

**RULE 3.840 | INDIRECT CRIMINAL CONTEMPT**

A criminal contempt, except as provided in rule 3.830 concerning direct contempts, shall be prosecuted in the following manner:

**(a) Order to Show Cause.** The judge, on the judge's own motion or on affidavit of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the essential facts constituting the criminal contempt charged and requiring the defendant to appear before the court to show cause why the defendant should not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant.

**(b) Motions; Answer.** The defendant, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars, or answer the order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.

**(c) Order of Arrest; Bail.** The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant will not appear in response to the order to show cause. The defendant shall be admitted to bail in the manner provided by law in criminal cases.

**(d) Arraignment; Hearing.** The defendant may be arraigned at the time of the hearing, or prior thereto at the defendant's request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and testify in his or her own defense. All issues of law and fact shall be heard and determined by the judge.

**(e) Disqualification of Judge.** If the contempt charged involves disrespect to or criticism of a judge, the judge shall disqualify himself or herself from presiding at the hearing. Another judge shall be designated by the chief justice of the supreme court.

**(f) Verdict; Judgment.** At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.

**(g) Sentence; Indirect Contempt.** Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against the defendant and inquire as to whether the defendant has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.

### Committee Notes

#### 1968 Adoption.

(a)(1) Order to Show Cause. The courts have used various and, at times, misleading terminology with reference to this phase of the procedure, viz. “citation,” “rule nisi,” “rule,” “rule to show cause,” “information,” “indicted,” and “order to show cause.” Although all apparently have been used with the same connotation the terminology chosen probably is more readily understandable than the others. This term is used in Federal Rule of Criminal Procedure 42(b) dealing with indirect criminal contempts.

In proceedings for indirect contempt, due process of law requires that the accused be given notice of the charge and a reasonable opportunity to meet it by way of defense or explanation. *State ex rel. Giblin v. Sullivan*, 157 Fla. 496, 26 So.2d 509 (1946); *State ex rel. Geary v. Kelly*, 137 So.2d 262, 263 (Fla. 3d DCA 1962).

The petition (affidavit is used here) must be filed by someone having actual knowledge of the facts and must be under oath. *Phillips v. State*, 147 So.2d 163 (Fla. 3d DCA 1962); see also *Croft v. Culbreath*, 150 Fla. 60, 6 So.2d 638 (1942); *Ex parte Biggers*, 85 Fla. 322, 95 So. 763 (1923).

(2) Motions; Answer. The appellate courts of Florida, while apparently refraining from making motions and answers indispensable parts of the procedure, seem to regard them with favor in appropriate situations. Regarding motions to quash and motion for bill of particulars, see *Geary v. State*, 139 So.2d 891 (Fla. 3d DCA 1962); regarding the answer, see *State ex rel. Huie v. Lewis*, 80 So.2d 685 (Fla. 1955).

Elsewhere in these rules is a recommended proposal that a motion to dismiss replace the present motion to quash; hence, the motion to dismiss is recommended here.



The proposal contains no requirement that the motions or answer be under oath. Until section 38.22, Florida Statutes, was amended in 1945 there prevailed in Florida the common law rule that denial under oath is conclusive and requires discharge of the defendant in indirect contempt cases; the discharge was considered as justified because the defendant could be convicted of perjury if the defendant had sworn falsely in the answer or in a motion denying the charge. The amendment of section 38.22, Florida Statutes, however, has been construed to no longer justify the discharge of the defendant merely because the defendant denies the charge under oath. See *Ex parte Earman*, 85 Fla. 297, 95 So. 755 (1923), re the common law; see *Dodd v. State*, 110 So.2d 22 (Fla. 3d DCA 1959) re the construction of section 38.22, Florida Statutes, as amended. There appears, therefore, no necessity of requiring that a pleading directed to the order to show cause be under oath, except as a matter of policy of holding potential perjury prosecutions over the heads of defendants. It is recommended, therefore, that no oath be required at this stage of the proceeding.

Due process of law in the prosecution for indirect contempt requires that the defendant have the right to assistance by counsel. *Baumgartner v. Joughin*, 105 Fla. 335, 141 So. 185 (1932), adhered to, 107 Fla. 858, 143 So. 436 (1932).

(3) Order of Arrest; Bail. Arrest and bail, although apparently used only rarely, were permissible at common law and, accordingly, are unobjectionable under present Florida law. At times each should serve a useful purpose in contempt proceedings and should be included in the rule. As to the common law, see *Ex parte Biggers*, supra.

(4) Arraignment; Hearing. Provision is made for a pre-hearing arraignment in case the defendant wishes to plead guilty to the charge prior to the date set for the hearing. The defendant has a constitutional right to a hearing under the due process clauses of the state and federal constitutions. *State ex rel. Pipia v. Buchanan*, 168 So.2d 783 (Fla. 3d DCA 1964). This right includes the right to assistance of counsel and the right to call witnesses. *Baumgartner v. Joughin*, supra. The defendant cannot be compelled to testify against himself. *Demetree v. State, ex rel. Marsh*, 89 So.2d 498 (Fla. 1956).

Section 38.22, Florida Statutes, as amended in 1945, provides that all issues of law or fact shall be heard and determined by the judge. Apparently under this statute the defendant is not only precluded from considering a jury trial as a right but also the judge has no discretion to allow the defendant a jury trial. See *State ex rel. Huie v. Lewis*, supra, and *Dodd v. State*, supra, in which the court seems to assume this, such assumption seemingly being warranted by the terminology of the statute.

There is no reason to believe that the statute is unconstitutional as being in violation of section 11 of the Declaration of Rights of the Florida Constitution which provides, in part, that the accused in all criminal prosecutions shall have the right to a public trial by an impartial jury. Criminal contempt is not a crime; consequently, no criminal prosecution is involved. *Neering v. State*, 155 So.2d 874 (Fla. 1963); *State ex rel. Saunders v. Boyer*, 166 So.2d 694 (Fla. 2d DCA 1964); *Ballengee v. State*, 144 So.2d 68 (Fla. 2d DCA 1962).

Section 3 of the Declaration of Rights, providing that the right of trial by jury shall be secured to all and remain inviolate forever, also apparently is not violated. This provision has been



construed many times as guaranteeing a jury trial in proceedings at common law, as practiced at the time of the adoption of the constitution (see, e.g., *Hawkins v. Rellim Inv. Co.*, 92 Fla. 784, 110 So. 350 (1926)), i.e., it is applicable only to cases in which the right existed before the adoption of the constitution (see, e.g., *State ex rel. Sellers v. Parker*, 87 Fla. 181, 100 So. 260 (1924)). Section 3 was never intended to extend the right of a trial by jury beyond this point. *Boyd v. Dade County*, 123 So.2d 323 (Fla. 1960).

There is some authority that trial by jury in indirect criminal contempt existed in the early common law, but this practice was eliminated by the Star Chamber with the result that for centuries the common law courts have punished indirect contempts without a jury trial. See 36 Mississippi Law Journal 106. The practice in Florida to date apparently has been consistent with this position. No case has been found in this state in which a person was tried by a jury for criminal contempt. See Justice Terrell's comment adverse to such jury trials in *State ex rel. Huie v. Lewis*, *supra*.

The United States Supreme Court has assumed the same position with reference to the dictates of the common law. Quoting from *Eilenbecker v. District Court*, 134 U.S. 31, 36, 10 S.Ct. 424, 33 L.Ed. 801 (1890), the Court stated, "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it." *United States v. Barnett*, 376 U.S. 681, 696, 84 S.Ct. 984, 12 L.Ed.2d 23 (1964). In answer to the contention that contempt proceedings without a jury were limited to trivial offenses, the Court stated, "[W]e find no basis for a determination that, at the time the Constitution was adopted, contempt was generally regarded as not extending to cases of serious misconduct." 376 U.S. at 701. There is little doubt, therefore, that a defendant in a criminal contempt case in Florida has no constitutional right to a trial by jury.

Proponents for such trials seemingly must depend on authorization by the legislature or Supreme Court of Florida to attain their objective. By enacting section 38.22, Florida Statutes, which impliedly prohibits trial by jury the legislature exhibited a legislative intent to remain consistent with the common law rule. A possible alternative is for the Supreme Court of Florida to promulgate a rule providing for such trials and assume the position that under its constitutional right to govern practice and procedure in the courts of Florida such rule would supersede section 38.22, Florida Statutes. It is believed that the supreme court has such authority. Accordingly, alternate proposals are offered for the court's consideration; the first provides for a jury trial unless waived by the defendant and the alternate is consistent with present practice.

(5) Disqualification of Judge. Provision for the disqualification of the judge is made in federal rule 42(b). The proposal is patterned after this rule.

Favorable comments concerning disqualification of judges in appropriate cases may be found in opinions of the Supreme Court of Florida. See *Pennekamp v. State*, 156 Fla. 227, 22 So.2d 875 (1945), and concurring opinion in *State ex rel Huie v. Lewis*, *supra*.

(6) Verdict; Judgment. "Judgment" is deemed preferable to the term "order," since the proper procedure involves an adjudication of guilty. The use of "judgment" is consistent with present Florida practice. E.g., *Dinnen v. State*, 168 So.2d 703 (Fla. 2d DCA 1964); *State ex rel. Byrd v. Anderson*, 168 So.2d 554 (Fla. 1st DCA 1964).

The recital in the judgment of facts constituting the contempt serves to preserve for postconviction purposes a composite record of the offense by the person best qualified to make such recital: the judge. See *Ryals v. United States*, 69 F.2d 946 (5th Cir. 1934), in which such procedure is referred to as “good practice.”

(7) Sentence; Indirect Contempt. The substance of this subdivision is found in present sections 921.05(2), 921.07 and 921.13, Florida Statutes. While these sections are concerned with sentences in criminal cases, the First District Court of Appeal in 1964 held that unless a defendant convicted of criminal contempt is paid the same deference the defendant is not being accorded due process of law as provided in section 12 of the Declaration of Rights of the Florida Constitution and the Fourteenth Amendment of the Constitution of the United States. *Neering v. State*, 164 So.2d 29 (Fla. 1st DCA 1964).

Statement concerning the effect the adoption of this proposed rule will have on contempt statutes:

This rule is not concerned with the source of the power of courts to punish for contempt. It is concerned with desirable procedure to be employed in the implementation of such power. Consequently, its adoption will in no way affect the Florida statutes purporting to be legislative grants of authority to the courts to punish for contempt, viz., sections 38.22 (dealing with “all” courts), 932.03 (dealing with courts having original jurisdiction in criminal cases), and 39.13 (dealing with juvenile courts). This is true regardless of whether the source of power is considered to lie exclusively with the courts as an inherent power or is subject, at least in part, to legislative grant.

The adoption of the rule also will leave unaffected the numerous Florida statutes concerned with various situations considered by the legislature to be punishable as contempt (e.g., section 38.23, Florida Statutes), since these statutes deal with substantive rather than procedural law.

Section 38.22, Florida Statutes, as discussed in the preceding notes, is concerned with procedure in that it requires the court to hear and determine all questions of law or fact. Insofar, therefore, as criminal contempts are concerned the adoption of the alternate proposal providing for a jury trial will mean that the rule supersedes this aspect of the statute and the statute should be amended accordingly.

**1972 Amendment.** Same as prior rule.

