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May a Party's Lawyer Prosecute Criminal Contempt Charges Against the Opposing Party?

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1. Introduction

In 1987, the United States Supreme Court concluded that counsel representing a party in a lawsuit may not prosecute criminal contempt charges against the adverse party. And when this issue came before the United States Supreme Court again in 2010, it so exercised Chief Justice John Roberts that he—joined by the odd bedfellows of Justices Scalia, Kennedy, and Sotomayor—took the unusual step of penning an impassioned dissent from the Court's dismissal of a writ of certiorari as improvidently granted. Chief Justice Roberts's dissenting opinion explains that this principle has deep historic roots and rests on core principles embodied in the Constitution. He emphasized that the criminal justice system is premised on the notion that the government prosecutes crimes, not private citizens.

2. Criminal contempt is a crime, and contemnors are thus entitled to many of the same protections as a defendant in an ordinary criminal case

Criminal contempt is a crime, punishable by jail time. *Ex parte Werblud*, 536 S.W.2d 542, 548 (Tex. 1976). Thus, many constitutional rights are accorded criminal contemnors. *Id.* at 547. This is because there is no meaningful distinction between an individual's rights at stake in a constructive criminal contempt hearing and those at stake in an ordinary criminal trial. *Ex parte Johnson*, 654 S.W.2d 415, 421 (Tex. 1983). For these reasons, contempt proceedings must conform as nearly as practicable to other types of criminal proceedings. *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986). Further, although broad and inherent, the contempt power "must be exercised with caution." *In re Reece*, 341 S.W.3d 360, 362 (Tex. 2011).

3. The Supreme Court and many state courts prohibit a party's lawyer from prosecuting criminal contempt charges against the opposing party

The Supreme Court has explained that criminal contempt proceedings arising out of civil litigation are between the public and the defendant, and are not a part of the original cause. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (reversing criminal contempt judgment against defendants found to have aided or abetted violations of permanent injunction prohibiting infringement of manufacturer's trademark). In *Young*, the Court held that counsel representing a party to the original cause may not prosecute criminal contempt charges against another party. *Id.* at 809. Concurring, Justice Scalia also noted that the trial court itself cannot prosecute constructive criminal contempt charges. *Id.* at 816-19 (Scalia, J., concurring); *Crowe v. Smith*, 151 F.3d 217, 227-28 (5th Cir. 1998) ("where criminal contempt is involved, there must actually *be* an independent prosecutor of some kind, because the district court is not constitutionally competent to fulfill that role on its own").

In Texas, the First Court of Appeals, echoing the Supreme Court's holding in *Young*, has declared that counsel for a party who is a beneficiary of a court order may not prosecute a contempt action alleging violation of that order. *In re Luebe*, 2010 WL 1546961, at *5 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (citing *Young* and *In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990)). Likewise, the Eighth Court of Appeals has observed that prosecution of criminal contempt "is not left to the private citizen, but is the responsibility of the State." *Hawkins v. Walvoord*, 25 S.W.3d 882, 892 (Tex. App.—El Paso 2000, pet. denied). Numerous jurisdictions across the country also adhere to the rule laid down by the Supreme Court. *See, e.g.*:

- *Rogowicz v. O'Connell*, 786 A.2d 841 (N.H. 2001) (counsel for a party that is the beneficiary of a court order may not prosecute a criminal contempt action alleging a violation of that order);

- *In re Peak*, 759 A.2d 612 (D.C. 2000) (counsel for private parties should not be named to prosecute criminal contempt arising out of basic civil case);
- *McDermott v. McDermott*, 602 N.W.2d 676, 679 (Neb. App. 1999) (in criminal contempt proceedings where act charged was not committed in presence of court, prosecution must be brought by the state);
- *Hermina v. Baltimore Life Ins. Co.*, 739 A.2d 893, 903 (Md. App. 1999) (only the state's attorney may initiate criminal contempt proceedings in a civil case);
- *Trecost v. Trecost*, 502 S.E.2d 445 (W. Va. 1998) (it is improper to permit a party's private counsel in civil proceeding to prosecute charge of indirect criminal contempt arising from that proceeding);
- *Hancz v. City of South Bend*, 691 N.E.2d 1322, 1325 n.3 (Ind. App. 1998) (charge of criminal contempt should be prosecuted by the State in an independent action);
- *Burris v. Hunt*, 965 P.2d 1003, 1006 (Okla. App. 1998) (criminal contempt must be prosecuted by the state);
- *DiSabatino v. Salicete*, 671 A.2d 1344, 1352-53 (Del. 1996) (attorney for party that is beneficiary of court order in civil proceeding may not prosecute criminal contempt action alleging violation of that order);
- *Matter of Marriage of Dahlem*, 844 P.2d 208, 209 (Or. App. 1992) (criminal contempt action must be brought by city attorney, district attorney, or the attorney general);
- *Dept. of Social Serv., ex rel. Montero v. Montero*, 758 P.2d 298, 302 (Haw. App. 1988) ("We concur with *Young's* holdings and conclude that they should be applied in the courts of the State of Hawaii");
- *Anderson v. Anderson*, 667 P.2d 660, 664 (Wyo. 1983) ("once a contempt has been identified as criminal in nature, the proper aggrieved party is the State and not a private litigant");
- *Brotherhood of Locomotive Firemen & Enginemen v. U.S.*, 411 F.2d 312 (5th Cir. 1969) (counsel for private

parties should not be named to prosecute criminal contempt arising out of basic civil case).

Recently, in a case raising this issue in the context of a congressionally-created court, Chief Justice John Roberts, joined by Justices Scalia, Kennedy, and Sotomayor, dissented from the Supreme Court's dismissal of a writ of certiorari as improvidently granted. *Robertson v. U.S. ex rel. Watson*, 130 S. Ct. 2185 (2010). When the Court granted certiorari, it framed the issue this way: "Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States." *Id.* Chief Justice Roberts's dissenting opinion does not, of course, indicate why five Justices decided certiorari should be dismissed as improvidently granted, but one thing is clear: in no way does it undercut the Court's prior holding *Young*.

The Chief Justice's dissent refers to allegorical depictions of the law frequently showing a figure wielding a sword—"the sword of justice to smite those who violate the criminal laws." *Id.* at 2190. He then declares: "A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of all the people." *Id.* This principle, Chief Justice Roberts emphasizes, has deep historic roots and rests on core principles embodied in the Constitution. *Id.* at 2187. It was also recognized by John Locke: "The . . . power a man has in the state of nature is the power to punish crimes committed against that law. [But this] he gives up when a joins [a] . . . political society, and incorporates into [a] commonwealth." *Id.* (citing Locke, Second Treatise, § 128, at 64).

In short, federal and many state courts agree that "the terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government." *Id.* at 2185. That is, an attorney for a party who is a beneficiary of a court order may not prosecute a criminal contempt action alleging violation of that order. Instead, "[t]he attorney who

prosecutes a criminal contempt . . . must be disinterested and impartial." *Merriweather v. Sherwood*, 250 F. Supp. 2d 391, 393 (S.D.N.Y. 2003).

4. The Disciplinary Rules may prohibit a party's counsel from prosecuting the opposing party for criminal contempt

Under Texas law, an attorney may be *disqualified* from prosecuting criminal contempt charges. For disqualification purposes, the Texas Disciplinary Rules of Professional Conduct are guidelines that articulate relevant considerations. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990). Disciplinary Rule 4.04(b)(1) provides that a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to gain an advantage in a civil matter.

An attorney attempting to prosecute criminal contempt charges against a client's adversary may violate this rule by, for example, offering to drop the contempt charges in exchange for some concession from the adversary. *See* 48A TEX. PRAC., TEX. LAWYER & JUD. ETHICS §9.4 (2012) (Rule 4.04 prohibits linking a criminal action to resolution of a related civil dispute). Or, a court might determine that the mere fact of the prosecution creates an unseemly appearance of conduct that violates Rule 4.04(b)(1).

The Supreme Court admonished in *Young* that an arrangement "represents an actual conflict of interest if its potential for misconduct is deemed intolerable." *Young*, 481 U.S. at 807, n. 18. Further, allowing counsel for an interested party to bring a contempt prosecution creates "at least the *appearance* of impropriety." *Id.* at 806; *see also Dunn v. Koehring Co.*, 546 F.2d 1193, 1203 (5th Cir. 1977) ("Seemingly, Koehring's only reasons for aiding in Dunn's prosecution were either a desire to see Dunn personally punished or to use this prosecution as a means to gain an advantage in the Mississippi suit for breach of warranty").

Appearance of impropriety is an important consideration in ruling on a disqualification motion. *In re Hoar Const., L.L.C.*, 256 S.W.3d 790, 798 (Tex. App.—Houston [14th

Dist.] 2008, orig. proceeding). The integrity of legal proceedings and fairness in the administration of justice are also compelling considerations. *In re Seven-O Corp.*, 289 S.W.3d 384, 391 (Tex. App.—Waco 2009, orig. proceeding). Thus, a trial court might decide that "in its proper function as internal regulator of the legal profession," it must disqualify an attorney from prosecuting criminal contempt charges against a client's adversary. *Howard v. Tex. Dept. of Human Servs.*, 791 S.W.2d 313, 315 (Tex. App.—Corpus Christi 1990, no writ).

5. Conclusion

"The misuse of the contempt power is prejudicial to the administration of justice." *Mississippi Comm'n on Judicial Performance v. Darby*, 75 So.3d 1037, 1043 (Miss. 2011). And Chief Justice John Roberts has recently emphasized that a criminal prosecution should pit the government against the governed, "not one private citizen against another." *Robertson*, 130 S. Ct. at 2185 (Roberts, C.J., dissenting). When the Supreme Court held in *Young* that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a criminal contempt action alleging a violation of that order, it based that holding on its supervisory authority, noting: "The use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness." *Young*, 481 U.S. at 808-09. It may be time for the Texas Supreme Court to exercise its supervisory authority and, like the United States Supreme Court, limit the circumstances in which a party's counsel may prosecute criminal contempt charges against an opposing party. After all, "[i]n modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases." *Id.* at 808 (quoting *Bloom v. Illinois*, 391 U.S. 194, 207 (1968)).