

II. **CRIMINAL CONTEMPT PROVISIONS.**

A. **Grounds for criminal contempt.**

See G.S. 5A-11 and G.S. 5A-12(b); (note that no grounds other than those specified in 5A-11 will support an action for criminal contempt).

B. **Distinction between direct and indirect criminal contempt.**

Whether criminal contempt is direct [G.S. 5A-13(a)] or indirect [G.S. 5A-13(b)] determines whether the contempt proceeding may be plenary or summary. All cases of indirect criminal contempt must follow the notice and plenary hearing requirements set forth in G.S. 5A-15. Direct criminal contempt may be acted on in a summary proceeding according to the notice and response requirements described in G.S. 5A-14, or defendant may be immediately cited for contempt and then adjudication may be deferred to a plenary proceeding under the same provisions as for indirect contempt.

1. Direct criminal contempt. Direct criminal contempt occurs when the act is committed within sight or hearing of the judge, is committed either in or in immediate proximity to where proceedings are being held before the court, and is likely to interrupt or interfere with matters then before the court. The judge may respond with summary proceedings or may defer punishment for plenary proceedings. If deferred, judge must inform person immediately following misconduct of intention to institute contempt proceedings. G.S. 5A-13(a).

2. Indirect criminal contempt is any other criminal contempt; acts which are contemptuous of the court's authority, but which do not occur in the judge's presence. G.S. 5A-13(b). *See Gaylon v. Stutts*, 241 N.C. 120 (1954) (distinction between direct and indirect contempt discussed).

3. Late arrival in court and failure to appear in court.

a. Failure to appear in court pursuant to a show cause order, or other order specifically directing a witness to appear constitutes criminal contempt under G.S. 5A-11(a)(3) or G.S. 5A-11(a)(7). Case law has varied as to whether this is indirect or direct criminal contempt. The soundest reasoning appears to be that of *Cox v. Cox*, 92 N.C. App. 702 (1989), which held that the defendant's failure to appear at show cause hearing was indirect criminal contempt because the judge had no direct knowledge of the facts which would establish that his failure to appear was willful. The judge could properly have cited the defendant for contempt for failure to appear, and had him arrested pursuant to G.S. 15A-305 to secure his appearance; however, he could not hold him in direct criminal contempt.

b. *See In re Smith*, 45 N.C. App. 123 (1980), *rev'd on other grounds*, 301 N.C. 621 (1981), in which the Court noted that "the willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt." *Smith* at p. 133. As the trial court had held a plenary hearing, the Court of Appeals did not have to determine whether the failure to appear was direct or indirect contempt.

c. In view of the great possibility that an appellate court would hold that failure to appear or late appearance in court constituted indirect, rather than direct, criminal contempt, trial judges would be advised to conduct a plenary hearing if faced with a tardy or absent contemnor.

C. **Summary proceeding requirements.** G.S. 5A-14. If conduct qualifies as direct [G.S. 5A-13(a)] and contemptuous [G.S. 5A-11], trial judge may punish summarily ("substantially contemporaneously") after giving defendant-respondent summary notice of the charge and a summary opportunity to respond.

1. Substantially contemporaneously. Factors bearing on whether time lapse between contemptuous conduct and court action punishing that conduct satisfies "substantially contemporaneously" requirement of G.S. 5A-14(a) include respondent's knowledge or notice of the conduct and the nature of the conduct.

a. *State v. Johnson*, 52 N.C. App. 592 (1980) (summary hearing for criminal contempt held on the day following the contemptuous behavior, at the conclusion of the bond hearing that the defendant had contemptuously interrupted the previous afternoon, was substantially contemporaneous with the contempt. Summary proceedings were proper, due to the brief nature of a bond hearing as compared to a trial, and the delay of contempt proceedings until the bond hearing was over did *not* trigger due process requirements for notice and hearing provided by G.S. 5A-15).

b. *In re Nakell*, 104 N.C. App. 638 (1991), *disc. rev. denied*, 330 N.C. 851 (1992) (hearing set for the afternoon of 16 November was substantially contemporaneous with conduct which occurred in the late afternoon of 14 November, when judge at that time gave contemnor specification of contempt and set hearing for contemnor to return for further consideration of the matter on the 16th; hearing on the 16th was in continuation of events of the 14th).

2. Notice.

Summary verbal notice by judge that defendant is charged with criminal contempt, and a description of defendant's actions that were considered contemptuous, meet the requirements of G.S. 5A-14(b).

a. *State v. Johnson*, 52 N.C. App. 592 (1980) (summary notice sufficient and written order to appear and show cause not required for summary proceeding for direct criminal contempt).

b. *State v. Pierce*, 58 N.C. App. 815 (1982) (error to hold defendant in contempt since defendant was not given notice of or an opportunity to respond to contempt charges at hearing held later in afternoon for defendant's tardiness at 1:20 p.m. the same afternoon. This case does not address the question of whether this late appearance was direct or indirect criminal contempt. However, *Cox v. Cox*, *supra*, suggests that this would be indirect criminal contempt, in which case plenary proceedings are required.).

c. Sample summary notice language: *[Mr./Ms. Defendant], you are hereby notified, as required by G.S. 5A-14, that you are charged with*

direct criminal contempt of court, in that when the court overruled an objection by your attorney to certain testimony by the witness Mr. X, you pounded the table with your fist and called the witness a "liar" and the court a "kangaroo court." When warned by the court, as the record will show, you repeated the "liar" and "kangaroo court" language and further threatened to "take care of" the witness after the trial. You are advised that you may now respond to this charge before the court takes further action. You may respond through your counsel or directly or both.

3. Opportunity to respond.

a. Defendant must be given a chance to respond to contempt charge. *See State v. Pierce*, 58 N.C. App. 815 (1982); *State v. Verbal*, 41 N.C. App. 306 (1979).

b. Opportunity to respond is not a hearing but is an opportunity to point out instances of gross mistake. *See* G.S. 5A-14, Official Commentary.

4. Burden of proof. G.S. 5A-14(b). Direct criminal contempt must be established beyond a reasonable doubt.

5. Finding of facts required. G.S. 5A-14(b). The findings should include (1) that contemnor was given an opportunity to be heard, (2) a summary of whatever response was made, (3) the judge's finding that the excuse or explanation proffered was inadequate or disbelieved, and (4) an indication that the reasonable doubt standard of proof was applied to the findings of facts. *State v. Verbal*, 41 N.C. App. 306 (1979).

6. The court is not required to appoint counsel to represent the alleged contemnor when imposing summary punishment for direct contempt. *In re Williams*, 269 N.C. 68, *cert. denied*, 388 U.S. 918 (1967).

D. Plenary proceeding requirements. G.S. 5A-15. Plenary proceedings are held when the judge chooses not to proceed summarily against an alleged contemnor, or when the judge may not proceed summarily.

1. Order to show cause.

a. Judicial official issues order directing person to appear before a judge at a reasonable time specified in the order and show cause why he or she should not be held in contempt of court.

b. An order to appear and show cause must be served on defendant. An order for arrest may be issued if there is probable cause to believe that the person will not obey the order. *See* G.S. 5A-16(b).

- c. If objectivity of judge issuing show cause order is reasonably questionable, judge must order that hearing be held before a different judge. G.S. 5A-15(a). A copy of the order must be furnished to the person charged. G.S. 5A-15(a).
2. Notice requirements. The order to show cause must include reasonable notice to defendant of the specific actions of contempt charged against him or her. *See O'Briant v. O'Briant*, 313 N.C. 432 (1985).
 - a. Notice adequate when mailed to foreign attorney at address he had given court. *In re Smith*, 45 N.C. App. 123 (1980), *rev'd on other grounds*, 301 N.C. 621 (1981).
 - b. Notice inadequate when order failed to specify which of plaintiff's acts (failure to comply with court order regarding visitation, etc., or failure to appear at two child custody hearings) constituted contempt, and when show cause orders presumably received preceded final adjudication of contempt by a full year. *O'Briant v. O'Briant*, 313 N.C. 432 (1985).
 - c. Case law assumes, without directly addressing, that mail service is sufficient to comply with the notice requirements of G.S. 5A-15(a).
3. Appointment of prosecutor. G.S. 5A-15(g). Judge may appoint a prosecutor to represent the court. If regular prosecutor has a conflict of interest, judge may appoint another attorney.
4. Show cause hearing.
 - a. Venue lies throughout judicial district where order was issued. G.S. 5A-15(b).
 - b. Person ordered to show cause may move to dismiss the order; the possible grounds are not specified in the statute. G.S. 5A-15(c).
 - c. If imprisonment is likely to be adjudged, alleged contemnor, if indigent, is entitled to appointment of counsel. G.S. 7A-451 (a)(1); *Hammock v. Bencini*, 98 N.C. App. 510 (1990).
5. Burden of proof. G.S. 5A-15(f). Indirect criminal contempt must be established beyond a reasonable doubt, and the judge must enter a verdict of guilty or not guilty.
 - a. Where the basis for contempt citation is the failure to comply with a court order, the movant must show that the failure to comply is willful, and

thus has burden of showing that alleged contemnor had the means to comply with order at some point after its entry. *Lamm v. Lamm*, 229 N.C. 248 (1948).

b. Judge is trier of facts. G.S. 5A-15(d). Contemnor is not entitled to a jury trial upon controverted facts. *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503 (1969).

c. Person charged with contempt may not be compelled to be a witness against himself or herself at the hearing. G.S. 5A-15(e). No such prohibition is specified in the statute on civil contempt proceedings; moreover, civil contempt proceedings, which place the burden of proof upon the defendant to show that he or she is not in contempt, have been held not to implicate the right against self incrimination as guaranteed by the fifth and fourteenth amendments to the United States Constitution. *Hartsell v. Hartsell*, 99 N.C. App. 380 (1990).

6. Finding of facts required. G.S. 5A-15(f).

7. Custody and arrest on contempt charge allowed. G.S. 5A-16.

E. Punishment for criminal contempt. G.S. 5A-12. See chart, following this section. After sentencing defendant for criminal contempt, the judge may withdraw, terminate, or reduce punishment at any time. [G.S. 5A-12(c)]. Note that a sentence of imprisonment for contempt is served day for day with no credit for good time or gain time. See N.C. Administrative Code 02B.0108.