

THE POWER OF THE COURT: CONTEMPT

I. BRIEF HISTORY

“Since the twelfth century courts have claimed [the] inherent power to protect the integrity of their proceedings and ensure compliance with their lawful orders by holding offending parties in contempt of court.”¹ Contempt originated as a means of guaranteeing the efficiency and dignity of the sovereign, and it developed from the hallowed rights of the monarchs of the English Crown.² As the population increased and diversified, it became imperative for the monarch to wield its bureaucratic authority through its agents.³ As a result, the contempt authority was utilized by the judiciary of early England as a method of disciplining presumed contempt or disrespect of the king’s command.⁴

This power carried over to the United States and was specifically mentioned in Section 17 of the Judiciary Act of 1789, which provided that the federal courts “shall have the power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.”⁵ The United States Supreme Court noted that Section “17 was intended to do more than expressly attribute to the federal judiciary those powers to punish for contempt possessed by English courts at common law.”⁶ At the federal level, this power is found at 18 U.S.C. § 401.

As early as 1851, the Territory of New Mexico adopted a contempt statute that has been brought forward and codified at NMSA 1978, § 34-1-2 (“It shall be within the power of each and every presiding [officer] of the several courts of this state, whether of record or not of record, to preserve order and decorum, and for that purpose to punish contempts by reprimand, arrest, fine or imprisonment, being circumscribed by the usage of the courts of the United States.”).⁷ In 1924, the New Mexico Supreme Court stated that:

The power of courts to punish for contempts is inherent. Its existence to the preservation of order in judicial proceedings and to the enforcement of obedience to their writs, orders, and mandates, and consequently to the due administration of justice. The exercise of this power is as old as the English history itself and has always been regarded as necessary incident and attributable of courts. Being a common-law power, inherent in all courts, the moment the courts of the United States were called into existence they became vested with it. It is a power coming to us from the common law and, so far as we know, has been universally admitted and recognized.⁸

Over the years, as courts have exercised the contempt power for different purposes in many and various cases, they have developed a vast and complicated body of contempt law. Today, contempt proceedings are categorized as either “criminal contempt,” the court’s inherent ability to punish, or “civil contempt,” the court’s power to coerce compliance with its orders.

II. DISTINGUISHING CRIMINAL CONTEMPT FROM CIVIL CONTEMPT

Although New Mexico statutes make no distinction between civil and criminal contempt, modern contempt litigation revolves around this difference. The distinction is significant because the procedural laws governing civil and criminal contempt differ dramatically. “The border line between what may be termed civil and what criminal contempt is, as has been pointed out by many authorities, exceedingly indistinct and narrow, leaving it often a question of extreme refinement as to whether the act was one or the other.”⁹ In *Costilla Land & Investment Co. v. Allen*, the New Mexico Supreme Court referenced *Bessette v. Conkey Co.*, a United States Supreme Court case, to address the distinction as follows:

Proceedings for contempt are of two classes, - - those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.¹⁰

“Contempts are frequently neither completely civil nor strictly criminal.”¹¹ The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised.¹² At least one court has identified four factors that should be considered in determining whether the alleged contempt is civil or criminal:

1. In what manner did the contempt happen, that is, did the contemnor refuse to do an affirmative act or did the contemnor do that which he [or she] was ordered not to do;
2. what was the substance of the proceeding;
3. what kind of punishment was imposed; and
4. for what reason did the court impose that kind of sanction.¹³

“Analyzing the first factor, if the contemnor refuses to do an affirmative act previously ordered by the court, the proceeding is considered to be civil; if the contemnor does something he or she was ordered not to do, the proceeding is criminal.”¹⁴

The second factor addresses the “course of proceedings.”¹⁵ For example, if the action is brought by a private party, rather than the state, the contempt proceeding is civil. However, the classification of a contempt as civil or criminal does not depend on whether the contempt proceeding arises out of an underlying criminal action or civil action.¹⁶

The third and fourth factors address the type of punishment imposed and the district court's reasons for imposing the punishment. They are often denominated as the principal considerations in determining whether a contempt proceeding is criminal or civil. For example, a court must consider whether the punishment is for a definite term, generally indicating criminal contempt, or whether it is conditional upon compliance with a court order, thereby indicating civil contempt. Another example of civil contempt is that the individual is given the opportunity to purge the contempt. As such, the person "carries the keys to his prison in his own pocket. He [or she] can end the sentence and discharge himself of contempt at any moment by doing what he [or she] was previously refused to do."¹⁷

Whether the contempt is criminal or civil, the New Mexico Supreme Court has continuously reminded courts to use it "cautiously and sparingly."¹⁸ Because "the contempt power of a court is so broad[,] it is "uniquely liable to abuse."¹⁹ "The least possible power adequate to compel compliance with the court's order is its proper exercise."²⁰ "A court should determine, from the outset, the purpose for which it is exercising its contempt power so that it can fashion an appropriate remedy."²¹

III. DIRECT VERSUS INDIRECT CONTEMPT

Distinguishing between criminal and civil contempt is not necessary in the context of direct contempt. Direct contempt is contemptuous conduct that occurs in the presence of the court.²² Indirect contempt occurs outside the presence of the court.²³ In *State v. Diamond*, the New Mexico Court of Appeals explained the difference between direct versus indirect contempt by citing to Justice Traynor's dissenting opinion in *Chula v. Superior Court*:

The classifications of contempts as direct or indirect is merely a semantic device differentiating contempts that can be adjudicated summarily from those that can be adjudicated only after adequate notice and hearing. When a contempt occurs within the "immediate view and presence of the court" the judge is fully informed of the facts necessary to adjudicate the guilt or innocence of the alleged contemner. When, however, the court is not so informed of such facts, notice and hearing are necessary to get them.²⁴

Punishment for contempt is appropriate when it is required to restore order in the courtroom, ensure respect for the judicial process, and appropriate warnings are given.²⁵

The United States Supreme Court has held that summary punishment of contempt satisfies due process requirements.²⁶ However, it has also cautioned that "for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct."²⁷ Summary punishment should be reserved only for conduct that is "an open threat to the orderly procedure of the court and such a flagrant defiance

of the person and presence of the judge before the public' that, it 'not instantly suppressed and punished, demoralization of the court's authority will follow.'"²⁸

What constitutes "immediate view and presence?" The Michigan Supreme Court defined the concept as follows:

[I]mmediate view and presence are words of limitation, and exclude the idea of constructive presence. The immediate view and presence does not extend beyond the range of vision of the judge, and the term applies only to such contempts as are committed in the fact of the court. Of such contempts, he [or she] may take cognizance of his [or her] own knowledge, and may proceed to punish summarily such contempts, basing his [or her] action entirely upon his [or her] own knowledge. All other alleged contempts depend solely upon evidence, and are inferences.²⁹

Contempt is only direct when all the facts necessary to find the contempt are within the personal knowledge of the judge.³⁰ For example, a "person who commits disruptive or defiant conduct in the midst of an ongoing court proceeding within the personal perception of the judge has committed an act of direct criminal contempt and may be punished summarily without further evidentiary proceedings."³¹ For direct contempt, a court should:

- identify on the record the parties and the matter to be heard;
- describe what happened and, if appropriate, read back any derogatory comments;
- describe where it happened;
- find whether the conduct was done in defiance or disrespect of the Court or against the dignity of the Court or against the law, or interrupted the proceedings;
- describe the resulting disturbance to the Court's business;
- provide the person with the opportunity to explain, apologize or purge;
- make findings to support a finding of contempt;
- immediately announce your judgment;
- prepare a written order; and
- enter the order so it can be appealed.

A judge does not have personal knowledge for purposes of summary contempt if the judge must rely on the testimony of others to establish the case against the contemnor.³²

IV. PROCEDURAL REQUIREMENTS

"Judges must take reasonable and necessary steps to maintain the order and safety of our court processes. At the same time, they must comply with fundamental principles of our constitutional system of due process of law to ensure that the judiciary itself does not act lawlessly in the course of enforcing the law."³³ Even in cases of direct criminal contempt that can be summarily addressed, the New Mexico Supreme Court requires judges to give alleged contemnors

an “adequate opportunity to defend or explain one’s conduct” as a minimum requirement before imposing punishment.³⁴

An alleged contemnor is entitled to procedural due process in cases of indirect contempt. The level of due process required is dictated by whether the contempt is criminal or civil. Because civil contempt sanctions are remedial and not intended to punish, the court may impose civil contempt sanctions “by honoring the most basic due process protections - in most cases, fair notice and an opportunity to be heard.”³⁵ On the other hand, criminal contempt, is a “crime in the ordinary sense; it is a violation of the law.”³⁶

A. DUE PROCESS PROTECTIONS IN INDIRECT CRIMINAL CONTEMPT CASES

“[C]riminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,” including protection against double jeopardy, notice of charges, assistance of counsel, the ability to present a defense, the privilege of self-incrimination, and a right of proof beyond a reasonable doubt.”³⁷ An alleged criminal contemnor “is presumed innocent until found guilty” and “cannot be compelled to testify against himself [or herself]”³⁸ Nor can a court conduct further contempt proceedings after an individual was summarily jailed for contempt in open court as the additional proceedings for sanctions would constitute double jeopardy.³⁹ Accordingly, case law holds that in a criminal contempt proceeding, the alleged contemnor:

- must be presumed innocent and proven guilty beyond a reasonable doubt;⁴⁰
- must be informed of the nature of the charged offense(s) and given notice of the specific offense(s) with which he or she is charged;⁴¹
- has a right against self-incrimination;⁴²
- must be afforded a hearing regarding the charges, including the opportunity to produce witnesses;⁴³
- must be given a reasonable opportunity to prepare and present a defense;⁴⁴
- must be given a reasonable time to secure the assistance of counsel and be provided counsel if he/she cannot afford one;⁴⁵ and
- when appropriate, the right to a jury trial.⁴⁶

In cases of indirect criminal contempt, the court shall appoint the district attorney to prosecute the contempt charge.⁴⁷ In addition, a new judge must be appointed to hear the criminal case.⁴⁸

Criminal contempt includes acts such as disorderly conduct, insolent behavior, done in disrespect to the court or any other conduct that actually obstructs or hinders the administration of justice or tends to diminish the court’s authority.⁴⁹ Criminal contempt requires a criminal state of mind.⁵⁰

Whether the defendant is found guilty of direct or indirect criminal contempt, the defendant has a right to appeal.⁵¹

B. DUE PROCESS PROTECTIONS IN INDIRECT CIVIL CONTEMPT CASES

Civil contempt proceedings are remedial, “instituted to preserve and enforce the rights of private parties to suits and to compel obedience to the orders, writs, mandates and decrees of the court.”⁵² The elements necessary for finding civil contempt are: (1) knowledge of the court’s order; and (2) an ability to comply.⁵³ Neither willfulness nor intent are elements of civil contempt.⁵⁴

If the court finds civil contempt, there are two general categories of remedial sanctions that the court may impose: compensatory sanctions and coercive sanctions.⁵⁵ Compensatory sanctions may include damages or attorney’s fees and are imposed to compensate a party for pecuniary losses sustained due to the contempt.⁵⁶ Coercive sanctions may include “fines, imprisonment, or other sanctions” designed “to compel the contemnor to comply in the future with an order of the court.”⁵⁷ Coercive sanctions are conditional, imposed to address the contemnor’s continuing violation of a court order.⁵⁸ Such sanctions may include imprisonment to coerce the contemnor into complying with the order of the court.⁵⁹ A contemnor subject to a coercive sanction has the power to discharge the civil contempt at any time “by doing what [the contemnor] has previously refused to do.”⁶⁰ As such, the contemnor “carries the keys of his prison in his own pocket.”⁶¹

“Civil contempt sanctions may be imposed by honoring the most basic due process protections - in most cases, fair notice and an opportunity to be heard.”⁶² Due process in a civil contempt proceeding does not automatically implicate a right to counsel.⁶³ Although a contemnor’s “interest in his personal liberty, through an extremely important one, is not as strong as it would be if he [or she] were criminally prosecuted or charged with criminal contempt. He [or she] will lose his [or her] liberty only if it is proven that he [or she] has the ability to comply and fails to make arrangements to do so.”⁶⁴ In *State ex rel., Department of Human Services v. Rael*, the New Mexico Supreme Court cited *Lassiter v. Department of Social Services* with approval and noted:

[T]hat an indigent’s right to appointed counsel has been recognized to exist only where the litigant may lose his physical liberty if he [or she] loses the litigation and that as his [or her] interest in personal liberty diminishes so does his [or her] right to appointed counsel. From this the Court derived an historical presumption that an indigent litigant has a right to appointed counsel only when, if he [or she] loses, he [or she] may be deprived of his [or her] personal liberty. The Court then set forth the test to be applied to determine whether the due process clause of the fourteenth amendment entitles the indigent to assistance of appointed counsel: The private interests at stake, the risk that the procedures used will lead to erroneous

decisions, and the government's interest must all be evaluated and their weight balanced against that historical presumption.⁶⁵

If a civil contemnor can be imprisoned, the question becomes: How long can the incarceration last before it implicates a right to counsel? The New Mexico Court of Appeals answered this question in *State v. Case* and held that if the punishment imposed is imprisonment for less than six months counsel need not be appointed and no jury trial is required.⁶⁶ What is required is a case-by-case evaluation of the need for counsel in such proceedings.⁶⁷ In evaluating an indigent party's request for counsel, the district court must consider "the indigent's ability to understand the proceeding, the complexity of the legal and factual issues, and the defenses that might be presented."⁶⁸ These holdings did not change with the United States Supreme Court decision of *Turner v. Rogers*.⁶⁹

In *Turner*, the Court held that "the 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)."⁷⁰ Specifically, the United States Supreme Court concluded that in cases involving child support enforcement, "where . . . the custodial parent (entitled to receive support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide support) [even if that person may be subject to incarceration up to one year]."⁷¹ However, to meet due process requirements, "the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order."⁷² Alternative procedures include sufficient notice regarding the importance of the ability to pay, a fair opportunity to present and dispute relevant financial information, and court findings on the noncustodial parent's ability to pay. Ultimately, the court must determine a person's ability to pay in contempt cases where incarceration is possible.⁷³

V. CONCLUSION

Contempt continues to be a necessary device for courts to govern the conduct of those appearing before the court and to enforce court orders. This article was not meant to address every case, or discuss possible defenses, such as free speech, or cruel and unusual and/or excessive punishments. It was intended to provide a framework as to how individuals or entities can be charged with contemptuous conduct.

¹ Elizabeth G. Patterson, "Civil Contempt & the Indigent Child Support Obligor: The Silent Reform of Debtor's Prison," 18 Cornell J.L. & Public Policy 95, 101 (2008) (Civil Contempt). In *State v. Sheppard*, 177 Mo. 205, 76 S.W. 79 (1903), the Missouri Supreme Court stated that, "[t]he power to punish for contempt is as old as the law

itself From the earliest dawn of civilization, the power has been conceded to exist. It has been exercised, or not, as a matter of public policy, but its existence has never been denied.” *State v. Sheppard*, 76 S.W. at 83.

² Edward Gregory Mascolo, “Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor,” 16 *New Eng. J. on Crim & Civ. Confinement* 171, 174 (1990).

³ See, Note 2, Mascolo, at 174.

⁴ See, Note 2, Mascolo, at 174.

⁵ Judiciary Act of 1798, ch. 20, § 17, 1 Stat. 73.

⁶ *Green v. United States*, 356 U.S. 165, 169 (1958), 78 S.Ct. 632, 2 L.Ed.2d 672.

⁷ “Even in the absence of express statutory authority, courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates. While statutes may provide reasonable regulatory measures, the Legislature may not substantially impair or destroy the implied power of the court to punish for contempt.” *Concha v. Sanchez*, 2011-NMSC-031, ¶ 23, 150 N.M. 268, 258 P.3d 1060 (quotation marks and citations omitted).

⁸ *State v. Magee Publishing Co.*, 1924-NMSC-023, ¶ 5, 29 N.M. 455, 224 P. 1028, *overruled in part on other grounds by State v. Morris*, 1965-NMSC-113, 75 N.M. 475, 406 P.2d 349 (citations omitted). The Supreme Court cited to *State v. Sheppard*, 177 Mo. 205, 76 S.W. 79 (1903) as a “splendid review of the origin and history of [the court’s contempt] power, supported by a wealth of authority as well as its universal recognition, both at common law and in the United States.” *State v. Magee Publishing*, 1924-NMSC-023, ¶ 5.

⁹ *Costilla Land & Investment Co. v. Allen*, 1910-NMSC-044, ¶ 7, 15 N.M. 528, 110 P. 847.

¹⁰ *Costilla Land & Investment Co. v. Allen* 1910-NMSC-044, ¶ 7, 15 N.M. 528, 110 P. 847, citing *In Re Nevitt*, 117 F. 448, 458 (8th Cir. 1902), that quoted with approval, *Bessette v. Conkey Co.*, 194 U.S. 324, 24 S.Ct. 665, 48 L.Ed. 997, (1904). In *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-442, 31 S.Ct. 492, 55 L.Ed. 797 (1911), the United States Supreme Court articulated the distinction as follows, “If the sanction is remedial - - for the benefit of the injured party - - then the contempt is civil; if, on the other hand, the sanction is punitive - - to vindicate the court’s authority - - then the attempt is criminal.”

¹¹ *State v. Pothier*, 1986-NMSC-039, ¶ 4, 104 N.M. 363, 721 P.2d 1294, citing, *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

¹² *Concha v. Sanchez*, 2011-NMSC-031, ¶ 24, 150 N.M. 268, 258 P.3d 1060 (internal quotation marks and citation omitted); *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 6, 63 N.M. 156, 315 P.2d 223.

¹³ *Munoz v. Munoz*, 39 P.3d 390, 393 (Wyo. 2002), citing *United Mine Workers of America, Local 1972 v. Decker Coal Company*, 774 P.2d 1274, 1280 (Wyo. 1989), superseded on other grounds by rule as recognized by *CRB v. State, Department of Family Services*, 974 P.2d 931, 936..

¹⁴ *Stephens v. Lavitt*, 239 P.3d 634, 638 (Wyo. 2010). It should be noted that a court order need not be in place for criminal contempt to occur, as in the case of disorderly, contemptuous, or insolent behavior.

¹⁵ *Stephens v. Lavitt*, 239 P.3d 634, 638 (Wyo. 2010).

¹⁶ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 24, 150 N.M. 268, 258 P.3d 1060 (quotation marks and citation omitted).

¹⁷ *State v. Pothier*, 1986-NMSC-039, ¶ 4, 104 N.M. 363, 721 P.2d 1294 (internal quotation marks and citation omitted).

¹⁸ *Corliss v. Corliss*, 1976-NMSC-023, ¶ 14, 89 N.M. 235, 549 P.2d 1070, citing, *International Min. & C. Corp v. Local 177, United Stone & Allied Prods. Workers*, 1964-NMSC-098, ¶ 18, 74 N.M. 195, 392 P.2d 343.

¹⁹ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 29, 150 N.M. 268, 258 P.3d 1060 (internal quotation marks and citation omitted). The New Mexico Supreme Court went on to say, “As human beings, judges sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir.” *Id.* (internal quotation marks and citations omitted).

²⁰ *Corliss v. Corliss*, 1976-NMSC-023, ¶ 14, 89 N.M. 235, 549 P.2d 1070 (citation omitted).

²¹ *State of New Mexico ex rel., Children, Youth and Families Department v. Mercer-Smith*, 2019-NMSC-005, ¶ 29, ___ P.3d ___, citing, *Concha v. Sanchez*, 2011-NMSC-031, ¶ 45, 150 N.M. 268, 258 P.3d 1060 (“A judge’s exercise of the contempt power must be tailored to the contemptuous conduct, exerting just enough judicial power to right the wrong; no more, no less.”).

²² *State v. Pothier*, 1986-NMSC-039, ¶ 8, 104 N.M. 363, 721 P.2d 1294. *See also, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 n 2, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (“Direct contempts that occur in the court’s presence may be immediately adjudged and sanctioned summarily, and, except for serious criminal contempts in which a jury trial is required, the traditional distinction between civil and criminal proceedings does not pertain.”) (citations omitted).

²³ *State v. Pothier*, 1986-NMSC-039, ¶ 8, 104 N.M. 363, 721 P.2d 1294.

²⁴ *State v. Diamond*, 1980-NMCA-026, ¶ 6, 94 N.M. 118, 607 P.2d 656, citing, *Chula v. Superior Court*, 57 Cal.2d 199, 18 Cal.Rptr. 507, 368 P.2d 107.

²⁵ *In re Byrnes*, 2002-NMCA-102, 132 N.M. 718, 54 P.3d 996 (except in cases of flagrant contemptuous conduct, before summary punishment for contempt may be imposed and enforced, the record should be clear that a specific warning was given by the judge, an opportunity to explain was afforded, and a hearing held); *State v. Cherryhomes*, 1985-NMCA-108, ¶ 5-6, 103 N.M. 771, 714 P.2d 188, *cert. denied*, 103 N.M. 740, 713 P.2d 556 (attorney refused to answer the court’s question, was belligerent that “clearly involved a disruption of the trial and blatant disrespect for the court” and was warned six time that he would be held in contempt was found to have committed direct criminal contempt for which the district court proceeded against him summarily).

²⁶ *Fisher v. Pace*, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed 569 (1949); *Ex parte Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888).

²⁷ *In re Oliver*, 333 U.S. 257, 274-75, 68 S.Ct. 499, 92 L.Ed 682 (1948).

²⁸ *In re Oliver*, 333 U.S. 257, 275, 68 S.Ct. 499, 92 L.Ed. 682, quoting, *Cooke v. United States*, 267 U.S. 517, 536, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

²⁹ *In re Wood*, 82 Mich 75, 82, 45 N.W.75 (1890); *In re Scott*, 342 Mich. 614, 618-19, 71 N.W.2d 71 (1955).

³⁰ *In re Scott*, 342 Mich 614, 618, 71 N.W.2d 71 (1955) (holding that “in order to have a valid summary conviction, due process requires that the salient facts constituting the contempt be within the personal knowledge of the judge[.]”).

³¹ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 27, 150 N.M. 268, 258 P.3d 1060.

³² *In re Scott*, 342 Mich 614, 619-622, 71 N.W.2d 71 (1955).

³³ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 1, 150 N.M. 268, 258 P.3d 1060. The New Mexico Supreme Court noted that “due process shortcuts of summary directly contempt proceedings are permitted only in exceptional circumstances[.]” *Concha v. Sanchez*, 2011-NMSC-031, ¶ 35.

³⁴ *In re Klecan*, 1979-NMSC-094, 93 N.M. 637, ¶ 6, 639, 603 P.2d 1094. The Supreme Court held that, “in all fairness to participants in litigation in this State, and except in cases of flagrant contemptuous conduct, before summary punishment for contempt may be imposed and enforced, the record should be clear that: (1) a specific warning was given by the judge; (2) an opportunity to explain was afforded; and (3) a hearing was held.” *In re Klecan*, 1979-NMSC-094, ¶ 13.

³⁵ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060, citing, *United Mine Workers v. Bagwell*, 512 U.S. 821, 827 n 2, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 2520, 180 L.2d 2d 452 (2011) (holding that constitutional due process in civil contempt requires notice and a hearing but not the right to counsel).

³⁶ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 26, 150 N.M. 268, 258 P.3d 1060 (internal quotation marks and citations omitted).

³⁷ *United Mine Workers v. Bagwell*, 512 U.S. 821, 826, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (quotation marks and citations omitted). In *Concha v. Sanchez*, 2011-NMSC-031, 150 N.M. 268, 258 P.3d 1060, the New Mexico Supreme Court expressed this proposition as follows:

A criminal contempt defendant is therefore entitled to due process protections of the criminal law, the specific nature of which will depend on whether the criminal contempt is categorized as direct or indirect. No matter how a criminal contempt is characterized, it is a fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. *Concha v. Sanchez*, 2011-NMSC-031, ¶ 26 (internal quotation marks and citation omitted).

³⁸ *Tran v. Bennett*, 2018-NMSC-009, ¶ 42, 411 P.3d 345 (citation omitted).

³⁹ *State v. Driscoll*, 1976-NMSC-059, ¶ 15, 89 N.M. 541, 555 P.2d 136. However, it was noted that successive contempts are punishable as separate offenses. *State v Driscoll*, 1976-NMSC-059, ¶ 17.

⁴⁰ *International Min. & C. Corp v. Local 177, United Stone & Allied Prods. Workers*, 1964-NMSC-098, ¶ 16, 74 N.M. 195, 392 P.2d 343.

⁴¹ *Norton v. Reese*, 1966-NMSC-154, ¶ 7, 76 N.M. 602, 417 P.2d 205 (observing that a contempt defendant has a right under Article II, Section 14 of the New Mexico Constitution to be given notice of the nature and cause of the criminal accusation).

⁴² *International Min. & C. Corp v. Local 177, United Stone & Allied Prods. Workers*, 1964-NMSC-098, ¶ 16, 74 N.M. 195, 392 P.2d 343.

⁴³ *State v. Diamond*, 1980-NMCA-026, ¶ 11, 94 N.M. 118, 607 P.2d 656, citing with approval, *In re Oliver*, 333 U.S. 257, 275, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

⁴⁴ *State v. Pothier*, 1986-NMSC-039, ¶ 11, 104 N.M. 363, 721 P.2d 1294.

⁴⁵ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 5, 97 N.M. 640, 642 P.2d 1099; NMSA 1978, § 31-15-10(C) (2001) (“The district public defender shall represent every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment.”).

⁴⁶ NMSA 1978, § 34-1-4 (1965) (“In all proceedings in the district courts for indirect criminal contempt arising out of written publications made out of court, the contemnor shall have the right to a trial by jury.”); see also, *In re Herkenhoff*, 1997-NMSC-007, ¶ 5, 122 N.M. 766, 931 P.2d 1382 (“If the punishment to be imposed is imprisonment for less than six months or a fine of less than \$ 1000, however, counsel need not be appointed and no jury trial is required.”) (citation omitted).

⁴⁷ NMSA 1978, § 36-1-18(A) (2001) (“Each district attorney shall . . . prosecute . . . for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested.”).

⁴⁸ Rule 21-211(A)(2)(b) NMRA (a judge shall disqualify himself or herself in any proceeding in which the judge is “acting as a lawyer.”); see also, *State v. Stout*, 1983-NMSC-094, ¶ 12, 100 N.M. 472, 672 P.2d 645 (the New Mexico Supreme Court held “that when a judge has become so embroiled in the controversy that he cannot fairly and objectively hear the case, or when he or one of his staff will necessarily be a witness in the proceeding,” the judge is precluded from hearing the case); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (noting that not every attack on a judge will require a different judge to proceed over a contempt case). In *Mayberry*, the trial judge was subjected to several personal insults by the defendant, who represented himself in a criminal trial. *Mayberry*, 400 U.S. at 455-462, 466. The United States Supreme Court concluded that a judge who is personally attacked in such a manner “necessarily becomes embroiled in a running bitter controversy.” *Mayberry*, 400 U.S. at 465. Accordingly, the Due Process Clause of the Fourteenth Amendment requires that the criminal contempt charges be heard by a different judge. *Mayberry*, 400 U.S. at 466.

⁴⁹ Rule 1-093 NMRA (suspended by the New Mexico Supreme Court Order No. 21-8300-032, effective November 22, 2021).

⁵⁰ *In re Stout*, 1984-NMCA-131, ¶ 14, 102 N.M. 159, 692 P.2d 545.

⁵¹ NMSA 1978, § 39-3-3(A)(1) (1972).

⁵² *In re Klecan*, 1979-NMSC-094, ¶ 5, 93 N.M. 637, 603 P.2d 1094.

⁵³ *In re Hooker*, 1980-NMSC-109, ¶ 4, 94 N.M. 798, 617 P.2d 1313.

⁵⁴ *State v. Rivera*, 1998-NMSC-024, ¶ 13, 125 N.M. 532, 964 P.2d 93 (recognizing a conflict in prior case law regarding the elements of civil contempt and explaining that “[n]either willfulness nor intent is an element of civil contempt”).

⁵⁵ *State ex rel., Apodaca v. Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, ¶ 10, 74 N.M. 201, 392 P.2d 347.

⁵⁶ *State ex rel., Apodaca v. Our Chapel of Memoires of N.M., Inc.*, 1964-NMSC-068, ¶ 10, 74 N.M. 201, 392 P.2d 347 (“[S]anctions may . . . be employed in civil contempt . . . to compensate the complainant for losses sustained.”); see also, *In re Hooker*, 1980-NMSC-109, ¶ 5, 94 N.M. 798, 617 P.2d 1313 (“The general rule is that a court has power to award damages and attorney’s fees to a party aggrieved by a contempt. The recovery is limited, however, to the actual loss plus the costs and expenses, including counsel fees, incurred in investigating and prosecuting the contempt.”).

⁵⁷ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060.

⁵⁸ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060.

⁵⁹ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 6, 97 N.M. 640, 642 P.2d 1099.

⁶⁰ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060 (internal quotation marks and citation omitted).

⁶¹ *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060 (citation omitted).

⁶² *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060, citing, *United Mine Workers v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 2520, 180 L.Ed.2d 452 (2011) (holding that constitutional due process in civil contempt proceedings requires notice and a hearing but not the automatic right to counsel).

⁶³ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 7, 97 N.M. 640, 642 P.2d 1099. While the threat of imprisonment implicates a right to counsel, the New Mexico Supreme Court noted that “[b]ecause he [or she] has the keys to his own prison, the defendant’s liberty interest is not the full-blown liberty interest found in cases such as criminal cases or where the defendant has no control over whether or not he [or she] remains incarcerated” *Id.*, 1982-NMSC-042, ¶ 14 (internal quotation marks and citation omitted).

⁶⁴ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 10, 97 N.M. 640, 642 P.2d 1099.

⁶⁵ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 9, 97 N.M. 640, 642 P.2d 1099 (internal quotation marks and citations omitted). *State ex rel., Department of Human Services v. Rael*, was a case of first impression on the issue of whether or not an indigent entitled to court-appointed counsel in a civil contempt proceeding brought to enforce an order of child support entered in a paternity suit. *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 1, 97 N.M. 640, 642 P.2d 1099.

⁶⁶ *State v. Case*, 1983-NMCA-086, ¶ 22, 100 N.M. 173, 667 P.2d 978. The court noted that, “[a] jury trial is required for contempts if the actual punishment for contempt exceeds six months. . . . In proceeding requiring a jury trial, Case would have the right to counsel. . . . Thus, the issue of right to counsel reduces a right to counsel where summary proceedings are appropriate and where the actual punishment would not exceed six months.” *Id.* (internal citations omitted). In *Bloom v. Illinois*, 391 U.S. 194, 201-211, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), the United States Supreme Court held that the constitutional right to a jury trial applies only to “serious” criminal contempt cases); see also, *Codispoti v. Pennsylvania*, 418 U.S. 506, 511-515, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974) (a jury trial was required for contempt of court cases where the sentences imposed on each contemnor aggregated more than six months).

⁶⁷ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 16, 97 N.M. 640, 642 P.2d 1099.

⁶⁸ *State ex rel., Department of Human Services v. Rael*, 1982-NMSC-042, ¶ 16, 97 N.M. 640, 642 P.2d 1099.

⁶⁹ *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 454 (2011).

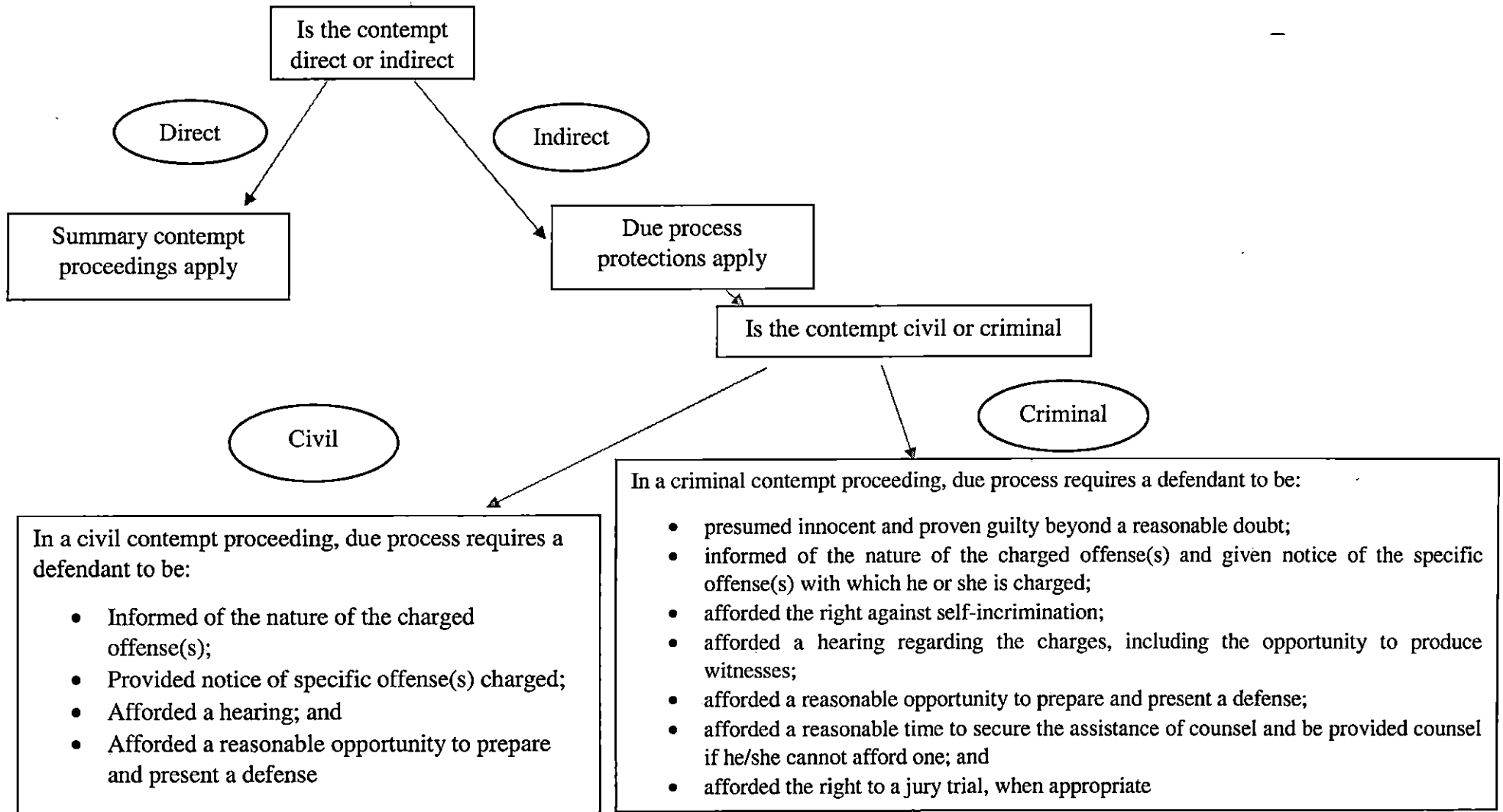
⁷⁰ *Turner v. Rogers*, 564 U.S. 431, 448, 131 S.Ct. 2507, 180 L.Ed.2d 454 (2011). The Court specifically stated that its holding does not address cases where the past due child support is owed to the state or unusually complex cases where the noncustodial parent “can fairly be represented only by a trained advocate.” *Turner v. Rogers*, 564 U.S. 431, 449, 131 S.Ct. 2507, 180 L.Ed.2d 454 (2011) (quotation marks and citation omitted)..

⁷¹ *Turner v. Rogers*, 564 U.S. 431, 435, 131 S.Ct. 2507, 180 L.Ed.2d 454 (2011).

⁷² *Turner v. Rogers*, 564 U.S. 431, 435, 131 S.Ct. 2507, 180 L.Ed.2d 454 (2011).

⁷³ *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 454 (2011) did change who had the burden of proof in child support cases. Before *Turner*, New Mexico provided clear guidance that it was the contemnor who had the duty to demonstrate his ability (or inability) to comply with the child support order to avoid a finding of contempt. *Wilson v. Wilson*, 1941-NMSC-026, 45 N.M. 224, 114 P.2d 737.

DUE PROCESS REQUIREMENTS¹



¹ Developed using the Michigan Judicial Institute's "Contempt of Court Benchbook," 5th Edition.

COMMON FORMS OF CONTEMPT

Conduct	Direct vs. Indirect Contempt	Civil vs. Criminal Contempt
Assault on attorney	May be either direct or indirect contempt. Summary punishment may be imposed if the violation occurred in the immediate view and presence of the court.	Civil or criminal sanctions can be imposed. <i>People v. Carr</i> , 3 Ill.App.3d 227, 278 N.E.2d 839 (Defendant was convicted of armed robbery and sentenced to four to eight years. Upon hearing the sentence, defendant punched the ADA in the nose. The following day, judge sentenced him to six months in the court jail for direct contempt, the sentence to run consecutively with the sentence for armed robbery).
Attorney's attire	Always direct contempt	Civil or criminal proceedings may be instituted. <i>State v. Cherryhomes</i> , 1985-NMCA-108, ¶ 5-6, 103 N.M. 771, 714 P.2d 188, <i>cert. denied</i> , 103 N.M. 740, 713 P.2d 556. (Where an attorney violates the court's order requiring attorneys to wear a tie by wearing a bandana, the district court had the discretion to exercise its power to issue a contempt sanction to preserve its authority and maintain respect for the court.)
Attorney's disruptive behavior in court	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Civil or criminal contempt sanctions may be imposed. <i>In re Byrnes</i> , 2002-NMCA-102, 132 N.M. 718, 54 P.3d 996 (attorney continued to interrupt the court, had been repeatedly warned about his conduct, fined \$1,000 for direct contempt)
Attorney's failure to appear in court	Always indirect contempt	Civil or criminal proceedings may be instituted. <i>State v. Wisniewski</i> , 1985-NMSC-079, ¶ 19, 103 N.M. 430, 708 P.2d 1031 (attorney's willfulness need not be proven to order civil sanctions).
Attorney's misconduct in the courtroom	Always direct contempt. Summary contempt proceedings may be initiated if necessary to restore order and preserve the court's authority.	Usually criminal contempt. <i>State v. Sosa</i> , 2009-NMSC-056, 147 N.M. 351, 23 P.3d 348 (in a criminal proceedings, statements made during closing argument can warrant a mistrial).
Attorney appearing in court under the influence	Always direct contempt. Summary contempt proceedings may be initiated if necessary to	Usually criminal sanctions. <i>Miller v. State</i> , 672 So.2d 95 (Fla.App. 1996) (direct criminal contempt sanction upheld when attorney appeared in court under the influence of drugs); <i>Ridge v. State Bar of California</i> , 47

	restore order and preserve the court's authority.	Cal.3d 952, 254 Cal.Rptr. 803, 805, 766 P.2d 569 (1989) (Supreme Court of California, in a suspension hearing, upheld a lower court ruling that an attorney who appears at a client's preliminary hearing under the influence of alcohol shows disrespect of the court and is in contempt)
Attorney's zealous advocacy	Defense	Although an attorney's contemptuous conduct cannot be excused or justified by the fact that the attorney believed such conduct necessary to the proper and thorough representation of a client, if the contemnor can show that the conduct was a good-faith attempt to represent his/her client without hindering the court's functions or dignity, a finding of direct contempt will be reversed. Compare, <i>Commonwealth v. Local Union 542</i> , 552 F.2d 498 (3 rd Cir. 1977); <i>Petrakh v. Morano</i> , 385 Ill.App.3d 855, 897 N.E.2d 316 (2008)
Communicating with grand jury	Indirect contempt in most cases.	Civil or criminal proceedings may be instituted. <i>People v. Parker</i> , 397 Ill. 305, 74 N.E.2d 523 (defendant charged and found guilty for criminal contempt for sending letter for foreman of the grand jury)
Contempt of court under the Children's Code	May be direct or indirect contempt. Summary punishment may be imposed if the violation occurred in the immediate view and presence of the court.	Civil or criminal contempt proceedings may be instituted. NMSA 1978, § 32A-1-18(C) (court may punish a person for contempt of court for disobeying an order of the court or for obstructing or interfering with the proceedings of the court or the enforcement of its orders); <i>State v. Julia S.</i> , 1986-NMCA-039, 104 N.M. 222, 719 P.2d 449
Criticism of the court	May be either direct or indirect contempt. Summary punishment may be imposed if the violation occurred in the immediate view and presence of the court.	Civil or criminal contempt proceedings may be instituted.
Defendant's disruptive behavior in court	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Civil or criminal contempt sanctions may be imposed. <i>Purpura v. Purpura</i> , 1993-NMCA-001, 115 N.M. 80, 847 P.2d 314, <i>cert. denied</i> , 115 N.M. 79, 847 P.2d 313 (trial judge properly invoked inherent power to issue a contempt sanction to preserve the decorum, respect and dignity of the court since defendant

		refused to obey the trial judge's order to button his top button and fix his tie and by disrupting the proceedings through disorderly attempts to leave); <i>West Valley City v. Borrego</i> , 752 P.2d 361 (Ut.App. 1988) (criminal contempt conviction upheld against a defendant who "became loud and boisterous, using profanity which tended to interrupt the due course of the sending hearing"; court rejected the defendant's free speech argument)
Failure to appear or testify	Always indirect contempt.	Civil or criminal contempt proceedings may be instituted. <i>Thompson v. Dehne</i> , 2009-NMCA-120, 147 N.M. 283, 220 P.3d 1132 (father awarded attorney's fees for mother's failure to appear at scheduled hearing)
Failure to comply with appellate rules	Always indirect contempt	Usually civil contempt. Rule 12-312(D), NMRA 2022 ("For failure to comply with these rules or any order of the court, the appellate court may . . . take such action as it deems appropriate . . . including but not limited to citation of counsel or a party for contempt . . .")
Failure to pay child or spousal support	Always indirect contempt.	Civil contempt proceedings are appropriate. <i>Niemyjski v. Niemyjski</i> , 1982-NMSC-062, 98 N.M. 176, 646 P.2d 1240 (civil contempt proceedings for failure to pay child support can include jail time)
Failure to rise	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Most cases involve criminal contempt; however, the failure to rise in and off itself may not be contemptuous conduct. To be held in contempt requires disrespect/obstruction. Compare <i>Commonwealth v. Cameron</i> , 501 Pa. 572, 462 A.2d 649 (1983) (criminal contempt conviction reversed when defendant twice intentionally failed to rise when judge entered the courtroom but did not engage in any outburst, etc.); <i>Commonwealth v. Reid</i> , 494 Pa. 201, 431 A.2d 218 (1981) (criminal contempt upheld when defendant refused to stand and also engaged in disruptive conduct)
Filing false pleadings and documents	Always indirect contempt	Most cases involve criminal contempt. <i>Gernhardt v. Boland</i> , 125 Misc. 783, 211 N.Y.S. 877 (1925) (whoever submits false affidavits or puts in false pleadings, is guilty of contempt);

Grand jury witness's refusal to testify	May be direct or indirect contempt.	Usually criminal contempt. <i>State v. Chavez</i> , 1983-NMCA-143, ¶ 11, 100 N.M. 612, 673 P.2d 1345 (relying on <i>Harris v. United States</i> , 382 U.S. 162, New Mexico Court of Appeals held that summary proceeding was not proper when witness refuses to answer before a grand jury)
Improper attempt to affect witness testimony	Always indirect contempt	Criminal contempt proceeding should be instituted. <i>Russell v. Mandel</i> , 136 Mich. 624, 99 N.W. 864 (1904)
Juror misconduct	Usually indirect contempt	Civil or criminal proceedings may be instituted. <i>In re Bassett</i> , 15 N.Y.S.2d 737 (1939) (criminal contempt arising out of misconduct of jurors)
Violation of parenting time order in divorce judgment	Always indirect contempt	If it is possible to restore the status quo by granting additional parenting time, civil contempt proceedings may be instituted. If it is not possible to restore the status quo, criminal contempt proceedings may be instituted. <i>Jaikins v. Jaikins</i> , 15 Mich.App. 115, 162 N.W.2d 325 (1968)
Willful violation of consent decree	Always indirect contempt	Civil or criminal proceedings may be instituted. <i>State ex rel., Apodaca v. Our Chapel of Memories of N.M., Inc</i> , 1964-NMSC-068, 74 N.M. 201, 392 P.2d 347 (contempt sanctions for violations of consent decree had characteristics of both criminal and civil contempt)
Willful violation of discovery order	Always indirect contempt	Usually civil proceedings. <i>American Medical Security Group, Inc. v. Parker</i> , 663 S.E.2d 697 (Ga. 2008)
Witness's refusal to appear	Usually indirect contempt	Usually criminal contempt. <i>State v. Diaz de la Portilla</i> , 177 So.3d 965 (Fla. 2015) (stating that such party may be founding in indirect criminal contempt for failing to appear at a scheduled hearing);
Witness's refusal to testify at trial	Always direct contempt. Summary contempt proceedings may be instituted if necessary to restore order and preserve the court's authority.	Criminal contempt proceedings may be instituted. <i>State v. Case</i> , 1983-NMCA-086, 100 N.M. 173, 667 P.2d 978 (summary proceeding appropriate when defendant refused to answer questions at trial; however, trial court did not have the ability to sentence defendant for 10 separate acts of contempt and sentence him for 1 year for each act without due process requirements being met)