CHAPTER 46

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Contempt

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The Massachusetts trial courts possess inherent authority to coerce compliance with their orders and to punish willful disobedience of those orders or other acts that degrade or obstruct the administration of justice.[1] As participants in the criminal justice system, defense lawyers, like their clients, are subject to the courts' contempt powers. To protect both their clients and themselves, counsel must understand the substantive reach of contempt as well as the specific procedures mandated by court rule and constitutional due process.

§ 46.1 CIVIL VERSUS CRIMINAL CONTEMPT

Historically, contempt has been classified as either civil or criminal in character. Those terms, however, are not strictly applicable in the sense in which they are generally employed. A contempt proceeding, which grows out of and remains ancillary to the principal case or controversy before the court, is sui generis within our legal system.

The differences between civil and criminal contempt are significant procedurally but, because the same conduct may be punished by either, sometimes elusive.[2] ***The key substantive distinction between civil and criminal contempt lies not in the conduct, but on the purpose the sanction is designed to serve.***[3] "'Criminal contempt' is punitive, designed to punish an attempt to prevent the course of justice; 'civil contempt,' on the other hand is remedial and coercive, intended to achieve

[1] The superior court and district court are courts of general jurisdiction. New England Tel. & Tel. Co. v. District Attorney for Norfolk County, 374 Mass. 569, 572 (1978); G.L. c. 218, § 4. The power to punish contempts is inherent and necessary to the operation of such courts. Berlandi v. Commonwealth, 314 Mass. 424, 442 (1943). *See also* Opinion of the Justices, 314 Mass. 767, 776–78 (1943). The power of limited jurisdiction courts in Massachusetts to punish for contempt is provided by statute. *E.g.,* G.L. c. 215, § 34 (probate court); c. 185C, § 3 (housing court). Judges of the Juvenile Court do not have the power of contempt for violations of conditions of custody dispositions in a CHINS case because there is no valid order on which contempt can be based. Commonwealth v. Florence F., 429 Mass. 523 (1999).

[2] Berlandi v. Commonwealth, 314 Mass. 424, 447 (1943). The Supreme Judicial Court has observed that "at best, the line of demarcation between contempts civil and contempts criminal in character is difficult to state with accuracy, and in close cases rests in shadow." Root v. MacDonald, 260 Mass. 344, 358 (1927). *See also* Matter of DeSaulnier (No. 3), 360 Mass. 769, 772 (1971); Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1033 (1993); United States v. Winter, 70 F.3d 655 (1st Cir. 1995) (discussing the civil/criminal distinction in the context of witness's refusal to testify).

[3] Manchester v. Department of Environmental Quality Eng'g, 381 Mass. 208, 211 n.3 (1980); Shillitani v. United States, 384 U.S. 364, 368–70 (1966).

compliance with the court's orders for the benefit of the complainant."[4] Criminal contempt, on the other hand, is punitive; it is used to vindicate the court's authority by punishing improper conduct.[5]

The distinct purposes of the two forms of contempt are reflected in the nature of the sanction. A civil contemnor may purge the contempt and avoid a fine, imprisonment, or other sanction simply by deciding to abide by the court's orders in the future. Thus, the penalty imposed in a civil contempt case is, in reality, a conditional one.[6] One convicted of criminal contempt, on the other hand, cannot escape punishment by correcting or apologizing for the offending conduct any more than a bank robber can prevent conviction by returning the stolen loot. A criminal contempt conviction is for past misconduct, and the resulting punishment is unconditional once imposed.[7]

The category into which the contempt is placed is also important because it will impact the rights afforded the accused contemnor; a criminal contempt prosecution must provide the much more extensive, constitutionally mandated rights.[8] However, the

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[4] Commonwealth v. Nicholas, 74 Mass. App. Ct. 164, 167 n. 6. (2009). See also Commonwealth v. Frith, 458 Mass. 434, 443 n.11 (2010)("Unlike a criminal contempt which is punitive, to vindicate the authority of the court, a civil contempt order is intended to be remedial and for the benefit of an aggrieved party"); Commonwealth v. Carney, 458 Mass. 418, 428 n. 14 (2010)(same); Colorio v. Marx, 72 Mass. App. Ct. 382 (2008)(court is required to look to the purpose and character of the sanctions imposed, rather than to the label given to the proceeding by the court below).

[5] Opinion of the Justices, 301 Mass. 615, 619 (1938); Blankenburg v. Commonwealth, 260 Mass. 369, 372 (1927). See also Hicks on Behalf of Feiock v. Feiock, 108 S. Ct. 1423, 1429 (1988).

[6] Mahoney v. Commonwealth, 415 Mass. 278, 284 (1993) (contempt was civil where sentence conditioned on payment of cash and agreement to stay away from alleged victim); Hicks on Behalf of Feiock v. Feiock, 108 S. Ct. 1423, 1430 (1988). The S.J.C. has held that the object of a civil contempt order that has been vacated has no right to appeal the collaterally consequential "stigma" of such an order. Commonwealth v. Rape Crisis Services, Inc., 416 Mass. 190 (1993).

Re civil contempt as remedial, *see also* Furtado *v.* Furtado, 380 Mass. 137, 141 (1980)(civil contempt is employed as a weapon to induce compliance with an existing court order); Hicks on Behalf of Feiock v Feiock, 485 U.S. 624 (1988); Mahoney v. Commonwealth, 415 Mass. 278, 284 (1993); In re Grand Jury Proceedings, 871 F.2d 156 (1st Cir. 1989) (daily coercive fines for failure to produce documents ended when grand jury issuing order did, even though second grand jury continued investigation). *Compare* Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 313 (1991) (ch. 93A civil contempt penalty justified to vindicate authority of court and deter future violations by defendant and others); Re civil contempt as remedial, *see also* Furtado *v.* Furtado, 380 Mass. 137, 141 (1980)(civil contempt is employed as a weapon to induce compliance with an existing court order); In re Grand Jury Proceedings, 871 F.2d 156 (1st Cir. 1989) (daily coercive fines for failure to produce documents ended when grand jury issuing order did, even though second grand jury continued investigation). *Compare* Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 313 (1991) (ch. 93A civil contempt penalty justified to vindicate authority of court and deter future violations by defendant and others).

[7] In re Birchall, 454 Mass. 837, 847-848 (2009); Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624 (1988).

[8] *See, e.g.,* International Union, United Mine Workers of Am., Inc., et al. v. Bagwell et al., 512 U.S. 821 (1994)(holding that because the fine was not compensatory and there was no opportunity to purge, the contempt was criminal, and the union was entitled to a criminal jury trial); United States v. Bucci, 525 F.3d 116, 129-130 (1st Cir. 2008) (discussing criminal/civil distinction in the context of Sixth Amendment right to public trial); Labor Relations Com'n v.

inverse is not necessarily true: civil contempt should not be conflated with civil case procedures generally. Recently, for example, the SJC held that a civil contempt finding must be proved by "clear and convincing evidence," not the usual civil preponderance standard.[9]

If the court does not declare in advance whether it is treating the proceeding as a criminal or civil contempt, it is limited to ordering a civil (coercive) sanction rather than a criminal penalty.[10] Moreover, the court should ordinarily impose the least severe sanction appropriate to correct the abuse and deter repetition. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay or prejudice that might result from the character of the sanction or the time of its imposition.[11]

The very same misconduct might provoke a civil contempt sanction, a criminal penalty, or both (partly remedial and partly punitive), depending on the court's objectives in a particular case.[12] Additionally, a civil contempt order may be converted to a criminal contempt order[13] (although unlike the former, the latter may not be brought in the name of a private party.[14]) The double jeopardy clause may not bar criminal and civil contempt for the same conduct.[15]

Salem Teachers Union, Local 1258, MFT, AFT, AFL-CIO, 46 Mass. App. Ct. 431 (1999) (holding that $20,000 daily fine was civil in nature and did not entitle labor union to jury trial); J.. Israel, Y. Kamisar et al., Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text 372 (rev. ed. 1990).

[9] In re Birchall, 454 Mass. 837 (2009)(overturning Manchester v. Department of Environmental Quality Eng'g, 381 Mass. 208 (1980)).

[10] Manchester v. Department of Environmental Quality Eng'g, 381 Mass. 208, 211–12 (1980)(overturned on other grounds); Meranto v. Meranto, 366 Mass. 720, 723–24 (1975); Sodones v. Sodones, 366 Mass. 121 (1975) (if no advance election reviewing court will consider it civil). *Cf.* Commonwealth v. McHugh, 326 Mass. 249, 276 (1950) (no obligation to elect in advance).

[11] Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 1:11 (District Court Administrative Office, Nov. 1981). *See also* United States v. Wilson, 421 U.S. 309, 319 (1975) (the "least possible power adequate to the end proposed should he used in contempt cases").

[12] Furtado v. Furtado, 380 Mass. 137, 141 (1980); Katz v. Commonwealth, 379 Mass. 305, 312 (1979). *Cf.* Mahoney v. Commonwealth, 415 Mass. 278 (1993) (civil contempt sanctions for violation of G.L. c. 209A protective orders were not "punishment" barring criminal prosecution for same conduct)**;** United States v. Burgos-Andujar, 275 F.3d 23 (1st Cir. 2001)(district court's increase of sentence held not to be a criminal contempt sanction where defendant's statements during allocution following "tentative" sentencing, may have suggested lack of remorse and a likelihood of recidivism, and sentencing court was explicit that there was no contempt finding.)

[13] Correia v. Correia, 70 Mass. App. Ct. 811 (2007).

[14] Robertson v. United States ex rel. Watson, 130 S.Ct. 2184 (2010)(dismissal of writ of certiorari).

[15] The First Circuit has held that where a defendant was found to be in civil contempt for refusing to comply with an order directing him to testify before a grand jury, and later was found to be in criminal contempt for failing to comply with the same order, there was no violation of double jeopardy protections. The Court reasoned that the double jeopardy clause does not bar simultaneous or even sequential civil and criminal proceedings even if they arise out of the same factual setting and even through the defendant had been incarcerated for 17 months on the civil contempt charge. United States v. Marquardo, 149 F.3d 36 (1st Cir. 1998). The SJC upheld civil contempt and criminal prosecution for violation of a ch. 209A protective

Although civil contempt proceedings sometimes arise within the context of a criminal case,[16] criminal contempt charges occur more frequently and pose a greater risk to defense lawyers and their clients. Accordingly, the bulk of this chapter shall be devoted to exploring the substantive doctrines and procedures governing criminal contempt in the Massachusetts courts.[17]

§ 46.2 DIRECT VERSUS INDIRECT CONTEMPT

This is another distinction whose significance lies chiefly in the procedural realm. Direct contempts are those that the judge personally observes, and there is no need for evidence or assistance of counsel because the court has seen the offense. The judge must *see or hear* all of the acts that constitute the contempt and may not rely on information from others.[18] The bright-line requiring that the judge actually observe the contemptuous conduct, conforms with due process by ensuring procedural safeguards to any defendant where the judge did not witness the conduct.[19]

An indirect contempt is one that occurs outside of the presence of the court, or the personal observation of the judge, and may consist or either a willful and knowing disobedience of a court order…or an act which either flouts the authority and dignity of the court or obstructs and impedes the administration of justice.[20] "It must be initiated by a complaint and the alleged contemnor is entitled to all the constitutional protections afforded to criminal defendants."[21] The crime of contempt is complete when contumacious conduct has taken place, regardless whether the subject later complies with the order he had violated.[22]

At common law, judges were afforded sweeping power to punish direct contempts instantly, without holding a hearing, making specific factual findings, or

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order in Mahoney v. Commonwealth, 415 Mass. 278 (1993). *See also* Commonwealth v. Medina, 64 Mass. App. Ct. 708 (Mass. App. Ct. 2005) and ch. 21, *supra*, addressing double jeopardy generally.

However, a divided Supreme Court has held that the double jeopardy clause applies in non-summary criminal contempt prosecutions *if* the two offenses for which the defendant is criminally punished or tried cannot survive the "same-elements" or "Blockburger" test. United States v. Dixon, 509 U.S. 688 (1993).

[16] Civil contempts often occur during criminal grand jury investigations when recalcitrant witnesses are cited and incarcerated to coerce their testimony. *See* this book chs. 5 (grand jury procedings) and 33.(witness' privilege against self-incrimination). An excellent source of guidance in this area is REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES by the Grand Jury Project, Inc. of the National Lawyers Guild (4th ed.).

[17] Civil contempt complaints frequently arise out of nonpayment of support orders entered in probate court or failure to comply with equitable decrees entered in labor disputes or other civil actions. These vast areas are beyond the scope of this work.

[18] Commonwealth v. Nicholas, 74 Mass. App. Ct. 164 (2009)(holding that where the judge did not see or hear the conduct that created a courtroom disturbance, the use of summary contempt was improper).

[19] Commonwealth v. Nicholas, *supra,* at 171.

[20] Avelino-Wright v. Wright, 51 Mass. App. Ct. 1, 5 (2001).

[21] Michael Shea, CONTEMPT PROCEEDINGS, Massachusetts Continuing Legal Education, WL MA-CLE 27-1. (2011)

[22] United States v. Marquardo, 149 F.3d 36 (1st Cir. 1998).

affording the accused even rudimentary due process.[23] Although judges retain discretion to employ summary procedures in certain instances of direct contempt (*see infra* § 46.4A), that authority has been substantially curtailed by court rule and case law. Nevertheless, the direct/indirect contempt distinction retains some vitality and must be addressed in ascertaining the procedural rights of the accused.

§ 46.3 CONTUMACIOUS CONDUCT

§ 46.3A. DEFINITION

There is no Massachusetts statute delineating the grounds for finding a lawyer or litigant in contempt of court.[24] In general, contumacious conduct fits into two broad categories: (1) willful disobedience of a lawful court order[25] and (2) acts that affront the court's dignity or obstruct the administration of justice.[26]

A contempt based on "willful disobedience" of a court order requires: (1) a lawful[27] order that is clear and unequivocal[28] (2) clear and undoubted disobedience,[29]

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[23] *See* Silverton v. Commonwealth, 314 Mass. 52, 53–56 (1943); Hurley v. Commonwealth, 188 Mass. 443, 446 (1905).

[24] In contrast, the power of a federal court to impose punishment for contempt is limited by statute to three specific types of conduct: "(1) Misbehavior of any person in its [the court's] presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401. *See also* Gilday v. Dubois, 124 F.3d 277 (1st Cir. 1997)(general discussion and analysis of the federal civil contempt standard).

[25] Contempt decrees based on disobeyal of an order may stand even if the original order was erroneous. Commonwealth v. Dodge, 428 Mass. 860, 861 (1999) (upholding contempt conviction despite finding that judge lacked authority to impose conditions on which contempt finding was based).

[26] *See* Furtado v. Furtado, 380 Mass. 137, 145 (1980); Miaskiewicz v. Commonwealth, 380 Mass. 153, 158 (1980); Berlandi v. Commonwealth, 314 Mass. 424, 433 (1943). *See also* Sussman v. Commonwealth, 374 Mass. 692, 701 n.9 (1978) (whether disobedience was intentional is relevant to summary contempt proceeding). *See infra* § 46.3C(3) regarding limitations on affronts to the Court. For a comprehensive examination of the definition of contemptuous conduct, and constitutional limitations on the contempt power, *see* Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power,* 14 AM. J. TRIAL ADVO. 243 (1990).

[27] Despite the court's inherent power to sanction contempt of its orders, the threshold inquiry in all contempt actions, whether for "willful disobedience" or for "obstruction," is whether the judge was empowered to impose the original order. In the Matter of Vincent, 408 Mass. 527 (1990). In juvenile proceedings, for example, a court exercising its powers under G.L. c. 119, §§ 39E–39J to aid a child in need of services (CHINS cases) may not hold the juvenile in contempt for not obeying the court's "attend school" order, as §§ 39E–39J do not grant judges power to issue "attend school" orders. *Id. See also* Commonwealth v. Florence F., 429 Mass. 523–4 (1999) (no order of the Juvenile Court in CHINS cases, even a condition of custody, can be a valid basis for a contempt finding). Similarly, a contempt order would not be lawful which unjustifiably required an attorney to, for example, breach the attorney-client privilege. *Cf.* Commonwealth v. Carr, 38 Mass. App. Ct. 179, 180 n. 2 (1995)(noting contempt charges against attorney for refusing to identify who had contacted him on behalf of a juvenile defendant, and that charges were ultimately dismissed.

(3) the ability and opportunity to comply,[30] and (4) intent to do the act.[31] However, some cases indicate that a specific intent to disobey might be required.[32]

A contempt based on "obstruction" or affront to the Court's dignity – When grounded on obstruction of justice, the contemptuous conduct need not actually

[28] O'Connell v. Greenwood, 59 Mass. App. Ct. 147 (2003)(clear and unequivocal command to refrain from allegedly contumacious conduct provides all who are subject to order's command with fair notice of conduct the order prohibits); Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501 (1997); Manchester v. Department of Environmental Quality Eng'g, 381 Mass. 208, 212 (1980); Nickerson v. Dowd, 342 Mass. 462, 464 (1961). See also In re Birchall, 454 Mass. 837, 852 (Mass. 2009); Newell, v. Department of Mental Retardation 446 Mass. 286 (2006) (the order may be oral but appeals court will look to precise words of the transcript to determine if an order was actually issued); Commonwealth v. Dwyer, 448 Mass. 122 (2006) (violation of court order concerning presumptively privileged records is punishable as criminal contempt).

[29] *See* In re Birchall, 454 Mass. 837, 851-2 (2009).

[30] Turner v. Rogers, 131 S.Ct. 2507 (2011)(judge failed to find that defendant had the ability to comply with support order before holding him in contempt); In re Birchall, 454 Mass. 837 (2009)(civil contempt finding against debtor cannot be maintained if inability to pay); In re Care and Protection of Summons, 437 Mass. 224 (2002) (noncompliance with judge's order may be excused where it becomes impossible, but the burden lies the alleged contemnors to prove impossibility); Milano v. Hingham Sportwear Co., 366 Mass. 376, 378 (1974) (civil contempt appropriate where defendant corporation was able to pay judgment); McNeil v. Director, Patuxent Inst., 407 U.S. 245, 251 (1972) (due process requires a hearing to determine whether the confined person had the ability to comply). A contempt judgment cannot be based on a witness's refusal to obey a subpoena duces tecum without proof that the item sought was in her control. Commonwealth v. Kreplick, 379 Mass. 494, 497–98 (1980) (fact that clerk of corporation responded to subpoena insufficient to show she had control of records sought). The burden of proving impossibility of compliance lies with the alleged contemnor. Commonwealth v. One 1987 Ford Econoline Van, 413 Mass. 407, 412 (1992) (citing Allen v. School Comm., 400 Mass. 193, 194 (1987)).

[31] *See* Commonwealth v. Howard, 62 Mass. App. Ct. 422 (2004) (nonpayment of child support alone cannot satisfy criminal contempt element of willfulness); United States v. Browne, 318 F.3d 261, 266 (1st Cir. Puerto Rico 2003)(insufficient evidence of specific intent to obstruct; obstruction is deliberate misconduct that may foreseeably disrupt or interfere with court proceedings, whether or not that was the subjective intent of the contemnor); Commonwealth v. Filos, 420 Mass. 348 (Mass. 1995) (judge's charge to jury held to have sufficiently described element of intent necessary for finding of contempt based on violating injunction forbidding aiding and abetting abortion clinic trespass); Albano v. Commonwealth, 315 Mass. 531, 535 (1944); Woodbury v. Commonwealth, 295 Mass. 316, 319 (1936).

The mens rea elements of criminal contempt do not include proof of the defendant's knowledge of the method of service of the judicial order if the defendant had actual notice that his conduct would violate it. Commonwealth v. Blake, 39 Mass. App. Ct. 906 (1995) (police read wrong order that did not contain verbal notice provision, but substance of orders was otherwise the same).

[32] *See* Sussman v. Commonwealth, 374 Mass. 692, 701 n.9 (1978) (summary procedure); United States v. Jones, 620 F.Supp.2d 163 (D.Mass. 2009) (criminal contempt inappropriate for prosecutor's failure to provide all material exculpatory information because no showing the defendant intended to violate the order). *Cf.* Factory Outlet v. Jay's Stores, 361 Mass. 35 (1972) (no willfulness required for corporate contemnor). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.3 (3d ed. 2000) (prior warning or intent to disobey should be required).

obstruct but must have a direct tendency to do so.[33] Courts must be careful to distinguish offenses to their sensibilities from obstruction of justice.[34] Contempt for obstruction or affront may be based on "objectionable manner, speech, attitude, conduct and tone of voice in the court room," or vulgar remarks to the judge.[35]

§ 46.3B. ZEALOUS ADVOCACY OR CRIMINAL CONTEMPT?

The Massachusetts Rules of Professional Conduct mandate zealous representation within the bounds of the law.[36] In performing that job, a criminal defense lawyer may at times become embroiled in conflict with a trial judge. The court's unilateral power to threaten or institute criminal contempt proceedings renders that contest inherently unequal. Counsel must steer clear of the forbidden zone of conduct or run the risk of fine or imprisonment. In some cases, the uncertainty over the reach of criminal contempt may create a conflict between lawyer and client, with counsel's personal reticence to risk contempt tending to discourage the zealous advocacy the client's cause demands.

The American Bar Association Standards for Criminal Justice state that while a lawyer should comply promptly with all orders of the court, "he has a right to make respectful requests for reconsideration of adverse rulings,"[37] and that the vigorous protection of his client's rights "may require that the lawyer resist the wishes of the judge on some matters, and though his resistance should never lead him to act disrespectfully, it may require him to appear unyielding and uncooperative at times. In so doing, he does not contradict his duty to the administration of justice but fulfills his function within the adversary system."[38]

While this line of demarcation remains vague, the Massachusetts Rules of Professional Conduct (as well as case law interpreting both these rules and former S.J.C. Rule 3:07 which they replaced) should provide guidance as to what attorney

[33] Berlandi v. Commonwealth, 314 Mass. 424, 455–56 (1943) (ineffectual conspiracy – "a person is not excused from attempting to influence a judge improperly by reason of the high character of the particular judge and the improbability that he will be influenced by the attempt").

[34] Brown v. United States, 356 U.S. 148, 153 (1958). *See also* Eaton v. Tulsa, 415 U.S. 697, 698 (1974) (witness's single expletive constitutionally insufficient to constitute contempt); Craig v. Harney, 331 U.S. 367, 376 (1947) (vehement language alone not enough unless imminently threatens administration of justice).

[35] Commonwealth v. Brunnell, 65 Mass. App. Ct. 423, 428 (2006). See also Commonwealth v. Wilson, 81 Mass. App. Ct. 464 (2012); Commonwealth v. Wiencis, 48 Mass. App. Ct. 688 (2000)(defendant who screamed at and threatened the jury as guilty verdicts were read, and after the jury left, continued angry disputation with the trial judge was properly held in contempt).

[36] Mass. R. Prof. C. 1.3. The Massachusetts Rules of Professional Conduct became effective on January 1, 1998. *See* 426 Mass. 1301 (1998).

[37] ABA Standards Relating to the Defense Function, Standard 7.1(d).

[38] ABA Standards Relating to the Defense Function, commentary to Standard 1.1(b). See also 68 A.L.R. 314 CONDUCT OF ATTORNEY IN CONNECTION WITH MAKING OBJECTIONS OR TAKING EXCEPTIONS AS CONTEMPT OF COURT; Commonwealth v. Nicholas, 74 Mass. App. Ct. 164, 170 n.11 (2009) (where criminal contempt cases involves accusations against an attorney, a major concern is not chilling an attorney's obligation to represent a client zealously).

conduct is protected,[39] and it also appears that courts are now prepared to recognize that certain "vigorous but respectful advocacy" engaged in by counsel cannot constitute contempt of court, even if the trial judge is right and the lawyer is wrong on the merits of their dispute. In *Sussman v. Commonwealth,*[40] a criminal defense lawyer was held in criminal contempt and fined for pursuing a line of questioning on cross-examination after the trial judge had sustained the prosecutor's objection to a somewhat similar inquiry. The Court reversed, holding as a matter of law that Sussman committed no contempt.[41] The Court stressed the importance of vigorous advocacy and the substantial danger that contempt proceedings against trial lawyers poses to such advocacy.[42] However, the court did endorse the use of criminal contempt against a lawyer who persists in conducting an examination or pursuing an argument that has been excluded, provided (1) the attorney has first been warned to stop, and (2) that such persistence amounts to an obstruction of the trial.[43] Once warned, the court declared, counsel's duty is to desist, "taking such steps only as are necessary to preserve his client's right of appellate review."[44] *Sussman* was a landmark decision in recognizing that a trial judge's power to hold counsel in criminal contempt is not unbounded. The evolution of substantive limits on the power of a judge to punish counsel for doing their job continued in *Commonwealth v. Segal,*[45] where the Court reversed an attorney's criminal contempt citation for objecting to the admission of certain documents at trial[46]

Similarly, as early as 1965, the U.S. Supreme Court found unconstitutional the use of criminal contempt to punish a lawyer for filing a motion the trial judge found objectionable.[47] The U.S. Supreme Court has also imposed substantive constitutional

[39] CPCS and the Massachusetts Association of Criminal Defense Attorneys (MACDL) have often defended counsel against contempt charges stemming from proper representation.

[40] 374 Mass. 692 (1978).

[41] Sussman v. Commonwealth, 374 Mass. 692, 702 (1978).

[42] Sussman v. Commonwealth, 374 Mass. 692, 696–97 (1978).

[43] Sussman v. Commonwealth, 374 Mass. 692, 697 (1978). A warning is not a condition precedent to criminal contempt in all cases. *Sussman, supra,* 374 Mass. at 697. One can readily conceive of a wide panoply of acts by counsel that would constitute contempt of court without the necessity of a prior warning. Such acts include the alteration or destruction of court records, improper contacts with jurors, willfully disrupting court proceedings, and perpetrating a fraud an the court. Some of these acts are punishable as crimes in their own right. *E.g.,* G.L. c. 268, § 13 (corruption of jurors); c. 268, § 13B (intimidation of witnesses); c. 268, § l3C (disruption of court proceedings). Moreover, Mass. R. Crim. P. 48 subjects counsel to contempt for "a willful violation" of any provision of the Rules of Criminal Procedure or of an order issued pursuant to those Rules.

[44] Sussman v. Commonwealth, 374 Mass. 692, 698 (1978).

[45] 401 Mass. 95 (1987).

[46] Commonwealth v. Segal, 401 Mass. 95, 98 (1987)("As a matter of law we see nothing contemptuous of the court in what defense counsel did").

[47] In Holt v. Virginia, 381 U.S. 131 (1965), two attorneys had been held in criminal contempt for filing a motion for change of venue claiming bias on the part of the judge. Noting that the language of the defendants' motion was not offensive, the Court held that the constitutional right of due process encompasses the filing of motions. *Holt, supra,* 381 U.S. at 136–37. *See also* In re Zalkind, 872 F.2d 1 (1989) (defense counsel's motion to recuse judge as biased was not violative of the professional code because of insufficient evidence that allegations were in bad faith); Craig v. Harney, 331 U.S. 367, 376 (U.S. 1947) ("…the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion").

limitations on a court's power to punish a lawyer for criminal contempt based on good-faith advice rendered to a client.[48]

The above case law supports the proposition that filing a motion, making an objection, or performing, in good faith, other acts inherent in legal representation, cannot, without more, be deemed contempt of court subjecting counsel to criminal penalties. Considered as a whole, these decisions provide substantial protection to the practicing lawyer against being convicted of criminal contempt and punished for representing his or her client zealously and in good faith.

Unfortunately, a great deal of ambiguity remains. In federal court, where the elements of contempt are defined by statute, insults directed at the judge or affronts to the dignity of the court are not, without more, sufficient to warrant prosecution for contempt.[49] The Massachusetts courts, on the other hand, have never suggested that disrespectful conduct is immune from punishment as criminal contempt. Is it safe to tell a judge her ruling is "erroneous" but risky to describe it as "absurd" or "certain to be reversed"? Admonitions directed towards trial lawyers for such conduct as shouting, gum chewing, and tardiness have consistently been approved.[50] Does such conduct subject counsel to prosecution for contempt? What about improper attire, failing to rise when the judge enters the courtroom, and a host of other real or imagined peccadilloes? Criminal contempt charges might well be sustained in some of these circumstances once counsel had been warned and ordered to desist. A lawyer who persists in such conduct following a warning, beyond the extent necessary to preserve the client's appellate rights, does so at her peril.

§ 46.3C. DEFENDANT AND WITNESS CONTEMPT

The court's broad contempt powers extend to all of the participants in a judicial proceeding, including litigants, witnesses, court officers, and spectators, in addition to counsel.

1. Disruptive Conduct

A defendant facing criminal charges may be subjected to criminal contempt proceedings for disrupting court proceedings. Disruptive conduct threatens to inhibit the fair and efficient administration of justice, erode the authority and legitimacy of the

[48] In Maness v. Meyers, 419 U.S. 449 (1975), the Court reversed the criminal contempt conviction of an attorney who had advised his client, on Fifth Amendment grounds, not to produce documents subpoenaed in a civil case. Characterizing legal advice to resist a subpoena and test its validity in the context of contempt proceedings as "a familiar procedure," the Court recognized that such proper advice could well be chilled if the lawyer who rendered it were subject to criminal penalties. *Id.* at 463–67. "We conclude," the Court held, "that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony." *Id. a*t 468. The Court took pains to carve out of its holding instances where such advice was patently frivolous, offered for purposes of delay, or otherwise rendered in had faith. *Id.* at 470 n.19.

[49] *E.g.,* Gordon v. United States, 592 F.2d 1215, 1217–18 (1st Cir. 1979).

[50] *E.g.,* Commonwealth v. Wilson, 81 Mass. App. Ct. 464 (2012); Commonwealth v. Dundon, 3 Mass. App. Ct. 200, 205–06 (1975).

judicial system, and jeopardize the constitutional rights of litigants.[51] The U.S. Supreme Court has delineated several options that a trial court may employ to deal with a disruptive defendant.[52] In some circumstances, such a person may be physically restrained, removed from the courtroom, jailed for civil contempt for the duration of the trial, or punished for criminal contempt.[53] Mass. R. Crim. P. 45, which authorizes physical restraint or removal of a disruptive defendant during trial, does not appear to preclude prosecution for criminal contempt on the basis of such conduct.[54] It also seems to suggest that a defendant has the right to be returned to the courtroom, after disruptive conduct, "upon his request and assurances of good behavior." For a more detailed treatment of defendant disruption, see *supra* §§ 28.1C and 28.2.

2. Failure to Appear or Refusal to Testify

A witness who refuses to answer a series of questions when ordered to do so also risks criminal (as well as civil) contempt. Each group of questions relating to a single subject or intended to establish a single fact may constitute a separate contempt, although it may be possible to limit the number of contempts by establishing an "area of refusal" in response to the first question.[55] A witness who simply fails to respond to a trial subpoena may also be prosecuted for criminal contempt.[56] Wide latitude is

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[51] Ira P. Robbins, DIGITUS IMPUDICUS: THE MIDDLE FINGER AND THE LAW, 41 U.C. Davis L. Rev. 1403, 1477 (2008).

[52] Illinois v. Allen, 397 U.S. 337 (1970).

[53] Illinois v. Allen, 397 U.S. 337 (1970). *Cf.* Deck v. Missouri, 544 U.S. 622 (2005)(due process does not permit the use of visible restraints without specific findings defendant poses escape or security risk.)

Three recent cases demonstrate the typical criminal contempt case where summary proceedings are appropriate. In Commonwealth v. Brunnell, 65 Mass. App. Ct. 423, 425-426 (2006), a defendant, unhappy with the judge's ruling denying a bail reduction, remarked, "Fuck you, judge; fuck you." "You know what judge? You can suck my fucking dick." Although the judge should not have found the defendant in contempt using the summary procedure, the defendant clearly could have been charged with contempt by way of complaint.

In Commonwealth v. Wiencis, 48 Mass. App. Ct. 688, 691-692 (2000), the defendant, after hearing the guilty verdict, erupted and screamed at the jury. The jury was removed. The judge admonished the defendant, who apologized and promised to behave. Upon the return of the jury, the defendant again lost control, threatening the jurors. The judge found him in contempt.

In United States v. Browne, 318 F.3d 261 (1st Cir. Puerto Rico 2003), the First Circuit held that the District Court properly found that the defendant cursing while exiting the courtroom after his sentencing was aimed at the judge and constituted an "obstruction of justice" warranting summary punishment for contempt.

[54] Other acts by a criminal defendant that could constitute criminal contempt include failure to appear in court in response to a summons (G.L. c. 276, § 26), and executing a false financial statement. Fay v. Commonwealth, 379 Mass. 498 (1980).

[55] Baker v. Eisenstadt, 456 F.2d 382, 389 (1st Cir.), *cert. denied,* 490 U.S. 846 (1972) (refusal to answer all questions to avoid waiver of privilege constitutes single contempt); Matter of DeSaulnier, (No. 3), 360 Mass. 769, 777 (1971) (leaves issue open).

[56] G.L. c. 233, § 5. But a witness who fails to produce items demanded in a subpoena duces tecum cannot be found in contempt without proof she was in control of the items. Commonwealth v. Kreplick, 379 Mass. 494, 497–98 (1980). Also, a witness who fails to appear for trial cannot be punished with contempt unless she has been previously warned of this

generally afforded a witness's refusal to testify based on a constitutional claim of privilege against self-incrimination.[57] Certainly, a witness whose constitutional claim of privilege is subsequently upheld on appeal cannot be punished for refusing to obey an unlawful command to testify.[58] An erroneous claim of privilege, however, may subject a witness to liability for criminal contempt.[59] The refusal of an immunized witness to testify triggers a prosecution for criminal contempt pursuant to statute.[60]

3. Contumacious Testimony

The conduct of a witness who testifies may also create a risk of criminal contempt. The commission of perjury, without more, is not contempt of court.[61] Conversely, "a person who lies under oath may be guilty of criminal contempt without meeting the technical requirements of perjury."[62] Criminal contempt in the context of perjury requires the further element of obstruction of the court in the performance of its duty.[63] Yet it may be a relatively short leap, in the trial judge's view, from "perjury alone" to such "obstruction."[64] The U.S. Supreme Court has held that the use of a single obscenity ("chickenshit") by a witness on cross-examination cannot constitutionally support a conviction for criminal contempt where such language was not directed at the judge or any officer of the court.[65] The vague definition of contumacious conduct under Massachusetts law, however, would appear to place a

possibility. Commonwealth v. Carr, 38 Mass. App. Ct. 179 (1995) (finding of contempt and use of summary proceeding under Rule 43 held improper against witnesses who failed to appear for trial after swearing that they would "recognize to the sum of $100.00 personal surety for their appearance the next day" where witnesses were not warned that they were in danger of being charged with contempt, there was no immediacy, and no issue of order in the courtroom).

[57] For contempt and other issues arising from a witness' assertion of Fifth Amendment rights, *see supra* ch. 33.

[58] *See* Commonwealth v. Borans, 388 Mass. 453 (1983).

[59] Matter of Roche, 381 Mass. 624 (1980); Commonwealth v. Corsetti, 387 Mass. 1, 8–9 (summary proceeding appropriate because faulty claim of privilege delayed and imperiled administration of justice). Under such circumstances, the politeness employed by the witness in refusing to testify is irrelevant. *Corsetti, supra,* 387 Mass. at 8. *See also* United States v. Wilson, 421 U.S. 309 (1975); United States v. Underwood, 880 F.2d 612 (1st Cir. 1989) (willful disobedience warranting contempt conviction found even though immunized witness relied in good faith on counsel's advice that subpoena was unlawful).

[60] G.L. c. 233, § 20H; Commonwealth v. Figueroa, 451 Mass. 566 (2008)(subject to the approval of the court, it is the purview of the prosecutor to seek a grant of immunity, or to seek an order of contempt if an immunized witness refuses to testify); Commonwealth v. Steinberg, 404 Mass. 602, 608 (1989).

[61] Ex parte Hudgings, 249 U.S. 378 (1919); Miaskiewicz v. Commonwealth, 380 Mass. 153, 158 (1980).

[62] Reporter's Notes to Rule 44, citing Miaskiewicz v. Commonwealth, 380 Mass. 153 (1980).

[63] Miaskiewicz v. Commonwealth, 380 Mass. 153, 158 (1980); Blankenburg v. Commonwealth, 272 Mass. 25, 31-34 (Mass. 1930).

[64] Miaskiewicz v. Commonwealth, 380 Mass. 153, 158 (1980) (enlisting judicial resources to further perjury punishable as contempt).

[65] Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (per curiam).

witness at risk for insulting language, at least where directed toward counsel or the presiding judge.[66]

§ 46.4 CRIMINAL CONTEMPT PROCEEDINGS

There are two distinct procedural routes for prosecuting criminal contempts in the Massachusetts trial courts.[67] Summary proceedings may be employed in cases that meet specified constitutional criteria and fall within the aegis of Mass. R. Crim. P. 43. The use of summary procedures for adjudicating any criminal charge, including contempt of court, is strongly disfavored. Thus, unless a particular contempt charge clearly qualifies for summary treatment, such a procedure may not be utilized.

All charges of criminal contempt that do not qualify for summary treatment must be addressed in accordance with the provisions of Mass. R. Crim. P. 44. That rule incorporates by reference the panoply of procedural requirements applicable to all criminal cases. The provisions of Rules 43 and 44 substantially embody evolving constitutional standards in this area derived from a series of decisions by the U.S. Supreme Court rendered during the decade immediately preceding the enactment of the Mass. Rules of Criminal Procedure in 1979.

§ 46.4A. SUMMARY PROCEEDINGS

1. When Summary Proceedings May Be Employed

Rule 43(a) specifies the limited circumstances in which summary proceedings may be employed to prosecute a criminal contempt. The rule provides that summary criminal contempt proceedings may be utilized only if: (1) instant adjudication is necessary to maintain order in the courtroom; (2) the contemptuous conduct could be seen or heard by the presiding judge and was committed within the actual presence of the court;[68] (3) the judgment of contempt is entered upon the occurrence of the contemptuous conduct;[69] and (4) the punishment imposed for each contempt does not exceed three months imprisonment or a fine of five hundred dollars.[70] The Supreme Judicial Court

[66] *But see* language cautioning courts in cases cited in footnotes *supra* at § 46.3A.

[67] Rules 43 and 44 of the Massachusetts Rules of Criminal Procedure, discussed in detail below, govern proceedings in superior court and district court. The courts of limited jurisdiction adjudicate criminal contempts in accordance with their own rules, such as Uniform Practices of Probate Courts of Massachusetts, Practice 4, subject to applicable constitutional requirements. *See, e.g.,* Edgar v. Edgar, 403 Mass. 616 (1988) (lack of provision for jury trial in a probate court criminal contempt proceeding doesn't violate constitution despite its availability in superior and district courts).

[68] "While the Reporter's Note indicates that the rule conforms to the common law, it is rather awkwardly written. By using the phrase "could be seen" rather than "must be seen," the rule somewhat muddies the waters." Commonwealth v. Nicholas, 74 Mass. App. Ct. 164, 170 n. 10 (2009).

[69] "A further problem with the rule is the tension between Rule 43(a)(2), which indicates that the judgment of contempt must be immediately announced (although sentencing can be delayed), and Rule 43(b), which states that before making a judgment of contempt…the presiding judge shall give the contemnor notice…and…opportunity to adduce evidence or argument…." Commonwealth v. Nicholas, 74 Mass. App. Ct. 164, 170 n. 10 (2009).

[70] Mass. R. Crim. P. 43(a).

has further required that (5) unless the conduct was "flagrant," a prior warning is required as a prerequisite to treating the alleged contempt summarily.[71] The absence of any one of these distinct requirements renders summary proceedings unavailable, triggering the more extensive procedures described in Rule 44. Since summary punishment is regarded with disfavor, the provisions of Rule 43 are narrowly construed.[72]

The first of these four requirements reflects the U.S. Supreme Court's past holding that absent overriding necessity for instant action to preserve order, there can be no justification for dispensing with the ordinary rudiments of due process in a criminal contempt case.[73] This threshold limitation on the use of summary procedures has been strictly enforced by the Supreme Judicial Court,[74] although perhaps less so

[71] Sussman v. Commonwealth, 374 Mass. 692, 697 (1978). *See also* Commonwealth v. Wilson, 81 Mass.App.Ct. 464 (2012)(conduct found flagrant and thus not requiring a warning); Commonwealth v. Wiencis, 48 Mass. App. Ct. 688 (2000) (threats to jury held sufficient to affirm summary contempt conviction); Commonwealth v. Malley, 42 Mass. App. Ct. 804 (1997) (judgment of contempt and 45-day sentence affirmed after summary proceedings under Rule 43(a) where defendant who expressed dissatisfaction with counsel who had apparently failed to contact a necessary witness, refused to sign waiver of counsel form or to proceed pro se, and interrupted judge numerous times, ultimately inducing judge, after warning to defendant, to dismiss jury and continue trial).

[72] The summary contempt power "is conceived narrowly and [to be] used with great restraint," and "care is needed to avoid arbitrary or oppressive conclusions." Commonwealth v. Wilson, 81 Mass. App. Ct. 464 (2012), quoting Commonwealth v. Diamond, 46 Mass.App.Ct. 103, 106, (1999) and Commonwealth v. Viera, 41 Mass.App.Ct. 206, 208, 669 N.E.2d 209 (1996) respectively. *See also* Commonwealth v. Nicholas, 74 Mass. App. Ct. 164 (2009); Commonwealth v. Wilcox, 446 Mass. 61 (2006)(jury trial provision contained in Declaration of Rights does not diminish a judge's power to punish summarily a criminal contempt by incarceration, although other sources of authority now constrain a judge's discretion in such matters); Commonwealth v. Brunnell 65 Mass. App. Ct. 423 (2006)(judges must exercise restraint in using summary criminal contempt only in cases where it is necessary to preserve the dignity and order of the court).Commonwealth v. Contach, 47 Mass. App. Ct. 247 (1999)(contempt finding reversed where defendant, an applicant for protection order under G.L. c. 209A, made an obscene gesture, appeared in court under the influence of alcohol and was found by judge not to have "told the truth about it"); Commonwealth v. Diamond, 46 Mass. App. Ct. 103 (1999) (contempt finding reversed where defendant, an attorney, was overheard by judge telling opposing counsel that he would get discovery "up the ass"); Commonwealth v. Rogers, 46 Mass. App. Ct. 109 (1999) (contempt finding reversed against attorney who left court after judge had announced in open court that all counsel should remain in the court-room; but order to pay $50.00 upheld); Commonwealth v. Carr, 38 Mass. App. Ct. 179 (1995) (finding of contempt and use of summary proceeding under Rule 43 held improper against witnesses who failed to appear for trial after swearing that they would "recognize to the sum of $100.00 personal surety for their appearance the next day" where witnesses were not warned that they were in danger of being charged with contempt, there was no immediacy, and no issue of order in the courtroom); Commonwealth v. Corsetti, 387 Mass. 1, 7 (1982). *But see* Commonwealth v. Brunnell, 65 Mass. App. Ct. 423, 428 (Mass. App. Ct. 2006) (defendant's outburst sufficiently flagrant so as to undermine the authority of the court to constitute contempt).

[73] Codispoti v. Pennsylvania, 418 U.S. 506, 514 (1974); *See also* Reporter's Notes to Rule 43.

[74] In both *Sussman* and *Sega1,* for example, the Court observed that the defendant attorney's conduct during trial had posed no threat to the orderly administration of justice, rendering summary procedures inapplicable. Commonwealth v. Segal, 401 Mass. 95, 98 (1987); Sussman v. Commonwealth, 374 Mass. 692, 695–96 (1978). Summary contempt proceedings

more recently.[75] The disruption need not occur in the presence of the jury; all that is required is that the summary proceeding is necessary "to maintain order."[76]

The second prerequisite for use of summary contempt procedures is that the conduct at issue took place within the sight or hearing of the presiding judge during legitimate court process ("direct contempt").[77] This requirement conforms to the common law doctrine authorizing judges to punish contempts occurring in their presence immediately and without the necessity of a hearing to determine the facts.[78] At common law, however, all direct contempts were subject to summary proceedings. Under Rule 43, the three other prerequisites listed at the beginning of this subsection must be satisfied as well.

The third requirement for the use of summary proceedings is that such proceedings occur immediately following the conduct at issue. This provision conforms to the holding of the U.S. Supreme Court that where circumstances permit delaying adjudication of an alleged contempt, there is no justification for dispensing with the usual elements of due process.[79] Rule 43(b) specifically authorizes the imposition or execution of sentence for summary contempt to be deferred until after the completion of trial "[w]here the interests of orderly courtroom procedure and substantial justice require."

The final limitation on summary criminal contempt proceedings is that the punishment imposed following such proceedings may not exceed three months' imprisonment or a fine of $500 for each contempt. This caveat reflects a distinction between petty and serious offenses that has constitutional ramifications in other aspects

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may be employed only where immediate action is essential to the orderly administration of justice. *Sussman, supra,* 374 Mass. at 695–96.

[75] In *Pounders v. Watson*, 521 U.S. 982 (1997), the Supreme Court reversed the Ninth Circuit Court of Appeals and upheld the trial court's use of summary contempt proceedings (without a hearing) against an attorney who had questioned her client about the penalty he would face if convicted, after having been told by the judge not to do so. The important factors that justified a summary procedure to the Court were: (1) the trial judge had admonished counsel repeatedly, both in open court and at bench conferences when the attorney was sitting a few feet away, not to discuss punishment; (2) after the attorney had asked her client whether he was facing the death penalty, the judge had sustained an objection and had said that this had already been talked about at side bar and that the court's admonitions should be followed; and (3) the attorney's next question to her client had been whether he was facing life without possibility of parole. Also, during the contempt proceedings, the judge made express findings that: (1) the attorney had willfully refused to comply with the judge's order not to discuss punishment; (2) the attorney's questions had permanently prejudiced the jury in favor of her client; and (3) the prejudice could not be overcome. The trial judge imposed a two-day jail sentence, to be served after trial.

[76] Commonwealth v. Wilson, 81 Mass. App. Ct. 464 (2012).

[77] The judge must perceive all elements of the contempt. Commonwealth v. Nicholas, 74 Mass. App. Ct. 164 (2009); Commonwealth v. Brunnell 65 Mass. App. Ct. 423 (2006); Commonwealth v. Wiencis, 48 Mass. App. Ct. 688 (2000); Garabedian v. Commonwealth, 336 Mass. 119, 125 (1957); In re Oliver, 333 U.S. 257 (1948). Moreover, the proceedings must concern a matter of permissible judicial inquiry. Joyce v. Hickey, 337 Mass. 118, 122 (1958).

[78] *See, e.g.,* Ex parte Terry, 128 U.S. 289, 313 (1888).

[79] Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974); Croppi v. Leslie, 404 U.S. 496 (1972); *see also* Reporter's Notes to Rule 43. *But see* Pounders v. Watson, 117 S. Ct. 2359 (1997) (upholding the judge's use of summary contempt against attorney based on her questioning of client).

of criminal law. In *Duncan v. Louisiana*,[80] the Supreme Court held that the fourteenth amendment guarantees all criminal defendants charged with nonpetty offenses the right to trial by jury. In *Bloom v. State of Illinois,*[81] the Court specifically held the jury trial right applicable in criminal contempt cases where the penalty imposed exceeds six months' imprisonment. Because summary contempt proceedings are carried out without a jury, the Constitution forbids their resulting in a term of imprisonment exceeding six months for any one offense. Rule 43 goes further than that constitution-mandated threshold by limiting summary contempt penalties to three months' imprisonment or less.[82]

2. The Elements of Summary Contempt Proceedings

Rule 43(b) outlines the procedures to be followed in cases of criminal contempt which qualify for summary treatment. The Rule requires the presiding judge to give the alleged contemnor "notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment." The Rule also requires the judge to sign and enter any judgment of guilt and to include a recital of the facts on which the adjudication is based.

In providing for notice and an opportunity to be heard in summary contempt proceedings, Rule 43(b) conforms to basic constitutional requirements of procedural due process.[83] It is unclear exactly what is meant by "at least a summary opportunity to adduce evidence or argument." One accused of criminal contempt has traditionally been afforded an opportunity to address the court in the nature of a right of allocution.[84] In *Sussman,* decided prior to the implementation of the Massachusetts Rules of Criminal Procedure, the Supreme Judicial Court held that "an adequate opportunity to defend or explain one's conduct is a minimum requirement before imposition of punishment."[85] Significantly, the Court in *Sussman* suggested that whether the accused *intended* to disobey the judge's ruling was relevant and open to explanation.[86] Construed in light of *Sussman,* Rule 43(b) appears to guarantee one subjected to summary contempt proceedings the right to present evidence or argument respecting the conduct at issue, the state of mind accompanying that conduct, and the punishment, if any, that should be imposed.

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[80] 391 U.S. 145 (1968).

[81] 391 U.S. 194 (1968). *See also* Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (if maximum penalty exceeds six months, jury trial right applies).

[82] The three-month limitation does not appear to apply to summary criminal contempt proceedings in those courts beyond the reach of the Rules of Criminal Procedure. In Edgar v. Edgar, 403 Mass. 616 (1988), the S.J.C. observed that the U.S. Constitution did not guarantee a right to jury trial in criminal contempt proceedings where the punishment imposed was six months' imprisonment or less. *Edgar, supra,* 403 Mass. at 618. The court specifically rejected an equal protection attack on the unavailability of a jury trial to one prosecuted for criminal contempt in the probate court. *Edgar, supra,* 403 Mass. at 618–20. There is no statutory provision for jury trials in probate court, the punishment for criminal contempt in that forum cannot exceed six months' imprisonment without violating *Bloom.*

[83] *See* Taylor v. Hayes, 418 U.S. 488, 497–99 (1974); Reporter's Notes to Rule 43.

[84] Katz v. Commonwealth, 379 Mass. 305, 315–16 (1979); Groppi v. Leslie, 404 U.S. 496, 504 (1972).

[85] Sussman v. Commonwealth, 374 Mass. 692, 699 (1978).

[86] Sussman v. Commonwealth, 374 Mass. 692, 701 n.9 (1978).

As in other criminal cases, the accused may not be required to testify at a criminal contempt proceeding.[87] The accused is to be presumed innocent and can only be convicted on proof of guilt beyond a reasonable doubt.[88] If imprisonment may be imposed, the accused is entitled to the assistance of counsel.[89] And as noted, if the sentence imposed might be in excess of three months' imprisonment or a five hundred dollar fine, the accused has a right to a jury trial rather than a summary proceeding.[90]

§ 46.4B. THE ADJUDICATION OF CRIMINAL CONTEMPT CHARGES NOT SUBJECT TO SUMMARY PROCEEDINGS

1. Procedure

All criminal contempts in the district court and superior court that do not meet the four criteria for summary treatment under Rule 43(a) must be prosecuted in accordance with Mass. R. Crim. P. 44. Rule 44(a) specifies that, except as otherwise provided, a nonsummary criminal contempt shall proceed like any other criminal case. This provision necessarily incorporates an accused's constitutional right to a jury trial, right to counsel, right to confrontation, and all the other procedural protections afforded criminal defendants in our trial courts. The alleged contemnor should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.[91] In order to provide sufficient notice, a charge of criminal contempt must delineate allegations that there was a clear, outstanding order of the court, that the defendant knew of that order, and that the defendant clearly and intentionally disobeyed the order in circumstances in which she was able to obey it.[92] The Rules of Criminal Procedure apply to such prosecutions, and the charges must be proven beyond a reasonable doubt.[93]

In treating nonsummary criminal contempt citations like other criminal charges, Rule 44 conforms to an important line of U.S. Supreme Court precedent beginning with

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[87] Furtado v. Furtado, 380 Mass. 137, 142 (1980); Katz v. Commonwealth, 379 Mass. 305, 314 (1979): Root v. MacDonald. 260 Mass. 344. 366 (Mass. 1927). As the SJC noted in Furtado v. Furtado, 380 Mass. 137, 142 n. 4 (1980), constitutional considerations require that defendant not be compelled to file an answer when the proceeding is criminal in whole or in part, although he may do so voluntarily.

[88] Furtado v. Furtado, 380 Mass. 137, 142 (1980); *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

[89] Furtado v. Furtado, 380 Mass 137, 142 (1980).

[90] Furtado v. Furtado. 380 Mass. 137. 143 n.5 (Mass. 1980). Although Bloom v. Illinois, 391 U.S. 194, 210 (1968), holds that the Federal Constitution only requires a jury where a sentence imposed is greater than six months, Mass. R. Crim. P. 43(b) mandates a trial be held in accordance with Mass. R. Crim. P. 44 where the sentence that may be imposed is greater than three months' imprisonment or the fine in excess of five hundred dollars.

[91] Correia v. Correia, 70 Mass. App. Ct. 811, 816 (2007).

[92] Id.

[93] *See* Shaw v. Commonwealth, 354 Mass. 583 (1968); Correia v. Correia, 70 Mass. App. Ct. 811 (Mass. App. Ct. 2007). *See also* Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 146, *further appellate review allowed,* 418 Mass. 1102 (1994) (no abuse of discretion by the trial judge who barred defendant from offering "full explanation of his conduct" in criminal contempt prosecution for violation of order prohibiting blocking access to facility offering abortion counseling services).

Bloom v. Illinois.[94] In *Bloom,* the Court held that criminal contempt is a crime and could not be excluded from the constitutional guarantee of the constitutional right to trial by jury in all nonpetty criminal cases.[95] The Supreme Court has since held that one accused of criminal contempt in a nonsummary proceeding must be afforded a public trial.[96]

Rule 44 specifically authorizes the court in which the alleged contempt was committed to hear the resulting criminal contempt case.[97] Alleged contempts committed in district court may be tried there, unless prosecuted by indictment.[98] While the Rule specifically provides that a nonsummary criminal contempt shall be prosecuted by complaint or indictment, the Supreme Judicial Court has upheld a contempt prosecution instituted by motion.[99] Recognizing that such a procedure does not conform precisely to the Rule, the Court nevertheless found that sufficient notice had been provided to sustain the charge, absent objection or prejudice to the accused.[100] Technical accuracy of pleading is not required in criminal contempt cases.[101] Nevertheless, specific misconduct must be charged, and the jury may not be permitted to go beyond the enumerated allegations in determining guilt or innocence.[102]

Rule 44 does not specifically address the role of various parties in a criminal contempt proceeding. The Supreme Judicial Court has held that the Commonwealth should be the adverse party that prosecutes a criminal contempt.[103] The judge presiding over a contempt proceeding should not be actively involved in the presentation of the case.[104]

2. Recusal of Judge

One issue that frequently arises in the context of a nonsummary criminal contempt proceeding is whether the same judge who cited the accused for contempt should preside over the adjudication of that charge. Rule 44(c) specifically provides that contempt charges shall be heard by a judge other than the trial judge "whenever the nature of the alleged contemptuous conduct is such as is likely to affect the trial judge's impartiality." This disqualification provision appears to mirror the decisions of the U.S.

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[94] 391 U.S. 194 (1968).

[95] Bloom v. Illinois, 391 U.S. 194, 199–201 (1968).

[96] Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971). 1.

[97] Rule 44(a). The prosecution of a juvenile for criminal contempt based on violating a superior court order (forbidding the racial harassment of a family) need not begin in the juvenile court because G.L. c. 119 (governing delinquency proceedings) does not apply. Doe v. Commonwealth, 396 Mass. 421 (1985). *Cf.* Commonwealth v. Brogan, 415 Mass. 169, 174 (1993) (not unjust to try defendant in Cambridge for contempt of Middlesex Superior Court order committed in Boston or Brookline, as trial in three separate counties illogical).

[98] Rule 44(b).

[99] Commonwealth v. Eresian, 389 Mass. 165, 167–68 (1983).

[100] Commonwealth v. Eresian, 389 Mass. 165, 169 (1983).

[101] Furtado v. Furtado, 380 Mass. 137, 145 (1980).

[102] *See* Commonwealth v. Leavitt, 17 Mass. App. Ct. 585, 594–96 (1984) (jury instructions permitting adjudication of guilt if jury found that defendant engaged in "conduct which is inappropriate" were overly broad).

[103] Katz v. Commonwealth, 379 Mass. 305, 312 (1979).

[104] Furtado v. Furtado, 380 Mass. 137, 151 (1980). See discussion *infra* § 46.4B2.

Supreme Court requiring recusal as a matter of constitutional due process in cases involving a personal attack on the presiding judge or those in which the judge has become embroiled in a running controversy with the accused.[105] Actual bias on the part of the trial judge need not be demonstrated to warrant recusal. Rather, it is the appearance of bias, based on the nature of the conduct at issue and the context in which it arose that requires a different judge to preside over the contempt proceeding.[106]

In applying the recusal provision of Rule 44(c), Massachusetts courts have distinguished between alleged contempts "personal to the judge" and other contumacious conduct.[107] Under this standard, virtually all indirect contempts may presumably be tried before the judge presiding over the case-in-chief. Many direct contempts, however, arising out of conduct occurring in the courtroom will require assignment to a different judge.

§ 46.4C. SENTENCING

The range of punishment that may be imposed on one found guilty of criminal contempt is not defined by statute or at common law, although a summarily adjudicated contempt cannot receive a punishment in excess of three months' imprisonment or a $500 fine.[108] An implicit limitation on the authorized term of incarceration may be

[105] Taylor v. Hayes, 418 U.S. 488, 501–03 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 463–66 (1971). *See also* Bloom v. Illinois, 391 U.S. 194 (1968) (right to unbiased judge in contempt proceeding).

[106] Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009)(finding probability of actual bias on the part of the judge or decision-maker violated due process, where justice of the West Virginia Supreme Court of Appeals received $3 million campaign contribution from the board chairman of corporation found liable for $50 million at the trial level; test is an objective one that asks not whether judge is actually subjectively biased, but whether average judge in judge's position is likely to be neutral); Taylor v. Hayes, 418 U.S. 488, 501 (1974). "There is a two pronged analysis for determining recusal; when faced with a question of his capacity to rule fairly, the judge must first consult his own emotions and conscience; if he passes the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this is a proceeding in which his impartiality might reasonably be questioned." Commonwealth v. Eddington, 71 Mass. App. Ct. 138, 143 (2008). Regarding recusal generally on due process grounds, *see supra* ch. 25.

This recusal requirement has not been applied to summary contempt proceedings. In those instances, the very judge who brings the contempt citation proceeds immediately to prosecute and adjudicate the charge. In effect, the judge serves as complainant, prosecutor, jury, and sentencing judge. Depending on the nature of the alleged contempt, the judge may also be the victim of the conduct at issue. The unfairness of permitting the trial judge to conduct summary contempt proceedings in such circumstances is self-evident, yet the state and federal courts have permitted trial judges to continue to police their own courtrooms in circumstances where summary procedures apply.

[107] *E.g.,* Katz v. Commonwealth, 379 Mass. 305, 313 (1979) (disqualification not required where defendant landlord failed to obey court order respecting property); Fay v. Commonwealth, 379 Mass. 498, 506 (1980) (disqualification not required where defendant filed false financial statement); Commonwealth v. Eddington, 71 Mass. App. Ct. 138 (Mass. App. Ct. 2008). *See also* Ungar v. Sarafite, 376 U.S. 575, 583–88 (1964) (criticism of judge not inherently so personal as to require recusal).

[108] Mass. R. Crim. P. 43(a)(3). If sentencing is delayed until after trial, the combined sentence for all summary contempts cannot exceed six months, or the constitutional right to a jury trial court would be infringed. Codispoti v. Pennsylvania, 418 U.S. 506, 513–15 (1974). *See also* United States v. Prewitt, 553 F.2d 1082, 1087–90 (7th Cir. 1977). Because the

gleaned from the statutes regulating the jails of the Commonwealth. G.L. c. 220, § 14, as interpreted by the Supreme Judicial Court, precludes commitments for contempt other than to a "jail."[109] The maximum term of imprisonment in a jail or house of correction is fixed by statute at two and one-half years.[110] Each instance of contumacious conduct occurring during the course of a trial, however, may constitute a separate offense subject to separate punishment.[111]

There are no statutory parameters on the amount of monetary fine that may be imposed as a punishment. The absence of any specific statutory authority to impose a fine might provide an arguable basis for a constitutional challenge to such punishment on procedural due process grounds.

Constitutional and statutory law requires that "the least possible power" necessary be employed in imposing contempt sanctions.[112]

§ 46.4D. APPEALS

At common law, the presiding judge was the final arbiter in adjudicating criminal contempt committed against the court. There was no appellate power of review in any form. As a result, the presiding judge had virtually unfettered authority to impose punishment without making factual findings or even particularizing the offending conduct.[113] Although the Supreme Judicial Court eventually ruled that review of criminal contempt was available by writ of error, such review was generally limited to issues of law, excluding the legal sufficiency of the evidence.[114] In *Sussman,* the Supreme Judicial Court expanded the scope of appellate review by examining the trial transcript and making a de novo determination that the defendant's conduct was insufficient to constitute criminal contempt.[115]

The enactment of the Rules of Criminal Procedure in 1979 resulted in the repeal of the writ of error statute.[116] The Rules now require that all criminal contempts be appealed to the Appeals Court.[117]

Massachusetts rule limits summary contempts to a three months' sentence, the *Codispoti* principles "are to be read in terms of *three* months." Reporter's Notes to Mass. R. Crim. P. 43.

[109] Hurley v. Commonwealth, 188 Mass. 443, 448 (1905).

[110] G.L. c. 279, § 23.

[111] *See* Matter of DeSaulnier (No. 3), 360 Mass. 769, 777 (1971).

[112] Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 1:11 (District Court Administrative Office, Nov. 1981). *See also* United States v. Wilson, 421 U.S. 309, 319 (1975) (the "least possible power adequate to the end proposed should he used in contempt cases").

[113] Silverton v. Commonwealth, 314 Mass. 52, 53–54 (1943).

[114] Hansen v. Commonwealth, 344 Mass. 214, 216 (1962); Blankenburg v. Commonwealth. 260 Mass. 369, 376–77 (1927).

[115] Sussman v. Commonwealth, 374 Mass. 692, 701 (1978).

[116] St. 1979, c. 344, § 13, repealing c. 250, § 9.

[117] Katz v. Commonwealth, 379 Mass. at 311. For one convicted of *summary criminal contempt,* Rule 43(c) specifically provides that the sole avenue of appeal shall be to the Appeals Court. To appeal a *nonsummary superior court criminal contempt conviction,* Rule 44 does not explicitly name the appellate route but incorporates all other provisions of law applicable to criminal cases; G.L. c. 278, § 28, and G.L. c. 211A, § 10, require entering a criminal appeal in the Appeals Court. Rule 44(b), applicable to *nonsummary criminal contempts in the district court,* provides that the only right of appeal shall be to the Appeals Court. *See* Commonwealth

The Massachusetts courts have not specifically addressed the scope of appellate review available under Rules 43 and 44. Federal appellate courts have consistently reviewed sentences for criminal contempt to determine whether or not the punishment imposed was excessive.[118] The Supreme Judicial Court has suggested that such review might be available.[119] The Eighth Amendment's prohibition of cruel and unusual punishment and excessive fines may also be a basis for attacking an unreasonable punishment for contempt on appeal. Otherwise, the scope of appellate review in criminal contempt cases under Rules 43 and 44 is presumably equivalent to the scope of review available in other criminal cases.

§ 46.5 PROCEEDINGS IN CIVIL AND MIXED CONTEMPT CASES

Civil contempts, as noted above, are remedial and coercive in character. Civil contempt proceedings may be instituted by a private party pursuant to the provisions of Mass. R. Civ. P. 65.3. A complaint for civil contempt serves to initiate a civil action subject to the Rules of Civil Procedure. In general, one accused of civil contempt has no right to a trial by jury.[120] Rules 43 and 44 of the Massachusetts Rules of Criminal Procedure have absolutely no applicability to civil contempt proceedings.[121]

In some circumstances, contempt proceedings may be both criminal and civil in nature. For example, a judge might wish to punish a litigant for past disobedience of a court order while also coercing adherence to that order in the future.[122] If a contempt

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v. Dodge, 428 Mass. 860, 861 (1999) (describing the proper way to contest criminal contempt proceedings on appeal). *Cf.* Arch Medical Assocs., Inc. v. Bartlett Health Enters., Inc., 32 Mass. App. Ct. 404, 405, n.3 (1992) (there is doubt as to whether one may appeal civil contempt order where underlying trial court proceeding is ongoing, at least in absence of incarceration, but court may exercise its discretion in entertaining such an appeal).

[118] *E.g.,* United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985); United States v. Gracia, 755 F.2d 984 (2d Cir. 1985]; Katz v. King, 627 F.2d 568 (1st Cir. Mass. 1980)(resentencing cured any error); United States v. Abascal, 509 F.2d 752, 757 (9th Cir. 1975), *cert. denied,* 422 U.S. 1027 (1975).

[119] Berlandi v. Commonwealth, 314 Mass. 424, 459 (1943).

[120] Commonwealth v. Raczkowski, 19 Mass. App. Ct. 991, 992 (1985) (rescript). *Cf.* G.L. c. 220, § 13A (providing for jury trial for nondirect civil contempts occurring during labor disputes).

[121] In the federal system, under normal circumstances, a party seeking to quash a grand jury subpoena cannot appeal a court order to comply without first resisting that order and subjecting itself to a contempt citation. United States v. Ryan, 402 U.S. 530, 533 (1971); Corporation Insular de Seguros v. Garcia, 876 F.2d 254, 257 (1st Cir. 1989). An exception exists for documents in the hands of a third party where the owner of the documents may seek immediate appeal of a court order requiring production. Perlman v. United States, 247 U.S. 7, 12–13 (1918). If, however, the third party was the attorney for the document holder, the First Circuit had held that the attorney could not appeal a court order to testify until he received a contempt citation. In re Oberkoetter, 612 F.2d 15, 16 (1st Cir. 1980). The *Oberkoetter* exception has now itself been overruled, however. In re Grand Jury Subpoenas, 123 F.3d 695 (1st Cir. 1997). Thus, a lawyer need not await contempt to appeal a district court order to produce a client's documents or to testify as to arguably privileged matters.

[122] *E.g.,* Furtado v. Furtado, 380 Mass. 137, 141 (1980) (defendant charged with failing to comply with child support order).

proceeding is criminal in any part, that feature controls and the accused must be afforded all procedural rights applicable to criminal contempt proceedings.[123]

§ 46.6 PRACTICAL RECOMMENDATIONS

§ 46.6A. AVOIDING CONTEMPT

Given the ambiguity of contempt of court as described at common law and the absence of statutory definition, there is no foolproof means by which a Massachusetts criminal defense lawyer doing his or her job can eliminate the risk of criminal contempt. When a conflict between judge and counsel ensues, the practitioner must keep in mind that only one party to the dispute possesses the power to hold the other in contempt. At the same time, the attorney who disagrees respectfully within the context of motion practice, examination of witnesses, argument, and other acts integral to trial advocacy can draw comfort and protection from state and federal precedent holding such conduct not punishable as contempt.[124]

Because appellate review of all criminal contempt convictions is available, it is incumbent on counsel to ensure that the record is complete whenever contempt becomes a possibility. Thus, for example, if the presiding judge refuses to let counsel present a motion, make an offer of proof, or perform some other necessary act, counsel must establish that refusal on the record. Similarly, if the presiding judge raises his or her voice or gestures in a threatening or insulting manner, that conduct must be described on the record as well. As with other criminal appeals, the appellate court will have before it only a cold transcript to review. If that transcript is incomplete or fails to present the full context that produced a contempt citation, the accused may suffer adverse consequences on appeal.

§ 46.6B. DEFENDING AGAINST CONTEMPT CHARGES

Should a lawyer or client be formally charged with criminal contempt, counsel's initial objective should usually be to try to have the case adjudicated under the more protective procedural requirements of Rule 44, rather than the summary proceedings set forth in Rule 43. If the presiding judge agrees to put off adjudication of the contempt charge until after trial, that objective will have automatically been accomplished since summary proceedings must occur immediately or not at all. Counsel may also argue that an immediate adjudication is not necessary to maintain order in the courtroom, rendering summary proceedings unavailable under Rule 43.

There are several obvious reasons why an accused should generally prefer Rule 44 procedures to the summary process delineated in Rule 43. By the time the trial is over, the judge's ardor to prosecute the contempt may have cooled, rendering further proceedings unnecessary. Even if the contempt case does go forward, the defendant will often be better off with a jury or a different judge (if the alleged contempt was “personal” in nature), rather than the same judge who brought the charge. Finally, one charged with criminal contempt will likely be able to put on a more fulsome and effective defense at a criminal trial than would be possible within the truncated context

[123] Furtado v. Furtado, 380 Mass. 137, 142 (1980). *See also* Corcoran v. Commonwealth, 335 Mass. 29, 35 (1956); Godard v. Babson-Dow Mfg. Co., 319 Mass. 345, 347 (1946).

[124] *See supra*§ 46.3B.

of a summary contempt proceeding. The only countervailing consideration is the limit of three-months' imprisonment imposed by Rule 43(a)(3) as punishment for any contempt adjudicated via summary proceedings. That limit does not exist in contempt cases that proceed under Rule 44..

Should counsel fail to avoid summary proceedings, every effort should be made to make that proceeding approximate a trial. If counsel is the accused, she may ask to testify under oath with respect to the conduct at issue, her state of mind at the time, and what punishment, if any, should be imposed. If appropriate, other witnesses may be called under the "opportunity to adduce evidence" provision of Rule 43(b). Should the presiding judge refuse to hear such testimony, an offer of proof should be made on the record. If witnesses other than those present in the courtroom are necessary to put on a defense, counsel should request a continuance to produce such witnesses. Counsel should take pains to make a complete and favorable record for purposes of appeal. In most cases, the defendant's interests will likely be served by asking the court to defer imposition and execution of sentence until after the ongoing trial has been concluded. Should the court refuse such a request and proceed to impose sentence without deferring execution, a stay of sentence may be sought from a single justice of the Appeals Court pursuant to Mass. R. Crim. P. 31.

In defending criminal contempt charges under Rule 44, counsel should generally proceed as in defending other criminal cases. A motion to disqualify the judge charging the contempt pursuant to Rule 44(c) should always be considered. As in other criminal cases, deciding whether or not to waive a trial by jury depends on the factual circumstances. The admissibility of expert testimony regarding reasonable standards of conduct by trial attorneys in cases where counsel has been charged with direct contempt is an open question worthy of exploration. In such cases, counsel should seek to argue, whenever possible, that the conduct at issue falls within the protected sphere of zealous advocacy, thus immune from prosecution as a matter of law. Such an argument may be presented in the context of a motion to dismiss, motion for a required finding of not guilty, or both.

In appealing criminal contempt convictions, counsel should not forget to argue in appropriate cases that the punishment imposed was unreasonable and excessive as a matter of law. Both procedural and substantive issues should be carefully reviewed. If summary procedures were employed, the factual record should be measured against the four prerequisites set forth in Rule 43(a). Were summary procedures appropriate, particularly in light of their strongly disfavored status? As with other criminal cases, a stay of execution pending appeal should generally be sought, first from the trial judge and then from the appellate courts.[125]

[125] *See supra* § 39.2.