Conduct unappealing

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EXCEPTIONALLY APPEALING

Did you hear about the lawyer who wouldn't stop texting in court? Apparently a North Carolina lawyer refused to stop "distracting conduct in a courtroom during ongoing immigration proceedings as directed by both the presiding immigration judge and the uniformed bailiff." The

judge testified that instead of paying attention to the proceedings, the lawyer "was pretty much non-stop glued to her cell phone ... texting away," which was "very distracting" and "very disrespectful." The lawyer argued that no federal rule prohibited texting in court, and she pointed to a sign outside the courtroom saying that attorneys could use electronic devices -- albeit "for clear and immediate business purposes only." That did not fly, of course, and the 4th U.S. Circuit Court of Appeals upheld her misdemeanor conviction and $2,500 fine in a published opinion, holding that the judge had authority to control the courtroom. *U.S. v. Moriello*, 980 F.3d 924 (4th Cir. 2020).

Closer to home, in California, Code of Civil Procedure Section 1209(a)(1) includes as a contempt of court: "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other proceeding." *See* Code Civ. Proc. Sections 1209-1222 (Title 5, "Of Contempts"); *see also* Penal Code Section 166(a)(1) ("disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority" is a misdemeanor).

In our present remote-court-appearance times, this raises interesting questions about whether misbehavior by video counts as being "in court" for contempt purposes. This was analyzed last month in *Rollins v. Superior Court*, A160553 (Jan. 7, 2021). Thomas Rollins, a nonparty to a family law case, was held in direct contempt when he appeared on camera during a remote video hearing. What happened was this: His wife was remotely attending a family law court hearing -- adverse to her ex-husband -- conducted via a Zoom video conference from their living room. The hearing was not going her way. Rollins, who was in the living room, but off camera, apparently was not pleased with the court's rulings and "made comments which were overheard by the court." The court warned him to stop, but he continued to "make comments," and came into view of the camera, making "gestures while commenting." Despite being warned to stop, Rollins continued yelling. As a result, the court held Rollins in contempt, finding that he was in the "immediate view and presence of the court via Zoom." Rollins was sentenced to three days in jail and fined $300.

Contempt comes in different flavors, including "direct" contempt, i.e., contempt committed "in the immediate view and presence of the court." Code Civ. Proc. Section 1211(a); *In re Buckley*, 10 Cal. 3d 237, 247-48 (1973). In contrast, indirect contempt arises when someone willfully disobeys a court order -- by acts or non-acts usually occurring outside the courtroom. *E.g.*, Code Civ. Proc. Section 1209(a)(5). A court's inherent power to punish contempt is deemed "necessary" for a court to do its job and "to maintain its dignity, if not its very existence." *In re Shortridge*, 99 Cal. 526, 532 (1893).

This is all very interesting, but what's the appellate angle? Well, if Rollins called you to appeal his contempt conviction, would you know how? We presume that there must be some avenue for appellate review, but how does that work for contempt? Because of the potential punishments, contempt proceedings are "considered quasi-criminal," giving rise to "some of the rights of a criminal defendant." *People v. Gonzalez*, 12 Cal. 4th 804, 816 (1996).

You might think that a contempt ruling is appealable as a final judgment of some sort, perhaps as the conclusion of a collateral special proceeding. After all, Code of Civil Procedure Section 1222

says that the "judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." Use of the word "final" might prompt the thought that final orders should be appealable. Contrary to expectations, however, contempt orders are not appealable. This follows from the phrasing "final and conclusive," with "conclusive" essentially meaning immutable. *Tyler v. Connolly*, 65 Cal. 28, 30 (1884), citing *Appeal of S.O. Houghton*, 42 Cal. 35 (1871); *In re Baroldi*, 189 Cal. App. 3d 101, 111 (1987) ("Because a contempt order is final and conclusive, there is no appeal").

Non-appealability also follows from the basic proposition that the right to appeal in California is statutory. Cal. Const., art. VI, Section 11(a). So if there is no constitutional or statutory provision expressly providing for an appeal, then there can be no appeal. And guess what? Nothing in the State Constitution or any state statute provides for such appeals. To the contrary, Code of Civil Procedure Section 904.1(a)(1) expressly excludes direct appeals from "a judgment of contempt that is made final and conclusive by Section 1222." And attempts to shoehorn contempt orders into other subdivisions of the basic appealability statute (Code of Civil Procedure Section 904.1) don't work.

Students of appealability will recall that non-appealability for contempt orders used to be expressly stated in a former version of Section 904.1(a)(2). Further, there once was a weird "loophole" in this law, such that a contempt order from a municipal court was not appealable, but a writ petition from such an order could be taken to the superior court, and the denial of that petition was then appealable to the Court of Appeal! *Bermudez v. Municipal Court*, 1 Cal. 4th 855 (1992). The Supreme Court affirmed this absurdity in Bermudez, but invited the Legislature "to consider this anomaly." This oddity no longer exists -- because municipal courts no longer exist.

So where does that leave those wishing to seek appellate review? The answer is that a contempt order "may be reviewed by certiorari [or prohibition] or, where appropriate, by habeas corpus." *In re Baroldi*, 189 Cal. App. 3d 101, 111, quoting *Buckley*, 10 Cal. 3d at 259. Thus, appellate relief is obtainable by an appropriate writ petition. *Devine v. Devine*, 213 Cal. App. 2d 549, 552 (1963) citing *Monjar v. Superior Cour*t, 12 Cal. 2d 715, 717 (1939). The standard of review is for substantial evidence. *Buckley*, 10 Cal. 3d at 247. And statutory automatic stays apply to writ petitions challenging contempt orders if (1) such writs are filed within "three judicial days" of the contempt order and (2) the petitioner is an attorney or an attorney's agent (Code Civ. Proc. Sections 128(b), 1209(c)) or a "public safety employee" (e.g., peace officer, firefighter, paramedic, etc.) regarding noncompliance with a subpoena (Code Civ. Proc. Sections 128(c), 1209(d)). Petitions filed more than three days after the order can seek a discretionary stay.

What's especially confusing is that when most lawyers hear "petition for writ of certiorari," what comes to mind is a cert petition to the U.S. Supreme Court seeking discretionary review after an unsuccessful appeal. So talking about "writs of certiorari" in California appellate practice sounds odd. But such writs are appropriate (indeed necessary) in unusual contexts such as contempt as well as in certain specialized administrative areas. For instance, a writ of certiorari is the method for seeking appellate court review of decisions of the Public Utilities Commission (Public Utilities Code Section 1756), Workers' Compensation Appeals Board (Labor Code Section 5950), and Alcoholic Beverage Control Appeals Board (Bus. & Prof. Code Section 23090). A

writ of certiorari is also the means to review a superior court appellate division ruling in excess of jurisdiction (*Dvorin v. Appellate Dept.*, 15 Cal. 3d 648, 650 (1975)), non-appealable probate orders (*Linstead v. Superior Court*, 17 Cal. App. 2d 9, 11 (1936)), and where necessary to resolve "significant issues of small claims law or procedure" (*Houghtaling v. Superior Court*, 17 Cal. App. 4th 1128, 1131 (1993)).

To confuse matters further, since about 1872, Code of Civil Procedure Section 1067 has helpfully asserted: "The writ of certiorari may be denominated the writ of review." Thus, the more common (and arguably preferable) caption for a "petition for writ of certiorari" in California is a "petition for writ of review." You'd think that avoiding the Latin word and skirting confusion with the more renowned SCOTUS cert petition would be a step toward clarity. And in many ways it is. However, lawyers working in these arcane areas are prone to stumble over appellate nomenclature. As a result, "petitions for writs of review" are readily confused with "petitions for review," which are an entirely different (and better known) animal -- equivalent to federal cert petitions. "Petitions for review," of course, were previously called "petitions for hearing," a name easily confused with "petitions for rehearing." The bottom line? Know when you need an unusual writ, know the proper name for petitions, and stay out of trouble.

Oh, and here's what happened with Rollins: His "petition for habeas corpus, prohibition or other appropriate relief" was successful. But the court concluded: "We emphasize we are compelled to grant relief in this case due to technical procedural noncompliance with the requirements our Supreme Court has mandated for direct contempt orders. Although Rollins has succeeded on his petition, we do not condone his behavior, which he apparently conceded was inappropriate in an apology letter to the court."