



PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex:

Could you please provide us with some background regarding the law related to contempt.

Practitioner

Dear Practitioner:

"If the artillery is the queen of battle, then the power to punish contempt is its functional equivalent in the stylized combat of modern litigation. The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal[.]" *In re Contempt of Auto Club Ins. Ass'n*, 243 Mich App 697, 707-708 (2000). "Because the power to hold a party in contempt is so great, it 'carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown.'" *Id* at 708 (citing *In Re Contempt of United Stationers Supply Co.*, 239 Mich App 496, 499 (2000)).

"[T]he seminal case, [*In Re*] *Wood*, [82 Mich 75 (1890)] at 82, cites 'How. Stat. [Section] 7259' for the proposition that a proceeding for contempt committed not in the presence of the court 'must be laid by affidavit.'" *Porter v Porter*, 285 Mich App 450, 459 (2009)(citing *In Re Wood*, 82 Mich 75, 82 (1890)). "Section 7259 [] is the predecessor of MCL 600.1711(2)." *Id*.

"MCL 600.1711(2) now provides: 'When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made **by affidavit or other method** and opportunity has been given to defend.'" *Porter, supra*, at 459 (emphasis in original).

"MCR 3.606(A) is the default court rule governing the initiation of contempt proceedings for conduct occurring outside the immediate presence of a court. See *Henry, supra* at 667, 765 NW2d 44, and *Auto Club, supra* at 712-713, 624 NW2d 443. Furthermore, the court rules govern practice and procedure in our courts. *Nathan, supra* at 493-494, 297 NW2d 646." *Porter* at 460 (internal citations retained).

MCR 3.606(A) requires that the "Initiation of Proceeding[s] [] [f]or a contempt committed outside the immediate view and presence of the court, [be] on a proper showing on ex parte motion supported by affidavits."

Recently, the Court of Appeals relaxed the requirement that a motion for order to show cause under MCR 3.606(A) be accompanied by a formal notarized affidavit. *Porter v Porter*, 285 Mich App 450, 461-464 (2009). However, while the *Porter* Court relaxed the affidavit requirement, it held that a party—in addition to their attorney—must sign a motion for order to show cause.

In *Porter*, the contemnor attacked the sufficiency of the two motions that were used to initiate the contempt proceedings against her. The contemnor argued on appeal that since neither motion attached the other party's required affidavit, the motions were not a proper basis for the trial court to initiate its contempt proceedings.

The Court of Appeals after a lengthy review of applicable law, held that since both the other party and their attorney verified the motions through their signatures on the motions that those signatures satisfied the affidavit requirement. Accordingly, *Porter* relaxes the requirement that a motion for order to show cause attach a party's affidavit, but holds quite clearly that, at a minimum, for a party to initiate contempt proceeding for contempt committed outside the court's view against the other party, the complaining party must verify the motion under MCR 2.114. *Porter v Porter*, 285 Mich App 450, 461-464 (2009).

Answer respectfully submitted
by Harvey I. Hauer, Hauer & Snover.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

Please send questions for Professor Lex to HHauer@hauersnover.com.

