreements

1. If a pre-January 1, 1970 support order is based upon a "severable" agreement (the property division provisions are separate and severable from the support provisions and the support provisions are modifiable), the support order is the proper subject for a Contempt proceeding. ***Davidson v. Sup. Ct. of Los Angeles County (1964)*** 226 Cal.App.2d 625.

2. If the support order is based upon an "integrated" agreement (the manner in which the property was divided was partly in consideration for the amount of agreed, nonmodifiable support), which often provides that the support award is not modifiable, regardless of any later change of circumstances, the date of an integrated agreement controls the issue of Contempt availability.

a. Support orders based on pre-January 1, 1970 integrated agreements have been held to be contractual obligations and are not the proper subject for Contempt. ***Bradley***, *supra*, at 509, deals with spousal support; ***Plumer v. Sup. Ct. (1958)*** 50 Cal.2d 631, 328 P.2d 193, deals with child support.

b. Former ***CC § 4811***, now ***FC §§ 92***, ***3585***, ***3586***, ***3590***, ***3591***, ***3593***, ***3651*** and ***4501***, was specifically amended to avoid the holdings of the ***Bradley (1957),*** *supra,* at 509, and ***Plumer,*** *supra,* at 631 cases. Support obligations arising from integrated agreements executed after January 1, 1970 are the proper subject for a Contempt proceeding.

G. Support Orders Based Upon Agreements Incorporated Into Foreign Judgments

1. Although it is not generally a permissible method for drafting a California judgment, a foreign decree which incorporates a marital settlement agreement by reference is the proper subject for a Contempt proceeding in California if such incorporation by reference (under the law of the sister state or foreign jurisdiction) results in a merger of the agreement into the judgment. Under such circumstances, the foreign order should be registered and enforced in whatever manner is appropriate. ***In re Marriage of Alper (1981)*** 116 Cal.App.3d 925.

H. Child Custody and Visitation Orders

1. Custody and/or visitation orders which are clear, unambiguous, and specific are properly subject to Contempt proceedings based upon the theory that a violation is a disobedience of a lawful judgment or order or constitutes interference with the proceedings of the Court. ***Rosin v. Sup. Ct. (1960)*** 181 Cal.App.2d 486.

2. A person in lawful custody of a child, who removes the child and secretes the child in violation of a specific visitation order, is guilty of a felony. ***People v. Lortz (1982)*** 137 Cal.App.3d 363; ***PenC § 278.5***. As discussed below, criminal prosecution and civil Contempts probably are not barred by traditional double jeopardy concepts. A criminal Contempt may be subject to the double jeopardy rules.

I. Intentional Violation of A Rule of Court

1. An intentional violation of a rule of Court may be a Contempt of Court. ***Crawford v. Workers' Comp. Appeals Bd. (1989)*** 213 Cal.App.3d 156, 169, citing ***Cantillion v. Sup. Ct. (1957)*** 150 Cal.App.2d 184, 187-188, 309 P.2d 890, and, as *contra* authority, ***United States v. Marthaler (2d Cir. 1978)*** 571 F.2d 1104, 1105.

2. The ***In re Grayson (1997)*** 15 Cal.4th 792, 937 P.2d 645, 64 Cal.Rptr.2d 102 Court reiterated this point when they held defense counsel in Contempt of Court for failure to file defendant's opening brief by a certain date, which was stated in the Court's order. The Court held that a "willful failure to comply with the order of a court constitutes contempt." This ruling was upheld and followed in ***In re Riordan (2002)*** 26 Cal.4th 1235; ***In re Rubin (2001)*** 25 Cal.4th 1176.

3. In ***Hanson v. Sup. Ct. (2001)*** 91 Cal.App.4th 75, 109 Cal.Rptr.2d 782, the Court stated "it is the settled law of this state that an attorney commits a direct contempt when he impugns the integrity of the court by statements made in open court either orally or in writing." *Id.* at 789. The Court held:

> This attorney's statement that his client had not received a fair trial was contemptuous on its face, since it impugned the trial judge's integrity by suggesting the judge had failed in his duty to guarantee a fair trial. The remark constituted disorderly, contemptuous, or insolent behavior toward the judge, tending to interrupt the due course of a trial or other judicial proceeding under ***Code Civ. Proc. § 1209***. Also, a court may hold an attorney in contempt for willful violation of a duty, and an attorney has the duty to maintain respect to the courts and judicial officers, to abstain from all offensive personality, and not to mislead the judge or jury by an artifice or false statement of fact or law. This attorney violated these duties by arguing to the jury that it was the goal of the defense and prosecution to misrepresent the facts.

J. Orders For In-kind Division of Community Assets

1. In ***Sullivan v. Sup. Ct. (1925)*** 72 Cal.App. 531, 237 P.2d 782, the judgment ordered the husband to convey a specified parcel of real property to the wife as part of the division of the community assets. Husband failed to make the conveyance, was held in Contempt and the adjudication was affirmed.

2. In ***In re Marriage of Fithian (1977)*** 74 Cal.App.3d 397, the Trial Court determined that 71% of the husband's military pension was community property and ordered that he pay wife 35.5% of each monthly payment as he received it directly to the wife. Ignoring the procedural issues, the Court of Appeal said:

> The underlying issue is whether use of the contempt sanction, under the circumstances presented by this case, would violate the constitutional prohibition against imprisonment for debt . . . . We have decided . . . that husband's obligation is not a debt . . . . As used in constitutional provisions proscribing imprisonment for debt, a debt is an obligation to pay money from the debtor's own resources. . . . Thus a failure to deliver a specific item of property or a specific fund of money may be punished by contempt. . . . Under this order husband's obligation was to deliver a specific item of property rather than to pay a designated sum from his private resource. Furthermore, . . . wife claims her community share of the retirement pay as an owner thereof, not as a creditor. . . . [Emphasis added]

3. ***Fithian*** has an excellent discussion about the entire concept of Contempt enforcement for an in-kind division of property as contrasted to the payment of an equalizing sum and creation of a debt. This case is important reading on this issue. *See also* ***Verner v. Verner (1978)*** 77 Cal.App.3d 718 and ***In re Marriage of Thomas (1984)*** 156 Cal.App.3d 631.

4. Although not the subject of this article, ***Fithian*** again teaches us the importance of language, drafting and forward looking strategy in drafting documents, including judgments.

K. Attorney Fees and Costs

1. Orders for attorney fees and costs are traditional items for Contempt proceedings since they are considered an element of child and/or spousal support. Caution suggests, particularly at trial where property division is also an issue, that you request that the order provide that the fees and costs are an element of spousal support to give you clear Contempt enforcement rights. Bankruptcy protection is no longer an issue because current bankruptcy law [***11 U.S.C. § 523(a)(2) & (15)***] provides that a debt is not discharged if "to a spouse, former spouse, or child of a debtor... or other order of a Court of record. . . ." It would appear that an order payable to counsel would not be dischargeable, but that is not yet known for certain. If the order is payable to the party, with a further order to remit it to counsel, that is probably safer.

2. ***FC §§ 270, 271, 2030, 2031, 3153*** (appointed counsel), ***§ 3557*** (child support enforcement), ***§ 3450(b)*** (immediate physical custody orders), ***§§ 6344, 6386*** (domestic violence), and ***§§ 7605,7640*** (paternity), are the general attorney fee sections. It is not specifically stated that orders thereunder are part of a support obligation. Thus, there is a plausible argument that the attorney fee order must state that it is part of a support order if it is to be the proper subject for a Contempt proceeding. If the proceeding from which the order results also involves property or custody issues, a request should be made for the Court to include language making the attorney fee part of the spousal support order.

3. Although attorney fee orders made pursuant to ***FC § 3557*** would appear to be specifically part of a spousal support obligation, it would be better practice to specifically request that the Court state that the attorney fees and cost portion of the order is "as and for spousal support."

4. Attorneys fees cannot be ordered as "supplemental child support" because they do not fall within the Guidelines nor do they qualify as "additional child support" under ***FC § 4062***. ***Boutte v. Nears (1996)*** 50 Cal.App.4th 162, 166. "The Court has no discretion to fashion its own 'add-ons' in the absence of statutory authority." ***In re Marriage of Gigliotti (1995)*** 33 Cal.App.4th 518, 527-530.

5. **CAUTION:** If the Court makes the attorney fee order a specific part of the spousal support obligation, it may, unless the Court otherwise provides, be taxable as income to the recipient spouse. A request should be made to the Court to specifically provide that the attorney's fee portion of the order, although spousal support for enforcement purposes, be designated as non-taxable to the recipient spouse.

6. Sanction orders are not in the nature of a support order but rather are a pure penalty, thus not Contempt enforceable nor bankruptcy protected unless otherwise provided by statute. ***11 U.S.C. 523(a)(5), (6) & (15)***.

L. Discovery Orders

1. If a deponent fails to obey an order entered under ***CCP § 2025.480(k)*** [an order to compel a deponent to answer questions or produce documents], the failure may be considered a Contempt.

2. ***CCP § 2023.030(e)*** states: "The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court."

M. Impugning Integrity of Court. An attorney commits a direct Contempt when he impugns the integrity of the Court by statements made in open Court either orally or in writing; this includes impertinent,

scandalous, insulting or Contemptuous language reflecting on the integrity of the Court in pleadings, motions, notices of motion, affidavits and other papers filed in Court. ***In re Koven (2005)*** 134 Cal.App.4th 262, 265, 271, 272.

IV. TYPES OF ORDERS FOR WHICH A CONTEMPT PROCEEDING IS IMPROPER

A. If a Contempt is based on any of the following, a motion for dismissal should be made to the Court at the outset of the hearing, or earlier.

1. Equalizing Payments

a. A payment ordered for the purpose of equalizing the division of community assets is, once the judgment is entered, nothing more than an order for the payment of a debt and is not the proper subject for a criminal Contempt proceeding.

b. ***Cal. Const., Art. I, § 10***, prohibits imprisonment for debt.

c. An order for payment of money in connection with the division of property is not the proper subject for a criminal Contempt proceeding. ***Fontana***, *supra*, at 1008.

d. In ***Martins v. Sup. Ct. (1970)*** 12 Cal.App.3d 870, 875, the judgment required the husband "to pay to wife by way of property settlement and division of community property and not by way of alimony, support or maintenance, the sum of $900.00. . . ." A finding of Contempt for failure to pay the $900.00 was reversed upon the ground that "the amount of the unpaid sums was but a debt incurred in the course of an agreed division of the parties' property."

(1) Query: May a civil Contempt be maintained for the payment of a debt? Possibly, although it is a new concept in family law and will be "hard to sell."

(2) Query: Is a sanction or ***FC § 271*** order anything other than a debt? This writer thinks not, but a strong argument to the contrary can be made.

2. Pre-January 1, 1970 Integrated Agreements

a. Support orders based upon pre-January 1, 1970 integrated agreements have been held to be contractual obligations and are not the proper subject for Contempt. ***Bradley***, *supra*, at 509, deals with spousal support; ***Plumer***, *supra*, at 631, deals with child support.

V. STATUTORY PROVISIONS

A. In General

1. Orders and judgments made pursuant to the Family Law Act are enforceable by Contempt. ***FC § 290***.

2. The subject of civil Contempts is found in ***CCP §§ 1209-1222***. Although ***CCP § 1209.5*** is absolutely no longer applicable in a criminal Contempt case, the same result is reached by the application

of ***Ivey*** which eliminates ability to comply as part of the *prima facie* case in an Order to Show Cause re Contempt for child and spousal support or for attorney fees.

3. ***CCP § 1209(a)(5)*** is the specific statutory authority most frequently utilized by family law practitioners for the initiation of the proceedings.

4. ***CCP § 1209(c)*** provides for an automatic three (3) day judicial stay for an order of Contempt against an attorney, or persons acting under the attorney's direction. This special provision does not seem intended to apply to attorney litigants.

5. ***CCP § 1209(d)*** was added to protect a public safety employee who is held in Contempt while acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena. The execution of any sentence is automatically stayed for three court days so that a writ can be filed to test the validity of the Court's order.

6. ***CCP § 1211(b)*** provides that the filing of an "Order to Show Cause and Affidavit for Contempt"on the Judicial Council Form constitutes compliance with the statutory requirements.

B. Statute of Limitations

1. The statute of limitations is contained in ***CCP § 1218.5(b).*** It is three years for child, family or spousal support and two years for all other Contempt enforceable orders. Please refer *infra* to **Section IX.L.** for a full discussion of the current statute of limitations applicable to family law Contempts.

C. Attorney Fees

1. In years long past, attorney fees and costs relating to Contempt proceedings were covered by the general fee sections of the Family Law Act. That is no longer the case. In 1995 language was added to ***CCP § 1218(a)*** [effective January 1, 1995], to provide that:

> [A] person . . . who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding.

a. By adding the second sentence in ***CCP § 1218(a)***, the Legislature intended to authorize a Trial Court to, in its discretion, require a Contemner to pay the complainant's reasonable attorneys fees and costs incurred in connection with the Contempt proceeding. ***Goold v. Sup. Ct. (2006)*** 145 Cal.App.4th 1, 9. Further, the Court in ***Goold*** found that "the legislature intended the second sentence of section 1218, subdivision (a) to authorize a Trial Court to award a complainant reasonable attorney fees and costs against a condemner *in all cases*, including violations of ***Family Code*** orders." *Id.*, at 10.

b. Notably, ***CCP 1218(a)*** does not include a provision that requires the Court to consider ability to pay or comparative ability as is required when attorneys fees and costs are requested pursuant to ***FC § 2030***.

c. Since ***CCP § 1218(a)*** is a self-contained expression of legislative intent, the Legislature acting with full knowledge of the "ability to pay" sections of the ***Family Code***, the issue of ability, or comparative ability to pay is not appropriate. This statute appears to be a further appropriate sanction against the Contemner, requiring him/her to pay for the fees required to try and correct his/her errant behavior.

d. However, the specific language in ***CCP § 1218(a)*** which also applies to civil cases where fees would not otherwise be allowed, provides the court with discretion in ordering fees, and accordingly, the court may consider ability to pay as a factor in that analysis.

e. It also appears that the statute clearly restricts the award of fees to the "prosecutor" of the Contempt; no jurisdiction being stated to exist for the person successfully defending the Contempt citation.

f. Query: May the Family Law Court consider, in a later fee application brought by the unsuccessful party, the time expended, and the fees and costs incurred, in their failed attempt to have the other party held in Contempt? This author thinks not because the specific statute [***CCP § 1218(a)***], provides that fees and costs can be awarded against a "party to the action, or any agent of this person, who is adjudged guilty of contempt . . . ." There is no reported case on this issue yet.

VI. PLEADING THE CONTEMPT

A. Court Forms. The Order to Show Cause re Contempt must be initiated by the use of the official Court forms, **Forms FL-410, FL-411** and **FL-412** as applicable.[1] ***FC § 292***. You should note on page 2 of **Form FL-410**, in bold font, at the end of the printed language, one of the following: "This will be prosecuted as a criminal contempt," or "This will be prosecuted as a civil contempt."

1. **Number Each Count.** Good practice dictates that each count of the alleged Contempt be set forth by individual number (i.e., Count 1, Count 2, etc.) in a separate paragraph in the body of the charging affidavit so that each count is easy to refer to during the course of the trial proceedings and in the order. The count number should be inserted to the left of the lined box on **Form FL-411**, if the form is being used for substantive allegations.

2. The "date due" paragraph asks for the date the missed payment was due as per the order. **Note**: You can only file one count per month so if payment is due one-half on the first and one-half on the fifteenth, you will have to pick which date you want to use. You may not use both.

3. "Payable to" is almost always the party filing the Contempt, but it could be to a third party. If so, much more detailed pleadings are required because of the more detailed requirements of ***FC §2023***, and the specifics it requires for a valid, enforceable order. This kind of Contempt will require you to have the payee present to testify.

[1] The forms have been revised to be more user friendly. **Form FL-410** now contains an information sheet to assist the attorney in accurately completing the document. It is acceptable to include attachments that are set forth on pleading paper to form **FL-411** to fully set forth the Court's prior order and the party's conduct which evidences his/her disobedience of said order.

4. The three amount columns are self-evident.

5. Sub-paragraph (b) is self-evident but you should plead any other orders violated such as visitation or other things, on a separate sheet, using columns, numbering the count, specifying the date and type of order, the specific terms of the order, the date of the violation, and the specifics of the violation. See **Form FL-412** for the mandatory Judicial Council form for other kinds of violations for which you seek Contempt adjudication. [Note: This author believes that a chart form presentation containing all this information is easier for the Court.] Use **Form FL-412** and say, "See attached."

6. Under "other material facts," you might refer to "*corpus delecti*" statements made by the Citee or other material facts you want the Court to know when reading the Order to Show Cause form.

B. Indirect Contempt. A proceeding for the punishment of an indirect Contempt (which is what we are dealing with in this Article) is commenced by the presentation of an affidavit (declarations are the same pursuant to ***CCP § 2015.5***) setting forth the specifics of the alleged Contemptuous conduct. The affidavit frames the issues before the Court and it is a jurisdictional prerequisite to the Court's power to punish for Contempt. ***CCP § 1211; Fabricant v. Sup. Ct. (1980)*** 104 Cal.App.3d 905, *accord,* ***Koehler,*** *supra,* at 1169 ("It has long been the rule that the filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding" [citations omitted]).

C. Importance of the Order to Show Cause Declaration. The affidavit serves as the Contempt pleading, although it cannot constitute evidence unless it is offered and received, into evidence. ***Collins v. Sup. Ct. (1957)*** 150 Cal.App.2d 354, 364, 310 P.2d 103.

D. Personal Service of Contempt. Unless Citee has concealed himself from the Court, he must be personally served with the affidavit and the Order to Show Cause; otherwise, the Court lacks jurisdiction to proceed. ***Cedars-Sinai Imaging Medical Group v. Sup. Ct. (2000)*** 83 Cal.App.4th 1281, 100 Cal.Rptr.2d 320, *accord,* ***Koehler,*** *supra,* at 1169 ("Service of an order to show cause to bring a party into contempt is insufficient if made by mail on the party's attorney of record").

E. "Notice Waived." The provision of a minute order stating that "notice is waived" has nothing to do with the formalities attendant to Contempt proceedings. "Notice waived" means a lawyer waives his right to written notice by opposing counsel of the lawyer's understanding of the Court's ruling or of further notice concerning a hearing date. It does not mean that a lawyer intends to waive his client's right to the issuance of an Order to Show Cause signed by the judge and personally served on the Citee. ***Cedars-Sinai Imaging,*** *supra,* at 1287.

F. Only One Count Per Month for Child, Family or Spousal Support Based Contempts. Although it previously was permitted to plead each violation of a support order as a separate count of Contempt, ***CCP § 1218.5(a)*** allows only one count of Contempt for each month in which a payment has not been made. Thus, if payments of child support or spousal support are due one-half on the first and one-half on the fifteenth, only one count can be filed for the failure to make both payments. Perhaps the Legislature thought a tradeoff for limiting the number of counts of Contempt to one a month was to extend the Statute of Limitations from one year to three years for support based Contempts and two years for other orders. ***CCP § 1218.5(b)***

G. Non-Support Based Contempts. They do not have the "only one per month" limitation, and are limited to one count per day for each act alleged to be contemptuous, unless each act is an individual separate act. *See* ***Mitchell***, *supra*, at 1236. However, "[t]he preclusion of multiple punishment in ***PenC § 654*** applies in civil contempt, to the extent the punishment is punitive in nature. . . . [I] is improper to impose multiple punishments for what was basically a single disobedience, although continuing in nature." ***Koehler,*** *supra*, at 1170 citing ***Mitchell,*** *supra,* at 1246 [other citations omitted]. Instead, where refusal to return privileged documents is the basis for the contempt the proper test is whether there were ''separate insults to the authority of the court, not whether the insults happened to occur on the same or different days." ***Conn v. Sup. Ct.*** **(1987)** 196 Cal.App.3d 774, 786 *citing* ***Reliable Enterprises, Inc. v. Sup. Ct., (1984)*** 158 Cal. App.3d 604, 621.

H. Declaration May Be Amended. Although it was formerly the rule that the failure to include all essential allegations in the affidavit was a fatal defect requiring dismissal, ***CCP § 1211.5*** now allows the Court to permit amendment of the affidavit at any stage of the proceeding, without the right to continue the proceeding unless the Court determines that a continuance is required to avoid prejudice to the Citee. ***CCP § 1211.5(b)***. You should give early notice, by letter would seem to be sufficient, of your intent to amend any of the allegations or statements in the charging documents to avoid a continuance.

I. Piecemeal Contempts. Piecemeal Contempts are not appropriate and may be barred by the Double Jeopardy Clause where "the same act or course of conduct" is the basis for the Contempt, and therefore, are "too interrelated to permit their being prosecuted successively." ***Kellett v. Sup. Ct (1966)*** 63 Cal.2d 822, 827. In determining whether the acts constituting the Contempt should be tried together, Courts should consider "whether the acts occurred in a different time and place." ***Rice v. Eaton (2012)*** 204 Cal.App. 4th 1073, 1082. (Citee's "numerous failures to pay child support are not so interrelated as to require that they be charged simultaneously.") ***CCP § 1218.5***.

> The issue the trial court should have considered was whether each month Eaton failed to pay child support was so interrelated with every other month he failed to pay child support that the contempt charges had to be charged together. [Page 1083, fn. 3.]
>
> [B]ecause each month that Eaton failed to pay child support is a separate act of contempt, the acts do not overlap in beginning, duration or end; they each occur at different times; and evidence he failed to pay child support in one month does not supply proof that he failed to pay child support in another month." [Thus] Kellett is inapplicable. [Page 1083, fn.4.]
>
> [R]epeated failures to pay child support do not constitute a continuing course of conduct that must be charged simultaneously. [Page 1083]

J. Prior Orders. Prior Orders to Show Cause relating to the same set of facts must be alleged.

1. The Contempt citation must show all prior applications based upon the same set of facts, as well as the disposition of said application. **Form FL-410**.

2. Failure to comply with the aforementioned requirement may result in a dismissal of the proceeding and a revocation of any orders made thereon [***Radlinski v. Sup. Ct. (1960)*** 186 Cal.App.2d 821, 823] or a citation for Contempt against the person signing and/or filing the affidavit. ***CCP § 1008(b)*** & ***(c)***.

K. Authority of Department of Child Support Services (DCSS). The district attorney has no authority to intervene in, or to prosecute, a Contempt rising from private civil litigation. ***Safer v. Sup. Ct. (1975)*** 15 Cal.3d 230.

1. A district attorney does not have standing to bring a Contempt proceeding unless an individual applies for such services with respect to the child. Mere registration of an out-of-state support order by a "support officer" does not create an inference that the parent requested the agency to enforce the order. ***Codoni v. Codoni (2002)*** 103 Cal.App.4th 18, 126 Cal. Rptr 2d 423.

L. Welfare. If either party to the proceeding is on welfare, it is required that notice of the proceeding be given to the district attorney's office because of the automatic assignment of support rights to the welfare paying entity.

M. Amendments. All amendments to an Order to Show Cause re Contempt must be in writing. They can be made in open court and, with the Court's permission, interlineated on the originally filed document.

VII. SERVICE OF THE CONTEMPT CITATION

Personal service of the Order to Show Cause re Contempt is almost always required. The alternative methods of service after appearance in the proceeding are specifically not applicable to Contempts. ***CCP § 1015.***

A. Who Can Serve? The Order to Show Cause re Contempt may not be served by a party to the action. ***In re Morelli (1970)*** 11 Cal.App.3d 819.

B. Personal Service. Unless it can be factually shown that the Citee is engaging in acts of concealment to avoid service of the Contempt citation, service must be affected personally upon the Citee. ***Ex Parte Meyer (1933)*** 131 Cal.App.41, 43, 20 P.2d 732; ***Kronenberger v. Sup. Ct. (1961)*** 196 Cal.App.2d 206, 210.

C. Service by Registered Process Server. If service is by a registered process server, the filing of a properly executed Proof of Service is *prima facie* evidence that the service occurred [***EvC § 647***], and the burden of proof on the service issue shifts. If a registered process server is not used, testimony of the server will be required. However, if service is an issue, live testimony will almost certainly be required.

D. Alternate Service Methods. Alternative methods of service require careful procedural due process safeguards. Specific factual allegations showing concealment and efforts to attempt personal service must be shown if an order for an alternate service method is to be constitutionally valid. ***Albrecht v. Sup. Ct. (1982)*** 132 Cal.App.3d 612 is still the authoritative and informative case on the subject of alternate service.

E. Service on Attorney. In extreme cases where the Citee conceals himself, the Court may direct that service be made upon the attorney of record for the Citee. ***Morelli (1970)***, *supra*; ***Albrecht,*** *supra*, at 612.

F. Concealment by Party. ***CCP § 1016*** is extensively discussed in ***Smith v. Smith (1953)*** 120 Cal.App.2d 474, 484-486, 261 P.2d 567, wherein the Court stated:

> The fundamental concept behind the so-called concealment cases is that a party cannot defeat the jurisdiction of the court by hiding out and evading service. That concept applies whether or not the guilty party is a resident of California or of some other state, and whether he conceals himself within or without this state. [*See also* ***Kottemann v. Kottemann (1957)*** 150 Cal.App.2d 483, 486, 310 P.2d 49; ***Morelli (1969)***, *supra*.]

G. Reasons for Personal Service. See also ***In re Abrams (1980)*** 108 Cal.App.3d 685, for an extensive discussion regarding the reasons and requirements for personal or substituted service in different types of Contempts, and the underlying basis for the Contempt matter having a bearing on the issue of the type of service required.

H. Courtesy Copy. Although it is professionally appropriate and courteous to mail a copy of the Contempt citation to opposing counsel, if you have any reason to believe that such advance notice will result in an evasion of service by the Citee, refrain from sending the courtesy copy until after the Citee has been personally served.

VIII. THE HEARING

A. Nature of the Proceeding. All prior cases must now be viewed with the wisdom and the clearly articulated thought process of the United States Supreme Court expressed in ***Hicks v. Feiock***, *supra*, at 624. *See* **Section I**. of this Article for a detailed discussion based on case law about the differences between civil and criminal Contempts and the procedural consequences which flow from the correct label of the actual proceedings.

1. Criminal Contempt

a. One of the purposes of a Contempt proceeding "is to impose punishment for the violation of an order made in a civil action." ***Bailey v. Leeper (1956)*** 142 Cal.App.2d 460, 298 P.2d 684, quoted with approval in ***Gibson v. Gibson (1971)*** 15 Cal.App.3d 943, 948.

b. The acts punishable are affronts to the Court, rather than to the litigant, and in a criminal Contempt, the Court is the aggrieved party. ***Killpatrick v. Sup. Ct. (1957)*** 153 Cal.App.2d 146, 314 P.2d 164. Be careful of this language for the reasons raised in ***Mitchell*** and ***Batey***, discussed in **Section XI**., *infra*, with regard to the possibility of a right to trial by jury for "punishment" cases or, at least, to protect your record.

c. "Because of the penalties that may be imposed, a civil contempt proceeding is criminal in nature." ***Hicks v. Feiock***, *supra*, at 624; ***In re Martin (1977)*** 71 Cal.App.3d 472, 480, citing ***Raiden v.***

Sup. Ct. (1949) 34 Cal.2d 83, 86, 206 P.2d 1081. In addition to other matters, the ***Raiden*** decision contains an excellent discussion of the impartiality required of the trial judge in cases of direct Contempt.

2. Civil Contempt

a. ***Hicks v. Feiock***, *supra*, at 630-632 provides a detailed discussion of a civil Contempt and the distinctions between it and a criminal Contempt. *See* **Section I.** of this Article.

B. Pleading Guilty

1. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." ***Boykin***, *supra.*

2. Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth Amendment. Second, is the right to trial by jury although not generally an issue in family Contempts. Third, is the right to confront one's accusers. *Id.* at 243.

3. Courts must make sure that the accused has a full understanding of what the plea of guilty connotes and of its consequence. *Id.* at 244. Specific waivers are required. ***County of Los Angeles v. Soto (1984)*** 35 Cal.3d 483, 489, 198 Cal.Rptr. 779.

C. Personal Appearance of Citee . . . Is It Required?

1. Pursuant to ***PenC § 1429***, "in a misdemeanor case the plea of the defendant may be made by the defendant or by the defendant's counsel." *See also* ***People v. Kriss (1979)*** 96 Cal.App.3d 913, 916.

2. ***PenC § 1193(b)*** provides that if "the conviction be of a misdemeanor, judgment may be pronounced against the defendant in his absence."

3. If the Citee does not appear personally, but is represented by counsel who is ready to proceed to hearing, the Trial Court has no authority to order issuance of a bench warrant to compel the personal attendance of the Citee. ***Morelli (1969)***, *supra*; ***Silvagni v. Sup. Ct. (1958)*** 157 Cal.App.2d 287, 291, 321 P.2d 15. This rule does not apply if the Citee is specifically ordered by the Court to be present, as contrasted to the language on the form when issues, and any such failure to appear could constitute another Contempt and could result in the issuance of a bench warrant.

4. If the Court determines that a criminal misdemeanor defendant has voluntarily absented himself from the proceeding, the Court may proceed in absentia. ***Farace v. Sup. Ct. (1983)*** 148 Cal.App.3d 915. In such a case, a ***PenC § 1043*** finding would seem necessary if the Court proceeds in absentia. ***PenC § 1043(e)*** provides as follows:

> If the defendant in a misdemeanor case fails to appear in person at the time set for trial or during the course of trial, the court shall proceed with the trial, unless good cause for a continuance exists, if the defendant has authorized his counsel to proceed in his absence pursuant to subdivision (a) of Section 977.

> If there is no authorization pursuant to subdivision (a) of Section 977 and if the defendant fails to appear in person at the time set for trial or during the course of trial, the court, in its discretion, may do one or more of the following, as it deems appropriate:
>
> (1) Continue the matter.
> (2) Order bail forfeited or revoke release on the defendant's own recognizance.
> (3) Issue a bench warrant.
> (4) Proceed with the trial if the court finds the defendant has absented himself voluntarily with full knowledge that the trial is to be held or is being held.

5. A family law Contempt proceeding is not a felony case, thus ***PenC § 1043(e)*** would apply and the trial may proceed in the absence of the Citee.

6. ***Morelli v. Sup. Ct. (1968)*** 262 Cal.App.2d 262, 68 Cal. Rptr 572, provides authority for conducting the Contempt hearing in the absence of the Citee and, if Contempt is found, the issuance of an attachment for defaulter to secure the presence of the Citee for sentencing.

7. For the required findings to proceed in absentia, and by analogy to ***PenC §§ 985*** and ***1043***, *see* ***People v. Semecal (1968)*** 264 Cal.App.2d Supp. 985.

8. The practice in the Los Angeles Superior Court, at least in the Central District, has generally been not to allow Contempts to proceed in absentia. If the Citee does not appear and is not represented by counsel, upon submission of proof of service (be sure to have the Proof of Service with you), an attachment for defaulter will be issued and the case will be continued or held in abeyance pending the detention of the Citee. Issuance of the attachment for defaulter is essential to maintain the Court's jurisdiction on that particular Order to Show Cause re Contempt.

9. If the supporting affidavit for the Contempt citation is defective in any manner, and no one appears for the Citee, it is extremely doubtful that the Court could proceed, in absentia, to try the matter. The defect should be remedied and the Order to Show Cause re Contempt, as amended, refiled and served upon the Citee.

10. A Citee cannot be held in Contempt merely for failing to personally appear for the Order to Show Cause hearing, or for sentencing, if the Citee is represented by counsel. ***Morelli (1970)***, *supra*; ***In re Claasen (1939)*** 36 Cal.App.2d 155, 97 P.2d 254; ***PenC § 1193(b)***.

D. The Power of the Court to Order Witnesses to Attend Contempt Hearings

1. ***CCP § 128*** provides that "[e]very court shall have the power to. . . compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code."

2. ***CCP § 177*** provides that "[e]very judicial officer shall have power. . . [t]o compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code."

3. It has long been established:

> [T]he administration of justice is founded on the principle that every litigant shall have a fair opportunity to procure the attendance of witnesses to establish his claim. One of the duties which every citizen owes to his government in support of the administration of justice is to attend court and give his evidence when he is properly summoned. It is within the inherent powers of the courts and judicial tribunals to compel the attendance of witnesses in the manner provided by law. The authority is incident to the power to adjudicate causes. ***Wood v. Silvers (1939)*** 35 Cal.App.2d 604, 607-608.

E. Right to Counsel and Right to Remain Silent

1. In California, when the potential punishment the Citee faces includes incarceration, the Citee has an absolute right to counsel, Court appointed if they qualify. The clearest predicate for the conclusion that an indigent has a right to appointed counsel is a determination that the Citee may lose his or her liberty. ***Santa Clara (Rodriquez)***, *supra*, at 1693.[2]

2. The Court must advise the Citee of his or her absolute right to be represented by counsel and that, if Citee is unable to afford an attorney and otherwise qualifies, an attorney will be appointed to represent the Citee.

a. The Court will generally refer an unrepresented party, who claims financial inability to obtain counsel, to the Public Defender's office. The Contempt hearing will normally be continued to allow interview, determination of qualification, and representation by the Public Defender.

b. ***Government Code ("GovC") § 27706*** specifically lists Contempt as one of the offenses that a public defender is required to handle.

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[2] Although not applicable in California, a similar issue was raised in ***Turner v. Rogers (2011)*** 131 S.Ct. 2507, 2520 which held:

> [T]he Due Process Clause does not automatically require the provision of counsel at civil Contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodial (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings.

However, while this case is of interest, this issue was long ago resolved the other way in California (***Cal. Const. Art. 1, § 15****; Santa Clara (Rodriguez)*, *supra* ["In this court's view an indigent person upon whom an order to show cause re contempt is served in a proceeding for alleged past violation of a Family Law Act order, and who by virtue of the order to show cause is exposed to deprivation of liberty as punishment for the alleged violation, and who shows that he or she is indigent, shall be entitled to effective assistance of counsel, provided at public expense, unless he or she chooses to waive the right."].)

c. The Civil Contempt Division of the Los Angeles County Public Defender's Office, located at 590 Hall of Records, 320 West Temple, Los Angeles, California, telephone number (213) 974-2878, will provide counsel to indigent Citees upon request.

3. The Citee is allowed at least one continuance, as a matter of right, for the purpose of obtaining counsel to represent the Citee at the hearing, and it is futile to oppose such a request. ***People v. Bigelow (1984)*** 37 Cal.3d 731, 740.

4. When the Citee is in Court without an attorney, it is the duty of the Court to advise the Citee of the Citee's right to counsel, to remain silent and the fact that the Citee cannot be required to take the witness stand.

a. Query: In a civil Contempt, is the Citee absolutely entitled to counsel?

5. Even when the Citee is represented by counsel, it is advisable for the Court to expressly inform the Citee of the Citee's constitutional, statutory and case law mandated rights. Cautious counsel for the moving party will request the Court to give the admonition of rights even if counsel is present for the Citee. A knowing acceptance and/or waiver should be on the record. The Court's statement should include:

a. If a criminal Contempt, the criminal nature of the proceedings and the maximum punishment which may be imposed;

b. If a civil Contempt, the civil nature of the proceedings and what consequences may result from an adjudication of Contempt;

c. The elements which must be proven;

d. If a criminal Contempt, that the burden of proof is beyond a reasonable doubt (probably the Citee should be informed of the permissive inferences that will apply in support cases);

e. If a civil Contempt, that certain presumptions as to ability to comply may be applicable and that the burden of proof may shift to the Citee if a presumption is determined to apply; and

f. The right to remain silent and not be called to the witness stand.

6. The Citee has an absolute right to remain silent with regard to the allegations, not to take the witness stand, and not to testify. ***EvC §§ 930***, ***940***; ***In re Witherspoon (1984)*** 162 Cal.App.3d 1000.

7. By analogy to the rule in criminal cases, if the Citee is represented by counsel, the Citee may waive the privilege against self-incrimination and voluntarily take the witness stand, even though the Court has not admonished the Citee with respect to the Citee's constitutional rights. ***People v. Thomas (1974)*** 43 Cal.App.3d 862. Cautious counsel should always ask the Court to advise the Citee of the right not to testify.

a. If the Citee does elect to testify, counsel should be aware that the Citee's testimony may be impeached even as to collateral matters if the testimony is "relevant as bearing on the [citee's]

credibility . . . unless it should [be] excluded under ***Evidence Code section 352***. [citation]" ***People v. Morrison (2011)*** 199 Cal.App.4th 158, 165.

8. A defendant's testimony may be used in a subsequent proceeding against him, if it was not obtained in violation of the United States Constitution or the California State Constitution. ***EvC §§ 1220*** and ***1204***. However, if the statement was elicited by the government under compulsion, then generally, the statement cannot be used against the defendant at a later *criminal* trial because to do so, would be in violation of the Fifth Amendment.

a. In several well-established cases, the defendant's testimony was used against him in a later criminal proceeding because the statements were considered voluntary. ***People v. Carter (1935)*** 10 Cal.App.2d 387 (defendant's testimony at his wife's trial was properly admitted at his subsequent criminal trial); ***People v. Barrios (1921)*** 52 Cal.App. 528, 532 (where a defendant was questioned at his two co-defendants' trial, the Court found that his testimony was voluntary because he was questioned by his own attorney, thus, it was properly introduced at his later criminal trial); ***People v. Weiger (1893)*** 100 Cal. 352, 358-359 (where defendant's deposition in two prior insolvency proceeding was made in obedience to a citation, the Court found that obedience to the citation did not prevent the defendant from asserting his Fifth Amendment privilege against self-incrimination, thus, the admission was voluntary and could be introduced at his subsequent criminal trial).

b. A trial witness is not compelled to testify in violation of the self-incrimination clause unless induced "to forgo the Fifth Amendment privilege" because of the imposition of "economic or other sanctions." ***Minnesota v. Murphy (1984)*** 465 U.S. 420, 427 and 434.

c. The ***EvC § 940*** privilege may be asserted in any proceeding - civil or criminal - where testimony might incriminate the witness in a future criminal proceeding. *Id.* at 425. "Any proceeding" includes criminal Contempt proceedings, ***International Union, United Mine Workers of America v. Bagwell (1994)*** 512 U.S. 821, 826, citing ***Gompers***, *supra,* at 418, 444 [citations omitted], and judgment debtor proceedings. ***In re Leavitt (1959)*** 174 Cal.App.2d 535, 538, 345 P.2d 75.

d. However, as recently as 2002, the application of the Fifth Amendment privilege against self-incrimination was limited in judgment debtor proceedings. ***In re Marriage of Sachs*** (2002) 95 Cal. App.4th 1144,1159-1161, addressed a husband's past due child and spousal support. In that case, the Court of Appeal held that the privilege against self-incrimination did not protect a party from producing income tax returns, and it did not preclude the other party from examining him about their contents in a judgment debtor proceeding. The Court stated that the obligated spouse was adequately protected by the confidentiality requirements of ***FC §§ 3552*** and ***3665***. The Court stated: "In combination, those statues ensure that Jeffrey's [obligated spouse] tax returns will be used only <u>in the present proceeding</u> and that information about his taxes will not be disclosed to third persons." *Id.* at 1161. [emphasis added]. Therefore, the Court's limitation on the use of a witness's testimony concerning his tax returns in a judgment debtor proceeding to the proceeding at hand, is akin to the Fifth Amendment's safe guard, which prevents the use of a person's compelled statement against him in a subsequent criminal proceeding.

e. It is important to note that even if a statement is compelled, it may be used later, without violating the Fifth Amendment, in proceedings that are <u>not</u> criminal. *See* ***Chavez v. Martinez (2003)*** 538 U.S. 760, 769; *see also* ***Estate of Bui v. City of Westminster Police Dept. (2007)*** 244 F.R.D. 591, 594. Meaning, the Fifth Amendment only prevents the use of compelled statements in criminal

proceedings. Thus, a compelled statement could likely be used against a Citee in a subsequent civil Contempt proceeding since other constitutional protections, such as the right to a jury trial and proof of guilt beyond a reasonable doubt, have not been extended to protect Citees in civil Contempt proceedings. ***International Union***, *supra,* at 826.

9. The right to remain silent [***EvC §§ 930***, ***940***] has also been held applicable in judgment debtor proceedings. ***Leavitt***, *supra*.

a. The right to exercise ***EvC § 940*** privileges has previously been followed in Department 1A of the Los Angeles Superior Court.

b. Based upon this author's personal experiences many years ago, if the right to exercise ***EvC § 940*** privileges at a judgment debtor proceeding will be an issue, you should be prepared to present complete briefs on the subject.

c. Although the right to remain silent is the absolute right of the Citee, the Supreme Court held that the "claim of privilege is not a substitute for relevant evidence" when the claimant bears the burden of showing "his present inability to comply with a court order." ***United States v. Rylander (1983)*** 460 U.S. 761. To hold otherwise, would convert the privilege from a shield against compulsory self-incrimination which it is intended to be, into a sword whereby a claimant asserting the privilege would be freed from adducing proof to support his burden. ***Rylander***, *supra,* at 752, 758.

d. Thus, since "inability" is an affirmative defense in child and family support Contempts, the ***EvC § 940*** privilege is illusory once the moving party has established their *prima facie* case.

F. Right to Speedy Trial

1. Arraignment. On the first return date for the Order to Show Cause re Contempt, the Citee is to be arraigned as in any other criminal/quasi-criminal case. The unresolved issue is when is that arraignment to take place since our Order to Show Cause re Contempt is not preceded by an arrest and the other time requirements of the ***Penal Code*** that apply to persons who are incarcerated.

a. There does not appear to be any clear law as to when the arraignment must occur. There are provisions in the ***Vehicle Code*** which outline the procedure by which a person arrested but not immediately taken before a magistrate is given a Notice to Appear which, if violated, then requires the generation of a formal complaint to invoke the jurisdiction of the Court. Until that complaint is issued, the jurisdiction of the Court is not invoked and the statutory time periods do not begin to run. *See* ***Rupley v. Johnson (1953)*** 120 Cal.App.2d 548, 552, 553. Does ***Rupley*** answer the question of when the arraignment must occur in our civil Contempt cases, this writer does not believe so. Although ***PenC § 825*** requires arraignment within 48 hours [or less if arrested on a Wednesday], that section only applies to persons who are arrested and in jail, not the usual circumstances in our cases. No law has been found mandating a dismissal in a case because of a delayed arraignment where a charge is filed against a person who is not arrested for the same reasons that a trial set after the statutory period (45 days - see below) by consent raises no problem. A consensual arraignment would seem to obviate any timing problems. ***People v. Morse (1970)*** 4 Cal.App.3d, Supp. 7, 9-10, says that “whatever other remedies may be available to a defendant whose arraignment is unduly delayed, immunity from prosecution is not one of them.”

b. ***PenC § 1382(a)(3)*** provides that, "regardless of when the complaint is filed, when a defendant in a misdemeanor or infraction case is not brought to trial within 30 days after he or she is arraigned or enters his or her plea, whichever occurs later, if the defendant is in custody at the time of arraignment or plea, whichever occurs later, or in all other cases, within **45 days** after the defendant's arraignment or entry of plea, whichever occurs later. . . ", the case must be dismissed (bold added).

(1) However, this time can be waived by specific consent, which should be on the record [which consent may be withdrawn at the continued trial date which was set pursuant to the waiver] or by the simple act of consenting to a later trial date.

(2) If on a trial date set beyond the 45-day limit the defendant does not agree to a further waiver, then trial must start within ten days.

(3) "If the defendant is not represented by counsel, the defendant shall not be deemed. . . to have consented to the date for the defendant's trial unless the Court has explained to the defendant his or her rights under this section and the effect of his or her consent." ***PenC § 1382(c)***.

2. However, the action will not be dismissed if the defendant enters a general waiver of the 30-day or 45-day trial requirement. ***PenC § 1382(a)(3)(A)***.

3. If the defendant requests or consents to the setting of a trial date beyond the 30-day or 45-day period, then the action will not be dismissed. ***PenC § 1382(a)(3)(B)***.

4. There are very specific procedures required to continue a criminal hearing at the request of counsel. Continuing a hearing in a criminal proceeding requires that a written notice be filed and served on all parties at least two days before the hearing together with affidavits detailing the reason for the continuance. The attorney shall also notify the Court clerk within two days of learning of a conflict. ***PenC § 1050(b)***.

G. Right to Stay if Criminal Filing Is Reasonably Possible.

1. Since the Citee has a right not to testify as to any matter which may tend to have the possibility of incriminating the Citee [***EvC §940***], if there is the possibility (reasonable, to be determined by the trial judge), that testimony in the civil matter would be incriminating, then the filing of the Contempt should be delayed until the resolution of the civil proceeding. If that is not done, the civil matter will, upon request, probably be delayed until the Contempt matter is concluded.

2. "The strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of ***Federal Rule of Criminal Procedure 16(b)***, expose the basis of the defense to the prosecution in advance of trial, or otherwise prejudice the case." ***Security and Exchange Commission v. Presto Telecommunications, Inc. (Dec. 17, 2010)*** 153 Fed.Appx. 428, 2005 WL 2871952 (C.A.9 (Cal.)). The same logic applies to state court.

H. Degree And Manner Of Proof

1. Proceedings under ***CCP § 1209*** *et seq*., if a criminal Contempt, are "special proceedings in which the contempt must be proven beyond a reasonable doubt rather than by a preponderance of the evidence. . . ." ***Quezada v. Sup. Ct. (1959)*** 171 Cal.App.2d 528, 340 P.2d 1018.

2. Contempt proceedings have long been classified as quasi-criminal (a fiction designed to cover the fact that they are statutorily civil in nature, but truly criminal in effect) and most of the technical rules and stricter standards of evidence and procedure will be applied. ***Hicks v. Feiock***, *supra*, at 624, now instructs that no inferences or presumptions may be used to shift any burdens of proof in criminal Contempts.

3. A Citee has the right to cross-examine all witnesses and the right to testify in the defense of the citation; over objection by the Citee, the Court cannot rest its decision on declarations alone. ***Reifler v. Sup. Ct. (1974)*** 39 Cal.App.3d 479. Generally speaking, except by stipulation, no declarations may be received in evidence in a Contempt case.

4. Hearsay evidence of assaulted persons' statement to a third party is admissible as a "spontaneous statement" under ***EvC § 1240***. ***People v. Saracoglu (2007)*** 152 Cal.App.4th 1584.

I. Citee May Not Be Called As an Adverse Witness

1. "A defendant in a criminal case has a privilege not to be called as a witness and not to testify." ***EvC § 930***. This statute applies in Contempt cases. *See also* ***Witherspoon***, *supra*, at 1000; ***Coursey***, *supra*, at 153.

2. The Citee may not be called as a witness pursuant to ***EvC § 776***. ***Oliver***, *supra*, at 240; ***Killpatrick***, *supra*, at 148, 149.

3. Since the Contempt proceedings are presumptively criminal in nature, it is incumbent upon the initiating party to present evidence to establish their *prima facie* case without calling the Citee to testify. ***Ex Parte Gould (1883)*** 99 Cal. 360, 33 P. 1112; ***Coursey***, *supra*, at 153.

4. It is not permissible to call the Citee to the witness stand or request that the Citee be sworn as a witness. ***Ex Parte Gould,*** *supra,* at 363; ***Witherspoon***, *supra*, at 1002.

5. In what this author considers to be a strange ruling, but one which has been citable authority for over forty years, the Citee may file a counter-affidavit denying the alleged misconduct and does not thereby waive the privilege not to testify or be called to testify and the Citee cannot be required to take the witness stand to be cross-examined about the contents of the affidavit. ***Crittenden v. Sup. Ct. (1964)*** 225 Cal.App.2d 101, 105. The ***Crittenden*** Court held that the filing of such a counter-declaration did not constitute a waiver of the ***EvC § 940*** privilege. ***Crittenden*** has never been overruled.

a. The decision in ***Crittenden***, *supra*, does not address the issue of whether or not the affidavit of the Citee may be considered, or received in evidence, over the objection of the other party.

b. It is the opinion of this author that such an affidavit should not be received in evidence over objection, as there would then be a denial of the constitutional right to confront and cross-examine witnesses.

c. It is unlikely that any declaration submitted by a Citee, who then refuses to testify and be cross-examined, will be afforded much evidentiary weight or will result in reasonable doubt being raised. This opinion is based upon discussions with many past and some present sitting judicial officers and seems to be a completely logical response to an illogical ruling.

6. Although a Citee may not be called personally to testify against themselves, the Citee's records and documents are subject to subpoena, and admissible to the extent that they are in the possession of other persons who can be called to testify and provide the evidentiary foundation for their admission into evidence.

7. Although the records and documents in the possession of the Citee are subject to subpoena, if only the Citee has the records there may be no effective way to use those documents, as there is no way to establish the evidentiary foundation for the documents since the Citee may not be called to testify on any subject which might tend to incriminate the Citee. The Citee is not required to produce any such documents if they are part of the Citee's personal records and would provide incriminating evidence. If the documents would have no tendency to incriminate the Citee, they would not be relevant to the issues at the hearing.

8. As above discussed, ***FC § 3552(a)*** provides that "[i]n a proceeding involving child, family or spousal support, no party to the proceeding may refuse to submit copies of the party's state and federal income tax returns to the court, whether individual or joint." Thus, it would seem appropriate to serve the Citee with a subpoena to produce said documents at the Contempt hearing.

a. This author questions the applicability of ***FC § 3552*** to Contempt proceedings in view of ***EvC § 940*** privileges and believes that any such subpoena may be quashed notwithstanding the holding of ***Sachs***, *supra.*

J. Citee's Spouse May Be Called to Testify

1. Although the general rule is that a person has a privilege not to testify against his or her spouse in any proceeding [***EvC § 970***], that privilege is specifically now abrogated by ***EvC § 972(g)*** which provides as follows:

a. A married person does not have a privilege under this article in:

> (g) A proceeding brought against the spouse by a former spouse . . . [to] enforce a child, family or spousal support obligation arising from the marriage to the former spouse; . . . The married person does not have a privilege under this subdivision to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but may assert the privilege as otherwise provided in this article if other information is requested by the former spouse. . . .
>
> Any person demanding the otherwise privileged information made available by this subdivision, who also has an obligation to support the child for whom an order to

establish, modify, or enforce child support is sought, waives his or her marital privilege to the same extent as the spouse as provided in this subdivision. [Author's note: This subparagraph only relates to child support.]

2. A married person has a privilege not to be called as a witness against his or her spouse without his or her spouse's prior express consent. ***EvC § 971***. This privilege is subject to the exceptions above noted.

3. The ***EvC §§ 970*** and ***971*** privileges are different than the ***EvC § 980*** privileges not to disclose confidential communications. There is no comparable waiver under ***EvC § 980*** as in ***§ 970***.

K. Payments to Third Parties

1. ***FC § 2023(a)*** provides that "[o]n a determination that payment of an obligation of a party would benefit either party or a child for whom support may be ordered, the court may order one of the parties to pay the obligation, or a portion thereof, directly to the creditor."

2. To enforce a ***FC § 2023*** order by Contempt, the requisite finding of "benefit" should be contained in the order.

3. ***FC § 2023*** [***CC § 4358***] payment orders require the direct testimony of the creditor as to lack of payment . . . all else is hearsay.

4. ***FC § 2023*** [***CC § 4358***] orders relating to the assignment of health insurance rights or payment of non-insured medical expenses, require testimony from the insurance carrier or provider of services as to payments made, instructions given, etc . . . all else is hearsay.

IX. DEFENSES AND TACTICS

A. Court Can Dismiss Contempt on Its Own Motion, in the Interests of Justice

PenC § 1385 permits the Court to dismiss a case in the interests of justice. Although no case directly on point has been found in the context of family law Contempt, in the case of ***Pepper v. Sup. Ct. (Brentwood Country Club) (1997)*** 76 Cal.App.3d 252, 258, the Trial Court dismissed the Order to Show Cause re Contempt and that dismissal was affirmed by the Court of Appeal. Thus such a motion can and should be made in a case where the facts indicate that the Contempt prosecution should not be pursued.

B. Defects In the Order Sought to Be Enforced

1. An order which is not valid, for whatever reason, obviously cannot be enforced by Contempt; for example:

a. ***Grant v. Sup. Ct. (1963)*** 214 Cal.App.2d 15, 23 - an invalid attempt to modify an interlocutory judgment by inserting conflicting provisions in the final decree.

b. ***Mowrer v. Sup. Ct. (1969)*** 3 Cal.App.3d 223 - an improper order for counsel to be in Court during certain hours.

c. ***Mitchell v. Sup. Ct. (1972)*** 28 Cal.App.3d 759 - the order exceeded the Court's jurisdiction because it ordered the turnover of partnership assets to satisfy a debt.

d. ***Noorthoek v. Sup. Ct. (1969)*** 269 Cal.App.2d 600 - the order was made by a disqualified judge.

e. ***McCormick v. Sup. Ct. (1960)*** 184 Cal.App.2d 657 - the alleged order was only a recommendation by a commissioner and not an order.

f. ***Davidson (Mendota)***, *supra*, at 739 - Contempt order cannot be based on an invalid judgment.

2. A more common occurrence is the attempted enforcement, by Contempt, of an *ex parte* order issued pursuant to ***FC §§ 2045(a)***, ***6320-6325*** (which may not last for more than 20 days, 25 days for good cause shown) which was not continued by subsequent Court order or made into a permanent *pendente lite* order prior to the time of its statutory expiration. Unless continued by a properly issued, specific, subsequent Court order, or based upon a stipulation which is made a Court order, the original restraining order lapses by operation of law at the expiration of the statutory period and events occurring thereafter cannot fall within the prohibition of that initial order. Naturally, events occurring during the valid term of the *ex parte* order are Contempt enforceable, even if that order is not later continued in effect. A mere stipulation to keep restraining orders in effect, <u>if not made an order of the Court</u>, would not create an order that is enforceable by Contempt.

a. Violations of an *ex parte* order, which occur during the operative period of the order, are the proper subject for a Contempt proceeding, even after the expiration or termination of the *ex parte* order.

C. Paternity Cases - Child Support

1. "Judgments for paternity or child support, entered as a result of an agreement between the district attorney and a parent not represented by an attorney, are voidable if the unrepresented parent can establish that he or she was not advised by the district attorney [now Department of Child Support Services (DCSS)] of the right to trial on the questions of paternity and ability to support and that he or she was unaware of such rights and would not otherwise have executed the agreement." ***Solberg v. Wenker (1985)*** 163 Cal.App.3d 475, 478-479 disapproved on another ground in ***In re Marriage of Comer (1996)*** 14 Cal.4th 504; ***County of Alameda v. Mosier (1984)*** 154 Cal.App.3d 757, 759-760; ***County of Los Angeles v. Soto (1984)*** 35 Cal.3d 483, 492; ***County of Ventura v. Castro (1979)*** 93 Cal.App.3d 462, 467-473.

2. A knowing and intelligent guilty plea in a Contempt proceeding relating to a voidable judgment does not bar a later motion to vacate said judgment. ***County of Los Angeles v. Thompson (1985)*** 172 Cal.App.3d 18.

3. A stipulated judgment for support, which is punishable by Contempt, is voidable if done without counsel or a knowledgeable waiver of counsel after being informed of the potential consequences of the stipulation. ***County of Ventura v. Tillett (1982)*** 133 Cal.App.3d 105.

4. Although ***Tillett*** and the other cases referred to above involve the district attorney, the logic of the cases should apply, with equal force, to any pro. per. stipulation and possibly to any stipulated support order which does not contain an acknowledgment of the possibility of Contempt enforcement. To be on the safe side, every such stipulation should have an acknowledgment on the record that it is subject to the Contempt process of the Court and the current maximum possible sentence for violation of the stipulated order.

D. Orders on Appeal

1. Most family law orders are not automatically stayed by filing a notice of appeal. If a bond is required to stay enforcement, then Contempt is available until the bond is actually filed. *See* ***CCP §§ 916-918***.

2. Orders which are not automatically stayed:

a. Enforcement of any orders/judgments for the payment of money. ***CCP § 917.1***.

b. Custody and visitation. ***CCP § 917.7***.

(1) However, pursuant to ***CCP § 917.7***:

> [I]n the absence of a writ or order of a reviewing court providing otherwise, the provisions of the judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of seven [7] calendar days from the entry of the judgment or order by a juvenile Court in a dependency hearing, or for a period of 30 calendar days from the entry of judgment or order by any other trial court.

c. Orders/judgments directing the assignment or delivery of personal property. ***CCP § 917.3***.

d. Orders/judgments directing the execution of instruments or documents. ***CCP § 917.4***.

e. Orders/judgments directing the sale, conveyance or delivery of possession of real property which is in the possession of the appellant or the party ordered to sell, convey or deliver possession of the property.

3. Unless a bond staying enforcement of the order has been posted or some other stay order obtained, there is no impediment to proceeding with a Contempt on an order which is on appeal, as long as the person appealing the order is not seeking to enforce that which they are appealing.

a. The party who appeals from an order/judgment may not initiate a Contempt proceeding concerning that order until the appeal is resolved. ***Fontana v. Sup. Ct. (1977)*** 72 Cal.App.3d 159.

4. If an enforcement of the order is stayed by reason of the posting of a bond on appeal, or by reason of some other stay order, Contempt may not be pursued. A motion to abate the Contempt proceedings after the filing of the bond would be appropriate.

5. However, if an order adjudicating Contempt is made before the appeal is filed or before a stay is issued, the Contempt holding will not be vacated. ***Associated Lumber & Box Company v. Sup. Ct. (1947)*** 79 Cal.App.2d 577, 180 P.2d 389.

E. Orders Indicated But Not Actually Made

1. Rulings on a motion which direct the preparation of a written order are not immediately operative and effective order unless so stated by the Court at the time the ruling is pronounced. ***In re Marriage of Drake (1997)*** 53 Cal.App.4th 1139, 1170, 62 Cal.Rptr.2d 486.

2. A minute order indicating the granting of a judgment of dissolution is not effective, or enforceable until the actual written judgment is signed and filed. ***Gideon v. Sup. Ct. (1956)*** 141 Cal.App.2d 640, 642, 297 P.2d 84.

3. The announcement of the Court at the conclusion of a trial is a tentative decision and until made into a judgment, is not properly the subject of a Contempt proceeding. ***CRC 3.1590(a)***.

F. Orders at Order to Show Cause Hearings - Must Be Written to Enforce

1. Although it was long said that orders made in connection with *pendente lite* Orders to Show Cause are generally effective upon pronouncement, ***In re Marriage of Skelley (1976)*** 18 Cal.3d 365, 369, 556 P.2d 297 (spousal support), ***In re Marriage of Pearce (1978)*** 84 Cal.App.3d 221, 223 (child support), they are no longer subject to Contempt enforcement unless and until there is a written order, even if it is a minute order. While the better practice is still to ask the Court to make the order effective forthwith, if the Court directs someone to prepare an order, at least ask the Court to have the minute order set forth the specifics of the orders and ask the Court to have the party who is to perform acknowledge their understanding of the order.

2. ***In re Marcus (2006)*** 138 Cal.App.4th 1009, 1015-1017 involved an ambiguous custody order which was not reduced to written form and served prior to the offensive act, as was ordered by the Court,

The Appellate Court issued absolute statements about the requirement for a written order if there is to be Contempt enforcement. The ***Marcus*** Court stated, after reviewing prior law:

> It has long been settled that the action of the court must be made a matter of record in order to avoid any uncertainty as to what its action has been [citations]. The record may be made by a written order signed by the judge and filed with the court [citation] or it may be set forth in detail in the court's minutes [citations]. But either way, a writing is essential to avoid the uncertainty that can arise when attempting to enforce an oral ruling. Indeed, an 'order' is defined by statute as the 'direction of a court or judge, *made or entered in writing*. . . .' (***CCP § 1003*** [Italics in original opinion, underlined added.]) ***Marcus***, *supra*, at pp. 1015-1016.

As always, knowledge of the actual order is required. ***Marcus***, *supra*, at 1017. Service of the written order is good practice.

3. Where counsel is requested to prepare and file a formal order at the conclusion of an Order to Show Cause hearing, to preserve the client's right to immediate enforcement (although not by Contempt), request that the Court state that "the order is effective forthwith," and for Contempt enforcement rights, that the order is entered in the minutes. ***Drake,*** *supra*, at 1170.

4. When the Court orders that a written order is to be filed the only effective order is the written order. ***Marcus***, *supra*, at 1016; *cf.* ***Drake***, *supra*, at 1170.

G. Orders Which Contain No Mandatory Directions

1. Orders which contain no mandatory direction to perform specific acts are not properly the subject of a Contempt proceeding. ***Schaefer v. Sup. Ct. (1968)*** 268 Cal.App.2d 180; ***Little***, *supra*, at 316-317.

2. However, under extreme circumstances, the precise language for a mandatory order may not be necessary for the utilization of the Contempt process. In ***Alpine Palm Springs Sales, Inc. v. Sup. Ct. (1969)*** 274 Cal.App.2d 523, 534, the use of the Contempt process was sustained where the order omitted the word "enjoined," but everyone had previously acted like that omission had not occurred. As a general practice, do not count on form over substance arguments to prevail in Contempt proceedings.

H. Orders Which Are Uncertain, Vague Or Ambiguous

1. An ambiguous restraining order is not the proper subject for a Contempt proceeding. ***Gottlieb v. Sup. Ct. (1959)*** 168 Cal.App.2d 309, 312, 335 P.2d 714.

2. Contempt will not properly lie if the injunction does not clearly and specifically state what acts are prohibited. ***Brunton v. Sup. Ct. (1942)*** 20 Cal.2d 202, 124 P.2d 831; ***Weber v. Sup. Ct. (1945)*** 26 Cal.2d 144, 148, 156 P.2d 923.

3. An injunction that is so vague that men of common intelligence must necessarily guess at its meaning is not the proper subject for a Contempt proceeding. ***In re Berry (1968)*** 68 Cal.2d 137, 156.

4. All ambiguity in the order must be resolved in favor of the Citee. ***In re Blaze (1969)*** 271 Cal.App.2d 210, 212.

5. Before allowing potential ambiguity to defeat your Contempt proceeding, read ***Rosin***, *supra*, at 181, where the Court held that conduct contrary to "inevitable" inferences from the order may be punished by Contempt. ***Rosin*** was a Contempt proceeding for the removal of the children from the State, conduct not specifically prohibited, but which resulted in an inevitable interference with visitation rights. Based on what is set forth above, ***Marcus*** may effectively overrule ***Rosin*** although there is no reference to ***Rosin*** in ***Marcus***.

6. The Second District Court of Appeal held in ***In re Marriage of Hartmann (2010)*** 185 Cal.App.4th 1247, that a restraining order which restrained Wife from "interfering with Husband's custodial time" was not vague and ambiguous and, therefore, was not violative of the First Amendment. *Id* at 1247, 1251-1252. In ***Hartmann***, the Court reasoned that,

> the order here does not prohibit Wife from speaking to everyone but her attorney about everything relating to Husband. It only prohibits speech that interferes with the custody order. In family law cases, courts have the power to restrict speech to promote the welfare of the children." *Id*, at 1251. The Court of Appeal opined further that "[i]f a court is unable to order the parties not to interfere with a custody order, such orders will become meaningless. [¶] Unfortunately, Wife's conduct gave the trial judge cause to be conspicuously tautological and categorically pedagogical. Let there be no doubt, Wife must stop interfering with the custody order." *Id.*

I. Insufficient Factual Basis For the Issuance Of the Injunction In the First Instance

1. An application for a restraining order which does not contain sufficient facts upon which to properly issue an injunction cannot be used to support a Contempt based upon said improperly issued order. ***Kreling v. Sup. Ct. (1941)*** 18 Cal.2d 884, 886, 118 P.2d 470. *See also* ***CCP § 527***. This theory of defense gives you the right to go back and litigate the appropriateness of the granting of the underlying order.

J. Orders Based Upon A Statute That Requires Findings

1. If the statutory provision requires specific findings as a condition to making the order, failure of the order to contain the findings will defeat a Contempt proceeding.

2. ***FC § 2023(a)*** requires a "determination that payment of an obligation of a party would benefit either party or a child for whom support may be ordered." Absence of such a "determination" in the order would render it defective, at least for the purposes of a Contempt proceeding.

K. Orders Which Are Constitutionally Overbroad

1. Injunctions which prohibit constitutionally protected rights such as freedom of speech and association are generally constitutionally overbroad and unenforceable without the requisite showing of "clear and present danger" resulting from activities which constitute "serious substantive evil."

a. Such injunctions may be proper only if a sufficient factual basis is presented to the Court. ***Smith v. Silvey (1983)*** 149 Cal.App.3d 400, 407.

b. In ***People v. Leon (2010)*** 181 Cal.App.4th 943, defendant contended that certain conditions of his probation violated his federal due process rights and his First Amendment guarantee of access to the Courts.

(1) The Court of Appeal held that a probation condition which generally prohibited the defendant's association with "gang members" was vague because it lacked a knowledge requirement. *Id*. at 950. Accordingly, the provision was subsequently rewritten by the Court of Appeal. The Court of Appeal also agreed with defendant that the requirement which prevented him from being present at any Courthouse, except for when he was scheduled for a hearing or subpoenaed as a witness, did impinge defendant's constitutional rights. The Court rewrote the provision to apply under certain specified circumstances because the condition denied defendant his right to access the Courts. *Id*. at 954.

L. Statute Of Limitations

1. In California, a Contempt proceeding initiated under ***PenC § 166*** is a misdemeanor. Although the statute of limitations for a misdemeanor is one year from the date of the offending event, and we previously used that statute of limitations for family law Contempts [refer to earlier versions of this Article for a complete, annotated discussion of this subject], we now have a specific statute of limitations for family law Contempts.

2. Effective January 1, 1995, the statute of limitations for family law matters is found in ***CCP § 1218.5*** and provide as follows:

a. Three years -- for failure to pay child, family or spousal support, three years from the date the payment was due.

b. Two years -- for any other order under the ***Family Code***, two years from the time that the alleged Contempt occurred.

3. Although the following cases were not repealed or mentioned in the legislative history (and although they still make good sense to this author), they probably no longer apply to family law Contempts because of the very specific statutory language contained in ***CCP § 1218.5***. However, these cases are included because this author believes their reasoning is still valid and the arguments should be advanced in the proper cases.

4. Where a failure to act may be regarded as a continuing violation of the Court's order, *laches* or a period of limitation may be no defense. ***Goodall v. Sup. Ct. (1918)*** 37 Cal.App. 723, 174 P. 924.

5. Failure to comply with the Court's order to pay when one has the ability to pay is a continuing offense "if it could be shown that at some later time he had such ability and then willfully refused to pay he could again be charged with Contempt as of such later date, but he could not be recharged respecting a date which had already been tried." ***Martin v. Sup. Ct. (1962)*** 199 Cal.App.2d 730; 18 Cal. Rptr. 773; *see also* ***Wright v. Sup. Ct. (People) (1997)*** 15 Cal.4th 521; 63 Cal.Rptr. 2d 322.

6. As a practical matter, although the case law as set forth in ***Goodall***, *supra*, at 723, and ***Martin (1962)***, *supra*, at 730, is still valid authority for the propositions therein contained, Courts in Los Angeles historically have not been receptive to such proceedings and they are generally dismissed.

7. Setting forth violations barred by the statute of limitations (although not as an alleged count of Contempt) accomplishes several legitimate purposes:

a. It provides evidence with regard to willfulness of the conduct based upon former actions.

b. It sets forth information for the Court with regard to sentencing, assuming there is an adjudication of Contempt.

c. It sets forth information with regard to probation conditions *(i.e.*, payment of arrearages), which will be relevant if there is an adjudication of Contempt.

d. It gives the Court insight as to the basic attitude of the Citee with regard to the particular orders in question.

M. Waiver Or *Estoppel*

1. Although not involving Contempt, ***Solberg (1985)***, *supra*, at 475 is a case involving an attempt to collect child support accrued under a judgment during the time the custodial parent was secreting the children. The Trial Court, on equitable grounds, quashed the writ of execution and that decision was affirmed on appeal, the Court holding that the wife was *estopped* from receiving the child support payments. The same *estoppel* argument should apply with greater force in a Contempt case. *See also* ***Szamocki v. Szamocki (1975)*** 47 Cal.App.3d 812, 818, disapproved on another ground in ***Comer***, *supra*; ***Kaminski v. Kaminski (1970)*** 8 Cal.App.3d 563, 565, disapproved on another ground in ***Comer***, *supra*; ***State of Washington ex rel. Burton v. Leyser (1987)*** 196 Cal.App.3d 451; ***In re Marriage of Paboojian (1987)*** 189 Cal.App.3d 1434.

2. Although it appears that the logic of the decision, although not the result, is tortured, in ***Moffat v. Moffat (1980)*** 27 Cal.3d 645, 283 P.2d 338, the custodial mother had deprived the father of his visitation and as part of a Contempt proceeding in an earlier matter, the Trial Court ordered child support suspended until there was compliance with the visitation order. Thereafter, the mother sought child support while continuing to deny visitation. The Trial Court ordered child support. The Supreme Court held that although the provisions of the prior Contempt adjudication were erroneous and an imposition of a penalty in excess of that prescribed by ***CCP § 1218***, since the Court had jurisdiction of the subject matter and of the parties, and since the mother did nothing to appeal or change the order, "the Trial Court erred in failing to give conclusive effect to the prevailing contempt order and in ruling that duty of support existed despite the denial of visitation." The effect of the foregoing was the reversal of the support order upon the basis that the prior order suspending child support was *res judicata*, even though beyond the jurisdiction of the Court, because it was not appealed.

a. The decision in ***Moffat*** is unusual and is the result of some extremely difficult facts. One should not rely upon that kind of reasoning in most cases.

3. Failure to allow visitation is not permissible justification for failure to pay child support. ***FC § 3556***. However, visitation interference may provide some basis for a defense of non-willfulness, albeit generally a weak, unsuccessful defense in the opinion of this author.

4. "The existence or enforcement of a duty of support owed by a noncustodial parent for the support of a minor child shall not be affected by a failure or refusal by the custodial parent to implement any rights as to custody or visitation granted by a court to the noncustodial parent." ***FC § 3556***.

5. "It is well established that a custodial parent's interference with the visitation rights of the noncustodial parent does not affect the latter's duty to pay child support." ***Solberg***, *supra*, at 479.

6. ***CCP § 1218*** specifically provides that being in Contempt, although barring other enforcement remedies, shall not bar enforcement of child or spousal support orders.

N. Double Jeopardy

1. It is Hornbook law that a person once placed in jeopardy by a criminal prosecution may not again be tried for the same offense. ***Hollar v. Sup. Ct. (1934)*** 140 Cal.App. 231, 35 P.2d 417.

2. However, the double jeopardy concept may effectively be different as to civil Contempts for nonpayment of Court ordered support because of the continuing obligation.

3. In ***Martin (1962)***, *supra*, at 737, the Citee had been charged with nonpayment of support in a Contempt proceeding on a prior occasion, that proceeding being dismissed after hearing. After the dismissal, another Order to Show Cause re Contempt was filed (alleging the same missed payment being due on the date stated in the order), and it was dismissed upon the grounds of double jeopardy. However, while affirming the ruling, the Court of Appeal stated:

> This ruling, however, does not mean that [citee] could not be charged with contempt for failure at some subsequent time to make these payments if it could then be shown that he, at such subsequent time, had the financial ability to pay them and had refused to do so. Failure to comply with the court's order to pay when one has the ability to pay is a continuing offense. That is to say, if it could be shown that at some later time he had such ability and then willfully refused to pay he could again be charged with contempt as of such later date, but he could not be recharged respecting a date which had already been tried.

a. **NOTE**: The ***Martin (1962)*** concept is that the ability to pay occurs on a date subsequent to the date alleged in the prior Contempt proceeding, thus no double jeopardy.

4. The ***Martin (1962)*** opinion is supported by the earlier decisions ***Application of Toor (1955)*** 131 Cal.App.2d 75, 76, 280 P.2d 79, and ***In re Earl (1933)*** 132 Cal.App. 445, 447, 22 P.2d 773.

5. It is interesting to note that since 1962 no appellate opinion has cited the ***Martin (1962)*** decision for its comments regarding double jeopardy. Thus, ***Martin (1962)*** remains the law of California on the subject. However, as previously noted, ***Martin (1962)*** arguments have not previously been well-received in the Central District.

6. The law with regard to double jeopardy relating to the crossover between criminal prosecutions and civil Contempt prosecutions was, and may still be, in a state of flux. As reasoned in ***People v. Derner (1986)*** 182 Cal.App.3d 588 and ***People v. Batey (1986)*** 183 Cal.App.3d 1281, ***Feiock***'s criminal Contempt logic probably now resolves this double jeopardy crossover issue once and for all based upon the penalty imposed. ***Hicks v. Feiock***, *supra*, at 624.

7. There were many cases previously decided which held that a Citee may not raise a double jeopardy defense where he has been tried under a ***Penal Code*** section arising out of the same facts, or tried for criminal Contempt under ***PenC § 166***, and is now being charged with civil Contempt. ***Ex Parte Karlson (1911)*** 160 Cal. 378, 117 P. 447; ***In re Morris (1924)*** 194 Cal. 63, 73, 227 P.2d 914; ***People v. Barry (1957)*** 153 Cal.App.2d 193, 201, 314 P.2d 531. This is still the law.

8. ***PenC § 657*** specifically states that "[a] criminal act is not the less punishable as a crime because it is also declared to be punishable as a Contempt."

9. The crossover problem was discussed in ***People v. Lombardo (1975)*** 50 Cal.App.3d 849, when the Court of Appeal determined that a ***PenC § 166*** prosecution would be barred by reason of a previously concluded ***CCP § 1209*** Contempt proceeding, which resulted in a finding of Contempt and an incarceration.

a. In ***Lombardo***, *supra*, at 849, the Court observed that the ***CCP § 1209*** Contempt was treated strictly as a criminal Contempt. The defendant was punished for failing to obey a lawful order of the Court, rather than the defendant having been given the more traditional civil Contempt punishment designed to compel compliance with Court orders which would not have been solely punitive in nature. The Court then concluded that where the ***CCP § 1209*** Contempt was punitive, and the elements of both proceedings are the same, double jeopardy was present. **Note**: This is ***Hicks v. Feiock*** thinking.

b. The ***Lombardo*** Court also noted the decisions in ***Morris*** and ***Barry***, and felt that its conclusion was not affected by the decisions in those cases.

10. Expanding on the logic of ***Lombardo***, the case of ***Derner*** , *supra*, at 591 held that "[i]f the Contempt proceeding was civil in nature the subsequent criminal prosecution of defendant did not constitute double jeopardy." But, if it was criminal in nature, double jeopardy bars the second prosecution.

11. ***Batey***, *supra*, at 1281, follows the same reasoning as ***Derner***, but has even more weight because it is a reversal of the Trial Court rather than an affirmation, as in ***Derner***. ***Batey*** has a lengthy well reasoned discussion of the history of the law in this area. The logic and reasoning of ***Hicks v. Feiock*** appears to reaffirm the ***Derner*** reasoning.

12. Several additional factors evaluated in other Contempt cases provide useful guidelines here:

a. Is the Contempt proceeding docketed as criminal and tried by the State rather than docketed as civil and pursued by a private party? ***Gompers,*** *supra*, at 418; ***In re Stewart (5th Cir. 1978)*** 571 F.2d 958, 963-964; ***Latrobe Steel Co. v. United Steel Workers*** (3d Cir 1976) 545 F.2d 1336, 1345, 93 L.R. R.M. (BNA) 2898, 79 Lab. Cas. (CCH) P. 11739; *compare* ***State v. Thompson (1983)*** 294 Ore 528, 659 P.2d 383, 387.

b. Does the Contempt order punishment which is absolute (*i.e.*, regardless of compliance) or conditional (*i.e.*, suspended if the Contemner complies with the order)? ***In Re Stewart (5th Cir. 1978)***, *supra*, at 964, (an unconditional fine); ***Latrobe Steel***, *supra*, at 1343.

c. Is the main purpose of the Court order to benefit the plaintiff by providing disincentives to the Contemner to continue defiance of the Court's order? If yes, it is a civil Contempt. ***Latrobe Steel***, *supra*, at 1344.

d. Do the circumstances indicate the private party plaintiff was seeking remedial relief to compel future compliance? ***Shakman v. Democratic Organization of Cook County (7th Cir. 1976)*** 533 F.2d 344, 350 cert. den. 429 U.S. 858 [50 L.Ed. 2d 135, 97 S.Ct. 156, 22 Fed.R.Serv.2d 19].

13. The end result of the foregoing should be a road map for defense counsel.

a. If defense counsel is concerned about subsequent criminal prosecution, counsel should attempt to have the family law Court make findings and statements in the sentencing portion of the case, so that it appears that the purpose of the sentence is by way of punishment and vindication of the authority of the Court; with such findings/statements there is a good double jeopardy argument at the criminal proceeding.

b. If representing the aggrieved party, and if criminal proceedings are contemplated, counsel should ask the Court to use only civil Contempt language, stating that the order is designed to accomplish future compliance with the Court's order, thus minimizing the double jeopardy argument.

14. Taking Order to Show Cause re Contempt off calendar.

a. Taking an Order to Show Cause re Contempt off calendar does not invoke the application of the double jeopardy rules. An off-calendar order is not equivalent to a dismissal and does not divest the Court of the jurisdiction. ***Mulvany v. Sup. Ct. (1986)*** 184 Cal.App.3d 906, 908.

15. Additionally, a conviction of Contempt is not considered a prior prosecution for a crime when attempting to ascertain whether an individual has committed successive crimes arising from the same course of conduct.

a. ***In People v. Kelley (1997)*** 52 Cal.App.4th 568, 60 Cal.Rptr.2d 653, Kelley was convicted of lewd conduct with the daughter of his recent wife. Within months of completing parole, defendant attempted to contact the child in hopes of "making amends." The girl obtained a restraining order against the defendant. Months later, defendant was convicted of stalking the young girl. The Court held that defendant's prosecution for stalking, following his conviction of Contempt for violating a restraining order, did not violate a statute prohibiting successive prosecutions for crimes arising from the same course of conduct.

b. In ***People v. Moses (1996)*** 43 Cal.App.4th 462, 50 Cal.Rptr.2d 665, the defendant was convicted of detention of a child with the intent to deprive another of right to custody of such child. The Court held that the Contempt for violation of the order granting mother custody of the child was not a lesser included offense of child detention.

O. *Corpus Delicti*

1. "The *corpus delicti* of a crime consists of two elements: the fact of the injury, or loss or harm, and the existence of a criminal agency as its cause." ***People v. Zapein (1993)*** 4 Cal.4th 929, 985-986, 17 Cal.Rptr.2d 122. "In any criminal prosecution, the *corpus delicti* must be established by the prosecution independently from the extrajudicial statements, confession or admissions of the defendant." ***People v. Wright (1990)*** 52 Cal.3d 367, 403-404, 276 Cal.Rptr. 731; disapproved on other grounds by ***People v. Williams (2010)*** 49 Cal.4th 405, 458. Such independent proof may consist of circumstantial evidence, ***People v. Jennings (1991)*** 53 Cal.3d 334, 364, 279 Cal.Rptr. 780, and need not establish the crime beyond a reasonable doubt. ***People v. Diaz (1992)*** 3 Cal.4th 495, 529, 11 Cal.Rptr.2d 353. The amount of independent proof of a crime required for this purpose is quite small; this quantum of evidence has been described as "slight" or "minimal." ***Jennings****, supra,* at 364.

2. In ***People v. Jones (1998)*** 17 Cal.4th 279, 70 Cal.Rptr.2d 793, the Appellate Court concluded that there was sufficient evidence to sustain the lower Court's finding that the prosecution met its burden of proof to establish a *corpus delicti* for a charge of oral copulation. The Court found that the critical evidence to support the *corpus delicti* was the fact that the victim was found ten feet from the roadway on a dirt median, shot in the head. There were bruises on her thighs, knees, legs and perineal area. She also exhibited injuries on her hands. Results from a sexual assault kit revealed the presence of semen inside her vagina, on her external genitalia, and in her rectum, although, none was found in her mouth. Experts testified that the lack of semen in her mouth could be due to the mouth's natural rinsing process. She was not wearing underpants, a brassiere or shoes when found. The Court held that this was enough circumstantial evidence to "permit a reasonable inference that a crime was committed." *Id.* at 287.

3. In a Contempt proceeding, the moving party must prove knowledge and willful violation of the Court order. Thus, following the *corpus delicti* rule of exclusion, where the Citee admits to another person that the Citee knew of the order, or violated the order, that admission may not be received in evidence until the moving party has otherwise established their *prima facie* case and there is independent evidence of the *prima facie* elements of the case. Once the *prima facie* case is established, the "hearsay admission" of the Citee is admissible.

4. For a discussion of the reasons for this exclusionary rule, which is primarily to protect against fabricated testimony, *see* ***People v. Amaya (1952)*** 40 Cal.2d 70, 75, 251 P.2d 324.

P. Offsets Due to Citee Are Not Matters Of Defense

1. In a Contempt prosecution, the fact that the payee is indebted to the payor Citee, is not a defense to the Contempt. ***Keck v. Keck (1933)*** 219 Cal. 316, 320, 26 P.2d 300.

Q. Mitigation Arguments

1. Punishment imposed by reason of a ***CCP § 1209*** Contempt may mitigate the sentence in a subsequent criminal Contempt. ***PenC § 658***; ***Ex Parte Karlson,*** *supra at* 378, 383.

2. In ***Bushman,*** the husband failed to make timely Court ordered *pendente lite* mortgage payments on the community business property. The Court of Appeal, in affirming the Contempt adjudication rejecting late payment as a mitigating factor to defeat the Contempt adjudication, said the issue was "whether the mortgage payments were debts within the definition of ***Bradley***, *supra*, at 509 and ***Fontana***, *supra*, at 1008 or whether they were and are part of and by way of spousal support." At page 181, quoting ***Hendricks*** the Court found the payments to be a form of "support accountability" and referred to ***FC § 2023***, allowing a Court to order payments directly to a creditor "upon a determination that payment of an obligation of a party would benefit either party or a minor child . . . ." ***Bushman***, *supra*, at 181; *see also* ***Hendricks***, *supra*, at 793.

3. Although late payment is an argument for mitigation of sentence, it is technically not a defense to the Contempt charges. Reconciliation is a mitigating factor, but not a defense. ***FC § 2026*** [***CC § 4381***].

4. *See* ***In re Marriage of Tamraz (1994)*** 24 Cal.App.4th 1740, where, after a purported reconciliation of what may have been seven years, the Court of Appeal affirmed a support order based on

a marital settlement agreement entered into in the year prior to the claimed reconciliation. Although it does not appear that a request for child support during the reconciliation period was made, and the language of the marital settlement agreement required a writing to terminate it (and there was none), this case may provide some point for argument under a similar fact situation. Keep in mind ***Auto Equity Sales V. Sup. Ct. (1962)*** 57 Cal.2d 450, which allows you to "cite anything that supports your position."

5. ***PenC § 1385*** permits the Court, on its own motion, to dismiss an action in furtherance of justice, an argument which may often be appropriate when strong mitigating factors are present.

R. Credit For Retirement Or Disability Pay

1. "[P]ayments for the support of the child made by the federal government pursuant to the Social Security Act or Railroad Retirement Act because of the retirement or disability of a non-custodial parent and transmitted to the custodial parent each month shall be credited toward the amount ordered by the court to be paid for that month by the non-custodial parent for support of the child unless the payments made by the federal government were taken into consideration by the court in determining the amount of support to be paid by the non-custodial parent." ***FC § 4504*** [Emphasis added.]

2. Thus, contrary to all other rules, automatic credit for payments is provided under ***FC § 4504***.

3. To avoid the effect of ***FC § 4504***, if Social Security or Railroad Retirement payments are contemplated, make specific reference in your order as to how those payments are to be treated and whether or not they were taken into consideration by the Court in fixing the support order.

S. Bankruptcy

1. Bankruptcy automatically stays all enforcement proceedings against the bankrupt party. Pursuant to the automatic stay orders under the Bankruptcy Act, it would be improper to attempt to enforce orders against the bankrupt party relating to obligations incurred prior to the date of the filing of the bankruptcy petition, notwithstanding the fact that the order is for child or spousal support.

2. The automatic stay order does not apply to support obligations which accrue after the date of the filing of the bankruptcy petition.

3. Application for release from the automatic stay can be made to the bankruptcy Court, and such applications are frequently granted (upon proper showing) with regard to the collection of child and spousal support obligations, obligations which are not normally dischargeable under the Bankruptcy Act.

T. Unemployment – No Longer an Easy Defense

1. It used to clearly be the law that if the Citee has no assets or income, the fact that the Citee refuses to seek available employment could not support a Contempt adjudication. Prior thinking was that the Court "cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for his failure so to do." ***In re Jennings (1982)*** 133 Cal.App.3d 373, 383; ***Ex Parte Brown (1955)*** 136 Cal.App.2d 40, 43, 288 P.2d 27. This is no longer the law.

U. Inability to Comply, Including Having No Income With Which to Pay Support, Is Now an Affirmative Defense

1. The Supreme Court in ***Moss*** forever changed that aspect of the law with regard to child support.

2. ***Moss,*** one of the more important family law Contempt cases to be decided in a very long time, contains many of the thoughts of the current California Supreme Court on the issue pertaining to Contempts and family support obligations. Some of these thoughts, as contained in the opinion, are set forth below for the guidance of the reader:

> Family support obligations are not ordinary debts subject to the constitutional prohibition of imprisonment for debt.
>
> A court may . . . punish by imprisonment as a contempt, the willful act of a spouse (or former spouse) who, having the ability and opportunity to comply, deliberately refuses to obey a valid order to pay alimony or an allowance for the support of the other spouse (or former other spouse). It is held that the obligation to make such payments is not a 'debt' within the meaning of the constitutional guaranty against imprisonment for debt.
>
> A contempt sanction or criminal penalty may be imposed for violation of a support order that is based on earning capacity when inability to comply with the order is caused in whole or in part by the parent's willful failure to seek and accept employment.
>
> Although citee argued that all he need do is raise a reasonable doubt as to his ability to pay, [the] court disagreed, saying: 'Ability to comply with a support order is not an element of the contempt which must be proven beyond a reasonable doubt by the petitioner. It is an affirmative defense which must be proven by a preponderance of the evidence by the alleged contemner.' *Id.* at 424.

3. The ***Moss*** Supreme Court very clearly noted prior case law permitting the assignment of the burden to prove an affirmative defense by a preponderance of the evidence, to a defendant in a criminal proceeding, and thus to an alleged Contemner in a criminal Contempt proceeding as being constitutionally permissible. ***Martin v. Ohio (1987)*** 480 U.S. 228.

4. The ***Moss*** Supreme Court noted that the California Legislature determined that it was appropriate to make the inability to pay - both with regard to present financial inability and the inability to obtain remunerative employment to enable compliance with later payment orders – an affirmative defense, the burden of proof thereby falling upon the defendant/Citee. The Supreme Court noted that the Legislature determined that proof of ability to pay is not an element of a Contempt for failure to comply with a child support order because it enacted ***CCP § 1209.5***, which made this an affirmative defense, not an element of the *prima facie* case.

5. ***CCP § 1209.5*** provides that,

> When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his or her child, proof that the order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof that the parent did not comply with the order is *prima facie* evidence of a contempt of court.

6. In ***Moss***, the United States Supreme Court confirms that whether ability to comply is to be an element of the Contempt or an affirmative defense, or whether ***CCP § 1209.5*** shifts the burden of persuasion or results in the imposition of the burden of producing evidence showing inability to comply, are questions of state law. ***Hicks v. Feiock***, *supra*, at 624, 629.

7. The ***Moss*** Supreme Court then went on to say that, "ability to pay has traditionally been considered an affirmative defense in Contempt proceedings."

8. The ***Moss*** Supreme Court noted that ***CCP § 1209.5*** was enacted in response to ***Warner v. Sup. Ct. (1954)*** 126 Cal.App.2d 821, 273 Cal.Rptr. 89, which held that ability to pay was an element of Contempt that had to be alleged in the affidavit and proved by the petitioner in Contempt proceedings, commenting that the Legislature's purpose in enacting the section was to nullify ***Warner*** insofar as it made ability to pay an element of the *prima facie* case. "Once the contempt is proved, any excuse or justification, such as ability to pay, is a matter of defense. We must adhere to this plain meaning of the statute." ***Moss***, *supra*, at 427.

9. The ***Moss*** Supreme Court also agreed with the ***Feiock*** Court's observation that this allocation of the burden of proof in a child support Contempt proceeding is reasonable.

10. However, the ***Moss*** Supreme Court disapproved of that portion of the holding in ***Feiock,*** insofar as it placed the burden on petitioner to prove that nonsupporting parent had ability to pay, stating:

> We see no constitutional impediment to the legislature's creation of a contempt offense for failure to support a child in which ability to pay is not an element. The ability of the parent to pay the amount of support ordered has been determined by the court which made the order. (***FC § 4050,*** *et seq*.) The nonsupporting parent has been given the opportunity to offer evidence on the question and to challenge the order in the appellate court. He or she is also afforded the opportunity to seek modification of the order if circumstances change making compliance difficult or impossible. (***FC § 3651***, ***FC § 3680***, ***FC § 3692*** and ***FC § 4010***). The contempt penalty for failure to comply with the support order is limited to five days in jail and a $1,000 fine for each monthly payment that is not made in full. (***CCP § 1218***, ***CCP § 1218.5***) The offense is comparable to a strict liability regulatory or public welfare offense in this regard (citation omitted), but unlike some regulatory offenses, the contemner may escape liability by establishing an affirmative defense. Under these circumstances the omission of an element of willfulness does not offend due process. *Id.* at 428.

11. It is also interesting to note that the ***Moss*** Supreme Court stated that a person could be found in Contempt for not seeking "available employment commensurate with the parent's skills and abilities" (***Moss***, *supra,* at 405), which apparently means that a person who accepts menial employment can be jailed for not seeking higher paying employment if that person has the ability to do so. Based upon the statements and comments of the Supreme Court in ***Moss***, a person who seeks and accepts employment that they know will not fulfill their child support obligation should be held in Contempt.

a. ***Ivey,*** although a child support case, establishes that "ability to pay" is not an element of Contempt "where the order is a family law order for payment of support, or attorneys fees and the Family Law Court has already determined the ability to pay." ***Ivey***, *supra,* at 798. "[I]nability to pay is an affirmative defense which must be proven by the alleged contemner." ***Ivey***, *supra,* at 798, 799. Ability to pay only becomes an element of the Contempt when the alleged Contempt "occurs long after the underlying order was entered." *Id.* at 799.

b. At least for child support, it is no longer the law that Contempt will only lie if the Citee has the actual ability to pay, as contrasted with the ability to work, and thus, the presumed ability to pay. ***Jennings***, *supra*, at 373, which was the prior law about unemployed Citees, falls as to child support Contempts on the holding of ***Moss.***

c. For child support orders, if the order was based upon ability to pay, the logic and holding of ***Moss*** will be all that is required to establish the *prima facie* case.

d. It seems to this author that the logic of ***Moss*** should apply to spousal support as it is clear that the public policy [***FC § 2100(a)***] of California is to "ensure fair and sufficient child and spousal support awards" and the payment of those awards. There is no logical difference between the obligation to pay child support or spousal support. Would different treatment of child support and spousal support be a denial of equal protection?

Moss, at 416, says "Working to earn money to support a child is not involuntary servitude any more than working in order to pay taxes. Failure to do either may subject one to civil and criminal penalties, but that compulsion or incentive to labor does not create a condition of involuntary servitude." Why is spousal support any different?

Moss, in fn. 4 at 405, expressly says "[W]e have no occasion to consider whether ***Todd*** should be overruled in toto." You be the one to get the Supreme Court to do it!

e. Long before ***Moss*** it was held that if a Citee voluntarily placed it out of their power to perform, such as voluntarily terminating their employment, the Citee could be held in Contempt. ***Bailey v. Sup. Ct. (1932)*** 215 Cal. 548, 11 P.2d 865. But prior to ***Moss***, no case had imposed an affirmative duty to obtain employment or prove why you had not done so.

f. It is no longer the law that a finding of Contempt based upon capacity to earn, rather than actual ability to pay, violates federal and state constitutional prohibitions against involuntary servitude. ***Application of Toor,*** *supra,* at 75; ***Jennings***, *supra*, at 373, which held to the contrary, are no longer good law.

g. Not only may the Court order child support based upon a spouse's ability to earn rather than upon actual income, but evidence indicating bad faith behavior designed to avoid work to avoid the payment of child support is no longer necessary to support a Contempt adjudication. ***In re Marriage of Williams (1984)*** 155 Cal.App.3d 57, requiring such a finding, is no longer good law.

h. If a Citee has valuable assets which are exempt from execution, those assets can be sold and the proceeds used to comply with the Court orders. If the Court determines that such a sale is "reasonable" under the circumstances, then such a determination can support a finding of "ability" to comply with the order. ***Bailey***, *supra*, at 548.

i. On the issue of inability to comply when performance was due and subsequent ability to comply, please refer to ***Ex Parte O'Leary (1932)*** 127 Cal.App. 183, 15 P.2d 761, which holds that the refusal to pay, when an individual has the subsequent ability to do so, is a continuing offense and punishable by Contempt.

V. Dismissal of Appeal If Party Is In Contempt

1. The Court of Appeal has the inherent power to dismiss an appeal by any party who has refused to comply with the orders of the Trial Court. ***TMS, Inc. v. Aihara (1999)*** 71 Cal.App.4th 377, 83 Cal.Rptr.2d 834. In ***TMS,*** the Court of Appeal held that an appeal by judgment debtors from the judgment in favor of plaintiff may be dismissed for the willful failure of the judgment debtors to comply with a Court order to answer post judgment interrogatories.

2. A judgment of Contempt is not required as a prerequisite to the Court of Appeal exercising its power to dismiss an appeal by any party who has refused to comply with orders of the Trial Court. ***TMS***, *supra*.

X. DISCOVERY

A. Does ***PenC §§ 1054*** *et seq*. apply to Contempt proceedings or does the Civil Discovery Act apply? It is the opinion of this author that ***PenC § 1054*** does not apply in our Contempt cases. ***PenC § 1054*** applies only to criminal prosecutions under the ***Penal Code***, a statutory scheme for discovery for "civil Contempts" is contained in the ***Code of Civil Procedure***.

1. On this issue there are two lines of case authority: (a) delinquency cases which do not apply ***PenC §§ 1054*** *et seq.* to juvenile Contempt proceedings *per se*, but instead, allow the Court discretionary authority to order discovery based on good cause shown, and (b) cases involving the ***Sexual Violent Predator Act (SVPA)*** and Section 1368 competency proceedings, which allow civil discovery.

2. One of the enumerated purposes of ***PenC §§ 1054*** *et seq*. is "[t]o provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." [emphasis added].

3. Pursuant to ***PenC § 1054.1***:

> [T]he *prosecuting* attorney shall disclose to the *defendant* or his or her attorney all of the following materials and information, if it is in the possession of the *prosecuting* attorney or if the *prosecuting* attorney knows it to be in the possession of the investigating agencies: (a) The names and addresses of persons the *prosecutor* intends to call as witnesses at trial. (b) Statements of all *defendants*. (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. (e) Any exculpatory evidence. (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

4. In ***Joe Z. v. Sup. Ct.* (1970)** 3 Cal.3d 797, the Supreme Court addressed the issue of whether "a juvenile is entitled to invoke pretrial discovery in delinquency proceedings in juvenile court." *Id*. at 801. The Court recognized that "the provisions of the Welfare and Institutions Code . . . are silent regarding this question, and there appear to be no reported decisions in California which have considered it." *Ibid*.

a. The Court, in ***Joe Z*** declined to apply the "discovery procedures generally applicable in 'civil' proceedings" to delinquency proceedings, even though they recognized that the ***Code of Civil Procedure*** makes civil discovery applicable to special proceedings of a civil nature. ***Joe Z***., *supra*. Instead, the Court opined that "the quasi-criminal nature of juvenile proceedings" often involve "the possibility of substantial loss of personal freedom . . . ." *Id*. [citations omitted]. Thus, civil discovery would hinder the "need [in quasi-criminal proceedings] for expeditious and informational adjudications . . . ." *Id*. [citations omitted].

b. Due to the quasi-criminal nature of delinquency proceedings, the Court concluded that "juvenile courts should have the same degree of discretion as a court in an ordinary criminal case to permit, upon a proper showing, discovery between the parties." ***Joe Z.***, *supra* at 801-802. The Court stated that "[a]uthority for such discovery derives not from statute but from the inherent power of every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of truth." *Id*. [citations omitted].

c. The Court concluded that upon a showing of "good cause," the defendant should be allowed to inspect the evidence. *Id.* at 805-806.

5. In ***Robert S. v. Sup. Ct.* (1992)** 9 Cal.App.4th 1417, the First District Court of Appeal declined to extend ***PenC §§ 1054** et seq.* to delinquency proceedings because the People conceded that the provision was only applicable in a "criminal case." *Id*. at 1420-1421.

a. The Court pointed out that the language in the ***PenC §§ 1054** et seq*. referred to terms such as: "prosecuting attorney," "defendant," and "jury" terms inapplicable to delinquency proceedings. ***Robert S.***, *supra* at 1421-1422. The Court stated that to interpret the statute as applying to juvenile

proceedings would be inconsistent with the rule of statutory construction that gives "precise and technical" meanings to words in statutes. *Id*. at 1420-1421.

b. Nevertheless, the Court concluded that "the juvenile court had the discretionary authority to make a discovery order consistent with ***PenC § 1054*** *et seq.*" ***Robert S.***, *supra* at 1422. Citing to ***Joe Z.***, the Court concluded that pretrial discovery may be permitted on a showing of good cause. *Id.*

6. However, in ***People v. Sup. Ct.*** **(Cheek)** ***(2001)*** 94 Cal.App.4th 980, the Sixth District Court of Appeal held that the Civil Discovery Act is applicable to SVPA proceedings even though "[t]he SVPA is silent with regard to discovery rights . . . ." *Id*. at 987-988. The Court stated "[A]n SVPA commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action. As in other special proceedings of a civil nature, the Civil Discovery Act is applicable." *Id*. at 988. [citations omitted].

a. The Court noted further that "the right to civil proceedings of a civil nature remains subject to the trial court's authority to manage discovery." ***People v. Sup. Ct. (Cheek)***, *supra* [citations omitted]. It also recognized that in a SVPA proceeding, the Trial Court "must keep in mind both the narrow scope of permissible discovery and the need for expeditious adjudication." *Id*. at 991. However, the Court found that "[t]he Civil Discovery Act provides the trial court with the authority and the procedures for management of discovery, so that discovery can serve its purpose in SVPA proceedings. Recognizing that discovery procedures are subject to misuse, the Civil Discovery Act authorizes the trial court to limit discovery where appropriate." *Id*. *See also* ***CCP § 2019.030***.

b. Furthermore, the Court declined to follow the Supreme Court's holding in ***Joe Z.***, stating that juvenile Court proceedings are "quasi-criminal" and SVPA proceedings are "special proceedings of a civil nature – to which the Civil Discovery Act applies." ***People v. Sup. Ct.(Cheek)***, *supra* at 995.

7. In ***Baqleh v. Sup. Ct.*** **(2002)**100 Cal.App.4th 478,485, petitioner argued that a mental examination in a competency hearing granted by the Trial Court was in error because the pretrial discovery was "not authorized by any applicable statute." He also argued that such an examination violated his Fifth and Sixth Amendment rights because"[e]ssentially, Courts have applied constitutional protections ordinarily available only in criminal proceedings to special proceedings of a civil nature, such as juvenile court and some civil commitment proceedings. *Id.* at 485, 495-496. [citations omitted].

a. There, the First District Court of Appeal pointed out that the "California courts have confusingly characterized the Section 1368 hearing (and similar civil commitment proceedings) both as criminal and as civil 'depending on the right or duty in question.'" ***Baqleh,*** *supra, at* 494 quoting ***People v. Samuel (1981)*** 29 Cal.3d 489,496 fn. 3. The Court held that, "subject to constitutionally mandated use limitations . . ., these provisions of the Civil Discovery Act [***CCP*** **§§ 2016-2017, 2019,** and **2032**] apply to section 1368 hearings." *Id.* at 491.

b. The Court declined to follow the Supreme Court's holding in *Joe Z.* Instead, the Court stated that,

> unlike a delinquency proceeding in juvenile court, a section 1368 hearing is a collateral proceeding that cannot directly result in the functional equivalent of a

> criminal adjudication of guilt . . . petitioner has not and cannot show that requiring him to submit to examination by a prosecution expert would or could result in a constitutionally impermissible abuse of discovery. . . . ***Baqleh***, *supra*, at 495.

Furthermore, the Court held that "an accused person cannot on the basis of the Fifth Amendment refuse to submit to a mental examination by a prosecution expert when properly ordered to do so in connection with a Section 1368 hearing." *Id.* at 502.

8. Applying the holdings of the above referenced cases to Contempt proceedings, it is the opinion of this writer that ***PenC* § 1054** *et seq.* would not apply to Contempt proceedings (for the reasons stated in ***Robert S.***), but some type of discovery may be appropriate.

a. Contempt proceedings, as were the proceedings in ***Joe Z***. and ***Robert S***, have been referred to as being "quasi-criminal"; thus, upon a showing of good cause, limited discovery could, arguably, be permitted.

b. The law on the discovery issue is not clear. Applying the holding of ***People v. Sup. Ct. (Cheek)***, civil discovery may be warranted in Contempt proceedings which involve "[d]isobedience of any lawful judgment, order, or process of the court." *See* ***CCP §1209***. Due to the fact that this provision is located in Part 3 of the ***Code of Civil Procedure*** which is entitled, "Special Proceedings of a Civil Nature," civil discovery may be warranted as it was in the Sexual Violent Predator Act case, ***People v. Sup. Ct. (Cheek)***, and the competency hearing case, ***Baqleh***.

c. Depending on the facts of your Contempt and the nature of the relief sought, you should consider a motion to limit discovery initiated by the Citee or prosecuting party.

XI. TRIAL BY JURY - NO LONGER A VEXING PROBLEM

A. Right to Jury Trial? It has long been said that there is no right to trial by jury in Contempt cases and that continues to be a correct general statement of the law.

1. Although this is a generally correct statement of the law, as predicted in the earlier versions of this Article, jury trials will now be required in certain family law Contempts. Be careful not to fall into this trap.

2. In California, if the punishment that may result from the Contempt trial is imprisonment for 180 days or more, ***Kreitman (1995)***, *supra*, at 750, holds that the Citee has a right to a jury trial. However, the United States Supreme Court has a different thought about aggregating Contempts and total punishment. See **Section K.** below.

3. Although it is clear that jury trials are now available in Contempt cases if the Court may consider a potential punishment of 180 days or more, a more liberal judicial view may one day expand the current case definitions and say that it is "serious punishment" to spend any time in jail. Logic tells this author that even 30 days in jail is "serious punishment" and the jury trial argument should at least be argued – no harm in asking and making the argument.

B. Constitutional Rights. The law in California had long been that a Citee in Contempt proceedings initiated under ***CCP § 1209*** has no constitutional right to a trial by jury. ***Bridges v. Sup. Ct. (1939)*** 14 Cal.2d 464, 94 P.2d 983; ***H.J. Heinz Company v. Sup. Ct. (1954)*** 42 Cal.2d 164, 266 P.2d 5; ***Morelli (1969)***, *supra*, at 350; ***CCP § 1217***.

C. Penalty. A charge under ***CCP § 1209*** is considered a "petty offense," the maximum penalty being a fine of $1,000 or imprisonment not exceeding five days, or both, on each count. ***CCP § 1218***.

D. Multiple Counts May Result in Jury Trial? The decisions of the United States Supreme Court in ***Duncan v. Louisiana (1968)*** 391 U.S. 145, 88 S.Ct. 1444, and ***Bloom v. Illinois (1968)*** 391 U.S. 194, 88 S.Ct. 1477, requiring jury trial where the Citee may be subjected to "substantial" punishment, have heretofore been held not to apply to ***CCP § 1209*** proceedings. ***Pacific Telephone and Telegraph Company v. Sup. Ct. (1968)*** 265 Cal.App.2d 370, 373. Those decisions are now inapplicable to family law cases by the clear holding by the California Court of Appeal, Fourth Appellate District, in ***Kreitman***, *supra*, at 750. However, the United States Supreme Court decision in ***Lewis v. United States (1996)*** 116 S. Ct. 2163; 1351 L.Ed.2d 500 discussed at the end of this section, may again change the law in this regard and eliminate the consideration of an aggregate sentence on multiple counts as determinative of the jury trial issue.

E. Does Length of Sentence Determine Right to Jury Trial? The writing was "on-the- wall" after ***Mitchell v. Sup. Ct. (1989)*** 49 Cal.3d 1230. The predicted effect of that decision on family law Contempt cases and on the jury trial issue came to fruition in ***Kreitman***, *supra*, at 750.

1. In ***Mitchell (1989),*** *supra*, at 1230, the defendants were charged with Contempt under a Red Light Abatement Law which provided for a $1,000 fine and a six month jail sentence for each offense. Defendants were convicted on multiple counts and sentenced concurrently to an aggregate of six months in jail. The brothers had requested and were denied a jury trial.

2. The California Supreme Court observed that the ***Mitchell*** Contempts were criminal (punitive) in nature because they were designed to punish for past acts, not to coerce compliance in the future, and the punishment had a severity equivalent to a misdemeanor, rather than the "relatively petty sanction imposed for other forms of 'civil' Contempt."

a. Ultimately addressing the issue as to whether the right to a jury trial applied when the prison sentence in a multiple count Contempt exceeds six months, the ***Mitchell*** Court concluded that "when the state seeks to punish a contempt of court with a substantial sentence comparable to a misdemeanor sentence, the contempt should be treated as a misdemeanor and the alleged contemner afforded a jury trial" (***Mitchell,*** *supra*, at 1244), thereupon annulling the Contempt adjudication.

b. The jury trial issue is avoided if the Contempt is declared to be a civil Contempt with no jail sentence sought.

c. The jury trial issue should be avoided by promptly filing your Contempts and not seeking long jail sentences.

d. The jury trial issue appears to be avoided if the possible Court-contemplated sentence, assuming the Contempt is sustained, is less than could be imposed for a misdemeanor, although what appears to be clear now is that the cutoff point is under 180 days:

> The salient fact remains that the contempts arose from a single trial, were charged by a single judge, and were tried in a single proceeding. . . . A contemner sentenced to more than 180 days in jail has a federal constitutional right to be tried by a jury. . . . in the absence of legislative authorization of serious penalties for contempt, a state may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months . . . We also disagree with the petitioner's argument that because he is faced with the possibility of a sentence greater than six months he is automatically entitled to a jury trial. If the court proceeds to trial on contempt charges without a jury, and the defendant does not expressly waive his or her right to a jury trial, the maximum sentence the court may impose is 180 days. Should the court prefer the option to impose a longer sentence, the court must advise defendant of the right to a jury trial and proceed with a jury absent an express waiver. ***Kreitman***, *supra,* at 750. [Citations to other cases omitted.]

e. The ***California Constitution*** guarantees a right to trial by jury on all criminal prosecutions for all criminal offenses above the grade of infraction. ***Mills v. Municipal Court (1973)*** at 298, fn. 8; ***Cal. Const., Art. I, § 16***. An infraction is not punishable by imprisonment. ***Mitchell (1989),*** *supra,* at 1241.

(1) Does this mean that any time there is the possibility of a jail sentence, there is a right to a jury trial?

(a) The answer, for the moment, appears to be "no." However, that does not mean that will be the correct answer next year, as the correct answer was changed by the holding in ***Kreitman*** and it could be changed again.

f. The ***Mitchell*** decision suggests that a ***CCP § 1209*** Contempt does not trigger the automatic right to a trial by jury.

g. ***Kreitman***, *supra*, at 750, now makes it clear, if the contemplated sentence is 180 days or more, the answer is definitely "yes." The Citee has the right to a jury trial.

h. Although the Supreme Court has not yet specifically dealt with the obvious issue that arises, and which will cause us all the problems, when there are multiple counts of Contempt (as we often see) which raise the stakes in the total Contempt hearing to 180 days or more of possible jail time, the Court of Appeal has now spoken on that issue in an opinion which appears reasonable, logical and in conformity with at least the minimum requirement of constitutional due process as told to us by the United States Supreme Court. The California Supreme Court has never addressed the multiple count issue, although they have told us that there is no constitutional right to a jury trial in Contempts punishable only with the five (5) day term authorized by ***CCP § 1218***; there is no reason to think that the Supreme Court would have a different view than the justices in ***Kreitman***, *supra*.

F. Federal Law. In the federal system, as discussed in ***Batey***, *supra*, at 1281, the Court must view the proceedings as a whole. If that is now done at the outset, rather than with hindsight, as in ***Batey***, the Court will always be faced with the possibility of long jail sentences in multiple count Contempts. The concept of duration of the sentence was one of the apparent motivating factors in ***Mitchell (1989),*** *supra,*

at 1230, although that does not seem to be one of the factors which requires consideration under the federal concept.

1. As stated in ***Batey***, *supra*, at 1285,

> Civil contempt, as contrasted with criminal contempt, has traditionally been viewed as non-punitive, for its purpose is only to compel compliance with a lawful order of the court . . . Federal law is to the same effect. "Under the sanction test if the purpose of the relief is to compel the respondent to comply or compensate the petitioner for the refusal, the contempt proceeding is civil in nature. If the purpose is to punish the respondent and vindicate the court, the proceeding is criminal." ***Batey***, *supra,* at 1285.

2. ***Hicks v. Feiock***, *supra*, at 624, now clearly applies this test to family law Contempts.

G. When to file. Thus, keeping the ***Mitchell*** language and the concepts of ***Batey***, it is important to file a Contempt before there are so many counts that the potential sentence exceeds six months, or to be super cautious, even one month, to keep the risk of a constitutional right to a jury trial to a minimum.

H. Considering "Contemplated Sentence." ***Kreitman*** has made it clear that the jury trial issue is dependent not on the possible sentence, but on the contemplated sentence. ***Kreitman***, *supra*, at 755. How does one determine that at the outset of the Contempt proceeding? Clearly, statutory maximums would control the outside limit.

1. Thus, in a multi-count Contempt, where the possible sentence is over 180 days, it appears that to avoid a jury trial, unless there is the advisement and waiver of the right to trial by jury, the Court must announce that it will not impose a jail sentence of over 179 days. In reality, a sentence of 180 days or more is almost never an issue.

I. Limiting Sentence to Avoid Jury Trial. If faced with the problem of a request for a jury trial, assuming that a jury trial is not desired, counsel can ask the Court that the limit of punishment for the entire Contempt be no more than five days of jail time, a $1,000 fine and less than a total of 180 days jail time. Those penalties already have the California Supreme Court's approval for jury avoidance in ***Mitchell (1989),*** *supra,* at 1230.

1. The net result of a Contempt adjudication, even if only five days in jail, will probably be the same since the motivation really is, or should be, persuading the Contemner that they do not want to violate the Court order again and run the risk of future incarceration. The booking process is probably the most horrific, degrading experience most "ordinary" people could ever go through and it will be something that they will probably be extremely motivated to avoid again happening to them.

J. Effect of Voluntarily Limiting Sentencing. Query: Can the constitutional right to a jury trial be taken away by agreeing to seek a lesser sentence on conviction? ***Mitchell*** seems to say "yes," but only if that position is made clear when the trial begins.

K. Effect of Aggregate Sentencing on Multiple Counts. In 1996 the United States Supreme Court addressed the issue of sentence on multiple counts. The 1996 decision in ***Lewis***, *supra,* may impact

the right to a jury trial in family law Contempt actions. This case presented a question of whether a defendant who is prosecuted in a single proceeding for multiple petty criminal offenses has a constitutional right to a jury trial where the aggregate prison term authorized for the offenses exceeds six months. The Supreme Court concluded that no jury trial right exists where a defendant is prosecuted for multiple petty offenses, even if the aggregate of the prison terms exceeds six months, because they said the issue is the stature of each single offense charged. Since we know our ***CCP § 1209*** Contempts are individually not jury trial cases, it appears under the United States Supreme Court's ***Lewis*** decision, we would never be required to have jury trials. Does ***Lewis*** bind our Courts? Probably not, since it is not a rule of constitutional due process and the states are free to expand these rights. Will our Courts follow the majority opinion in ***Lewis***? Although it seems that following ***Lewis*** would be expedient and would avoid a problem in prosecuting multiple count Contempts, ***Kreitman*** tells us the rule in California is different. Most Trial Courts, being conservative, have seemed to take the position that if the possible sentence is 180 days or more, then a jury trial will be offered.

PRACTICE POINTER: Do not delay filings. The penalties increase with each adjudication, why wait and risk a possible jury trial or dismissing some valid counts of Contempt.

XII. PENALTIES FOR CONTEMPT - SENTENCING

A. Statutory Penalties Particularly For Family Law Contempts

1. Effective January 1, 1994, there are specific rules regarding punishment upon an adjudication of Contempt. The law was revised to again <u>permit</u> incarceration at the first Contempt adjudication. The revisions to ***CCP §1218***, pertaining to family law Contempts are:

a. ***CCP § 1218(a)*** provides that the Court shall determine whether the person charged is guilty of the Contempt charged and if adjudged guilty of the Contempt, a $1,000 fine may be imposed <u>and/or</u> five days in jail may be ordered for each count of Contempt. [Jail is permissive.]

b. ***CCP § 1218(c),*** which is the specific section relating to family law Contempts, provides that the Court <u>shall order</u> the following upon the finding of a Contempt:

(1) Upon a first finding of Contempt, community service for up to 120 hours (five days), <u>or</u> to be imprisoned for up to 120 hours (five days), for each count of Contempt. [Again, permissive.]

(2) Upon the second finding of Contempt, community service for up to 120 hours (five days), <u>in addition</u> to ordering imprisonment of the Contemner for <u>up to</u> 120 hours (five days) for each count of Contempt. [Mandatory term discretionary.]

(3) Upon the third or any subsequent finding of Contempt, **<u>both</u>** of the following [mandatory]:

(a) A term of imprisonment for up to 240 hours (ten days), <u>and</u> to perform community service for up to 240 hours (ten days), for each count of Contempt.

(b) Pay an administrative fee, not to exceed the actual cost of the Contemner's administration and supervision, while assigned to a community service program pursuant to these provisions.

(4) The Court shall take the parties' employment schedules into consideration when ordering either community service or imprisonment, or both.

c. Sentencing. See **Section XIV** in this Article.

d. The following paragraph remains in ***CCP § 1218(b)*** and specifically applies to family law Contempts:

> No party, who is in contempt of a court order or judgment in a dissolution of marriage or legal separation action, shall be permitted to enforce such an order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. The restriction shall not affect nor apply to enforcement of child or spousal support orders.

e. ***PenC § 1203.1b*** (which may not apply to a ***CCP § 1209*** Contempt) authorizes a Court to impose fines when it suspends the imposition or execution of sentence and grants probation. The statute specifically authorizes the recoupment of certain costs incurred for probation and the preparation of pre-plea or pre-sentence investigations and reports on the defendant's amenability to probation. The section requires determinations of amount and ability to pay, first by probation officer; and, unless the Court makes a "knowing and intelligent waiver" after notice of the right from the probation officer, a separate evidentiary hearing and determination of those questions by the Court.

(1) Failure to object at sentencing to noncompliance with the probation fee procedures of ***PenC § 1203.1b*** waives the claim on appeal. ***People v. Valtakis (2003)*** 105 Cal. App.4th 1066, 130 Cal. Rptr. 2d 133.

f. Attorneys Fees

> [A] person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt. . . may be ordered to pay the party initiating the contempt proceeding the reasonable attorney's fees and incurred by this party in connection with the contempt proceeding. ***CCP § 1218(a),*** last sentence of the paragraph.

Please refer to **Section V.C.** in this Article for a more detailed discussion about attorneys fees for the prevailing party.

B. Multiple Convictions

1. Commitment for multiple convictions may run concurrently or consecutively. ***Powers v. Sup. Ct. (1967)*** 253 Cal.App.2d 617, 618.

C. No Child Support Reduction Permitted as Part of the Sentence

1. The Court has no power to reduce child support as part of the Contempt adjudication or sentencing. ***Smith v. Sup. Ct. (1977)*** 68 Cal.App.3d 457, 465.

a. ***Smith*** cites the rationale of former ***CCP § 1694*** (applicable only to proceedings under the Revised Uniform Reciprocal Enforcement of Support Act ("URESA") which, as of now, is codified in ***FC § 3556*** and reads:

> The existence or enforcement of a duty of support owed by a noncustodial parent for the support of a minor child is not affected by a failure or refusal by the custodial parent to implement any rights as to custody or visitation granted by a court to the noncustodial parent.

This provision has now also become a part of the Family Law Act, although the language is slightly modified. *See* ***FC § 3556***.

b. Although not a Contempt case, in ***In re Marriage of Roesch (1978)*** 83 Cal.App.3d 96, the Court held that a Court cannot condition the payment of child support upon the custodial parent's non-interference with the other parent's right of visitation.

c. Although the Court in ***Moffat*** dismissed a Contempt for nonpayment of child support because of an egregious denial of visitation and concealment, the Court affirmed the concept that the payment of child support should not be tied to the granting or denial of visitation.

d. The rationale of the ***Smith v. Sup. Ct.***, ***Roesch*** and ***Moffat*** cases is that child support is for the benefit of the child and provides for the necessities of life for a child; the child should not be deprived of these necessities because of the inappropriate conduct of the parent.

D. Custody Change Is Not A Permissible Penalty

1. The Court cannot take custody from a Contemner when that issue was not raised by the pleadings. ***Clarke v. Clarke (1970)*** 4 Cal.App.3d 583, 588. A separate Order to Show Cause seeking a change of custody is the proper way to seek that remedy.

E. Visitation Conditions Are Not A Permissible Penalty

1. Visitation cannot be conditioned upon the timely payment of child support in a modification proceeding [***Camacho v. Camacho (1985)*** 173 Cal.App.3d 214], but presumably, such a provision could be a valid condition of probation if accepted by the Contemner in lieu of another sentence. *See also* ***Moffat***, *supra*, at 645 and ***Roesch***, *supra*, at 96.

F. Spousal Support Termination Is A Permissible Penalty

1. The Court may terminate spousal support because of the wrongful conduct of the Contemner. ***Clarke***, *supra*, at 589, citing ***Williams v. Williams (1951)*** 103 Cal.App.2d 276, 229 P.2d 830, where the mother removed children from the state to frustrate the father's visitation rights.

a. **Query**: Is it a denial of due process if notice that such a remedy will be sought as part of a civil Contempt penalty is not given in the pleadings?

G. Incarceration Until Performance - A Civil, Not Criminal, Remedy

1. ***CCP § 1219(a)*** provides that, with certain exceptions relating to refusal to testify, "when the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment." Does this apply to nonpayment of support by a person who is demonstrated to have the funds, but refuses to pay? Why not!?

2. If so, civil Contempt penalties based upon failure to support or turn over specific property, and ***Moss*** concepts may be a very powerful tool in certain cases.

a. Before the Court may utilize a ***CCP § 1219(a)*** incarceration, evidence showing the present ability of the Contemner to perform the ordered act must be presented. ***Application of Ny (1962)*** 201 Cal.App.2d 728, 731-731.

b. The order of commitment must recite the fact of the ability to comply and must expressly state the act to be performed. ***Application of Ny***, *supra*, at 728; ***Noorthoek v. Sup. Ct.***, *supra*, at 600; ***Liu***, *supra*, at 135.

H. Summary Contempt Against Counsel

1. In the matter of ***Watson v. Block, et al. (1996)*** 102 F.3d 433, the state Trial Court found the defendant's counsel in summary Contempt for asking questions that had been prohibited. After appellate relief was denied in all state Courts, the Ninth Circuit Court of Appeals reversed, noting that nothing in the record indicated that counsel would not have engaged in further improper conduct unless she were immediately punished, that her conduct did not constitute an open, serious threat to orderly procedure and that the least possible power adequate to achieve the end proposed should be used. Accordingly, it held that the use of summary Contempt procedure in the circumstances of this case violated due process. The decision of the Ninth Circuit was reversed by the United States Supreme Court. The Court reversed, noting that the ruling of the Ninth Circuit "introduced uncertainty into routine proceedings of the many state Courts within the Court of Appeals' large geographical jurisdiction. The Judgment is reversed." ***Pounders v. Watson (1997)*** 521 U.S. 982, 991 [117 S.Ct. 2359].

a. **Note**: ***CCP § 128(b)*** and ***CCP § 1209(c)*** provide that if an order of Contempt affects an attorney, the execution of the sentence shall be stayed pending the filing, within three judicial days, of a petition for extraordinary relief testing the lawfulness of the Court's order. No longer can an attorney be immediately taken away from the Courtroom to be placed in custody.

I. Payment Schedule As A Condition Of Probation

1. It is not unusual for the Court to try to have the parties work out a payment program on arrearages and make that payment program part of the conditions of probation.

2. Unless the aggrieved party stipulates to the payment program in lieu of other collection rights, thereby creating an *estoppel* situation with regard to the right to otherwise collect the arrearage, the Court does not have the power, particularly at the Contempt hearing, to retroactively modify the manner in which the former judgment is to be paid. A payment plan for arrearage, although it clearly can be a condition of probation, should not unwittingly become a retroactive modification of the prior order or judgment.

3. "It is strange that a court, after finding an individual in contempt for failure to pay a total sum due under one of its judgments, should allow him . . . (without punishment), to pay the amount in installments. That course . . . placed (citee) in a better position than he had occupied prior to the order adjudging him in contempt, and in effect presented him with a reward for his disobedience of the court's judgment." ***Tripp v. Sup. Ct. (1923)*** 61 Cal.App. 64, 68-691 [214 P. 252], disapproved on other grounds by ***Bradley***, *supra*.

4. Notwithstanding the foregoing, a payment plan for the arrearage, as a condition of probation, may not be a bad thing since it adds a significant motivation to the payor's need to comply with the schedule of payments and it may avoid the problem of having to pursue further procedures for the collection of the money.

5. If installment payments are to be a condition of probation, the lawyer should request that the arrearage accrue interest at the judgment rate of ten percent (10%) on the unpaid balance during the period of the payout. The payee is entitled to this judgment rate of interest anyway, interest running from the actual date the original payment was due. ***FC § 155***; ***CCP § 685.020(b)***. This will result in the payee obtaining interest at a rate higher than he/she could obtain if the money were otherwise invested. The obligor also gets the benefit of having the extension of credit at an interest rate lower than he/she could probably obtain from a commercial lender. Everyone would appear to win, assuming that installment payments are appropriate.

J. Child Who Refuses to Testify Or Take Oath

1. ***CCP § 1219.5*** imposes the following conditions upon sentencing a child under age sixteen (16) who is held in Contempt for refusal to take the oath or testify:

a. The Court shall first refer the matter to the probation officer in charge of matters coming before the Juvenile Court for a report and recommendation as to the appropriateness of the imposition of a sanction.

b. The probation officer shall prepare and file the report and recommendation within the time directed by the Court. In making the report and recommendation, the probation officer shall consider factors such as the maturity of the minor, the reasons for the minor's refusal to take the oath or to testify, the probability that available sanctions will affect the decision of the minor not to take the oath or not to testify, the potential impact on the minor of his or her testimony, the potential impact on the pending litigation of the minor's unavailability as a witness, and the appropriateness of the various available sanctions in the minor's case.

c. The Court shall consider the report and recommendation in imposing a sanction in the case.

XIII. NO REPERCUSSIONS FOR FILING AN ORDER TO SHOW CAUSE RE CONTEMPT THAT FAILS

A. Withdrawal of Order to Show Cause Re Contempt After Compliance Is Not A Basis for Civil Action

1. In ***Green v. Uccelli (Green I) (1989)*** 207 Cal.App.3d 1112, 255 Cal.Rptr. 315, while a dissolution was pending, Green (an attorney in pro. per.) sued his wife's attorney, Uccelli, for damages for malicious prosecution, abuse of process, and intentional infliction of emotional distress. Green alleged that Uccelli had filed two Orders to Show Cause re Contempt that were taken off calendar once Green had complied. The Trial Court sustained Uccelli's demurrer without leave to amend and dismissed.

a. Green appealed, but the First District affirmed stating, *inter alia*, that per the rationale of ***Chauncey v. Niems (1986)*** 182 Cal.App.3d 967, 227 Cal.Rptr. 718, an attorney who brings an Order to Show Cause that is taken off calendar before the hearing cannot be sued for malicious prosecution.

b. The First District thus extended its holding in ***Lossing v. Sup. Ct. (1989)*** 207 Cal.App.3d 635, 255 Cal.Rptr. 18 (attorney who brings Order to Show Cause re Contempt and that does not result in a Contempt adjudication cannot then be sued for malicious prosecution).

B. No Malicious Prosecution Actions Based on Family Law Cases. In ***Bidna v. Rosen (1993)*** 19 Cal.App.4th 27, 23 Cal.Rptr.2d 251, the Court held that "no malicious prosecution action may arise out of unsuccessful family law motions or orders to show cause." Having identified a clear trend away from allowing malicious prosecution actions for family law enforcement proceedings, the majority decided that it was time to establish a bright line rule barring these actions when they are based on family law proceedings.

XIV. PROCEEDINGS AFTER CONTEMPT ADJUDICATION, INCLUDING SENTENCING

A. Bail. Although bail is not generally set, if incarceration is indicated, although the Contempt sections do not specifically provide for bail after adjudication, counsel should try to persuade the Court to require bail, pending sentencing or the other party proceeding on a writ.

B. Criminal Sentencing Rules. Since the Contempt adjudication has the appearance of a criminal conviction with confinement as one of the possibilities, sentencing has always followed the criminal sentencing rules. Since the sentencing fits more into the misdemeanor rather than the felony scheme of things, although earlier versions of this Article may have said otherwise, this author believes that the misdemeanor sentencing rules should be followed. Those rules are:

1. Unless time for sentencing is waived, which should be done either on the record or in writing,

> [A]fter a plea, finding, or verdict of guilty, the . . . court shall appoint a time for pronouncing judgment which shall not be less than six hours, nor more than five days, after the verdict or plea of guilty, unless the defendant waives the postponement. . . . The court may extend the time for not more than 20 judicial

days if probation is considered. Upon request of the defendant. . . that time may be further extended for not more than 90 additional days. ***PenC § 1449***

2. Although ***PenC § 1191.3*** provides for one-third to one half good time/work time credits, that ***Penal Code*** section applies to felony convictions and may not be applicable to incarceration for a ***CCP § 1209*** Contempt. The experience of this author has been that Contempt sentences are often reduced by the Sheriff by one-half for good behavior since they are held in "solitary" confinement, not allowed into the general prison population. Of course, actually being processed as admitted into jail is an infrequent event in this day of over crowded jails.

a. At sentencing, if the Citee is ordered to jail, you should do the following:

(1) Ask that the Court state that "there is to be no reduction in the number of days to be served because of conduct."

(2) Ask that the Court order the Citee immediately remanded and the Sheriff ordered to transport him/her to jail, or

(3) Ask that the Court order the Citee to report to the jail intake processing center at 3:00 p.m. on Friday if there is concern about the Citee losing his/her job if jailed during the week.

(4) Ask that the Court state the number of hours, not days, of actual incarceration.

(5) If requesting community service, check prior to sentencing to find an organization that will accept someone to do Court ordered community service.

3. ***PenC § 1191*** provides that, unless time is waived "the court shall appoint a time for pronouncing judgment, which shall be within twenty judicial days after the verdict, finding, or plea of guilty. . . ."

4. Thus, since there is no case law of which this author is aware concerning the time for pronouncing judgment (meaning imposing the sentence), the safest course would be to do so some time between one and ten days, unless there is a formal waiver of time.

5. It is improper to impose sentence immediately after a guilty plea or adjudication of guilt without a time waiver. ***Application of Elsholz (1964)*** 228 Cal.App.2d 192.

6. Even with a formal waiver of time, since it is unlikely that there will be a formal probation report, it would appear that caution requires that pronouncing judgment should be done within twenty judicial days.

C. Obtaining Confinement. Given the current theories espoused in ***Batey***, *supra*, at 1281; ***Hicks v. Feiock***, *supra*, at 624; ***Derner***, *supra*, at 588, and discussed in the double jeopardy section of this Article, it would seem that all the criminal sentencing rules need to be followed if confinement is one of the end results of the Contempt adjudication.

D. Avoiding Set Aside. It seems that better practice and policy require that the criminal sentencing statutes be followed as closely as possible so as to afford the least opportunity to have the Contempt sentence set aside.

E. Probation. Do family law Courts have the authority to order probation after the Citee is found guilty of Contempt for violating an order made pursuant to the ***Family Code?***

1. ***CCP § 1218*** provides specific penalties the Court must impose when a party is found in Contempt of Court for failure to comply with a Court order made pursuant to the ***Family Code***. For example, ***PenC § 1218(a)(1)*** provides that the first finding of Contempt is punishable by the Court by either order that "[t]he condemner to perform community service of up to 120 hours, or to be ***imprisoned*** up to 120 hours. . ." [Emphasis added.] Accordingly, the punishment for Contempt is statutory and does not include the option to order probation, so does the Trial Court have authority to order probation, summary probation/conditional sentence? ***CCP § 1218*** offers no guidance to Trial Courts in this area. This provision does not provide that probation or a conditional sentence is available.

2. ***CCP § 1218*** does not provide that "probation" is available to Trial Courts in Contempt matters. However, it is common practice for family law Trial Courts to order conditional sentences (formerly known as Court probation, summary probation, or informal probation). See ***Moss v. Sup. Ct. (Ortiz)***, *supra* ("[T]he superior court imposed a sentence of five days in jail for each of six counts of contempt, and ordered Brent to perform ten hours of community servitude for each of the six counts. Execution of sentence was stayed to permit Brent to purge himself of contempt by making specified payments, and he was placed on three years' informal probation."); ***Ramirez v. Superior Court (1977)*** 72 Cal.App.3d 351, 353 ("[P]etitioner was found in contempt for missing three court-ordered child support payments. Sentence of 15 days was imposed and was suspended with petitioner being placed on probation, conditioned on: (1) his keeping current from then on; and (2) paying off the arrearages (computed at $837) by paying $250 forthwith and $7.50 per week thereafter."); ***In re Kreitman***, *supra*, ("[P]etitioner was found guilty on 42 counts [of contempt]. He was subsequently granted a three-year probationary term and sentenced to 210 days in jail (five days per count).")

3. "Probation is a wholly statutory creation." ***People v. Tanner*** *(1979)* 40 Cal.3d 514, 519 (citations omitted). The term "probation has a specific meaning." ***PenC § 1203(a)*** provides that, "as used in this code, 'probation' means the suspension of the imposition or execution of a sentence and the order for conditional and revocable release in the community ***under the supervision of a probation officer.***" (Emphasis added.)

4. In this author's experience, family law Trial Courts do not order Contemners to be supervised by probation officers. Rather, a "conditional sentence" is imposed by the Trial Court. ***PenC § 1203(a)*** provides, "As used in this code, 'conditional sentence' means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the Court ***without the supervision of a probation officer.***"

5. ***PenC § 1203(a)*** also provides that "it is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized ***in any code*** as a sentencing option for infractions or misdemeanors." (Emphasis added.) ***PenC § 1203b*** provides:

> ***All courts shall have the power to suspend the imposition or execution of a sentence and grant a conditional sentence in misdemeanor and infraction cases without referring such cases to the probation officer.*** Unless otherwise ordered by the court, persons granted a conditional sentence in the community shall report only to the court and the probation officer shall not be responsible in any way for the supervising or accounting for such persons.

Accordingly, pursuant to ***PenC § 1203b***, "all courts" have the power to impose conditional sentences, which would include family law Courts in "misdemeanor and infraction cases." Family law Courts do not handle misdemeanor or infraction cases - civil Contempts are neither.

6. Under ***PenC § 166***, a criminal Contempt is considered a misdemeanor so there is no question that the criminal Trial Court has the power to order a conditional sentence in cases brought under Section 166; although ***PenC § 1203b*** also allows for all Courts to order conditional sentences in "infraction" cases.

7. But, according to Black's Law Dictionary, "infraction" also means "a violation, [usually] of a rule or local ordinance [usually] not punishable by incarceration." "Violation" means "the act of breaking or dishonoring the law." Black's Law Dictionary (8th Ed. 1999) p. 796 col. 2 & p. 1600 col. 2. Given these definitions, after the Trial Court finds Citee in Contempt, does the Trial Court have discretion to order a conditional sentence? This author thinks not!

8. Although many appellate cases refer to the fact that the Trial Court had ordered conditional sentences (formerly known as Court probation, summary probation, or informal probation – in family law Contempt proceedings, no case cites authority for the validity of those orders. *See* ***Moss****, supra;* ***Ramirez****, supra;* ***Kreitman****, supra.* These cases do not address the Court's authority to impose a conditional sentence in cases involving ***CCP § 1209*** *et seq*. violations and the statutes are silent on this issue.

9. It is this author's opinion that family law Courts do have the authority to order conditional sentences in Contempt proceedings brought under ***CCP § 1209*** *et seq*. If a Court has the power to incarcerate, it should have the power to impose conditions upon when, or under what circumstances, incarceration should occur. Therefore, it is this author's opinion that after the Trial Court finds the Citee in Contempt, it has the discretion to make a conditional sentence. Statutory authority for this belief does not seem to exist. Please see the following non-published cases on this issue:

a. ***Bunyard v. Sup. Ct. Of San Diego*** 2012 WL 5991308 (Cal.App.4 Dist.). This case reverses a Contempt adjudication for factual reasons and then goes on to state, in obvious dicta, that there is no statutory authority for probation in Contempt cases.

b. ***In re Marriage of Jimienez*** 2009 WL 2623333 (Cal.App. 2 Dist.). Probation order affirmed without any discussion of authority for the probation order.

c. ***In re Marriage of Keller*** 2002 WL 472016 (Cal.App. 1 Dist.). Probation order affirmed without any discussion of authority for the probation order.

d. ***In re Marriage of Managan*** 2003 WL 35462 (Cal.App. 2 Dist.). Affirmed stipulated Contempt with probation conditions without any discussion of authority for the probation order.

XV. WRIT

A. No Appeal from A Contempt Adjudication. ***CCP § 1222*** provides that an adjudication of Contempt is final and conclusive. The only appellate relief is a writ. Neither a Trial Court nor an Appellate Court may amend an order adjudicating Contempt. ***In re Bloom (1987)*** 185 Cal.App.3d 409 was disapproved on other grounds by ***Boysaw v. Sup. Ct. (2000)*** 23 Cal.4th 215, 221; ***In re Baroldi (1987)*** 189 Cal.App.3d 101 was disapproved on other grounds by ***Boysaw***. ***CCP § 1222*** has been determined to be constitutional. ***Mitchell***, *supra*, at 759; ***Bell v. Hongisto (1974)*** 9th Circuit, 501 F.2d 346.

B. Appeal Not Available. The fact that no appeal lies from an adjudication of Contempt (pursuant to ***CCP § 1222***), although appeal is available from a conviction of a criminal Contempt under ***PenC § 166***, does not result in a denial of equal protection of the laws. ***In re Buckley (1973)*** 10 Cal.3d 237, 514 P.2d 1201, cert. den. 94 S.Ct. 3202.

C. Writ of *Habeas Corpus* or *Certiorari*. Contempt proceedings may be reviewed by a petition for writ of *habeas corpus* or by *certiorari*. ***Gue v. Dennis (1946)*** 28 Cal.2d 616, 170 P.2d 887; ***Kyne v. Eustice (1963)*** 215 Cal.App.2d 627; ***Heller v. Heller (1964)*** 230 Cal.App.2d 679.

D. Standard of Review on Writ. On review, the Appellate Court's responsibility is merely to ascertain whether the Trial Court acted within its jurisdiction. The reviewing Court's responsibility is merely to determine whether there existed any substantial evidence to sustain the Trial Court's jurisdiction and the manner in which discretion was exercised. ***In re Coleman (1974)*** 12 Cal.3d 568; ***Bongfeldt (1971)***, *supra*, at 474; ***Board of Supervisors v. Sup. Ct.***, *supra*, at 1736.

E. Exceeding Court's Jurisdiction. "[I]t seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the Court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess." ***Mitchell (1972)***, *supra*, at 759, 762.

F. Presumptions? Unlike ordinary civil proceedings, there is no presumption as to the regularity or validity of the Trial Court proceedings wherein a judgment of Contempt has resulted. ***Ex Parte Scroggin (1951)*** 103 Cal.App.2d 281, 229 P.2d 489; ***Raiden v. Sup. Ct. (1949)*** 34 Cal.2d 83 (alleged direct Contempt by lawyer because of argument at a motion); ***Ex Parte Wells (1946)*** 29 Cal.2d 200, 173 P.2d 811 (order of incarceration until compliance must specifically state what acts are to be done); ***Freeman v. Sup. Ct. (1955)*** 44 Cal.2d 533, 282 P.2d 857 (Appellate Court will look to see if there was substantial evidence to support adjudication; pg. 536); ***Board of Supervisors v. Sup. Ct.***, *supra*, at 1736.

G. Findings. In Contempt adjudications, the Trial Court is required to make findings with particularity and specificity. ***Petition of Mancini (1963)*** 215 Cal.App.2d 54.

H. Required Findings to Support Contempt Adjudication. Under previous law, findings had to show the existence of a specific, valid order, the specific details of how said order was violated, the Contemner's knowledge of the order, the Contemner's willful failure to comply, and the Contemner's ability to pay the money, or to do or not to do the act or omission charged, and the Court's specific findings as to the violations of the order. ***Petition of Mancini***, *supra*, at 57; ***Powers v. Sup. Ct. (1967)*** 253 Cal.App.2d 617; ***Morelli (1970)*** *supra*, at 850. As to ability and willfulness, that may no longer be the case. Remember, ability and willfulness are no longer elements of the *prima facie* case but are affirmative defenses, at least

in most, but not all, cases. A judgment for indirect Contempt must state evidentiary facts for each element of Contempt, except willfulness. ***Koehler,*** *supra,* at p. 1169.

I. Use of Form FL-415. Findings and Order. See Form, which is included at end of this Article.

J. Delay in Preparation of Findings and Commitment. The findings must be correctly and promptly prepared. The order of commitment must be signed promptly. ***In re Jones (1975)*** 47 Cal.App.3d 879, held that an eight day delay in signing the commitment order was too much of a delay and a writ of *habeas corpus* was issued. Use **Form FL-415** and it can be signed at the time of adjudication and sentencing.

K. Inferences to be Drawn in Favor of Citee. No intendment may be indulged in favor of the order directing commitment for Contempt; the charging affidavit, the findings and the judgment must be construed most strictly in favor of the Citee. ***Ruppe v. Sup. Ct. (1932)*** 127 Cal.App. 118, 15 P.2d 197; ***Board of Supervisors v. Sup. Ct.***, *supra,* at 1736.

L. "Civil" or "Criminal" Contempt. If not designated as a "civil Contempt," it will be handled, in all aspects, as a "criminal Contempt." Any ambiguity with regard to whether the Citee was found in civil or criminal Contempt will likely be resolved in the Citee's favor. Accordingly, counsel should ensure that the commitment order explicitly states whether the Contempt is "civil" or "criminal" in nature.

M. Specific Writ Applications

1. Although much of this law relating to "ability" may no longer be applicable, it remains here for your reference.

a. Ability to pay may be found in general terms. ***Darden v. Sup. Ct. (1965)*** 235 Cal.App.2d 80, 85.

b. A finding of "partial ability" is sufficient. ***Ex Parte Spollino (1962)*** 208 Cal.App.2d 783.

c. A finding of ability to comply "to a greater extent" is inadequate. ***Application of Michelena (1957)*** 150 Cal.App.2d 377, 309 P.2d 861.

d. A finding of ability to "make a substantial payment" was held inadequate to support an order of commitment until payment was made. This case does not address issue of Contempt for not making the payment when due. ***Ex Parte Scroggin***, *supra*.

e. Failure of the order to mention the ability of the Contemner to make the payments is fatal, and this is not cured by a recital that the Citee has "[w]illfully failed to make payment[s]." ***Nutter v. Sup. Ct. (1960)*** 183 Cal.App.2d 72, 75.

f. In ***Powers v. Sup. Ct.***, *supra*, at 617, the order lumped together many payments and made a broad finding that the Citee had failed to make ten child support payments. The Court of Appeal held that the order of Contempt was void for failure to specify, with particularity, the payments actually in default.

g. An order which failed to specify which "previous order" the Citee failed to obey resulted in the order of Contempt being held void. ***Hough v. Sup. Ct. (1960)*** 179 Cal.App.2d 342.

h. ***Application of Gilreath (1959)*** 167 Cal.App.2d 655, 335 P.2d 203 held an order of commitment void where the order adjudging the Citee in Contempt had not been filed nor a minute order prepared. *See also* ***Jones****, supra,* at 879, invalidating Contempt when order of commitment not signed until eight days after Citee in jail.

N. Finality of Adjudication. An adjudication of Contempt is a final and conclusive order, and any attempt to supply a new finding, or to amend the commitment *nunc pro tunc*, is not permitted. ***Martin (1971)****, supra,* at 739.

O. Length of Incarceration. If a civil Contempt ,a Citee may be incarcerated until the act required is performed, subject to certain case imposed exceptions. ***CCP § 1219***. *See also* ***Ex Parte Scroggin****, supra.*

1. For examples of invalid commitment orders where the Court, pursuant to ***CCP § 1219***, attempted to imprison the Citee until the performance of specified acts, please *see* ***People v. Gwillim (1990)*** 223 Cal.App.3d 1254, 274 Cal.Rptr. 415; ***Liu****, supra,* at 135; ***Noorthoek****, supra,* at 600; ***Ex Parte Vallindras (1950)*** 35 Cal.2d 594, 220 P.2d 1; ***Myers v. Sup. Ct. (1920)*** 46 Cal.App. 206, 189 P. 109.

XVI. ORDER TO SHOW CAUSE TO REVOKE PROBATION

A. Procedures. If the Citee has violated the terms and provisions of probation, that probably also means that the Citee has committed further acts of Contempt. The proper way to deal with the situation is to:

1. File an Order to Show Cause re Contempt.

2. File an Order to Show Cause to revoke probation. ***PenC § 1203.3***.

a. The Order to Show Cause to revoke probation has different procedural due process requirements than an Order to Show Cause re Contempt. However:

(1) Personal service is required;

(2) Specific pleading of the terms of probation and the details of the alleged violations are required; and

(3) The Citee has the right to counsel and the right to remain silent.

b. Proof beyond a reasonable doubt is <u>not</u> required. The standard of proof is "preponderance of the evidence." ***Moss****, supra*, at 396.

XVII. REVOKING, MODIFYING OR CHANGING TERMS OF PROBATION

A. Statutory Authority. ***PenC § 1203.3*** gives the Court the authority, at any time during the term of probation, to revoke, modify or change its order of suspension of imposition or execution of sentence.

XVIII. WITHDRAWING A PLEA OF GUILTY OR NOLO CONTENDERE AFTER COMPLETION OF PROBATION

A. Petitioning Court to Withdraw Plea. ***PenC § 1203.4*** provides that after a person has "fulfilled their conditions of probation for the entire period of probation," they may petition the Court to withdraw their plea of guilty or *nolo contendere* and enter a plea of not guilty, or set aside the finding of guilt after trial. The decision on this matter is one within the discretion of the Court. Thus, from the complaining party's point of view, the conditions of probation should always include "compliance with all existing Court orders and the timely payment of all future support orders" so there can be a defense against any such motion by the Contemner if full compliance with all orders does not occur during probation. Also, such language will provide a basis to file an Order to Show Cause to revoke probation for other violations during the period of probation.

1. **Note**: "However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." ***PenC § 1203.4***.

B. Possession of Firearms. Dismissal of an accusation pursuant to ***PenC § 1203.4*** does not permit a person to own, possess or have in his/her custody or control any firearm capable of being concealed upon the person.

XIX. RESTRICTION ON RIGHTS OF CONTEMNERS

A. Enforcement of Court Order. A person who is in Contempt of a Court order shall not be permitted to enforce such order or judgment, by way of execution or otherwise, against the other party. However, said restriction shall not affect, nor apply to, the enforcement of child support orders. ***CCP § 1218***.

1. **Note**: The prohibition is against enforcement and the language of the section does not specifically prohibit a request for modification, just enforcement. However, except for ***Ramirez v. Sup. Ct. (1970)*** 72 Cal.App.3d 351 situations discussed below, case law seems to clearly establish a prohibition on the rights of a Contemner to seek equitable relief (modification) from the Court.

a. A party adjudicated in Contempt for nonpayment of a child support or spousal support cannot bring proceedings to modify the order until purged of the Contempt. ***Schubert v. Sup. Ct. (1930)*** 109 Cal.App. 633, 634-635; ***In re Marriage of Thweatt (1979)*** 96 Cal.App.3d 530, 157 Cal.Rptr. 826.

b. Nonpayment not amounting to Contempt (*e.g.*, because of lack of knowledge of order or inability to pay) does not affect standing to seek modification.

2. As discussed in **Sections G, H, I, L,** and **M** below, the prohibition of ***CCP § 1218*** is usually invoked except when a party is seeking to modify the support order for which that party has been held in Contempt and now has no ability to comply with that order. In theory, the logic of those cases could be extended to others if the right fact situation presented itself.

3. The appellate Court can dismiss or stay an appeal taken by a party who is in Contempt of a Trial Court order issued in the action or who, although not formally adjudged in Contempt, has willfully

disobeyed Court orders in this action. ***In re Marriage of Hofer (2012)*** 208 Cal.App.4th 454 (disentitlement doctrine may be used to dismiss an appeal even in "the absence of a formal citation and judgment of contempt"). This so-called "disentitlement doctrine" is particularly likely to be invoked where the appeal arises out of the very order the party has disobeyed. ***MacPherson v. MacPherson (1939)*** 13 Cal.2d 271, 277.

B. Vacating Interlocutory Judgment. In ***Travis v. Travis (1948)*** 89 Cal.App.2d 292, 295, 200 P.2d 943, the Contemner husband filed an action to vacate the same interlocutory judgment which he was disregarding. The Court stated, "The rationale upon which relief is denied is that it would be a flagrant abuse of the principles of equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid while he stands in contempt of its legal orders and processes." *See also* ***Weeks v. Sup. Ct. (1921)*** 187 Cal. 620, 203 P. 93.

C. Entry of Judgment. Following the above principle, the Court in ***Sullivan***, a case decided when interlocutory judgments were first granted and final judgments required application to the Court, the denial of the entry of the final judgment on application of the Contemner was affirmed. This holding, although not overruled, is probably <u>not</u> good law today and would likely not be followed because of the strong public policy in favor of terminating untenable marriages. Further, <u>now</u> no action is required by the Court; after a bifurcated judgment is granted it becomes final by its terms.

D. Modification of Court Order. ***In re Marriage of Milch (1975)*** 47 Cal.App.3d 666 states at page 669 that "a party adjudged in contempt of an order of court lacks standing to seek a modification of the court order he has disobeyed . . . ," citing ***Schubert***, *supra.*

E. "Clean Hands" Doctrine. The same result has been reached under a "clean hands" doctrine in ***Leathers v. Leathers (1958)*** 162 Cal.App.2d 768, 774, 328 P.2d 853, where a party to a custody battle was characterized as a fugitive from a sister state. *See also* ***Perry v. Sup. Ct. (1970)*** 7 Cal.App.3d 236, also involving a multi-state custody dispute; ***Allen v. Sup. Ct. (1961)*** 194 Cal.App.2d 720; ***DeBurgh v. DeBurgh (1952)*** 39 Cal.2d 858, 868, 250 P.2d 598; ***Witkin, Summary of California Law,*** *(8th Ed.), Parent & Child, § 19,* pages 4548-4551.

F. "Factually in Contempt." Relief may also be denied to a moving party who is factually in Contempt, though not formally adjudicated as a Contemner. ***Knackstedt v. Sup. Ct. (1947)*** 79 Cal.App.2d 727, 180 P.2d 375, defaulting party not permitted to obtain entry of final judgment; ***Paddon v. Sup. Ct. (1924)*** 65 Cal.App. 479, 224 P. 474, declining to issue a writ of prohibition where Contempt proceedings were pending against the petitioner; ***Ross v. Ross (1941)*** 48 Cal.App.2d 72, 119 P.2d 444, denying a change of venue until compliance with a Court order.

G. Default. However, a party in default is not necessarily in Contempt. In ***Milch***, the Court held that a party who was not willfully in default "is not barred from seeking a modification by the fact that he is not in full compliance with the order which he seeks to have modified." ***Milch***, *supra*, at 670.

1. Thus, where a party has paid support to the extent of his/her ability to pay, and is found not guilty of Contempt, he/she will be permitted to pursue his/her own Order to Show Cause or other judicial proceeding with regard to the subject order with which he/she is not then in full compliance.

H. Modification of Future Support Payments.

> It is also a well settled proposition in most jurisdictions, including California, that the existence of accrued and unpaid alimony does not *per se* prevent the court from granting a modification as to future installments. [Case citations omitted.] These cases hold that the existence of accrued and unpaid alimony is not conclusive on the court, but is merely one of the circumstances that may justify a refusal to modify, but that whether the order will be modified depends upon all the facts and circumstances of the particular case, and rests in the sound discretion of the trial court. They also establish that modification will not be denied even to a husband who is in default when such denial would produce an inequitable result. ***Triest v. Triest (1944)*** 67 Cal.App.2d 320, 323, 154 P.2d 2. *See also* ***Moore v. Moore (1955)*** 133 Cal.App.2d 56, 62, 283 P.2d 338; ***Levy v. Levy (1966)*** 245 Cal.App.2d 341, 362.

I. No "Absolute Preventions" of Modification of Support Orders. ***Triest***, *supra*, at 323, quotes the California Supreme Court in ***Merritt v. Merritt (1934)*** 220 Cal. 85, 88, 29 P.2d 190, where it is stated:

> If the existence of accrued and unpaid alimony should be held to absolutely prevent the court from altering, reducing or altogether abrogating future installments of alimony, then it would result that in cases of pecuniary inability of defendant to pay and discharge all arrearage of alimony, the court would be powerless to grant relief as to future and further alimony, no matter what the changed conditions of the parties in the property, or how loudly the facts and circumstances might call for the equitable intervention of the court. The hands of a court of equity are not thus bound.

1. Then, coming full circle, the Supreme Court in ***Merritt*** added, "Of course, if the husband has willfully refused to comply with the order of the court and has a present ability to comply, he is in Contempt, and no order of modification will be granted." [Emphasis added.]

J. Forfeiture of Right to Appeal. By misconduct, a party may also forfeit their right to appeal. ***MacPherson*** *supra*; ***Knoob v. Knoob (1923)*** 192 Cal. 95, 218 P. 568 (appeal dismissed because appellant removed child from the state in violation of custody order); ***Kottemann***, *supra*, at 483 (appeal dismissed where appellant refused to pay alimony, evaded service and transferred assets in violation of a restraining order); ***Estate of Scott (1957)*** 150 Cal.App.2d 590, 310 P.2d 46 (appeal dismissed because appellant was a fugitive from a superior Court criminal case).

K. Maintaining Any Action. In ***Moffat***, *supra*, at 645, 652, the Supreme Court "[a]cknowledge[s] the general principle that one who flagrantly and persistently defies a court order is not entitled to maintain an action and to ask the aid and assistance of a court while standing in contempt." This may well mean that no action, except to enforce child support, is to be permitted by one who has been held in Contempt and has not purged that Contempt. *See also* ***Milch***, *supra*, at 666.

L. Court Should Not Consider a Request for Modification of Support If Requesting Party Has the Ability to Comply with the Existing Order but Does Has Not Done So. In ***Ramirez***, *supra*, at

354, the father was held in Contempt in 1975 for nonpayment of child support and placed on probation. Among the conditions of probation were the requirements that he:

> [K]eep current in child support and pay a specified arrearage. In 1977, the father filed an order to show cause to reduce his support. The trial court, without taking testimony, found that the father was still in contempt and concluded that it . . . has no jurisdiction to entertain a modification of the support order.

1. The ***Ramirez*** Court reversed, without a single reference to any prior appellate decisions, stating that the Trial Court apparently relied upon ***CCP § 1218*** and that ***CCP § 1218*** was not applicable because the 1977 ruling "contains no finding that the (father) was, as of that date, in contempt." Further, the Court went on to discuss the fact that while the father had not fully paid his court-ordered obligations, "contempt involves not only the failure to comply with a court order, but the ability to comply." Thus, the Court concluded [**the Trial Court erred in summarily rejecting evidence of the father's financial condition as of the date of the modification hearing**]. ***Ramirez***, *supra*, at 354-355.

2. According to ***Ramirez***, the rationale for the rule permitting a Court not to hear a Contemner "exists as a device to induce that party to comply with the order. If, when a party seeks relief he cannot then comply, the rule loses its purpose. A past contempt, no longer existing because of inability to comply, cannot, and should not, impose on the ex-contemner a continuing obligation, increasing month by month, that he cannot meet." Conclusion: "[I]f that evidence showed a then inability to comply, it should have determined his motion for modification on its merits."

a. The opinion then goes on to say that "such action (the hearing of the order to show cause) would, of course, not preclude the court from taking any appropriate means - possibly revocation of the probation - as might legitimately punish petitioner for his past contempt." ***Ramirez***, *supra*, at 355.

b. Does this mean the revocation of probation at the modification hearing? That would have been a good strategy and one could read the opinion that way. However, this author believes that due process requires notice of the intent to revoke probation and an opportunity to be heard on the matter of revocation of probation, so a formal Order to Show Cause to revoke probation, set for the same day, would have been a good and the proper strategic move by wife's lawyer.

3. ***Ramirez*** still appears to be good law; its persuasiveness may be questioned since it does not refer to the prior case law on the subject that is contrary to the position taken therein. However, as above noted, there is now substantive appellate law to support ***Ramirez*** and the logic of the result seems inescapable.

4. When the Supreme Court decided ***Moffat*** ten years after ***Ramirez,*** there was no mention of ***Ramirez***.

M. Practical Outcomes. If there is a rule denying relief to Contemners or to defaulters, that rule is ignored with regularity in most family law departments, especially where the rights of children or third persons are involved, or where equity seems to demand that relief be granted, notwithstanding any prior Contempt adjudication. Perhaps that is because the general rule about restrictions on rights of people in Contempt is rarely raised!

N. Modification of Custody. In support of the ***Ramirez*** concept, *see* ***Smith v. Smith (1955)*** 135 Cal.App.2d 100, 107, 286 P.2d 1009 where a father, still in Contempt, was granted a change of custody, the Court rejecting the rule of denial of access to the Courts to the Contemner and stating, "We must not suffer the urge to punish either parent to lead to judicial action which in effect punishes these innocent children. . . ."

XX. OTHER PRACTICAL CONSIDERATIONS

A. Representing the Aggrieved Party

1. Do not wait for substantial sums to accrue on the support order before filing the Order to Show Cause re Contempt. This is now particularly true in view of the jury trial issue which may arise because of the possibility of a long jail sentence.

2. Under a ***Hicks v. Feiock***, *supra*, at 624, civil Contempt concept [using ***Moss*** or a ***CCP § 1209.5*** permissible inference], counsel may be able to persuade a Court to incarcerate until full compliance is effected, particularly if you can establish clear ability (if the Citee was properly motivated) to fully comply.

3. Trial Courts may assume that a long delay in filing indicates a lack of interest by the aggrieved party and may result in a lowering of the Trial Court's interest or concern.

4. Early enforcement procedures tend to accomplish better future compliance by the paying party. The real object is to get the money into the hands of the supported spouse because he/she generally has a true need for the money to pay necessary living expenses.

5. The judicial attitude has long been to give people more than one chance at understanding the seriousness of their obligation to comply with Court orders. Thus, it is difficult to obtain any jail time on a first Contempt citation - but, the patience of many judicial officers is wearing thin over nonpayment of support and visitation issues.

a. If there is too long a delay before filing the first Contempt proceeding, then it will be even longer before there is a real probability of jail time for the truly recalcitrant payor.

b. Normally, one trip through the booking process at the Los Angeles County Jail is enough to turn a sporadic payer into a person who sends their check a few days early.

6. Judges are reluctant to impose long jail sentences for Contempts in family law cases because long sentences may be counter-productive. The person in jail cannot earn money to pay the support obligation, the interference with the employment schedule may result in the loss of a job, and there is substantial animosity resulting from time in jail, which is harmful to future contact with children.

7. Knowing all of this, it was formerly a good idea to request a weekend sentence rather than a long sentence in the appropriate case. There was a better chance to get such a sentence, and it did not create more anger than is necessary by seeking something which the Court will probably not grant anyway. However, with the jail overcrowding problem, short-termers may not actually ever be processed into jail. However, upon payment of certain fees, local jails could be used without overcrowding problems.

8. It is important, from a strategic point of view, to have multiple counts of Contempt sustained against the Citee, so list each payment separately. Also, each count of Contempt must be separately stated. ***Powers***, *supra*.

9. It is always better, for later argument, to be able to say that the Citee was held in Contempt on twelve counts (each month for one year) than to say one count, which was the nonpayment of support for the entire year assuming, which I do not, that such a pleading would be proper. In any event, such a grouping of payments is improper pleading. ***Powers***, *supra*.

10. If there is any ambiguity in the underlying order, file not only the Contempt, but also file an Order to Show Cause seeking modification of the order to cure any possible ambiguity.

a. In such a situation, care should be taken in setting forth the facts in the declaration in support of the modification proceedings so that a defense of the Contempt proceedings based upon allegations of ambiguity is not supported by your modification pleadings. If the order is truly ambiguous, it is not appropriate to file a Contempt proceeding.

B. Representing the Moving Party At the Hearing

1. **Prepare the Court file.** Prior to the commencement of the hearing, review the Court file and "turn out" or mark with a "post-it" note each document that is relevant to the pending hearing, which the Court should examine and that is a proper subject for judicial notice. This will save the Court and the clerk the time and frustration of searching through the file. These small courtesies, and this kind of consideration, often pay off in attorney fee orders and in enhancing your professional status with the Court and its staff.

2. The check marks which the clerk puts on the Minute Order indicate the presence of persons at the hearing. This is something that is done as part of the established procedure of the Clerk's Office and is something which, if raised by a request to take judicial notice may result in establishing the Citee's presence at the time of the making of an order. Ask the Court to take judicial notice of that “fact.” If the Court declines to do so [which this author thinks it should], then your client can testify to the other party being present when the order was made.

3. Establish whether this will be a civil or criminal hearing [***Hicks v. Feiock***, *supra*, at 624] and have the Court make the proper statements at the outset of the proceeding.

4. Establish the existence of the underlying Order by requesting that the Court take judicial notice of that document in the Court file. Attach a conformed copy of the order alleged to have been violated to the Order to Show Cause re Contempt and then request opposing counsel to stipulate that it is in evidence. If nothing else, the order is then easily accessible to the Court.

5. Immediately upon the commencement of the hearing, ask the Court to receive the moving party's declaration in evidence, as his/her direct testimony subject to cross examination. Since this will speed up the time for testimony, it will be favored by the Court, but it can only really happen by stipulation or the failure of opposing counsel to object. That pleading is clearly hearsay and not otherwise admissible. If accepted, a *prima facie* case should then be established.

a. Besides saving a lot of time in the presentation of usually routine evidence, this also avoids the possibility of a client making foolish mistakes because of nervousness.

b. There is a view, which is valid, that allowing a witness to "warm up" on direct examination is a good idea so that the usual nervousness has a chance to go away during friendly examination. Depending upon the client, this may be a better trial strategy than opting for efficiency.

C. Representing The Citee

1. Although the following was the law and proper strategic position when "ability" was an element to establish, not an affirmative defense, if you are representing the Citee the allegations are failure to pay monetary orders, and if it is appropriate to seek a modification of the existing order, you may want to file your Order to Show Cause re modification. However, do not file your client's **FL-150** as it may present the moving party in the Contempt proceeding with the evidence on ability to pay which they may not otherwise have had at the hearing. In such a circumstance, state on the face of the Order to Show Cause re modification that "because of pending Contempt, no detailed financial information is now provided."

a. In view of the ***Moss*** and ***Ivey*** decisions, at least for support and attorney fee Contempts, not filing an **FL-150** may no longer be a concern as inability to pay is an affirmative defense in all but "old" orders. However, you may not want to file a **FL-150** form in advance of the hearing and give opposing counsel all that information to work with at the hearing. It remains to be seen how Courts will deal with this issue. Old concepts die hard! Whether this can still be done remains to be decided. **Warning**: By not filing a **FL-150** form, you run the risk of the Order to Show Cause re modification being dismissed because ***CRC 5.260*** requires that it be filed any time financial relief is requested.

b. If a Contempt proceeding is pending, or is possible because of the factual circumstances, it previously has been the procedure to file for a modification without submitting a completed **FL-150** form with the other Order to Show Cause papers; this should no longer be acceptable as the ***EvC § 940*** objection is not appropriate on the issue of "ability."

2. Review the orders carefully to be certain that there are no technical defenses that have been overlooked. If there are, move to discharge the Contempt.

3. Make a motion to dismiss at the conclusion of the presentation of the evidence against the Citee. Be prepared to discuss in factual detail, the basis of each request to dismiss.

4. If in trouble on the law, work hard at a negotiated settlement which does not involve a stipulation as to the Contempt adjudication. It is always better not to have a Contempt adjudication in the file. Even a Contempt adjudication resulting from stipulation works to the Citee's continuing prejudice during the course of the case. Voluntary payment plans often promote settlement.

5. Be wary of stipulations that make it easier for the other side to provide their case, particularly on issues they might not be able to prove. Requested stipulations may be a way of avoiding some area where the other side believes they have a proof problem. This is a criminal (quasi-criminal?) case with possible jail time for the Citee. Counsel has a duty to be technical to protect the Citee's rights. But, be wary of foolish technical objections which unnecessarily increase fees, hearing time and may anger the Court.

6. Offer a voluntary wage assignment if the issue is payment of support. The supported person is entitled to one by statute [***FC §§ 5208***, ***5230*** and ***5231***] and often the assurance of regular receipt of the money is all it takes to resolve the issues.

7. **If appropriate, consider filing bankruptcy.** The filing of a Bankruptcy Petition automatically stays the Contempt proceedings and provides a vehicle for the Citee to discharge other debts so that the client will be better able to comply with the Court orders.

a. The effect of the bankruptcy discharge may be a change of circumstances which may trigger a modification proceeding.

b. There are potentially serious penalties for filing bankruptcy petitions only for delay. **Beware**! Do not participate in any such schemes with your client.

8. If possible, be sure that the Citee makes some payments required by the Order/Judgment before the Contempt is served. A factual defense when there is total nonpayment is almost impossible. Partial payments at least raise factual issues.

9. Obtain evidence of alternative methods of supporting the children or former spouse. Although not a defense to the failure to pay the sums ordered, alternative methods of payment (i.e., school tuition, medical expenses, clothing, etc.) present a much better picture to the Court and may offer some mitigation, or basis for defense, based upon non-willfulness. This evidence may also assist the Court in finding that the failure to comply was not willful.

10. Late payment of the support obligation, or compliance with the Order after the fact, may not be a defense to the Contempt charge, but it certainly goes a long way in the mitigation argument at the time of sentence and a Motion to Dismiss in the interests of justice.

11. Contempts are very serious matters, and one should expect the Court to view them in the most technical manner possible. When representing the cited party, any technical defect in the presentation of the *prima facie* case should be resolved in favor of your client and the Court should dismiss the Contempt.

USED FOR THEIR PROPER PURPOSE, CONTEMPTS ARE AN EFFECTIVE PART OF THE DISSOLUTION PROCESS AND WILL PROBABLY RESULT IN LONG-TERM COMPLIANCE BY AN OTHERWISE RECALCITRANT PARTY. HOWEVER, CONTEMPTS SHOULD ONLY BE USED TO ENFORCE COMPLIANCE WITH COURT ORDERS; THEY ARE NOT FOR COLLECTION OF MONEY.

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