

CONTEMPT PROBATION – PART 1 **WHAT DO I DO NOW THAT I GOT THE FINDING?**

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INTRODUCTION

There have been several discussions on the ACFLS list serve about bringing and trying contempt of court matters. There have been no discussions about what happens once you get a finding of contempt. This article discusses contempt sentencing and probation requirements, including some best practices in this area. Part 2 will cover probation violation issues. This article assumes that the citee is agreeing to be placed on probation after the contempt finding rather than just serving his/her sentence.

Family Code §290 gives the court the power to make orders that in its discretion it believes are necessary for the enforcement of its judgment or orders. Contempt matters are treated as if they are the equivalent of a criminal misdemeanor. Penal Code §1203.1 provides the rules for probation and Penal Code §1203.3 provide the rules for probation revocations. Criminal law cases provide further authority for issues related to probation and probation revocations. The United States Supreme Court in Hicks v. Feiock (1988) 485 U.S. 624 makes it clear that no criminal penalties can ever be imposed on a person who has been denied criminal protections. The better practice in family court contempt proceedings is to proceed with providing the citee¹ with the same Constitutional protections as a misdemeanor defendant.

In order to file a contempt of court proceeding, we are required to use the Judicial Council form Order to Show Cause and Affidavit for Contempt (FL-410) (“OSC”) along with the appropriate Affidavit form(s). The face of the OSC clearly states “A contempt proceeding is criminal in nature.” Based on this requirement, it is clear that all contempt proceedings filed on these forms will require that the citee be provided all of the same Constitutional protections as a criminal misdemeanor defendant. The best practice is to ensure that these protections are maintained in order to have a valid contempt finding. A failure to ensure these protections can result in a reversal of the finding and possibly the inability to retry the matter.

The majority of these protections also are to be extended to a contemnor who is before the court for a probation revocation hearing. At the beginning of the case, prior to the contempt finding, you need to make sure that the citee is properly advised of his/her rights. A failure to be properly advised with any appropriate waivers of those rights, can result in a conviction that will be set aside on writ review.

At all stages where a plea is being entered, you should make sure that the citee is under oath. The citee's attorney should **NOT** be advising his/her own client of the rights and taking the waiver of those rights. If there is an error in the advisement and waiver and it is done by citee's attorney, then it is an invited error and the contempt finding will stand on review. If it is done by the

¹A person charged with a contempt citation is known as the Citee. A person found guilty of contempt (either by a plea or after trial) is known as a Contemnor. These two terms will be used throughout the article denoting whether the situation is pre-conviction or post-conviction.

court or opposing counsel, then an argument can be made it is an invalid waiver and the finding must be set aside. Citee's attorney does not have the obligation or duty to point out the problems with the advisement and/or waiver of rights. To the contrary, it goes against the attorney's ethical duties in representation of his/her client.

ADVISEMENT AND WAIVER OF RIGHTS

Arrestment Rights – Pre-trial

A citee can either enter a plea (negotiated disposition or as charged) or go to trial on the contempt citation. Initially the citee should have been advised of the following rights at arrestment (the first appearance for the contempt citation):

- The right to counsel of choice or court-appointed counsel if s/he cannot afford counsel or the right to represent her/himself.
- The right to a speedy trial. A speedy trial is one that is commenced within 45 days of the arrestment if the citee is out of custody or 30 days if the citee is in custody at the time of the arrestment.
- The right to a trial. Unless the maximum time the citee is facing is more than 180 days, there is only a right to a court trial. If the maximum time is greater than 180 days, then there is a right to a jury trial.
- The right to subpoena witnesses and produce evidence in citee's defense.
- The right to confront and cross-examine witnesses against the citee.
- The right to remain silent.
- The right to have the Judge hear the proceeding rather than a Commissioner.

Advisement and Waiver of Rights for a Plea Bargain

The citee can choose not to go to trial by either accepting an agreed upon disposition of the counts and an agreed upon sentence or by entering a plea to the contempt citation as charged with no promises. In order to enter a valid plea, the following advisements must be made on the record, however, the better practice is to also have a written advisement of rights and waiver of those rights by the executed by the citee.

- The Fifth Amendment (and California Constitution Art. I §15) right to remain silent and not incriminate him/herself and that this right is being waived in order to enter the plea
- Advisement of the Constitutional rights must be acknowledged and waived to enter the plea (The better practice is to warn the citee that by pleading guilty or no contest, s/he will be waiving these rights)"
 - The right to counsel, and if counsel cannot be afforded, the right to court-appointed counsel. This right is not waived if citee is represented by counsel
 - The right to a speedy and public trial
 - The right to confront and cross-examine witnesses against him/herself
 - The right to remain silent and not incriminate him/herself and that by entering the plea s/he is incriminating her/himself
 - The right to subpoena witnesses and produce evidence on his/her behalf

- The right to be sentenced by a Judge (This right is only waived if the plea is being taken by a Commissioner. If this right is not waived, then a Commissioner cannot take the plea)
- Verification that the plea and waiver of rights is being done voluntarily and intelligently:
 - Inquire into whether or not the citee's judgment has been impaired by illness, being under the influence of alcohol or drugs/narcotics of any kind, or in any other way
 - Inquire if the citee has had sufficient time to consider the plea and discuss the matter with his/her counsel, if represented
 - If represented by counsel , inquire if satisfied with counsel
 - Go through the terms and conditions of the plea, including a factual basis for the plea, to make sure the citee has a full understanding. This should also include advising the citee of the maximum sentence s/he is facing
 - Counsel should be asked if s/he joins in the waivers and agrees that there is a factual basis for the plea
 - There should also be an advisement and waiver of rights for the time for sentencing if the sentencing is to take place as soon as the plea is entered.

Findings Necessary Before Probation Can Be Imposed

At sentencing the Court must make the following findings on the record:

- A knowing, intelligent and voluntary waiver of the citee's Constitutional rights
- A factual basis for the plea
 - The order violated was a valid court order.
 - Citee had knowledge of the order. The better practice is to include how the Citee had knowledge of the order.
 - Citee failed to comply with the order. The better practice is to include the facts supporting the violation.
 - Citee's ability to comply with the order². The better practice is to ask that the Court include a finding showing the ability to comply with the order for every count included in the finding.
 - The Court may or may not also make a finding that the violation was willful. This finding is not necessary, but it can't hurt!
- That the Court is accepting the plea and finds the citee guilty. If any counts are dismissed as part of the plea, this should also be confirmed at the same time.
- The Court should then state the sentence imposed for each count of contempt that is not dismissed³.

The Judicial Council Form FL-415 (Findings and Order Regarding Contempt) can be used or you can prepare your own Findings and Order After Hearing. Whichever format you choose, you need to make sure that you have (1) stated what rights the citee was given and/or waived, (2)

²This finding only applies to non-Code of Civil Procedure §1209.5 allegations (child support)

³For example: Count 1 – 5 days in jail. Count 2 – 5 days in jail. Etc.

the requisite findings of contempt based on the type of contempt prosecuted⁴, (3) the disposition of each count of contempt set forth in the Order to Show Cause and Affidavit for Contempt, (4) the sentence being pronounced (5) if probation is granted **ALL** of the terms of probation.

The Findings and Order must state the evidentiary facts supporting a finding of each of the elements of the sustained counts, except that it need not state evidentiary facts supporting an ultimate finding of willful violation of an order, because that can be inferred from the circumstances⁵.

SENTENCING

Imposition of Sentence – Probation

The rules for imposing sentence are the same whether the finding is from the entry of a plea or after a trial. Once the finding has been made, the citee now becomes a contemnor. The Judge must impose sentence, however, cannot do so immediately upon a finding, unless the contemnor waives time for sentencing. The standard rule is that the time for sentencing can be no sooner than six hours nor more than five days from conviction. This time may be extended for not more than 20 judicial days if probation is considered. (See Penal Code §1449)

The court may stay execution of the contempt judgment for a reasonable period to afford the contemnor one last chance to comply with the order⁶. This is in effect an opportunity for the contemnor to purge the contempt finding against him/her and have the contempt dismissed.

The Findings and Order must be promptly and properly completed when filed with the Court. A delay can result in the issuance of a *habeas corpus* writ⁷. The best practice is to bring the completed (as fully as possible) findings with you and complete it while you are there in court for the Judge to sign immediately.

Difference Between “Imposition of Sentence Suspended” and “Execution of Sentence Suspended”

If the Court imposes sentence, places the contemnor on probation, and suspends execution of sentence, this limits the Judge's discretion to impose a specific sentence upon a finding of a violation of probation. At this point, there can be no further probation as there is no further sentence to be served. When execution is suspended, the Judge can only impose the entire

⁴For non-child/family support citations: (1) a valid court order (2) citee's knowledge of the order (3) citee's failure to comply with the order, and (4) citee's ability to comply with the order. For child/family support citations: (1) a valid court order (2) citee's knowledge of the order, and (3) citee's failure to comply with the order.

⁵See Petition of Mancini (1963) 215 Cal.App.2d 54.

⁶See Warner v. Superior Court (1954) 126 Cal.App.2d 821, 827; '76 L & W Co. v Superior Court (1892) 93 Cal 139,143.

⁷See In re Jones (1975) 47 Cal.App.3d 879. [A delay of 8 days in signing the commitment order was too much of a delay.]

sentence that was suspended. At the sentencing the Judge must state the particular sentence being imposed (I.e., 5 counts of contempt with a total of 25 days) and that execution is suspended pending successful completion of probation. If probation is revoked, the Court has no choice but to impose the entire sentence.

If the Court imposes sentence, places the contemnor on probation, and suspends imposition of the sentence, this gives the Judge discretion to impose an appropriate sentence upon a finding of a violation of probation. If the Judge imposes less than the maximum suspended sentence, then the contemnor can remain on probation. When imposition is suspended, the Judge states the entire sentence being imposed and that imposition is suspended pending successful completion of probation. An example of this would be if the sentence is 120 hours of community service and 120 hours of jail, the Court could order the contemnor to do 10 hours of community service and 48 hours of jail for the violation. The remaining 110 hours of community service and 72 hours of jail will continue with imposition suspended and the contemnor will be placed back on probation.

If there are no terms of probation stated in the Findings and Order, then the contemnor is not on notice as to what s/he must do to comply with probation. If there is no notice, there can be no probation violation and no further sentence can be imposed. You in effect only have a finding with no punishment available other than the consequences of the contempt finding on other family court issues.

If there is a contempt finding on more than one count, the Court should also state whether or not the sentences are to run concurrently or consecutively. Just as it sounds, if they are concurrent, the sentences on all of the counts overlap (they are all served at the same time), and if they are consecutive, each count's sentence starts when the previous count's sentence has terminated. The sentence is served on each count in order. The ruling on whether the sentences are served concurrently or consecutively is part of the judgment and must be included by the Clerk or the Judge to the officer executing the judgment (ie., the jail). (See Penal Code §669, §§1213 - 1213.5). This must be done at the time of the sentencing and cannot be deferred to another time. If this is not done, then the sentences will be required to be run concurrently⁸.

Probation

There are no published cases that hold that the court cannot impose probation and probation terms pursuant to Family Code §290. The maximum time that the contemnor can be on probation is up to three years. (See Penal Code §1203a).

⁸See In re Calhoun (1976) 17 Cal 75. [The trial court mistakenly reserved jurisdiction at the sentencing hearing under Penal Code §669 to determine how the sentences should be run. The sentences were deemed to run concurrently. See People v. Cowan (1941) 44 Cal.App.2d 155, 163. [After the 60-day time period the Court is without authorization to order the sentences to be run consecutively.]

CONCLUSION

This area of the law is a cross-over between family and criminal law. In order to be effective in obtaining a valid contempt finding and probation terms, you really need to have a good understanding of the Constitutional and criminal law rules related to misdemeanor rights.