Contempt of Court Principles and Asset Protection Planning

*By Barry S. Engel**

Barry S. Engel analzes contempt of court in the asset protection planning context

Overview

Contempt of court is an important area of law in the asset protection planning context. Sanctions for failing to comply with a court order to repatriate trust assets or to turn over documents in one's possession may include a fine or imprisonment or both. A person may have a defense to a finding of contempt if it is factually impossible for that person to comply with a court's order. However, the "impossibility of performance" defense will not be available if that person, in close time-proximity to the issuance of the court order not being obeyed, caused the impossibility.

Contempt of Court Defined

Contempt of court may be either civil or criminal in nature. Civil contempt is designed to coerce the contemnor to comply with a court order. Criminal contempt, on the other hand, penalizes past conduct. Contempt may also be direct or indirect, depending on whether the contempt takes place at or near the presence of the court.

Impossibility of Performance: A Complete Defense

Impossibility of performance is a complete defense to a charge of contempt. To be held in contempt of court, generally the defendant must have the present ability to comply with the court's order. A party may generally not be held in contempt where the party fails to comply with a court order because he or she is factually unable to do so.

BARRY S. ENGEL is the founding principal of Engel & Reiman pc, a Denver-based law firm established in 1983 and the author of Asset Protection Planning Guide, 3d Edition, as published by Wolters Kluwer, CCH.

Self-Created Impossibility: Not a Defense

An exception to the impossibility of performance defense is when the impossibility to comply is self-created. In other words, the impossibility defense will not be recognized as a valid defense in those situations where the impossibility to perform was created by the defendant at or about the time that the court's order was entered. Courts will look at whether the person acted in good faith. Courts have held that contempt will not apply unless the person acted in bad faith.

Asset Protection Planning Principles and Contempt Law

Contempt issues are important in the asset protection planning context, particularly with regard to trust protector issues and anti-duress issues. The trust protector typically has "negative" powers such as the power to veto a distribution, rather than "affirmative" powers such as the power to compel a distribution. Anti-duress clauses typically serve the purpose of ensuring that the acts of power holders are voluntary.

If a litigation threat arises, the more cautious approach is for the power holders, including the protector, to be persons who are not subject to U.S. jurisdiction.

Select Cases Involving Asset Protection Trusts and Contempt Rulings

To the author's knowledge there have been hundreds (if not more) of threats or actual challenges to integrated estate planning trusts (IEPTs) or more generally to integrated estate plans (IEPs). Despite these numbers, only a relatively small percentage of these threats or challenges went any meaningful distance into litigation, and only a handful ultimately involved contempt of court issues. Naturally, it is the latter that has prompted much discussion in the planning community. When these reported cases are analyzed, it can be seen that their results are generally consistent with current contempt of court principles. An analysis of these cases also illustrates the importance of a proper design in the IEPT itself, as well as the importance of proper timing in the course of its administration.

Contempt of Court Defined

"Contempt can be generally defined as an act of disobedience or disrespect toward a judicial or legislative body of government, or interference with its ordinary process, for which a summary punishment is usually exacted."[1] Contempt is a matter between the judge and the litigant, and not between the two opposing litigants.[2] The contemnor is the person guilty of contempt of court.[3]

Caution. Since both state and federal courts have broad discretion to impose sanctions on an individual found to be in contempt of court, it is important for the asset protection planner to be aware of and plan around any possible contempt issues. Sanctions may include fines, forfeiture of rights, and/or imprisonment.

Contempt may be classified as either criminal or civil. Civil contempt is primarily remedial in nature, designed to coerce the contemnor to comply with the order usually by ordering the imprisonment of the contemnor until he or she complies or agrees to comply with the order of the court.[4]

With criminal contempt, the primary injury is to the state. The purpose of a criminal contempt action is to preserve the dignity and authority of the court by penalizing past wrongful conduct. The differences between civil and criminal contempt are often blurred. In the words of one authority, over the years the two types of contempt "have been liquefied to the point where one often washes into the other. As a result, one is left with but few and vague guidelines. A wrongdoer may never know, at the time of his wrongful act, whether he has committed a civil or criminal contempt or what the form of sanction will be."[5]

The burden of proof for criminal contempt is "beyond a reasonable doubt," whereas the burden of proof for civil contempt is generally "clear and convincing evidence."[6] "Clear and convincing evidence" is a less stringent standard than "beyond a reasonable doubt," but it is a more stringent standard than the "preponderance of the evidence" standard applied in many civil actions.[7]

Contempt of either type, criminal or civil, may also be classified as "direct" or "indirect." In general, contempt is "direct" if it takes place in or near the presence of the court. The court, having witnessed the act, may summarily find the contemnor guilty with no defect of the conviction on due process grounds.[8] Contempt is "indirect" if it takes place outside the presence of the court and generally is based upon a refusal to obey a court's order.[9]

Comment. Indirect civil contempt is the classification of contempt that has the most relevance here.

Impossibility of Performance: A Complete Defense

Contempt proceedings are typically initiated when a party to a lawsuit is ordered to perform an act and the party so ordered fails to perform or obey. The court will then hold a hearing to determine why he or she failed to comply with the order. If the party simply refuses to comply with the order, the court will generally issue an order of contempt.

If, however, a party is factually not able to comply with a court order, a court may not hold the party in civil contempt.[10] This concept is known as the "impossibility of performance" defense, which is a complete defense to a charge of contempt.[11] When a court orders a defendant to pay money or produce documents, the defendant must have the present ability to pay the funds or produce the documents at the time of the contempt proceedings before an order of contempt will stand.[12]

Comment. The court in *Bryan* also stated there is no doctrine of "anticipatory contempt."[13] Thus, the offense of contempt can occur only after the court order has been issued.

Planning Note. If it is "impossible" for a party to perform what the court orders, then, subject to the discussion on self-created impossibility, the party may not be held in contempt of court. Under a properly designed, implemented, and administered protective trust (as would be the case with the majority of irrevocable trusts of whatever label), it would not be possible for the party to raid the trust and turn over the trust assets.

In *Maggio v. Zeitz*, the Supreme Court of the United States noted that such a proceeding "is one primarily to get at property rather than to get at a debtor."[14] The Court also stated:

> The nature and derivation of the [turnover procedure] make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant *at the time of the proceeding* .... [W]e do not consider resort to this particular proceeding appropriate if, at the time it is instituted, the property and its proceeds have already been dissipated, no matter when that dissipation occurred. Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order of the referee, a criminal contempt*, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow*.[15] (emphasis added).

When determining whether an alleged contemnor has the ability to comply with a court's order, the court is generally limited to examining the facts and circumstances of impossibility that exist at the time the order is issued.[16] In *R.W. Rylander*,[17] the U.S. Supreme Court stated:

> In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question. [citations omitted] While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production. [citations omitted][18]

Although the burden of proving impossibility may be on the party claiming impossibility, the *Maggio* court, in discussing a turnover proceeding in the bankruptcy context, stated:

> [T]he turnover order must be supported by 'clear and convincing evidence,' *Oriel v. Russell*, 278 U.S. 358 (1929), and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded against. It is the burden of the trustee to produce this evidence, however difficult his task may be.[19]

The "impossibility of performance" defense was outlined by the U.S. Court of Appeals for the Second Circuit in *Badgley v. Santacroce*,[20] as follows:

> The purpose of civil contempt, broadly stated, is to compel a reluctant party to do what a court requires of him. Because compliance with a court's directive is the goal, an order of civil contempt is appropriate 'only when it appears that obedience is within the power of the party being coerced by the order.' [citation omitted] ... A party may defend against a contempt by showing that his compliance is "factually impossible." [citation omitted].[21]

Particularly when the sanction to be imposed is imprisonment, courts will generally require a present ability

to perform as of the time of the contempt hearing. In *Bowen*,[22] the Florida Supreme Court stated, "[b]ecause incarceration is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply."[23]

Planning Note. Just like with other irrevocable trusts, the provisions of the trust document in the IEP must not give the settlor custody or control of the trust assets. Obviously, if the settlor holds or can get at trust assets, the settlor can be ordered to produce them and failing production the settlor can be held in contempt of court. Consistent with the foregoing discussion, however, if the assets are not in the custody or control of the settlor, and if the settlor cannot compel that they be turned over to his or her custody or control, then the settlor cannot be held in contempt of court.

Comment. Assume an estate plan that involves a California settlor creating an irrevocable trust for the college education of his children. The trustee is in Colorado, and Colorado is designated as the governing law. The settlor is not a trustee and has neither custody, control, nor powers over trust assets. There are no legal issues pending, threatened, or expected against the settlor when the trust is established. Four years later the settlor commits a tort and is sued a year later as a result. Through the course of the proceedings the settlor is ordered to turn over the assets he settled in the education trust more than five years earlier. When the settlor is unable to produce the trust assets despite his best, good faith efforts to do so, does it make any sense at a legal level, or more simply at just a visceral level, that the settlor could be found in contempt of court? Should the analysis be any different when an IEPT is involved rather than an education trust?

The principles embedded in the impossibility of performance defense are illustrated in the case of *Foust v. Denato*.[24] In *Foust*, the president of a metal construction company (Foust) was subpoenaed to appear before a grand jury with "all receipt books, receipt stubs and copies of receipts relating to payments of money to (the union) by all individuals assigned to work through said union" for a two-year period.[25] Foust appeared before the grand jury without bringing the records and was cited for contempt.

At the hearing to show cause why he should not be punished for contempt, Foust testified that he did not have possession of or access to the records listed in the *subpoena duces tecum* on that date or on any prior date. The requested records were in the exclusive care, possession, custody, and control of the person who served as financial secretary, business agent, and treasurer of the local union. Foust further testified that he did not know where in the union hall the records were kept and that he did not have keys to the union hall or the financial secretary's desk. Foust also testified that he had no intention of disobeying the subpoena insofar as it was possible for him to obey it and that if he had access to the requested records, he "would gladly have brought them down here."[26]

The court in this case overturned the contempt order on the basis that Foust had no control over the records and that although he might have been able to get possession of the records through action of the union executive committee, it was not necessary for him to do so in order to show a good-faith effort to comply. The court further stated that there are no cases that would require a person to attempt to use physical force to obtain possession of documents or things not in the person's custody or under his or her control. Finally, the court stated that the *subpoena duces tecum* should have been served upon the financial secretary who had the records in his custody and not on Foust.

The case of *First National Bank of Cape Girardeau v. Lufcy*,[27] involved a trustee who offered to turn over all assets of the trust estate but who had insufficient assets in his hands to comply with the court order. It was determined that the trustee could not be imprisoned for contempt because it would approach being imprisoned for debt.

In *Falstaff Brewing Corp. v. Miller Brewing Co.*,[28] the defendant was not found in contempt for failing to produce documents over which it had no control. The defendant's former counsel had taken direct physical possession of the documents during the litigation process and had subsequently lost the documents.

Self-Created Impossibility: Not a Defense

Pursuant to the impossibility of performance defense, a party may not be held in contempt of court for failing to produce that which he or she cannot possibly produce. An exception potentially applies in the case of the self-created impossibility. In determining whether this exception to the "impossibility of performance" defense is to apply, courts have looked to factors such as:

- Whether the party has acted in good faith;
- Whether the party cooperated with the court by complying to the greatest extent possible;

- Whether the party self-induced the inability to comply at a time when the party anticipated the issuance of the order; and
- Whether sufficient time elapsed that would dissipate a presumption that the requested documents or assets were in the possession or control of the party at the time of the contempt proceedings.

The impossibility of performance defense will not be recognized as a valid defense in situations where the impossibility to perform is created by the defendant at or about the time that the court's order or subpoena issues.[29]

Comment. The time nexus factor is an important factor. The inquiry is *when* did the defendant create the impossibility and not simply did the defendant create the impossibility. If the inquiry was simply limited to "did the defendant create the impossibility," then every settlor of every trust, of whatever nature, and indeed every donor of property, could potentially be held in contempt of court because the impossibility was created by that person when he or she made the transfer, whether in trust or outright.

Planning Note. The court will examine the nexus in time between the date that the impossibility was created and the date the court's order issued. If a time nexus is found between these two dates such that it can be shown, under the requisite burden of proof, that the defendant knew when the impossibility was created that a court order would enter (or a subpoena would issue), the court will likely find that the inability to comply was self-created in bad faith and the "impossibility of performance" defense will not be available.

A finding of a self-created impossibility that resulted in the "impossibility of performance" defense being unavailable is the case of *Ex parte Coffelt*.[30] In *Coffelt*, the Arkansas Supreme Court found the defendant's claim that he was unable to comply with an order to return funds to have been ineffective. The defendant disposed of the funds subject to the order one month prior to the issuance of the order and had reason to know that the order would be issued at or about the time that he undertook to dispose of the funds. As such, the court determined the defense of impossibility of performance to be unavailable.

By contrast, in *Federal Trade Comm. v. Blaine*,[31] Blaine claimed he was unable to comply with a court's order to produce corporate documents relating to a corporation of which he was the president, asserting that he had transferred all of the documents to his attorney five months prior to being served with the subpoena. When the order to produce the documents was issued, Blaine's attorney returned the documents to him, but several files were missing. After the attorney and Blaine testified that they did not know the whereabouts of the missing files, the court denied the petitioner's motion to hold Blaine in contempt. The court reasoned that the "impossibility of performance" defense was a complete defense to a contempt charge because, although Blaine had earlier disposed of the documents, he was not responsible for the current unavailability of the documents. The court found that Blaine had disposed of the documents in good faith prior to the issuance of the order to produce and thus should not be held in contempt because he could not produce them.

In *Ex parte Fuller*,[32] the Missouri Supreme Court overturned a contempt citation against the defendant who had failed to pay the plaintiff money that the defendant had received from merchandise sold on consignment. The court stated:

> [I]f the Court had found, on substantial evidence, that petitioner had the proceeds of the sale of the property in his possession or under his control at the time the order directing him to deliver same to the receiver was made, or that he so held the money prior to the making of the order, but disposed of or converted it in anticipation of the order and to avoid compliance therewith, such a finding of facts would have authorized the court's conclusion that petitioner wrongfully, illegally, and contumaciously misapplied, misappropriated, and converted same to his own use, but the court made no such finding.[33]

In *Van Hoosear v. Railroad Comm'n of California*,[34] the court applied a similar standard of whether the contemnor could be charged with "contumaciously [putting the property] out of his power to obey the order of the commission."[35]

The following are select rulings from other courts.

- In *Johnson v. Yoemans & Strickland*,[36] the court stated, "[a]t the time he disposed of the property there was no order requiring him not to do so, and it is not, therefore, proper to punish him for contempt in selling it, and it is just as improper to punish him for contempt, for not obeying the order now that it is impossible for him to do so."[37]
- The case of *Ex parte Chambers*[38] involved an individual who was found not to be in contempt of court because assets were transferred by him before an order

concerning those assets was issued by the court. The court stated that "one must have knowledge or notice of an order which one is charged with violating before a judgment of contempt will obtain ... . Chambers had no duty to preserve [the] assets for the payment of fines to be ordered in the future ...."[39]

- In *Berry v. Midtown Service Corp.*,[40] during a stay of execution on a judgment, a defendant disposed of his assets, thereby rendering himself execution proof. Finding the defendant to not be in contempt of court, the court stated that "a party must have violated an express court order before [being] punished for contempt ...."[41]

With regard to the presumption that the alleged contemnor had the requested items in his or her possession, in *Brune v. Fraidin*,[42] the court stated that "[t]he presumption of continued possession is only as strong as the nature of the circumstances permits. The presumption loses its force and effect as time intervenes and as circumstances indicate that the bankrupt is no longer in possession of the missing goods or their proceeds."[43] The *Brune* court also stated, "Always strongest in the beginning[,] the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference."[44] The *Brune* court further stated:

> A turnover order is not a money judgment saying that the bankrupt ought to have the merchandise or its proceeds. It is the court's command that he surrender, and necessarily presupposes the ability to comply. Obviously the court should not order one to do something that was impossible and then punish him for failure to do it. It has been said that such procedure dangerously approaches near the line, if it does not overstep it, of imprisonment for debt. If the bankrupt has concealed and then dissipated assets of the estate, punishment should be sought under the provisions of the bankruptcy law relating to making of false oaths or concealment of assets.[45]

Comment. Among other things, the *Maggio*[46] and *Brune* courts set forth the principle that courts should look to whether a remedy other than contempt of court ought to be applied. For instance, if a remedy exists under the bankruptcy crimes provisions of the U.S. Code,[47] or under applicable fraudulent transfer law, then resort should be had thereto as opposed to punishing someone for something they did but cannot undo.

Asset Protection Planning Principles and Contempt Law

Asset protection planning is often implemented as part of an overall, integrated estate plan in which the goal of preserving assets during the lifetime of the client is married with traditional, death-time estate planning goals. In this setting, the integrated estate planning trust (IEPT) is often utilized. An IEPT may be established under the laws of a foreign country or under the laws of the settlor's home country. Whether an IEPT is offshore or onshore, issues relating to contempt of court have always been important.

Comment. An interesting philosophical question arises with regard to asset protection planning and contempt law. Assume that you have worked hard for many years building your professional practice, and you have somehow managed to carve out a nice nest egg for retirement. Assume further that due to some reason or another, you are forced to make the awkward choice of being incarcerated for a period of time or losing your retirement nest egg altogether and ending up impoverished. What would you do? Clients interested in being proactive in their wealth planning may never have to answer this question if their planning and affairs are handled correctly. But this fact pattern does present an interesting question.

Impossibility of performance is a complete defense to contempt; a person may not be held in contempt of court if it is impossible for the person to comply with a court order. However, a self-created impossibility of performance is not a defense to contempt.

The concept and role of the trust protector is often incorporated into offshore trusts. Powers typical of this position include the power to veto certain actions of the trustees and the power to remove and replace trustees. Thus, the role of the protector is often more of a passive one rather than an active one, due to the protector having negative rather than affirmative powers. The distinctions between "negative" and "affirmative" powers were recognized by the court in *Federal Trade Comm'n v. Affordable Media, LLC*,[48] which is commonly referred to as the *Anderson* case.

Planning Note. Under a properly drafted, properly implemented, and properly administered planning structure, creation and funding will take place well in advance of any dispute or claim that may give rise to proceedings in which a court order compelling action or the like will issue. The same applies with respect to

any action by the trustees in diversifying assets out of the jurisdiction in which the threat against the settlor is developing.

Planning Note. If and when ordered by the court to take or carry out any act, the person subject to the order and who is also subject to the jurisdiction of the court would be well advised to take any and all steps to comply with the order and to thoroughly document all such efforts. In the event that any person is ordered to pay trust funds against the terms of the trust, the foreign trustee should consider making an application for direction to a court that has local jurisdiction over the foreign trustee. An order by the foreign trustee's local court directing that it *not* pay over trust assets would be a compelling factor when a court examines whether a settlor can in fact turn over trust assets.

Select Cases Involving Asset Protection Trusts and Contempt Rulings

Over the past several years a number of reported cases have dealt with contempt of court issues in the Integrated Estate Planning (IEP) context. The author's first experience with a settlor facing a charge contempt of court dates back to 1995 and involved a client of the author. The settlor was not found to be in contempt of court (no client of the author's has been incarcerated or fined for contempt of court). In those federal proceedings the court stated:

> I've reviewed the law regarding contempt and the standards that are required for me to hold Mr. [X] in contempt. That standard is clear and convincing proof, which means something more than preponderance of the evidence but something less than absolute certainty.
>
> One thing I've learned a long time ago as a judge, you never order something you can't enforce. And if we order him to pay a million dollars, I have to be assured that's a reasonable order. As a matter of fact, contempt law says that one should not issue orders that cannot be complied with. It's a violation of due process to issue orders that the respondent cannot comply with.
>
> I'd look pretty silly if I entered orders that couldn't be enforced.
>
> There's case law to the effect that if we issue a compliance order that the respondent does not have the ability to comply with, that's punishment and violation of due process.
>
> By putting him in prison, that doesn't compel compliance, because he does not have the ability, apparently, to comply.

The *Eulich* Decision

One judicial decision on contempt of court relevant to Integrated Estate Planning Trusts (IEPTs) is not even a case involving an IEPT; rather, it is a case involving an offshore tax structure set up in the early 1980s. Nevertheless, this case warrants analysis and discussion in the IEPT setting for, among other reasons, it sets forth in context some of the key principles applicable in the law on contempt in the United States.

A Memorandum Opinion and Order ("Opinion") was entered on August 18, 2004, in the U.S. District Court for the Northern District of Texas in what is simply known as the *Eulich* case.[49] Therein, the Court "determine[d] that clear and convincing evidence establishes that John F. Eulich failed to comply with the court's Order of Enforcement dated September 17, 2002, and did not make all reasonable efforts to comply with it."[50] Mr. Eulich was accordingly held in civil contempt of court (although not incarcerated).

The Facts of the Eulich Case. The Opinion relates to an IRS investigation of the Eulichs for tax years 1995, 1996, and 1997, and not to an IEPT. As part of the investigation, the IRS sought documents relating to the Mona Elizabeth Mallion Settlement Trust No. 16 (the "Trust"), a Bahamian trust that had between $75,000,000 to $100,000,000 in assets. The documents were not forthcoming from the Eulichs, and in fact production thereof by the Canadian Imperial Bank of Commerce and Trust Co. (Bahamas) Ltd. (the "Foreign Trustee") was found by the court to have been blocked by Mr. Eulich.[51]

On June 27, 2003, the Government filed a "Motion to Hold [Eulich] in Contempt of the September 17, 2002 Order of Enforcement." The court referred the Motion to the magistrate judge and a hearing was held on March 12, 2004. The magistrate judge issued his report on April 26, 2004, "recommending that the court hold Eulich in civil contempt of court, as the magistrate judge found by clear and convincing evidence that Eulich [had] not complied with the court's enforcement order and that [he had] failed to make all reasonable efforts to comply with the court's enforcement order."[52]

A fine of approximately .06 percent per annum of the value of the Trust was recommended by the magistrate

judge, with the further recommendation that the fine be tolled once Eulich files proceedings to compel disclosure by the Foreign Trustee of the sought-after documents. Eulich and the IRS both filed objections to the magistrate judge's report.

The court agreed in part and did not agree in part with the objections Mr. Eulich filed. Following the contempt being confirmed by the court, Mr. Eulich was in fact able to obtain the documents and other information required, and the contempt was purged.

Analysis. The court analyzed Mr. Eulich's five objections to the magistrate judge's recommendations. The court starts by correctly citing a number of legal principles applicable in U.S. contempt law, stating that:

> [a] movant seeking a civil contempt order must establish, by clear and convincing evidence, "(1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order" .... Once the movant has shown a *prima facie* case, the respondent can defend against it by showing a present inability to comply with the subpoena or order .... [T]he court ... will not be blind to evidence that compliance is factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action ... and the party subject to a court order is 'under a duty to make in good faith all reasonable efforts to comply' with the order.[53]

While analyzing Mr. Eulich's second objection, the court in *dicta* makes a statement that "Eulich made a conscious decision to set up the Trust in the Bahamas. He thus created the present dilemma regarding the disclosure or nondisclosure of the documents in question...."[54] The *Eulich* court then states "*Eulich cannot benefit from a situation that he himself created.*" (emphasis added).[55] The court then cites three cases purportedly in support of this statement, namely, *United States v. Hayes*,[56] *United States v. Bryan*,[57] and *Pesaplastic, C.A. v. Cincinnati Milacron Co*.[58] Each of these three cases is analyzed below, and as discussed, none of these cases in fact supports a broad application of the notion that *[one] cannot benefit from a situation that he himself created*.

The reader can certainly take "judicial notice" of the fact that clients of law firms and accounting firms benefit all day long from situations they themselves created. If this statement by the *Eulich* court is in fact true generally, then *Eulich* dealt a blow to marital deduction planning, charitable planning, life insurance planning, and the like, and not just to asset protection planning (at least in the Northern District of Texas). Applying a rule of reason, one can conclude that this statement is indeed overbroad and not a correct statement of the law generally.

This statement not being a correct statement of the law generally, the question then arises as to its applicability in the contempt of court context. Is this an accurate statement of law with general applicability in the context of contempt, or is it an overly broad statement that in reality has narrow application in the contempt of court context?

To support the statement in question, the *Eulich* court first cites *United States v. Hayes*.[59] In *Hayes,* the IRS requested that Hayes produce certain documents related to a tax shelter operation. Hayes partially complied with the order, but did not provide information related to certain foreign partnership agreements. The 11th Circuit held that the IRS satisfied its *prima facie* burden by demonstrating that Hayes did not comply with the court's order, and overturned the district court's ruling that he could not be found in contempt of court because apparently Hayes made "some effort" to comply with the summons. The 11th Circuit Court of Appeals found the District Court's application of a "some effort" standard to be an abuse of the court's discretion, and the District Court's decision was overturned.

Hayes has nothing to do with either the impossibility of performance defense to a charge of contempt of court or with the self-created impossibility exception thereto. *Hayes* does, however, cite *In re Grand Jury Proceedings—United States v. Bank of Nova Scotia,*[60] by stating "we note generally that the obedience of judicial orders is of paramount importance and that courts do not lightly excuse a failure to comply."[61] The Nova Scotia case involved a Bahamian bank that was served with a subpoena by a federal grand jury. The bank refused to produce documents, claiming that production would violate Bahamian law. The 11th Circuit Court of Appeals upheld the district court's civil contempt order, concluding that "*the inevitability of conflict between laws of different countries did not excuse one who chooses transnational commercial operation from compliance with United States law.*"[62] In other words, one who can comply must comply, and the fact that he will then have to suffer the consequences under foreign law is, in essence, his problem. The provisions of foreign law may cause one to make a difficult choice, but this difficulty is not tantamount to an impossibility.

As can be seen, neither *Hayes* nor the *Nova Scotia* case supports a broad application of the statement that *one cannot benefit from a situation that he himself created.*

The *Eulich* court then cites the U.S. Supreme Court case of *United States v. Bryan*,[63] for the proposition that "[a]

court will not imprison a witness for failure to produce documents which he does not have *unless he is responsible for their unavailability* ..." (emphasis added).[64] In *Bryan,* the respondent was the executive secretary of the Joint Anti-Fascist Committee and had custody of the group's records. The Committee on Un-American Activities of the United States House of Representatives (the "Committee") had attempted without success to procure this group's records. When called before the Committee to explain why she refused to hand over the requested records, Ms. Bryan indicated that she *refused to comply* because the Committee had no constitutional right to demand any records. Bryan was convicted of failing to produce records in compliance with a Committee Subpoena. The Court of Appeals reversed the lower court's ruling. On appeal, the U.S. Supreme Court reinstated Bryan's conviction. The relevant portion of this opinion states "ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, *unless he is responsible for their unavailability*."[65] (Emphasis added.) Importantly, *Bryan* involved willful refusal; there was no impossibility of performance issue in *Bryan*.

The third case cited by the *Eulich* court in support of its statement that "Eulich cannot benefit from a situation that he himself created" is *Pesaplastic, C.A. v. Cincinnati Milacron Co*.[66] *Pesaplastic* is cited by *Eulich* for the proposition that "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings."[67] Here again, the question arises if this is an accurate statement of the law with general applicability in the context of contempt, or if this is an overly broad statement that in reality has narrow application?

In *Pesaplastic,* a judgment was entered in favor of Pesaplastic, C.A. against Tedruth Plastics Corporation. The court ordered Tedruth's attorneys to provide certain documents and to keep other documents within the State of New Jersey. Tedruth's attorneys asserted the impossibility defense, claiming they were unable to keep the documents in New Jersey because they belonged to another client. Under these circumstances, were the attorneys justified in refusing to turn over the files on the grounds of impossibility? Aside from the court's concern with the credibility of the Tedruth attorneys (apparently, the attorneys had also previously demonstrated the ability to recover some of the documents), the Tedruth attorneys also failed to produce some of the documents that were in fact still in their possession. The *Pesaplastic* court stated that Tedruth and its lawyers could not raise the defense of impossibility "because their own actions were responsible for their subsequent inability to comply,"[68] and the court then went on to explain this statement in context:

> First, even before the documents were removed ..., the Law Firm failed to provide meaningful discovery by refusing to identify the responsive documents. Second, despite the fact that Tedruth and the Law Firm argue that they had no control over the documents, certain boxes of those documents were selectively removed from the shipment.... Finally, although Tedruth and the Law Firm argue that they were unable to persuade Cities Service to return the documents, it is clear that as soon as they were held in contempt a second time, immediate arrangements were made for the return of the documents. Thus, the very fact that they were ultimately able to secure the return of the documents suggests that compliance with the court's order was not impossible and that all reasonable efforts were not made in the first instance.[69]

The *Pesaplastic* court cited *United States v. Asay,*[70] wherein the IRS issued six summonses to an accountant, Clifford H. Asay, Jr. Mr. Asay was required to produce for examination his records and all books and records currently in his possession pertaining to certain taxpayers. Upon consulting with his attorney and the attorney for the taxpayers who were under investigation, Mr. Asay followed their advice and returned all books and records not prepared by his accounting firm to the taxpayers the day before he was scheduled to appear before the IRS. Mr. Asay then appeared before the IRS and refused to testify or produce any documents, explaining that he had returned all documents to the taxpayers. Asay also delivered a letter indicating that he was resisting the summons on six grounds, including: (1) fourth amendment privileges; (2) the information was already in the government's possession; (3) the statute of limitations as to the open years had run; (4) the requests for production were second examinations unlawful under Code Sec. 7605(b); (5) the summonses constituted an abuse of discretion; and (6) the summonses constituted selective law enforcement. Mr. Asay was found in contempt of court and on appeal the finding was affirmed.

In summary, *Hayes* involved partial compliance with an order, and not full compliance as is required to avoid a charge of contempt. *Bryan* involved a continuing refusal even up to the point in time that the order was disobeyed. *Pesaplastic* involved willful noncompliance in the face of an order, as did the *Asay* case it cited. It can thus be seen that none of the cited cases supports the *Eulich* court's

dicta, and that the court's statement is thus an overly broad statement that in reality has narrow application, as opposed to an accurate declaration of contempt law generally. It is reasonable to conclude that in *Eulich* the narrow application has to do with the time-nexus factor (as next discussed) and Mr. Eulich blocking production of the required materials (which he in fact managed to ultimately obtain and produce).

What these cited cases do support, however, is that the time-nexus factor is a crucial element in each of the decisions. These cases all support that the true inquiry is not just whether the person created the impossibility, but when did that person create the impossibility.

To illustrate this principle of the time-nexus factor, assume two business partners have a falling out and the next day Partner A disposes of the business records he has in his possession. A year later litigation is filed (it being irrelevant who files the complaint), and a year after that each of the partners is ordered to produce his business records. Partner A is certainly "*responsible for their unavailability*," but does that mean he can be held in contempt of court for failing to produce them because he disposed of them two years earlier? Does this make sense at a legal level, or more simply at a visceral level?

Other cases not cited by the *Eulich* court show the place and importance of the time-nexus factor. If a time-nexus is found such that the individual knew at the time the impossibility was created that a court order would likely be entered, the court can be expected to find the inability to comply was self-created, and the impossibility of performance defense will be lost.

Consider *Maggio v. Zeitz,*[71] that was apparently not argued before the *Eulich* court. *Maggio* involved a turnover proceeding, wherein the U.S. Supreme Court noted that such a proceeding "is one primarily to get at property rather than to get at a debtor."[72]

Concerning the time-nexus factor, the Supreme Court in *Maggio* stated:

> Maggio makes no explanation as to the whereabouts or disposition of the property which the order, earlier affirmed, declared him to possess. *But time has elapsed between issuance of that order and initiation of the contempt proceedings in this case.* He does tender evidence of his earnings after the turnover proceedings and up until November 1944; his unemployment after that time allegedly due to his failing health; and of his family obligations and manner of living during the intervening period. He has also sworn that neither he nor his family has at any time since the turnover proceedings possessed any real or personal property which could be used to satisfy the trustee's demands. And he repeats his denial that he possesses the property in question. (emphasis added).[73]

The *Maggio* court also noted that coercing performance is the principle behind holding one in contempt of court, and that "to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably."[74]

> **Comment.** The result of the *Eulich* decision, like other contempt of court decisions claimed by some to be the death knell of the asset protection component of Integrated Estate Planning, is consistent with the law on contempt of court as it has been for decades when it is viewed in the context of its own facts. This is true even with respect to the statement in *dicta* that *"Eulich cannot benefit from a situation that he himself created,"* when that statement is analyzed in context and with reference to the cases the *Eulich* court cited. Interestingly enough, as noted earlier in this analysis of *Eulich*, the court did state that Mr. Eulich himself blocked production of the documents by the Foreign Trustee, presumably in close time proximity to the order of the court. This factor is a situation Mr. Eulich himself created, and it alone would support a contempt finding. As a reminder to the reader, the documents were subsequently produced.

The *Anderson* Case

The *Anderson* case is more formally known as *Federal Trade Commissioner v. Affordable Media, LLC*.[75] The decision in *Anderson* resulted in Denyse and Michael Anderson being incarcerated for a number of months for contempt of court. Briefly, the reason that the Andersons were incarcerated is that the court found that, under the design of the foreign trust they settled, they in fact had the power to repatriate the trust assets at the time the court ordered them to do so. Therefore, they were not able to satisfy their burden of proving that compliance with the court order was impossible. When they did not exercise their powers in a fashion designed to bring about compliance, they were found to be in contempt of court.

In September 1999, the lower court in the *Anderson* case modified its contempt finding to provide an alternative to the repatriation of the funds in controversy. The court stated that an alternative to repatriation would be for the Registrar of the High Court of the Cook Islands to "be made a joint signatory of the Trust Account."[76] This in fact took place, the contempt was purged and the Andersons

were released. This alternative to the repatriation of funds provides a very useful precedent for contempt matters of this nature that may arise in the future.

The Facts of the Anderson Case. The Andersons were involved in litigation with the Federal Trade Commission (FTC) over a telemarketing venture that the court called "a classic Ponzi scheme."[77] The commissions that they received from the venture were held overseas in a Cook Islands trust that they had settled approximately two years before their involvement in the telemarketing venture. Through the course of the proceedings, they were ordered to produce certain financial information that they did not cooperate in producing. They were also ordered to repatriate funds held overseas in the Cook Islands trust. When the funds were not returned to the United States, the Andersons were taken into custody and held in a Las Vegas, Nevada jail on federal contempt charges. The appellate court affirmed the lower court's finding that compliance with the repatriation order was possible because the Andersons remained in control of the trust.[78]

The Andersons had designated themselves as co-trustees of the trust that they settled, along with a trust company in the Cook Islands. Later, it was revealed to the court that they also designated themselves as the protectors of the trust. Further, the Andersons remained co-trustees and co-protectors throughout the litigation.

Comment. This particular design as used in the Andersons' trust is not understood by the author; it is not a design that the author would advise using.

After the Andersons were ordered by the court to repatriate all assets held outside of the United States, the Andersons faxed the Cook Islands trustee and instructed it to provide an accounting and to repatriate the trust assets. The Cook Islands trustee then (1) notified the Andersons that the court's order was an event of duress under the trust, (2) removed the Andersons as co-trustees because of the event of duress, and (3) refused to provide an accounting or repatriation of the assets.

In other words, the Andersons' fax to the foreign trustee that was sent *after* the court's order issued is what led to impossibility of performance by the Andersons. The Andersons thus created the performance impossibility in close nexus to (indeed, after) the court issued its order; performance was not impossible at the time of the court's order. Accordingly, the Andersons were not able to satisfy their burden of proof as to impossibility of performance.

Flaws in the Design of the Anderson Trust. The Cook Islands trustee refused to repatriate the trust's assets because it determined that an event of duress had occurred. A fatal flaw in the design of the Anderson trust is that under the provisions of the trust, the Andersons, as protectors, could conclusively determine that an event of duress had not occurred. The court stated in a footnote:

> The provisions of the trust also make clear that the Andersons' position as protectors gives them control over the trust. In provisions of the trust agreement that the Andersons conveniently fail to reference, the trust agreement makes clear that *the Andersons, as protectors, have the power to determine whether or not an event of duress has occurred ....* Moreover, the very definition of an event of duress that the Andersons assert has occurred makes clear that *whether or not an event of duress has occurred depends upon the opinion of the protector ....* Therefore, notwithstanding the provisions of the trust agreement that the Andersons point to, *it is clear that the Andersons could have ordered the trust assets repatriated simply by certifying to the foreign trustee that in their opinion, as protectors, no event of duress had occurred.*[79] (emphasis added).

The *Anderson* court noted the difference between the protector having negative powers and having affirmative powers such as the affirmative power to determine whether or not an event of duress had occurred. The court stated, "[a] protector can be compelled to exercise control over a trust to repatriate assets if the protector's powers are not drafted solely as the negative powers to veto trustee decisions or if the protector's powers are not subject to the anti-duress provisions of the trust."[80]

The *Anderson* court was skeptical that "a rational person would send millions of dollars overseas and retain absolutely no control over the assets."[81] The court also noted that the Andersons had previously been able to obtain over $1 million from the trust in order to pay their taxes. However, the court found that "the most telling evidence"[82] of the Andersons' control over the trust was that after the FTC had revealed to the court that the Andersons were protectors of the trust, they immediately attempted to resign as protectors. The court stated: "This attempted resignation indicates that the Andersons knew that, as the protectors of the trust, they remained in control of the trust and could force the foreign trustee to repatriate the assets."[83]

Comment. Under the facts and circumstances of the *Anderson* case, and, in particular, under the design of the Anderson trust, it is no surprise that the Andersons were jailed for contempt of court and that impossibility of performance was unavailable as a defense. The Andersons as their own trustees and protectors had

the power to repatriate the subject funds as of the time of the court's order.

Unanswered Questions After the Anderson Decision. The *Anderson* court raises an interesting question when, in *dicta*, it states:

> [W]e are not certain that the Andersons' inability to comply in this case would be a defense to a finding of contempt. It is readily apparent that the Andersons' inability to comply with the district court's repatriation order is the intended result of their own conduct—their inability to comply and the foreign trustee's refusal to comply appears to be the precise goal of the Anderson's trust... . Given that these offshore trusts operate by means of frustrating domestic courts' jurisdiction, we are unsure that we would find that the Andersons' inability to comply with the district court's order is a defense to a civil contempt charge. *We leave for another day the resolution of this more difficult question* ....[84] (Emphasis added.)

Do these statements mean that a new, "natural consequences" standard applies under Ninth Circuit contempt law? Or did the court possibly want to create a "chilling effect" on the whole bunch due to one "bad apple"? The latter appears to be a distinct possibility.

The *Anderson* court stated:

> We leave for another day the resolution of this more difficult question because we find that the Andersons have not satisfied their burden of proving that compliance with the district court's repatriation order was impossible.[85]

The *Anderson* court also commented on the burden of proof that one would have to meet when asserting the impossibility of performance defense in the asset protection context. The court stated that "the burden ... will be particularly high because of the likelihood that any attempted compliance with the court's orders will be merely a charade rather than a good faith effort to comply."[86]

> **Comment.** It has been said that "bad facts make bad law" and that *Anderson* is another example of this old adage. The author disagrees that *Anderson* is another example of this old adage, and continues to be of the view that *Anderson* is a case wherein bad facts led to an unfortunate result that was nevertheless appropriate and consistent with American contempt law. Proper asset protection structures are designed to take contempt law into consideration. It does not appear that such was the case with the trust that the Andersons settled. Having stated this, it is interesting to note that, despite the contempt proceedings, the trust settled by the Andersons remained intact even as the FTC brought proceedings in the Cook Islands in an attempt to "bust the trust." Not only was the FTC unsuccessful in this effort, but the Cook Islands court assessed costs of the proceedings against the FTC. Although the overall Anderson plan did not work well for the Andersons, the trust continued to protect the subject assets through these proceedings.

The *Lawrence* Case

In *In re Lawrence*,[87] the bankruptcy debtor, Lawrence, was incarcerated for contempt of court. The primary reason for Lawrence's incarceration was that he lied to the courts throughout the proceedings and the court was therefore unable to find him credible when he claimed that he could not repatriate trust assets. With regard to the debtor's lying, the court stated during earlier proceedings:

> The debtor in these proceedings, Mr. Lawrence, looked me in the eye when I asked him to and lied through his teeth.
>
> But the thing is, Mr. Lawrence—look at me, Mr. Lawrence. The thing is you lied to me.
>
> I will refer the matter to the attorney, U.S. Attorney and I'm sure from there it will go to the FBI. I think also there will be a proceeding for perjury under which Mr. Lawrence you will probably go to jail.
>
> I have no doubt that this will hold up and I have no doubt that you will never get a discharge and also, your case will never be dismissed. You're going to have this debt forever.
>
> ... [Y]ou're not going to get away with this and you're never going to get a discharge. You're probably going to go to jail and you're probably going to be watched forever.
>
> [My] order will indicate that [you are] to turn over [your] passport tomorrow. Forfeiture for this will be all assets that [you] may have in the United States if [you leave].

The Facts of the Lawrence Case. Following the stock market crash of October 19, 1987, Lawrence and his

companies experienced a margin deficit with Bear Stearns. Within weeks of an arbitration award in excess of $20 million being entered against Lawrence, he created and funded an offshore asset protection trust in Mauritius. As the court stated during proceedings held on July 23, 1998:

> Now, I would like to put things in simple terms. Let's talk about what happened here. We had a debtor, big time debts, big time litigation with Bear Stearns, went on for 42 months, ultimately a $20 million, roughly, judgment in place, 42 months of that. Within a few days of that a ... transfer to a trust in a place called Mauritius.

Lawrence's Lack of Credibility. The court found that Lawrence lacked any credibility whatsoever, and accordingly found it not credible that Lawrence was unable to obtain the funds that he claimed to have previously settled in trust. The court noted that:

> [t]he terms of the Turn Over Order ... required the Debtor ... to, [among other things], turn over to the Chapter 7 Trustee the *res* of the putative Lawrence Family 1991 Inter Vivos Trust (the so-called Mauritian trust) (hereafter the "Alleged Trust"), and to provide a full accounting of all transactions in respect of the Alleged Trust ....
>
> The Court, having quite an extensive institutional memory of this case, has reviewed the record in both the main case and in the adversary proceeding previously commenced by the Trustee against the Debtor ... and has considered the testimony of the witnesses at the Status Conference and the argument of counsel, and being otherwise fully advised in the premises, hereby incorporates herein by reference all of the findings and rulings entered in the record on August 26, 1999 by Judge Utschig and Judge Utschig's findings and rulings in *In re Lawrence*, 227 BR 907 (Bankr. S.D. Fla. 1988) ....[88]

The court then stated that it concurred "with the previous findings by Judge Utschig that the Debtor is not credible. ..."[89] In a footnote, the court explained that:

> [t]his Court has previously had the opportunity to observe the demeanor and candor of the Debtor in evidentiary proceedings before this Court. In each of the two prior instances in which the Debtor has testified before this Court, the Court has specifically made findings that the Debtor's testimony [was] not credible and not believable. [citations omitted] The Court notes that Judge Utschig has made similar findings concerning the Debtor's testimony before Judge Utschig.[90]

A number of examples of Mr. Lawrence's lack of credibility are cited in a decision entered prior to the order finding Lawrence in contempt in *In re Lawrence*.[91] These examples include:

- Lawrence provided vague and evasive answers to interrogatories, including that he was unaware if there were any distributions to him from the trust.
- Neither the trust nor any of its amendments were ever produced in executed form.
- In the words of the court, "[t]he Debtor repeatedly testified before this Court that the Mauritian Trust was set up for his estate planning and retirement security purposes, and that an important motive was the knowledge that the money would be available for him in his old age. [citations omitted] Yet, when questioned by the Court, the Debtor refused to acknowledge that shielding his assets from his creditors was an important aspect of the arrangement. This is absurd, given the fact that absent this shielding effort, there would be no money left for his retirement as creditors would have taken every penny they could find."[92]
- Lawrence did not reconcile how the terms of the trust were consistent with his estate planning and retirement goals.
- As noted by the court, "[a]t one point during the hearing, the Debtor stated he had not even thought about the trust in years."[93]
- Although Lawrence testified that "a purpose behind the creation of the Mauritian Trust was to provide for charities ... [n]either the initial Trust Indenture nor any of the amendments indicate any charities as beneficiaries ... ."[94]
- Lawrence testified repeatedly that the arbitration proceedings with Bear Stearns played absolutely no role whatsoever in his decision to transfer 90 percent of his net worth to the trust.
- Lawrence's affidavit wherein he swore unequivocally, "I do not have nor have I ever had any communications or dealings with ... the trustee of the Trust" contradicted his own testimony.[95]

The court in previous proceedings stated that the "hearing continued over a three (3) day period during which [the] Court had a unique opportunity to observe the Debtor, who was the sole witness. [footnote omitted] [The] Court endured eleven hours of what can candidly only be described as disingenuous and untruthful testimony from the Debtor. It seems clear that over the

course of the Debtor's testimony he committed perjury on several occasions."[96] In view of Lawrence's complete lack of credibility, the court was not able to believe that Lawrence was not able to repatriate the assets. Lawrence was thus found in contempt of court.

The court stated that its finding regarding Lawrence's ability to comply was based not only on the trust provisions but also on the entirety of the record and on:

> [t]he court's own common sense: it defies reason—it tortures reason—to accept and believe that this Debtor transferred over $7,000,000.00 in 1991, an amount then constituting over ninety percent of his liquid net worth, [footnote omitted] to a trust in a far away place administered by a stranger—pursuant to an Alleged Trust which purports to allow the trustee of the Alleged Trust total discretion over the administration and distribution of the trust *res*.[97]

Comment. Language of this nature argues the point that the bankruptcy bench is comprised of more bankruptcy attorneys than estate planners, to put it mildly. In any event, while under the exigencies of Lawrence's situation he may have been willing to trust a stranger in a faraway land, such trust in a stranger is not an element common to or necessary under many plans. Such plans do not so much involve one trusting a stranger in a distant land as involving one trusting his or her professional team, typically comprised of domestic professionals and their foreign counterparts. A protective design of the trust, with checks and balances drafted in to protect against untoward actions by whomsoever may be involved, is also highly important.

Additionally, having already determined that Lawrence wholly lacked any credibility, the court stated:

> While impossibility is a recognized defense to a civil contempt order, the law does not recognize the defense of impossibility when the impossibility is self created. [citations omitted] The Debtor has testified that he voluntarily established the Alleged Trust in 1991. Since the provisions [of the trust] which he now relies upon in order to substantiate his inability to comply with the Turn Over Order were of his own creation, he may not claim the benefit of the impossibility defense.[98]

Comment. The court indeed paints with too broad a brush when it comes to its succinct summary of contempt of court and the law on the self-created impossibility. This broad-brush précis is neither a complete nor an accurate description of the impossibility defense and the self-created impossibility.

On August 10, 2006, Lawrence filed a Motion for "Release from Contempt Incarceration." On August 25, 2006, this motion was referred along with a series of other motions filed by Lawrence to the Magistrate Judge. An evidentiary hearing was held before the Magistrate Judge on September 25, 2006. In the Magistrate Judge's Report and Recommendation dated October 10, 2006 (the "Report"), the Magistrate Judge found that "1) [Lawrence] has failed to meet his burden to show that the contempt order has lost its coercive effect; 2) [Lawrence] has failed to meet his burden to show that there exists no realistic possibility of compliance; and 3) the matter should be revisited by the bankruptcy court at reasonable intervals."

The Magistrate Judge further recommended that Lawrence's Motion for Release from Contempt Incarceration should be denied. Thereafter, Lawrence filed a series of objections.

A hearing was held on December 8, 2006 to address both the Report and Lawrence's objections. The judge granted Lawrence's objections and declined in part to accept the Report. Specifically, the judge adopted the portion of the Report recommending that the United States' "Emergency Motion to Strike/Response in Opposition to Motion by Appellant for Release from Incarceration" and Lawrence's "Emergency Request for a Hearing on the Motion for Release of Contemnor" be denied. The judge rejected the portion of the Report recommending that he deny Lawrence's Motion for Release from Contempt Incarceration.

At the time this order was entered, Lawrence had been incarcerated for contempt for more than six years. In his ruling, the judge stated:

> Upon examination of the entire record ... I now conclude that there is no realistic possibility that he will comply. As such, it is the law of this case that I am obligated to release Lawrence because the subject incarceration no longer serves the civil purpose of coercion.

The reasoning behind the judge's decision included his opinion that "six years is longer than most terms of imprisonment for serious federal crimes. In my view, further reviewing the matter at additional 'reasonable intervals' will simply not change the result."

It should be noted that the judge did not base his ruling solely on the fact that Lawrence had spent more than six years in jail although it was a factor when viewed in context of the entire record.

> Based on the totality of the circumstances, I conclude that Lawrence has come to value his money (whatever may be left) more than his liberty. Clearly he is not to be rewarded, but, at the same time, our Constitution prohibits imprisonment for unlawful debt. Because I find that there is no realistic possibility that Lawrence will comply with the contempt order, although he still has the ability to do so, his incarceration may not last indefinitely. In light of the fact that Lawrence has "steadfastly" refused to comply, regardless of the number of "intervals" I have reviewed the matter, I am obligated to adhere to the holding of the Eleventh Circuit that "... the judge will be obligated to release Lawrence because the subject incarceration would no longer serve the civil purpose of coercion."

Although Lawrence was ordered to be released from prison, the judge specifically stated in his ruling that the bankruptcy trustee may file with the bankruptcy court within ten days of the order a request for such additional protections as the bankruptcy trustee deemed necessary to prevent Lawrence from wrongfully having access to his trust's assets. Further, any failure by Lawrence to comply with a further order of the Bankruptcy Court may be subject to further contempt proceedings.

The *Bilzerian* Case

In *United States v. Bilzerian,*[99] Paul A. Bilzerian was convicted of securities fraud in the Southern District of New York in 1989, which conviction was affirmed in 1991. The Southern District of New York Court ("SDNY Court") sentenced Bilzerian to four years imprisonment and a $1.5M fine. After paying the fine, Bilzerian's prison sentence was reduced to twenty months.

After Bilzerian's criminal conviction, the Securities and Exchange Commission (SEC) brought a civil securities fraud suit against Bilzerian in 1989. Just prior to the entry of the U.S. Court for the District of the District of Columbia's ("U.S. Court") judgment holding Bilzerian liable for securities fraud on April 8, 1991, a judgment in the amount of $26M was entered against Bilzerian on April 2, 1991, in an unrelated matter in Texas and on April 6, 1991, Bilzerian filed for bankruptcy protection in the Middle District of Florida.

On January 28, 1993, in connection with the April 8, 1991, judgment, the U.S. Court ordered Bilzerian to be disgorged of over $33M in profits from the fraud and on June 25, 1993, the U.S. Court directed Bilzerian pay an additional $29M in prejudgment interest (the "disgorgement orders").

The SEC did not seek enforcement of the disgorgement orders until 1998 because Bilzerian claimed the disgorgement orders were dischargeable in bankruptcy court. The Eleventh Circuit ruled in *In re Bilzerian,*[100] that the disgorgement orders were not dischargeable in bankruptcy. In November 1998, the SEC moved to hold Bilzerian in contempt of court for failure to comply with the disgorgement orders. On August 21, 2000, in finding Bilzerian in contempt, the U.S. Court held that Bilzerian: (1) had not demonstrated his financial inability to comply; (2) had not made all reasonable efforts to comply; and (3) had separated himself from his assets and funneled them to shell companies, partnerships, and trust entities, and that any financial inability to comply was self-created. To purge himself of the contempt ruling, the U.S. Court directed Bilzerian to remit $5,000 to the court registry on the first of each month (until further order by the U.S. Court) and to submit, by October 2, 2000, the trust instruments, formation documents, and financial records as they related to any legal entities in which Bilzerian had an interest ("Bilzerian-related entities," described below), as well as an accounting of his assets. The U.S. Court further warned Bilzerian that he would be incarcerated if he failed to comply with this order.

The two trusts from which the U.S. Court required trust instruments follow: (1) the Paul A. Bilzerian and Terri L. Steffan[101] Irrevocable Trust of 1994 (the "Children's Trust"). The Children's Trust was settled in 1994. It owned 2.3M shares of Cimetrix, Inc. Bilzerian was not a beneficiary; and (2) the Paul A. Bilzerian and Terri L. Steffan Revocable Trust of 1995 (the "Family Trust" (a Cook Islands Trust)). The Family Trust, of which Bilzerian was a settlor and a beneficiary, was established in 1995, *after the $26M judgment was entered against Bilzerian in Texas, after he filed for bankruptcy protection in Florida, after the U.S. Court judgment was entered, and before the disgorgement issue was settled.*

The U.S. Court also directed Bilzerian to provide the formation documents and financial records of the following three legal entities: (1) Overseas Holding Company ("Overseas Company"), a Cayman Islands corporation, which shares are owned 100 percent by the Family Trust. Bilzerian claimed that he was not an officer, director, employee, or shareholder of Overseas Company; (2) Overseas Holdings Limited Partnership ("Overseas LP"), which directly owns: (i) the Bilzerian family home valued at approximately $3.5M; (ii) approximately $407,000 in proceeds from the sale of a second home in Tampa, Florida; (iii) a vacation home in Minnesota valued at $792,500; and (iv) 2.9M shares of common stock in Cimetrix, Inc. valued at approximately $10,010,000; and

(3) Bicoastal Holding Company ("Bicoastal"), a private investment company incorporated in Nevada. Bilzerian and Steffan held Bicoastal as joint tenants by the entirety *until December 1995* (after the U.S. Court judgment was entered), at which time it was transferred to the Family Trust. Bicoastal's assets consisted of 180,000 Cimetrix, Inc. shares and an employment contract valued at approximately $500,000 for Bilzerian's services as president, CEO, and director of Cimetrix, Inc.

Bilzerian had previously submitted to the U.S. Court *in sworn declarations* (1) that he disgorged all of his assets to the bankruptcy trustee in 1991; (2) that he owned nothing except a used Casio watch, clothing, and miscellaneous items valued at less than $5,000; and (3) that he did not know what it meant to have an "indirect beneficial interest" in an asset. Additionally, Steffan submitted a sworn declaration to the U.S. Court that, to the best of her knowledge, Bilzerian (1) had not owned any "meaningful assets" since 1991; (2) had not received a salary since 1989; and (3) had no means or ability to pay the disgorgement orders.

On October 2, 2000, after submitting the first $5,000 payment and various documents and declarations that purported to comply with the August 21, 2000, order, Bilzerian moved to amend the August 21, 2000, order, which was denied. These aforementioned documents and declarations were not inclusive of the formation documents or financial records of the Bilzerian-related entities. Bilzerian asserted that he did not provide the same because the trustee and the trust protector of the Family Trust declined to turn over the documents to Bilzerian and that Bilzerian also asserted that he lacked the legal authority to provide them to the U.S. Court.

The U.S. Court found this particularly disturbing in that, not only did Bilzerian fail to provide the formation documents or financial records, but he never indicated that he did not have access to them or that he *could not* supply the documents. The U.S. Court also noted that it was not plausible that Bilzerian and Steffan, as the settlors of the Family Trust, had no access to the trust instruments. Moreover, the U.S. Court held that any of Bilzerian's efforts to comply fell far below reasonable.

Bilzerian was incarcerated for contempt of court. In so doing, the Court distinguished the two separate natures of civil contempt proceedings: "those to enforce the payment of a judgment and those to uphold the dignity of the court."[102] The U.S. Court further went on to note that, because Bilzerian had not even complied minimally with the U.S. Court's previous orders, the instant contempt proceeding "clearly [was] to vindicate the integrity of the Court."[103] The U.S. Court held that Bilzerian had not established that he was unable to comply with the August 21, 2000, order, but that he could not provide the documentation (trust instruments, formation documentation, and financial records of the Bilzerian-related entities) that the U.S. Court required, which the U.S. Court found to be lacking in credibility.

Bilzerian was jailed until he reached a settlement with the SEC in January 2002, wherein he agreed to: (1) split the proceeds from the sale of his home; (2) divide funds of certain bank accounts; and (3) deliver 3.18 million shares of stock in Cimetrix.

The *Grant* Case

The issue in *United States of America v. Raymond and Arline Grant*[104] was whether Raymond and Arline Grant (the "Grants") had the power to repatriate assets based upon the provisions of two offshore trusts settled by them (one in Bermuda and one in Jersey, Channel Islands). After years of protracted litigation, the Court held that based upon the trusts' provisions, the Grants had the power to repatriate the assets of the two trusts, and repatriation was ordered.

A final judgment was entered against the Grants for more than $36,000,000 in unpaid taxes. The U.S. government unsuccessfully attempted to repatriate the assets held in the Grants' offshore trusts in order to pay down a portion of their tax liability, asserting that the trusts constituted the Grants' property, which should be repatriated to the United States.

In the Court's September 2, 2005 "Report and Recommendation that the Government's Amended Motion for Repatriation of Assets be Granted," the Court answered the issue of whether Arline Grant ("Arline") (as Raymond by this time was deceased) had the power to effect a repatriation of the trust assets by stating: "Clearly, she has such power. She has unreviewable discretion to change the trustees, and the present trustees must comply with such a request. This Court can, therefore, order [Arline] to change the trustee of each trust to a U.S. trustee, which will result in the repatriation of these assets."[105]

The Court stated that the defining issue was whether for purposes of repatriation, the corpus of a trust is any different than funds held in an ordinary offshore bank account or any offshore asset of a taxpayer. The Court posed the question as "[I]s this a trust over which the beneficiary lacks any control, such that the beneficiary is simply that and nothing more, and regardless of what she does or says, she lacks the power to repatriate these assets to the United States? - or, does the beneficiary retain such control that she has the power vested in her in some way by the terms of the trust to repatriate the corpus?"[106] If Arline had the

power to repatriate, the court indicated that the trust's assets were no different than any other asset.

With regard to the Bermuda Trust, the trust conferred upon Arline the power to change the trustee at any time, and further provided that should the trustee be changed, and the new trustee resides outside of Bermuda, the law governing the trust will change to the law of the jurisdiction in which the new trustee resides.

Arline also asserted that her power to appoint a new trustee to either trust was limited to such trustees as she may determine in her sole discretion, and that a court order requiring her to exercise her power would violate the trusts' terms. The Court dismissed this argument by holding that the owner of an asset cannot avoid the impact of a lawful court order requiring repatriation by simply stating "I choose not to do so." This is, of course, basic contempt law.

In May 2008, the government had a pending motion for Arline to show cause why she should not be held in contempt, arguing that she had not complied with the repatriation order. The Court concluded, however, that Arline had sufficiently established that she was unable to comply with the Court's repatriation order.

The Court acknowledged that Arline "made significant efforts to repatriate the funds to the United States, either directly to her or to a U.S. trustee, to no avail. For example, on January 17, 2006—less than a month after the repatriation order was issued, she sent a letter to the Jersey trustee, enclosing the repatriation order and seeking information about the procedure to repatriate funds."[107] In response to Arline's letter, the Jersey trustee's lawyers informed her "that any attempted exercise by you of your right to remove our client as trustee of this Trust and to appoint a U.S. resident trustee in its place would not be a valid exercise of [Arline's power as trust beneficiary] and would therefore be void and of no effect, which means that our client will remain the trustee of the trust, notwithstanding your attempted exercise of your power."[108]

The Court further acknowledged that Arline contacted the trustee for the Bermuda trust. Her attempt was met with a similar response, which stated "the Trustees of the above trust have considered your request to transfer the entire trust fund to you. We wish to advise at this time we cannot comply with your request."[109]

Arline also sent letters to financial institutions, asking them to serve as transferee trustees. These requests were rejected in part because of the possibility that the offshore trustees would fight any attempt to repatriate.[110]

The Court acknowledged that while more than two years had elapsed since the issuance of the repatriation order, the failure to repatriate the funds was "not for a lack of effort." The Court stated that it was "reluctant to fault [Arline] for her trustees' denial of her requests to repatriate the funds." As a result, the Court ruled that Arline had sufficiently established that she was not able to comply and repatriate the offshore funds. Therefore, the government's order to show cause was denied. Note, however, that while Arline was not found to be in contempt of court, the Repatriation Order still continued and stood in full force and effect.

And that was the end of it ... or so Arline (and likely her advisors) thought—so much so that in the years following the 2008 decision more than $500,000.00 of the many millions held offshore was repatriated to the U.S., part of which was spent by Arline and part of which was placed in accounts in the name of the Grant children.

When this came to the attention of the U.S. government, it was not too pleased and in fact on January 13, 2012 the U.S. government filed a Motion for Permanent Injunction and a second Show Cause Motion. The Court granted this Motion and required Arline to show cause why she should not be held in contempt of court for her failure to comply with the Repatriation Order upon her receiving funds from the trusts (Order dated June 22, 2012). Arline responded with a Motion to Discharge the Show Cause Order, which the court denied, instead holding Arline in contempt with respect to both the Repatriation Order and the June 22, 2012 Order.

As of April 22, 2013, the date of this latest Order in the *Grant* case, "[Arline] has not satisfied the judgment, nor has she paid to [the government] any portion of the monies transferred to her from the trusts."

In this latest decision, the government's Motion for Permanent Injunction was granted, ordering that:

- Arline request on a quarterly basis that the trustees of the offshore trusts transfer all available income to accounts within the United States.
- Funds transferred to Arline in the past and that are still in her possession, custody or control of her or her children be provided to the United States.
- Funds transferred to Arline or her children in the future be similarly turned over.
- No further accounts be opened by Arline or others acting in concert with her for the purpose of receiving funds from the trusts, without those being immediately turned over to the United States.
- Neither Arline nor anyone working in concert with her communicate to the foreign trustees the existence of this latest Order "or the suggestion that distributions requested are being compelled."

The question arises, is this latest incarnation of the *Grant* case a victory or a loss for Arline, for the Grant trusts and

for asset protection principles generally? In the course of deciding, the reader should consider:

- That many millions remain offshore, free from the judgment and after more than a decade of litigation; free from the reach of the adversary.
- Several hundred thousand dollars were repatriated that were expended for the benefit of Arline and/or her family.
- Only $221,000 was turned over to the adversary.
- The favorable contempt of court principles of the 2007 Order in this case and of any related cases remain unchanged ... it was the fact that Arline had taken receipt (or custody or control) of assets without turning them over, in violation of the Repatriation Order, that led to her being found to be in contempt of court and that led to the Court being offended to the extent it was.
- There is no mention in the Order of Arline being fined, penalized, incarcerated, or the like.

The *Solow* Case

The issue in *Securities and Exchange Commission v. Jamie Solow*[111] was whether Jamie L. Solow ("Solow") was in contempt of court based upon the Securities and Exchange Commission's ("SEC") application for an Order to Show Cause arising from an unpaid judgment against Solow for approximately $3.4 million. Solow was held to be in contempt of court because: (a) he relinquished assets to his wife to avoid a forthcoming disgorgement order; (b) his inability to satisfy the disgorgement order was of his own making; and (c) he did not, in good faith, exercise all reasonable efforts to pay under the disgorgement order.[112]

A key element of the case was that a disgorgement order was involved, not a judgment, with the Court stating "[d]isgorgement orders operate to wrest ill-gotten gains from the hands of a wrongdoer ... A disgorgement order is more like an injunction for the public interest than a money judgment ... It is this feature, the similarity to an injunction, that allows disgorgement orders, unlike judgments, to be enforced by civil contempt."[113] The Court then stated it had "broad equitable powers to reach assets otherwise protected by state law to satisfy a disgorgement," and cited a string of cases, including a case that holds a "disgorgement is not a 'debt' under the Federal Debt Collection Procedures Act, and the defendants could not avail themselves of the state law exemption under the Act."[114]

Mr. Solow argued, unsuccessfully, that "while federal tax liens can encumber a taxpayer's interest in property held as tenants by the entirety, no other type of creditor is afforded such special treatment ..." and that "it is clear that in the bankruptcy context, property held as tenants by the entirety can not be divided to satisfy the debts of the debtor spouse ...." As the Court put it, "[t]herefore, Mr. Solow argues that only the IRS as a 'super-creditor' may disrupt a tenancy by the entirety."

The SEC alleged that Solow engaged in a fraudulent trading scheme involving securities. The final judgment, entered on May 14, 2008 (the "Final Judgment"), enjoined Solow from attempting to register as, or be associated with, a broker-dealer or investment advisor. The Final Judgment ordered Solow to pay $2.6 million, along with prejudgment interest of about $780,000, for a total of approximately $3.4 million.

In June 2009, with the Final Judgment still largely unpaid (Solow had only paid approximately $2,600 of the $3.4 million), the SEC motioned the Court for an Order to Show Cause in an attempt to hold Solow in contempt of court. The SEC asserted that Solow's depleted net worth was the result of a "purposeful claim of asset dissipation."[115] The SEC contended that *shortly before the jury trial commenced*, Solow and his wife, Gina ("Mrs. Solow") liquidated joint securities accounts and transferred the proceeds to an account in Mrs. Solow's name. Additionally, Mrs. Solow traveled to Switzerland to deposit cash and jewelry in safe deposit accounts.

After the jury's verdict and before the Final Judgment's entry, Solow executed a $5.26 million mortgage on his homestead property for the purpose of funding a Cook Islands asset protection trust (the "Trust") in Mrs. Solow's name. The SEC alleged that this enabled Solow to transfer $5.49 million of his individual net worth to Mrs. Solow, in addition to the transfer of two real estate parcels whose combined value was over $3 million. In its motion, the SEC asserted that Solow claimed to be wholly reliant on Mrs. Solow to pay his recurring and non-recurring expenses.

For purposes of the SEC's motion, the important events and financial transactions included the following:

a. Four days *after* the jury found Solow liable, Mrs. Solow retained Donlevy-Rosen & Rosen, P.A. (the "Rosen Firm"), a Florida asset protection law firm.
b. During February and March 2008, numerous financial transactions took place involving the Solows' joint checking account.
c. Thereafter, Mrs. Solow authorized a series of transactions resulting in a $1.2 million mortgage being placed on the Solows' Fort Lauderdale residence in exchange for a certificate of deposit in the same amount to be assigned to the Trust.

d. Mrs. Solow thereafter paid the Rosen Firm in excess of $123,000.00 for her asset protection. The Solows also executed a mortgage on their Hillsboro Beach, Florida residence in the amount of $5.2 million in exchange for a certificate of deposit in the same amount to be assigned to the Trust.
e. Between April 9, 2008 and May 14, 2008 (the date of the Final Judgment's entry), Solow paid $74,000 to his attorney, Mrs. Solow traveled to Switzerland to deposit cash and jewelry in safe deposit accounts, and numerous transfers were made from the Solows' joint accounts to accounts solely in Mrs. Solow's name.

The Court stated "[i]t is undisputed that [Solow] has violated the terms of the [Final] Judgment by failing to make full and prompt payment as ordered. Accordingly, [Solow] bears the burden of coming forward with evidence showing 'categorically and in detail' why he has been unable to comply with the Court's order. In asserting that he is unable to comply with the order, [Solow] was required to 'show that he has made in good faith all reasonable efforts' to comply. [Solow] has not satisfied this burden because, to the extent that he has been unable to comply, such inability was self-created and therefore, an impossibility defense is unavailable to him."[116]

The Court found Solow to be similar to the defendants in *In re Lawrence*[117] and *SEC v. Bilzerian*[118]:

> Mr. Lawrence, Mr. Bilzerian and Mr. Solow each divested control over their assets through the use of offshore asset protection trusts and then represented to their trial judges that it was impossible for them to make their court ordered payments.[119] Like the defendant in *Lawrence*, Mr. Solow divested himself of his assets *in anticipation of the judgment that was about to be entered against him*. Moreover, this Court finds that Mr. Solow *has not made good faith reasonable efforts to retrieve those assets*.[120] (Emphasis added.)

Morris v. Morris[121]

In July 2001, Leland and Merry Morris entered into a postnuptial agreement outlining their respective child support obligations. One provision of the agreement stated that if Merry challenged any provision of the agreement after their divorce, Leland could seek the return of $1,000,000 in cash, the marital home and all previously made alimony payments (all totaling approximately $2,500,000).

Leland and Merry divorced in August 2001. Merry thereafter sought enforcement of the existing visitation rights and to modify the visitation schedule. Leland counterclaimed against Merry and won a judgment against her with respect to the above-referenced assets. After the judgment was entered, Merry settled and transferred assets to a Cook Islands trust.

Over the course of the next few years, Merry conducted herself in the following manner:

- Repeatedly failed to produce documents ordered by the Court;
- Repeatedly failed to appear at scheduled depositions;
- Failed to pay off the judgment entered against her despite the Court finding that she had the ability to do so;
- Violated the Court's orders, which the Court indicated were "willful, deliberate, intentional, and part of a continuing pattern of conduct of [Merry] throughout these proceedings designed to frustrate and interfere with the administration of justice;"
- Conducted fraudulent transfers in an attempt to hinder, delay or defraud a creditor;
- Failed to repatriate the transferred assets; and
- Repeatedly failed to appear at hearings despite the Court rescheduling on many occasions.

After Merry failed to appear at a December 8, 2005 hearing in which she was to show cause why she should not be held in contempt of court, the Court issued a warrant for her arrest. In finding Merry in civil contempt on December 22, 2005, the Court outlined multiple reasons supporting its finding that Merry willfully and intentionally failed to comply with the Court's orders. These reasons included:

- Merry was required to act within 48 hours of service of an August 25, 2005 temporary injunction or to appear before the Court to show cause why she should not be held in contempt. She did not take any action.
- Merry failed to obey the Court's September 19, 2005 order to deposit funds into the Court's registry.
- Merry admitted in a previous deposition that she had not deposited funds in the Court's registry despite the fact that she had withdrawn cash on a line of credit. Her testimony was an admission that she possessed funds subject to the temporary injunction, but that she willfully and intentionally failed to deposit those funds in the Court's registry despite an ability to do so.
- The Court further indicated that additional withdrawals on the line of credit covered by the temporary injunction totaling over $600,000.00 were made by Merry and that none of these funds were subsequently deposited into the Court's registry.

The Court rejected Merry's argument that she could not retrieve assets transferred to the Trust based upon multiple reasons. First, despite being ordered to produce records

establishing that the funds were located in the Cook Islands, Merry failed to produce any verifiable records. Next, even if the Court were to assume that Merry sent the funds to the Cook Islands and that the trustee had possession of the funds, the Court rejected her claim of an inability to secure the return of the funds (although the Court did not say why it rejected this particular claim).

> Merry testified that she wrote a letter to the Cook Islands trustee during October 2005 asking the trustee to comply with the Court's order. It should be noted that the Court stated that the letter received in evidence was undated, there was no return receipt, fax confirmation or any other proof that it was sent or received (apart from Merry's testimony). Merry also claimed that the Cook Islands trustee refused her request. As a result of the letter to the trustee, Merry claimed that her noncompliance with the temporary injunction was not intentional and/or that she did not have an ability to comply.
>
> Based upon other circumstantial evidence, namely that Merry's lifestyle had not changed, she continued to own the marital home, she continued to spend money on credit cards and continued to travel, the Court did not believe Merry's assertion that she did not have access to the funds. The Court concluded its analysis by stating that Merry's defense based upon her claim of an inability to comply was not credible. "Moreover, because [Merry's] purported inability to comply is self-created, it is not a defense to contempt. In sum, Plaintiff has proven, by the greater weight of the evidence, that Ms. Morris is in civil contempt."[122]
>
> Merry disappeared from December 2005 through January 2008, at which time she surrendered to authorities. In July 2008, Merry was released after being incarcerated for more than five months after agreeing to a settlement in which she would pay $1,000,000 of the $2,500,000 owed to Leland into a trust fund for their children.

The Cook Islands trustee agreed to release the funds because Merry's children were beneficiaries of the trust. Merry's attorney stated that had the children not been beneficiaries, no deal would have been reached. On violation of this settlement, Merry was liable to pay the remaining $1,500,000.00. From Merry's perspective she was successful in that she was able to (eventually) negotiate a more palatable payment. The reader will likely ask, however, at what cost?

Conclusion

In conclusion, contempt of court is an important area of law in the asset protection planning context. Sanctions for failing to comply with a court order may include a fine or imprisonment or both. A person may have a defense to a finding of contempt if it is factually impossible for that person to comply with a court's order. However, the "impossibility of performance" defense will not be available if that person, in close time-proximity to the issuance of the court order not being obeyed, caused the impossibility.

ENDNOTES

* This article is adapted from Chapter 17, *Contempt of Court Principles and Asset Protection Planning*, in Asset Protection Planning Guide by Barry Engel. This article is reprinted without significant revision from the Asset Protection Planning Guide (3d Ed., Dec. 2013).

1 Ronald L. Goldfarb, *The Contempt Power* 1 (Columbia University Press, 1963).

2 *See Hickinbotham v. Williams*, 305 SW2d 841 (Ark. 1957) and *Ivy v. Keith*, 92 SW3d 671 (Ark. 2002).

3 *Black's Law Dictionary* 360 (9th ed. 2009).

4 *See T.E. Joyce*, CA-7, 74-2 USTC ¶9509, 498 F.2d 592 (7th Cir. 1974); *see also McComb v. Jacksonville Paper Co.*, 16 CCH Labor Cases ¶64,959, 336 U.S. 187 (1949); and *Matter of Lemco Gypsum, Inc.*, 95 B.R. 860 (Bankr. S.D. Ga. 1989).

5 Goldfarb, *The Contempt Power* at 68–69.

6 *See Stotler and Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989); *Heinold Hog Market, Inc. v. McCoy*, 700 F.2d 611, 614 (10th Cir. 1983); *Federal Trade Comm'n v. Blaine*, 308 F. Supp. 932 (N.D. Ga. 1970).

7 *See Black's Law Dictionary* 636 (9th ed. 2009).

8 *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

9 *Joyce*, 498 F.2d at 595.

10 *See Maggio v. Zeitz*, CCH Bankruptcy Law Reporter ¶56,031, 333 U.S. 56 (1948); *Dragland v. Dragland*, 613 So. 2d 561 (Fla. Dist. Ct. App. 1993).

11 *United States v. Bryan*, 339 U.S. 323, 330-331 (1950).

12 *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985).

13 339 U.S. at 341.

14 *Maggio v. Zeitz*, 333 U.S. at 63.

15 *Id.* at 63–64 (emphasis added).

16 *See Federal Trade Comm'n v. Blaine*, 308 F. Supp. 932, 932 (N.D. Ga. 1970) (using a lesser standard of proof) ("it must appear by a legal preponderance of the evidence that respondent at the time of service on him of the subpoena in question had possession or control of the documents referred to").

17 *R.W. Rylander*, SCt, 83-1 USTC ¶9300, 460 US 752, 757.

18 *Id.* at 757.

19 *Maggio*, 333 U.S. at 64.

20 *Badgley v. Santacroce*, 800 F.2d 33 (2d Cir. 1986).

21 *Id.* at 36.

22 *Bowen* 471 So. 2d at 1274.

23 *Id.* at 1277.

24 *Foust v. Denato* 175 N.W.2d 403 (Iowa 1970).

25 *Id.* at 404.

26 *Id.*

27 *First National Bank of Cape Girardeau v. Lufcy*, 34 F.2d 417 (8th Cir. 1929).

28 *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983).

29 *See* 17 C.J.S., *Contempt* §21 (1999) and 17 Am. Jur. 2d, *Contempt* §141 (2004).

[30] *Ex parte Coffelt* 389 S.W.2d 234 (Ark. 1965).
[31] *Federal Trade Comm. v. Blaine*, 308 F. Supp. 932 (N.D. Ga. 1970).
[32] *Ex parte Fuller*, 50 S.W.2d 654 (Mo. 1932).
[33] *Id.* at 657.
[34] *Van Hoosear v. Railroad Comm'n of California*, 207 P. 903 (Cal. 1922).
[35] *Id.* at 905.
[36] *Johnson v. Yoemans & Strickland*, 41 Ga. 368 (Ga. 1870).
[37] *Id.* at 369.
[38] *Ex parte Chambers* 898 S.W.2d 257 (Tex. 1995).
[39] *Id.* at 261-262.
[40] *Berry v. Midtown Service Corp.*, 104 F.2d 107 (2d Cir. 1939).
[41] *Id.* at 110.
[42] *Brune v. Fraidin*, 149 F.2d 325 (4th Cir. 1945).
[43] *Id.* at 327-328.
[44] *Brune*, 149 F.2d at 328 (citing 31 C.J.S., *Evidence*, §124).
[45] *Id.* at 329.
[46] *Maggio v. Zeitz,* CCH Bankruptcy Law Reporter ¶56,031, 333 U.S. 56 (1948).
[47] *See* 18 U.S.C §§152-157 (2013).
[48] *Federal Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999).
[49] *Eulich v. United States of America*, 2004 WL 1844821 (N.D. Tex. 2004).
[50] *Id.* at *6.
[51] *Id.* at *4.
[52] *Id.* at *1.
[53] *Id.* at *2-3.
[54] *Id.* at *3.
[55] *Id.*
[56] *United States v. Hayes*, 722 F.2d 723 (11th Cir. 1984).
[57] *United States v. Bryan*, 339 U.S. 323 (1950).
[58] *Pesaplastic, C.A. v. Cincinnati Milacron Co.* 799 F.2d 1510 (11th Cir. 1986).
[59] *United States v. Hayes* ,84-1 USTC ¶9146, 722 F.2d 723 (11th Cir. 1984).
[60] *In re Grand Jury Proceedings—United States v. Bank of Nova Scotia,* 691 F.2d 1384 (11th Cir. 1992).
[61] *Hayes*, 722 F.2d at 726.
[62] *Id.*
[63] *United States v. Bryan*, 339 U.S. 323 (1950).
[64] *Id.* at 330-31.
[65] *Id.*
[66] *Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F.2d 1510 (11th Cir. 1986).
[67] *Id.* at 1521.
[68] *Id.* at 1522.
[69] *Id.*
[70] *United States v. Asay, 80-1* USTC ¶9242, *614 F.2d 655 (9th Cir. 1980).*
[71] *Maggio v. Zeitz,* 333 U.S. 56 (1948).
[72] *Maggio v. Zeitz*, 333 U.S. 56 (1948) at 63.
[73] *Maggio v. Zeitz*, 333 U.S. 56 (1948) at 70–71.
[74] *Maggio v. Zeitz*, 333 U.S. 56 (1948) at 72.
[75] *Federal Trade Commissioner v. Affordable Media, LLC,* 179 F.3d 1228 (9th Cir. 1999).
[76] Modification Order, Order Modifying Preliminary Injunction, U.S. District Court, District of Nevada, CV-S-98-669-LDG (RLH), entered September 23, 1999.
[77] *Anderson*, 179 F.3d at 1232.
[78] *Id.* at 1241.
[79] *Id.* at 1243 n.13.
[80] *Id.* at 1242.
[81] *Id.* at 1241.
[82] *Id.* at 1242.
[83] *Id.* at 1243.
[84] *Id.* at 1239–1241.
[85] *Id.* at 1240.
[86] *Id.* at 1241.
[87] *In re Lawrence*, 238 B.R. 498 (Bankr. S.D. Fla. 1999).
[88] *Id.* at 499–500.
[89] *Id.* at 500.
[90] *Id.* at 500 n.2.
[91] *In re Lawrence* , 227 B.R. 907 (Bankr. S.D. Fla. 1998).
[92] *Id.* at 912.
[93] *Id.* at 913 n.13.
[94] *Id.* at 913.
[95] *Id.* at 914.
[96] *Id.* at 910.
[97] *Lawrence*, 238 B.R. at 500.
[98] *Id.* at 501.
[99] *United States v. Bilzerian,* 926 F.2d 1285 (2d Cir. 1991).
[100] *In re Bilzerian,* 153 F.3d 1278 (11th Cir. 1998).
[101] Terri L. Steffan ("Steffan") is Bilzerian's wife.
[102] *S.E.C. v. Bilzerian*, 131 F. Supp. 2d 10, 13 (D.D.C. 2001), *citing NLRB v. Sawulski*, 158 B.R. 971, 975 (E.D. Mich. 1993).
[103] *Id.* at 15.
[104] *United States of America v. Raymond and Arline Grant,* Case No. 00-08986-Civ-Jordan (S.D. Fla. 2005).
[105] Report and Recommendation that the Government's Amended Motion for Repatriation of Assets Be Granted p.7.
[106] Report and Recommendation that the Government's Amended Motion for Repatriation of Assets Be Granted p.4.
[107] Order on Motion for Order to Show Cause, p.2.
[108] *Id.*, quoting a February 6, 2006 letter to Mrs. Grant.
[109] *Id.*, quoting December 13, 2007 letter to Mrs. Grant.
[110] *Id.* at pp. 2-3.
[111] *Securities and Exchange Commission v. Jamie Solow,* Case No. 06-81041, United States District Court for the Southern District of Florida.
[112] Order at page 39.
[113] Order at page 21, citing *Steffen v. Gray, Harris & Robinson, P.A.*, 283 F. Supp. 2d 1272, 1282 (M.D. Fla. 2003).
[114] Order at page 23.
[115] Order at page 2.
[116] Order at pp. 24-25.
[117] *In re Lawrence* , 279 F.3d 1294 (11th Cir. 2002).
[118] *SEC v. Bilzerian* , 112 F. Supp. 2d 12 (D.D.C. 2000).
[119] Order at page 28, *citing Lawrence*, 279 F.3d at 1296-97; *In re Bilzerian*, 112 F. Supp. 2d at 17-23.
[120] Order at page 28.
[121] Case No. 502005CA006191XXXMB (Circuit Court of the 15th Judicial Circuit, Palm Beach County, Florida 2006).
[122] Order Finding Defendant Merry Morris In Civil Contempt, p. 6.