

**REPORT AND RECOMMENDATIONS
RELATING TO CONTEMPT**

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INTRODUCTION

The law governing contempt of court is a mixture of statutory law, judicial decisions and court rules. In re Yengo, 84 N.J. 111, 119 (1980). Current statutory provisions on this subject are contained in N.J.S. 2A:10-1 et seq. and in N.J.S. 2C:1-5(c) and 2C:29-9, the provisions in Title 2C pertaining to the crime of contempt. The relevant court rules are contained in R. 1:10-1 et seq., entitled "Contempt of Court and Enforcement of Litigant's Rights Related Thereto." As is the case with many of the chapters in Title 2A of the statutes, the overlap between statutes and court rules, and the necessity for consulting judicial opinions, makes this a confusing area of law.

The confusion in the law of contempt arises in part because "contempt" is a common law concept with both criminal and civil aspects that traditionally were not carefully distinguished. In order to understand the scope of the court's "contempt" power and the limitations upon it in the modern context, it is necessary to distinguish between criminal contempt proceedings, in which the court punishes an offender in order to vindicate its own authority, and so-called civil contempt proceedings, in which the court uses its remedial powers to advance the interests of private litigants, often through the use of penal sanctions intended to coerce compliance with a court's orders. Thus, the same act might merit punishment as a criminal contempt and might also justify an award of relief to vindicate a litigant's private interest in ensuring that another party adheres to the court's commands. Following the New Jersey Supreme Court opinion in N.J. Department of Health v. Roselle, 34 N.J. 331, 337 (1961), the court amended the court rules to distinguish more clearly between the criminal and the civil aspects of the contempt power, denominating the historical category of civil contempt proceedings as proceedings for "relief in aid of litigants' rights." R. 1:10-5. The purpose of this project is to revise and clarify the current contempt provisions in N.J.S. 2A:10-1 et seq., which were enacted some years prior to the decision in N.J. Department of Health v. Roselle and which were never revamped subsequently.

One major effect of the proposed revision would be to remove civil contempt proceedings from the scope of the statute. The Commission is of the view that the provision of remedial relief to litigants, i.e., "relief in aid of litigants' rights," is a subject appropriately dealt with in the court rules.

The statute proposed by the Commission pertains only to criminal contempt proceedings. It is the Commission's view that defining an offense and prescribing punishment for that offense is an area peculiarly within the legislative province. See generally New Jersey Statutes Title 2C. The proposed statute also serves to codify some of the constitutional principles which have been recognized as limitations on the criminal contempt power. See In re Daniels, 118 N.J. 51, 69 (1990).

a. History of the contempt power

The power of a court to punish for contempt is said by the courts themselves to be inherent, in as much as this authority is "derived from necessity" and ceases "only where such necessity ceases." State v. Doty, 32 N.J.L. 403, 404 (Supreme Ct. 1868). The contempt power

is said to derive from the common law. See In re Yengo, 84 N.J. 111, 130 (1980), cited in In Re Daniels, 118 N.J. at 59; In Re Cheeseman, 49 N.J.L. 115, 139-141 (Sup. Ct. 1886); In Re Verdon, 89 N.J.L. 16, 17, 20 (Sup. Ct. 1916), rev'd on other grounds sub nom. Attorney-General v. Verdon, 90 N.J.L. 494 (E. & A. 1917); see also Illinois v. Allen, 397 U.S. 337, 347 (1970)(Justice Brennan called the court's constitutional power regarding contempts "fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace.").

The judicial decisions which include these broad statements concerning the reach of the contempt power typically do not make distinctions as to the various circumstances in which the "contempt power" is exercised, perhaps because it was not until the decision in N.J. Department of Health v. Roselle, supra, that the importance of distinguishing between the civil contempt power and the criminal contempt power was recognized. Indeed, the 1953 court rules dealt with both civil and criminal contempts under the same rule, R. 4:87-1 et seq., and referred to the proceedings as to both as prosecutions. See R. 4:87-2 ("Every other contempt, whether of a criminal or civil nature, shall be prosecuted on notice...."). As to the criminal contempt power in particular, no distinctions are made concerning the importance or necessity of the power to charge a person summarily with contempt, and the power to adjudicate the contempt in a summary fashion. While it has been said that immediate adjudication of a contempt may sometimes be necessary to prevent "'demoralization of the court's authority' before the public," In re Daniels, 118 N.J. at 67, in the same opinion it is also recognized that constitutional standards must be met in the adjudication of criminal contempts. Id. at 60-74.

Historically, legislation concerning contempts of court began with attempts to limit the exercise of the contempt power in cases where the judiciary was abusing the power. This pattern is seen in the federal system, where the federal contempt statute appears to have been directed against judicial attempts to interfere with newspaper comments on trials. See In Re Buehrer, 50 N.J. 501, 514 (1967), citing Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts, 37 Harv. L. Rev. 1010, 1023-28 (1924). The federal act, which became the model for many similar state enactments including that of New Jersey, sought to limit the power of federal courts to deal with contempts in a summary manner, i.e., without the protections afforded a defendant in a criminal proceeding, by defining the summary contempt power as applying only to the following situations:

... the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

The first attempt of the New Jersey Legislature to limit the contempt power came in 1884, with the enactment of a statute which provided for a de novo appeal on both law and fact in cases in which a person was adjudged in contempt by a court of jurisdiction "inferior" to the Supreme Court. The Supreme Court heard an appeal pursuant to the statute in a case involving a newspaper publisher acquitted of a charge of assault and battery, who was held in contempt by the Court of Oyer and Terminer for publishing an article "intended to cast discredit upon the grand jury that had indicted him, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial." In Re Cheeseman, 49 N.J.L. 115, 136,

137 (Sup. Ct. 1886). The conviction for contempt was upheld, the court finding that the New Jersey courts, as successors to the English courts of common law, had the "legal power to punish summarily for any words uttered by speech, by writing or by printing outside of the regular course of litigation, which were designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert in a pending cause the due administration of justice." Id. at 141.

In a series of similar cases in the ensuing years the courts used the contempt power to penalize out-of-court criticism by the press. See, e.g., In Re Holt, 55 N.J.L. 384, 385 (Sup. Ct. 1893)(conviction for contempt in Court of Quarter Sessions of the Peace, for publication of newspaper article "calling in question the impartiality of the court in the trial of a certain indictment," set aside for failure of proper procedure); Croasdale v. Court of Quarter Sessions, 88 N.J.L. 506 (1916)(Court of Quarter Sessions held to have jurisdiction to try contempt charge against publisher for publishing newspaper editorial "criticizing the alleged inaction of the county prosecutor and of the Quarter Sessions in a criminal matter"); Attorney-General v. Verdon, 90 N.J.L. 494 (E. & A. 1917), rev'ing In re Verdon, 89 N.J.L. 16, 17, 20 (Sup. Ct. 1916)(contempt prosecution by the Hudson County Court of Quarter Sessions, against newspaper publishers for "certain newspaper publications reflecting upon it, and tending to bring it into disrepute").

Eventually, the legislature responded to these incidents with a 1917 statute expressly modeled after the federal contempt statute, and closely following its language. The statute provided:

No power of any court in this State to punish contempt shall be construed to extend to any case except the misbehavior of any person in its actual presence, the misbehavior of any officer of said court in his official transactions, and the disobedience by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said court.

L. 1917, c.37, sec. 1, p. 71.

Thus, the Legislature defined contempt in such a way as to exclude press or other out-of-court criticism of the judiciary. The statement to the bill described the exercise of the summary contempt power by the courts "'to summarily summon before them persons criticizing their officials acts and to fine or imprison such persons at will and without a jury trial'" as "'truth-stifling, despotic, and exceedingly dangerous to liberty'" and further stated that the purpose of the bill was "'to prevent abuses of this power.'" N.J. Department of Health v. Roselle, 34 N.J. 331, 341 (1961).

Questions were raised immediately as to the constitutionality of the 1917 statute as a limitation on the authority of the "common law" New Jersey courts, particularly the Court of Chancery, see In Re Merrill, 88 N.J. Eq. 261 (Perrog. Ct. 1917)(holding that a litigant's ex parte letter to judge was contempt "in the actual presence of the court" within the meaning of the 1917 act, but questioning whether the act could constitutionally limit the authority of the Prerogative Court to punish for contempt); In Re Bowers, 89 N.J. Eq. 307, 309 (Ch. 1918)(holding that the threat of political harm against a litigant's attorney if he did not withdraw from representing the litigant, constituted contempt even though not covered by the

1917 act) and In Re Caruba, 139 N.J. Eq. 404, 426 (Ch. 1947), aff'd 140 N.J. Eq. 563 (E. & A. 1947), cert. denied, 335 U.S. 846 (1948)(citing In Re Bowers with approval). In particular, in In Re Caruba, the Court of Chancery referred to the federal contempt statute upon which the New Jersey statute was modeled, and suggested that the authority of Congress to limit the contempt power of the lower federal courts stemmed from the fact that the federal courts are courts of limited jurisdiction and powers, unlike the New Jersey courts, which draw their powers and authority from the common law. 139 N.J. Eq. at 410-11.

Despite the questions raised concerning the authority of the Legislature to limit the courts' summary contempt power, however, there do not appear to have been any instances of the exercise of the summary contempt power to punish press criticism of the courts for some time after the adoption of the 1917 statute. The issue of courts punishing press criticism was recognized to have constitutional implications in the late 1940's with decisions by the United States Supreme Court which held that the use of the contempt power by state courts to silence out-of-court press criticism was subject to the limitations of the first and fourteenth amendments. See, e.g., Bridges v. California, 314 U.S. 252 (1941); Craig v. Harney, 331 U.S. 367 (1947); see also In Re Matzner, 59 N.J. 437,442 (1971)(criminal contempt for journalistic utterances sustainable only where individual charged was responsible for the utterance "with the intent to create a clear and imminent danger of substantial prejudice to the fair trial of the case"); In Re Look Magazine, 109 N.J. Super. 548,554 (Law Div. 1970)(first amendment limits contempt power to those utterances that constitute "a serious and immediate threat" to the administration of justice).

The 1917 legislation defining the summary contempt power was carried forward in the 1937 Revised Statutes as R.S. 2:15-1. When Title 2 was revised following the adoption of the 1947 constitution, this provision was carried forward again, as N.J.S. 2A:10-1, which currently provides:

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

- a. Misbehavior of any person in the actual presence of the court;
- b. Misbehavior of any officer of the court in his official transactions;

and

- c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

Also in the 1951 revision of Title 2, the Legislature retained the common law crime of contempt in 2A:85-1, and again in the revision of the Criminal Code, the principle of 2A:85-1 was continued in 2C:1-5(c), which provides that "This section does not affect the power to punish for contempt, either summarily or after indictment, or to employ any sanction authorized by law for enforcement of an order or a civil judgment or decree." In 1981 the legislature added 2C:29-9, in order to "grade" the offense of contempt for purposes of determining appropriate punishment within the scheme established by the Criminal Code. In grading the offense as one of the fourth degree, the provision also defines the crime as

occurring when a person "purposely or knowingly disobeys a judicial order or hinders, obstructs or impedes the effectuation of a judicial order or the exercise of jurisdiction over any person, thing or controversy by a court, administrative body or investigative entity."

b. Limitations on the contempt power - In re Daniels

The New Jersey Supreme Court has imposed limitations on the exercise of the contempt power in the last several decades, through the adoption of court rules and in its judicial decisions. The current court rules provide that a contempt which is committed "in the actual presence of a judge" may be adjudicated summarily, without issuance of process, that is, without notice or order to show cause. The order adjudicating the contempt must contain a certification that the judge "saw or heard the conduct constituting the contempt." R. 1:10-1. All other proceedings for contempt must be instituted through issuance of an order for arrest or an order to show cause. 1:10-2. A person arrested on a charge of contempt "shall be admitted to bail." R. 1:10-3. A contempt proceeding may be prosecuted only by the Attorney General, a county prosecutor, or an attorney designated by the court. Only with the consent of the person charged may a judge "allegedly offended or whose order was allegedly contemned" hear and decide the proceeding. R. 1:10-4. The punishment in a summary contempt proceeding is limited to those which attach to a "petty offense," typically defined as up to six months imprisonment, and a fine not exceeding \$1,000. See In Re Buehrer, 50 N.J. at 519-20.

In Re Daniels is the New Jersey Supreme Court's most recent opinion on the subject of contempt; in it the Court makes numerous pronouncements about the nature of the contempt power and the rights of persons accused of contempt. Daniels, a public defender representing a criminal client, was cited for contempt by a Superior Court judge who accused Daniels of having responded to a ruling by the judge with nonverbal conduct that the judge regarded as sarcastic and disrespectful. 118 N.J. at 57. Daniels objected to the judge's characterization of his conduct, but the judge discharged the jury, found Daniels to be in contempt, and gave Daniels an opportunity to be heard before passing sentence. Daniels objected again to the judge's characterization of his conduct, declined to call any witnesses because he did not have a chance to speak with them (affidavits of court personnel stating they had not seen Daniels engaged in the conduct were submitted at a later point), but asked to consult an attorney, a request the judge declined. Id. at 57. The judge then found that Daniels had laughed at his rulings in open court, held him guilty of contempt, and sentenced him to two days in jail and a \$500 fine. Id. at 58.

On appeal, the New Jersey Supreme Court vacated the sentence of imprisonment but upheld the imposition of the fine, holding that Daniels had properly been charged and convicted under the summary contempt power set forth in R. 10:1-1. According to the Court, the summary contempt power permits a judge to charge a person on-the-spot with contempt that the judge has "seen or heard," afford the person charged with an opportunity to be heard on the charge, but not to be represented by an attorney, and to be sentenced immediately on a finding of contempt. Thus, the judge is permitted to act as prosecutor, judge and jury in the same proceeding. In vacating the sentence of imprisonment, however, the court appeared to be imposing a significant qualification on the exercise of the power by limiting the permissible sentence in a summary contempt proceeding to a fine or other sanction not involving imprisonment. See id. at 65. In addition, in the course of the opinion the court made a number

of statements that suggest that where there is a dispute of fact as to the commission of the act or the nature of the conduct, or where the incident involves a "personal confrontation" between the judge and the person accused of contempt, the matter should be referred to another judge for adjudication. See id. at 64-65.

Also in In Re Daniels, the court outlined the steps that a court should follow in adjudicating a contempt; the court's comments are worth outlining at length, as the procedures the court outlined are not embodied in the court rules at the present time:

Some of the steps a court should follow, then, are:

(1) It should immediately evaluate the gravity of the misconduct and decide whether it should invoke its right, power, and duty to charge or adjudicate the contempt. Conduct that falls short of contempt may be handled informally, outside the structure of Rule 1:10, some matters by a rebuke in chambers, some by reference to other disciplinary bodies. Conduct that amounts to contempt may require immediate action under Rule 1:10.

(2) Once the court has determined that it should exercise the contempt power, it should immediately inform the party that it considers the act contemptuous and afford the party an opportunity to retreat or explain the circumstances, and thus avoid, perhaps, any need for adjudication.

(3) Depending on the degree of the contempt, the court must evaluate whether it calls for immediate adjudication lest there be a 'demoralization of the court's authority' before the public. Cooke v. United States, 267 U.S. 517, 536 ... (1925). An example would be a witness or lawyer who refuses a lawful order of the court to cease interruption or to refrain from insult or invective in the course of a trial.

(4) If immediate adjudication of such conduct is called for the court must evaluate whether the record will adequately disclose the essence of the contempt. As noted supra at 64, in most instances of invective the record will adequately describe the misconduct. Other misconduct may be less graphic and call for fuller fact-finding. We need not, however, magnify what is a self-evident offense, such as an obscene gesture, into a mega-trial.

(5) If the contempt involves personal insult to the court (as opposed to other personnel in the system, as in Ex parte Terry, supra, 128 U.S. 289 ... or In re McAlevy, 94 N.J. 201 ... (1983)), the court should consider whether there is any appearance of personal confrontation or loss of objectivity that would require reference of the matter to another judge.

(6) Finally, if the conduct appears to be such that imprisonment may be warranted and immediate action is not essential to prevent demoralization of the court's authority before the public, or to assure continuity of proceedings, as in the case of a continually disruptive spectator, both a more formal

charging process and reference to another judge for adjudication and sentence would ordinarily be required in order to accord due process. The charge should particularly inform the part of the need to present evidence in mitigation, or, as here, to call other witnesses in the courtroom to state their accounts of the event.

In the Daniels opinion, the Court makes broad declarations about the extent of the summary contempt power, but appears to cut that power back significantly by qualifying the exercise of the summary contempt power and reiterating the applicability of the constitutionally based rights to the presumption of innocence and proof beyond a reasonable doubt. This revision of the contempt statutes codifies the limitations recognized in the Daniels opinion.

In reviewing the statutes regarding contempt and the many judicial decisions involving the exercise of the contempt power, the Law Revision Commission concluded that the courts should resort to the use of the contempt power only sparingly, in those cases in which other remedies are inadequate. It is to be emphasized that the courts have available a variety of tools to maintain order in the courtroom and to protect the orderly administration of justice, including the power to remove those who are fractious or disorderly, or who refuse to adhere to the court's commands. In particular, in situations in which attorneys engage in offensive conduct, judges should first consider whether the conduct may be dealt with by the imposition of sanctions under the court rules, or by reference to the attorney disciplinary process.

In this proposed statute the Commission does not categorize contempt proceedings as "summary." The Commission's view is that in charging a person with criminal contempt, the court is invoking the authority of the state to punish for a specified offense, and that all appropriate constitutional and procedural safeguards should be available to those charged with the offense, including the requirement of proof beyond a reasonable doubt, the opportunity to present a defense, and in specified circumstances, to have counsel and to have a judge other than the judge who has preferred the charge of contempt, adjudicate the offense. In the Commission's view it is irrelevant whether a criminal contempt charge is adjudicated immediately or after the passage of time; the procedural and constitutional protections available to the accused are the same in any case.

The provision entitling a person accused of contempt to a hearing at which witnesses and evidence may be presented is not intended to prohibit the immediate adjudication of a charge of contempt, if the circumstances are such that an appropriate hearing may take place immediately. It is anticipated that in most cases, the alleged contempt will consist of a colloquy between judge and accused which will be reflected in a transcript, and thus the hearing to which the accused is entitled is likely to be a very simple and expeditious one. It remains within the discretion of the judge whether ongoing proceedings will be suspended and a hearing will be held immediately, or whether proceedings will continue, and the hearing on the contempt charge will be delayed. It is anticipated that in most cases involving alleged contempts during a proceeding, that a hearing may be held during a break in ongoing proceedings, at the end of the day.

Proposed Section 7, specifying the punishment for the offense of contempt, also contains procedural protections for persons accused of contempt. This proposed section would prohibit the imposition of either a period of incarceration or a fine in excess of \$500 unless the person accused has been provided the right to counsel. The Supreme Court in In re Daniels, emphasized the very grave consequences that may attend even a brief period of imprisonment, reminding us that "...the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen may suffer." 118 N.J. at 65. This proposed section, by limiting the punishment which may be imposed in the absence of a right to counsel, effectively extends the right to counsel to any case in which a period of imprisonment or other "consequence of magnitude" may be imposed. See Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971) (right to counsel inheres "whenever the particular nature of the charge is such that imprisonment in fact or other consequence of magnitude is actually threatened or is a likelihood on conviction..."). Compare the statutory provisions regulating the adjudication of contempts of legislative committees, which afford a person accused of contempt a right to a hearing, a right to be represented by counsel, and a right to call and cross-examine witnesses. N.J.S. 52:13-1 et seq.

The proposed revision, which places certain limits on the adjudication of criminal contempts, is not intended to impugn the authority of judges to maintain order and decorum in their courtrooms by means other than the contempt power. It is understood, for example, that judges may eject disruptive spectators or participants from the courtroom, may hold certain proceedings in camera, and may control press access to the courtroom. See Pressler, Current N.J. Court Rules, Comment R. 1:2-1 and cases and statutes cited therein.

PROPOSED STATUTE

Section 1. Application of Chapter

a. Contempt of court shall be punishable only in a proceeding that is pursuant to this chapter and subject to Rules of Court, or upon indictment pursuant to the Code of Criminal Justice.

b. This chapter shall not apply to civil contempt proceedings, that is, proceedings for relief in aid of litigants' rights.

c. This chapter shall not impair any power granted to the courts by the Constitution, including the power to discipline attorneys and the power to provide sanctions for violations of court rule.

Source: New

COMMENT

This chapter establishes standards for the imposition of sanctions for contempts of court. This section states the limitations of applicability of those standards. This section provides that contempt shall be "punishable" only pursuant to this chapter and in the manner specified in Court Rules, or, in the alternative, under the Criminal Justice Code, Title 2C. This chapter is concerned, therefore, only with so-called criminal contempt, *i.e.*, the authority to punish for an act that constitutes contempt. Note that if a contempt is prosecuted under Title 2C, the accused is entitled to all of the rights attendant upon any other criminal prosecution under Title 2C, including indictment and trial by jury.

Subsection (b) states the principle that this chapter, which is concerned with punishment for the offense of contempt, does not apply to what were formerly referred to as "civil contempt" proceedings. "Civil contempt" is a misnomer, see *N.J. Department of Health v. Roselle*, 34 N.J. 331, 342 (1961). What was formerly referred to as the "civil" contempt power is the exercise of the court's authority to enforce its orders through the use of sanctions. The exercise of that authority is governed by R. 1:10-5, and is now referred to as "relief in aid of litigant's rights." Relief in aid of litigants rights is not governed by the statutes in this chapter.

Subsection (c) serves as a reminder that certain powers are granted to the Supreme Court by the Constitution. Legislation cannot impair those powers, and this chapter does not purport to do so. These powers include the power to discipline attorneys and the power to provide sanctions for violations of court rule. See, N.J. Const. Art.6, §2, ¶3.

Section 2. Acts constituting contempt of court

A person is guilty of contempt of court if the person:

a. knowingly disobeys any decree, writ, process, judgment, command or other order of a court of this State, in a matter as to which the court has jurisdiction over the subject matter and the person charged; or

b. knowingly obstructs a court of this State, in the presence of a judge of the court.

Source: 2A:10-1; 2A:10-6; 2A:10-7

COMMENT

This section clarifies the language of the source section which defines the acts which constitute contempt of court, and adds language setting the "mens rea" standard of knowledge, which has been recognized as necessary to sustain a finding of "criminal" contempt. See Department of Health v. Roselle, 34 N.J. 331, 337 (1961)("The act or omission [constituting contempt] must be accompanied by a mens rea, a willfulness, an indifference to the court's command"); see also In Re Daniels, 118 N.J. 51, 69 (1990)(suggesting that the mens rea requirement is that the conduct is "knowing and willful and evidence[d] an intent to flout the authority of the Court," citing In Re Mattera, 34 N.J. 259, 273 (1961). The court in In Re Daniels also suggests that in the adjudication of contumacious conduct which takes place before the judge in a courtroom, a prior, unheeded warning of the "obstructive nature" of the conduct establishes the intentional character of the conduct. Id. at 69-70; see also id. at 67 (stating that when a judge concludes that the contempt power should be exercised, the offending party should immediately be informed, and be given "the opportunity to retreat or explain the circumstances").

The language in the current statute concerning the "misbehavior of any officer of the court in his official transactions" has been eliminated. The Law Revision Commission recommends that such conduct be prosecuted under the statutes penalizing official misconduct, see 2C:30-2. "Misbehavior" of a court officer which falls short of the statutory definition of official misconduct or does not constitute any other offense, but which constitutes disobedience of a court order under proposed subsection 2(a) or obstruction of the court under 2(b), could still be dealt with as contempt under the revised statute. Any other "misbehavior" of an officer of the court in his official transactions should be dealt with under other applicable criminal statutes or as a personnel matter. To the extent that this language could be regarded as including attorneys as "officers of the court," "misbehavior" of an attorney is properly dealt with through the attorney disciplinary process.

The language "a court of this State" includes the constitutional courts and legislative courts, including the municipal courts, as was specifically provided in 2A:10-7.

Section 3. Process

a. A court shall institute a prosecution for contempt by the issuance of an order for arrest or an order to show cause specifying the acts which are alleged to constitute contempt.

b. A court may institute a prosecution for contempt without the issuance of an order for arrest or an order to show cause if:

(1) the acts which are alleged to constitute contempt were seen or heard by the judge who is prosecuting the contempt; and

(2) the acts alleged to constitute contempt have disrupted or threatens to disrupt proceedings before the prosecuting judge; and

(3) the person charged with contempt is informed that the person's acts are alleged to constitute contempt.

Source: 2A:10-8

COMMENT

This section provides that a court may institute contempt proceedings either by issuance of process or without issuance of process, in those cases where the contempt is in the presence of the court and threatens to disrupt ongoing proceedings. In such cases, the person charged must be informed that the conduct is considered contumacious, in order to give the person the reasonable opportunity to respond to the accusation in the absence of a written charge. While the section adopts a summary form of process for these cases, it does not alter the hearing and proof requirements for prosecutions instituted in this manner. The Commission recognizes the need for judges to act quickly in cases involving immediate disruption or threat of disruption, but determined that the need to act could be met by the power to charge an offender with the offense of contempt, or to remove the offender from the courtroom. In cases which do not involve immediate disruption or threat of disruption, a formal charging process

like that involved in other minor criminal offenses should be undertaken. See In Re Daniels, 118 N.J. 51, 68 (1990).

Section 4. Bail

A person charged with contempt in a proceeding commenced by the issuance of an order for arrest shall be admitted to bail pending a hearing.

Source: New

COMMENT

This section is consistent with R. 1:10-3, which reiterates the constitutional right to bail in cases where a prosecution for contempt is commenced by the issuance of an order for arrest. See also R. 3:26-1 (stating the constitutionally-based right of all persons to bail prior to conviction) and N.J.S. 2C:6-1 (bail for disorderly persons offenses generally limited to a maximum of \$2,500).

Section 5. Hearing and proof

a. A person may not be found guilty of contempt unless the charge is admitted or proved by competent evidence establishing the guilt of the accused beyond a reasonable doubt.

b. A person charged with contempt shall be entitled to a hearing at which evidence and witnesses may be presented in defense of the charge.

c. A person charged with contempt shall not be tried by the judge who instituted the prosecution for contempt if:

(1) the conduct alleged to constitute contempt consists primarily of personal disrespect or vituperative criticism of the prosecuting judge and appearance of objectivity requires trial by another judge; or

(2) the prosecuting judge's testimony concerning the conduct alleged to constitute contempt is necessary to establish guilt.

Source: New

COMMENT

Subsection (a) of this proposed section states the fundamental principle that a person accused of contempt is entitled to the presumption of innocence and proof of guilt beyond a reasonable doubt. In Re Daniels, 118 N.J. 51, 69 (1990). Subsections (a) and (b), read together, reflect the principle that even in those cases in which the contempt appears clear, the person accused must always be given the opportunity to explain the conduct alleged to constitute contempt, even if the acts allegedly constituting the contempt took place in open court in the sight and hearing of the prosecuting judge. Id. Thus, in a case in which the contempt consists of statements made in open court, the proof requirement may be met by the transcript of the proceedings, subject to the right of the accused to explain the intent of the words reflected in the record. See In Re DeMarco, 224 N.J. Super. 105 (App. Div. 1988).

Subsection (c) of this section reflects the principle that, in certain cases, the appearance of justice requires the contempt be adjudicated by a judge other than the one who witnessed the contempt. The subsection does not go as far as In Re Daniels which requires that in cases which involve the need for fact-finding, or "personal insult to the court," adjudication should be referred to a neutral fact-finder. Id. at 63-65 & 68. See also Court Rule 1:10-4 which requires a second judge in almost any contempt case.

Section 6. Prosecution

A charge of contempt may be prosecuted by the Attorney General, a county prosecutor or an attorney appointed by the court.

Source: New

COMMENT

This provision is consistent with R. 10-4.

Section 7. Penalties

a. A finding of contempt pursuant to this chapter shall be punished in the same manner as a disorderly persons offense, as provided in the Code of Criminal Justice.

b. The penalty imposed upon an adjudication of contempt pursuant to this chapter shall not include a period of incarceration, nor shall any fine in excess of \$500 be imposed, nor shall any other consequence of magnitude be imposed, unless the person found guilty of contempt was afforded the right to counsel at a hearing to adjudicate contempt and on appellate review of any such adjudication.

Source: New

COMMENT

This section provides that a conviction for contempt of court shall be punishable in the same manner as a disorderly persons offense is punishable pursuant to the Code of Criminal Justice. Under 2C:43-8 the period of incarceration for a disorderly persons offense is limited to a definite term not exceeding six months; under 2C:43-3(c), the fine currently is limited to \$1,000. Limiting the punishment to that for a disorderly persons offense effectively precludes the attachment of the constitutional rights of indictment and trial by jury. In Re Buehrer, 50 N.J. 501, 513 (1967).

Subsection (b) of this section does, however, provide a statutory right to counsel in all cases in which any period of incarceration may be imposed, where the fine exceeds \$500, or where any other consequence of magnitude may attach. That any period of incarceration, no matter how short, is a "consequence of magnitude," was recognized by the Supreme Court in In Re Daniels, 118 N.J. 51, 65 (1990). Where a "consequence of magnitude" may attach, a right to counsel normally attaches. Rodriguez v. Rosenblatt, 58 N.J. 281 (1971).

Section 8. Review of convictions for contempt

a. Every finding of contempt pursuant to this chapter shall be appealable in the manner provided by the Rules of Court.

b. The reviewing court shall make independent findings of fact and conclusions of law based upon the record of the proceedings in the court below.

c. The sentence imposed by the reviewing court shall not be greater than that imposed by the court below.

Source: 2A:10-3

COMMENT

This section continues the provision in the source section for the right of appeal on both the law and the facts in all contempt cases. The court in In Re Daniels emphasized that the right of appeal de novo in contempt

cases "is a fail-safe mechanism for assuring that the contempt power is not abused." In Re Daniels, 118 N.J. 51, 62 (1990), citing In Re Yengo, 84 N.J. 111, 135 (1980).

Section 9. Additional powers of courts

In addition to the power to prosecute contempts, a judge may act to abate disruptions to court proceedings:

a. by ordering that a person be removed from the courtroom by a court security officer; or

b. by initiating charges against any person who commits an offense in court and, where appropriate, by ordering the person arrested.

Source: New

COMMENT

This section specifically grants powers to judges to act to abate disruptions to court proceedings. These powers supplement the power to prosecute contempts and may be used in conjunction with that power or in lieu of it.