

SCRIPT—ABBREVIATED ARRAIGNMENT—CONTINUANCE OF
ARRAIGNMENT—CONTEMPT CHARGE

IF ONLY ATTORNEY APPEARS

- Are you authorized to appear under Penal Code section 977? Are you authorized to appear for the arraignment today?

ARRAIGNMENT—SHORT FORM—ATTORNEY APPEARING 977 OR
BOTH CITEE AND ATTORNEY APPEARING

- Do you have a copy of the OSC-re-Contempt?
- Is _____ your true and correct name?
- Do you waive formal arraignment, statement of rights, enter a not guilty plea and deny any and all allegations contained in the OSC-re-Contempt?
- A not guilty plea is entered.

CONTINUANCE OF ARRAIGNMENT—CITEE APPEARING WITHOUT AN
ATTORNEY—CITEE DESIRES REPRESENTATION

- Do you have a copy of the OSC-re-Contempt?
- You are here today for your arraignment. Do you have an attorney? Do you want an attorney? Can you afford an attorney?
- My understanding is that you wish to [hire an attorney / meet with a public defender to see whether you qualify for their services]. Is that correct?
- Would you like to continue this matter so that you can do that?
- You have a right to a timely arraignment. You have a right to a trial within 45 days of your arraignment. If we continue your arraignment, that will also result in continuing your trial. Is that OK? Do you agree

to continue this arraignment to the date of _____ *date* _____ so that you may get an attorney?

- The arraignment is continued until _____ *date* _____ at _____ a.m. in this department. You are ordered to appear on that date at that time in this department without further order, notice or subpoena.

USE NOTES / SOURCES AND AUTHORITY

- Contempts in family court are criminal in nature and procedural issues must be handled with precision. Contempts cause some anxiety for judges and attorneys without a criminal law background. These materials should provide the step-by-step information attorneys and judges need, and reduce the possibility of error. Also, consult Kolodny, *Family Law Contempts* (2015).
- For a formal arraignment, use script 8.2, such as when the citee is self-represented or does not waive formal arraignment.
- The timeframes for trial are from Penal Code section 1382(a)(3). It is widely assumed, but not known, that these sections apply to contempts. The section itself applies to a “misdemeanor or infraction.” (*Id.*) So the literal language does not specify (and so may, arguably, not apply to) contempts. It is also assumed, but not known, that Penal Code section 977(a), which authorizes an attorney to appear for their client, also applies in contempts. The custom and practice of attorneys in Los Angeles County is to waive the Penal Code section 1382 time requirements. If this is done the court may request that the matter be set on the next court date as a “0 of 30,” meaning that trial will be on that date or within 30 days of that date. This gives the trial court some flexibility in the event of calendar congestion.
- For general law on arraignments see generally, *California Criminal Law: Procedure and Practice* (Cont.Ed.Bar 13th ed. 2013), ch. 6.

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SCRIPT—FORMAL ARRAIGNMENT
CITEE IS REPRESENTING SELF
OR ATTORNEY DOES NOT WAIVE FORMAL ARRAIGNMENT

- Is _____ your true and correct name?
- You are charged in this OSC-re-Contempt with _____ counts of contempt. The following is alleged: *(Use Note: Summarize or read all counts with sufficient detail.)* Do you understand the charges?
- You have the right to deny all counts of contempt.
- You have the right to counsel. If you cannot afford counsel, one will be appointed to you free of charge.
- You have the right to a speedy and public court trial.
- You have a right to subpoena witnesses in order to present a defense. A subpoena is a legal document that orders witnesses to appear in court. You can testify if you want to, but you do not have to testify.
- You have the right to confront and cross-examine witnesses. That means that you can be present in court when witnesses testify and you may ask them questions.
- You have the right to remain silent and you do not have to testify unless you want to.
- To each of the counts of contempt, how do you plead?
- A not guilty plea is entered.

USE NOTES / SOURCES AND AUTHORITY

- In criminal cases, it is customary for courts to sometimes delegate formal arraignment questions to the prosecutor. This could also happen in family court. The court or attorney can use this script.
- **Warning:** There is a right to a *jury* trial if the punishment exceeds 180 days.
- **Warning:** Script 8.3 must be used if the citee desires to waive an attorney. If so, use script 8.3 before using this script.
- If the citee desires to plead guilty, also use script 8.5 for a guilty plea.
- If a represented citee desires to waive formal arraignment, use script 8.1.
- Further authorities are cited in the use notes and sources and authority to script 8.1.

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SCRIPT AND FINDINGS—*FARETTA* WAIVER OF RIGHT TO
COUNSEL—CONTEMPT CHARGE

- My understanding is that you want to represent yourself. Is that true?
- You have the right to representation by an attorney. If you cannot afford an attorney, one will be appointed to you free of charge. Do you understand? Do you still want to represent yourself? Do you waive and give up your right to an attorney?
- Do you understand the contempt charges against you? To be found in contempt, the following elements must be proved: 1) a valid written court order was in effect; 2) you had knowledge of that court order; 3) you had the ability to comply with that court order; and 4) you willfully failed to comply with that order. To be found in contempt, your conduct must be willful. [This alleged contempt involves the failure to make payments as ordered. Therefore, your ability to pay is a critical issue in this proceeding. If you were unable to pay, you cannot be found in contempt. Further, if the court recently found that you had the ability to pay when the orders were made, the burden may be on you to show that you did not have the ability to pay. The court has a form available for you to give information to the court regarding your ability to pay called an income and expense declaration, form FL-150. The court clerk will inform you where to obtain a copy of the form and assistance in completing it if you desire. Because you have a privilege against self-incrimination, you do not have to complete this form. If you do complete and submit this form, it can be used against you in court. However, if you want to, you may use this form to provide information to the court regarding your ability to pay.]
- Before individuals can represent themselves, they must be advised of the dangers and disadvantages of self-representation. I need to know that you understand the dangers.
- Self-representation is almost always unwise. Do you understand?

- You will receive no special privileges or help from the court. Do you understand?
- You must obey all the same rules of evidence and procedure just like an attorney. Do you understand?
- *(Use Note: If other side represented):* The other side is represented by an attorney who is an experienced professional. They have a significant advantage in terms of education, experience and ability in legal matters. Do you understand?
- The court may terminate your right to represent yourself if you become disruptive or fail to follow the rules. Do you understand?
- You will not be able to appeal this case based on ineffective assistance of counsel—in other words, if you don't do a good job representing yourself, that's not grounds for an appeal. Do you understand?
- You may accidentally present a defense that backfires— that helps prove your guilt. Do you understand?
- You are charged with _____ counts of contempt. You are facing up to five days in the county jail for each count, a total of _____ days. You are facing a fine of up to \$_____. Do you understand?
- You will be expected to be ready for trial within a reasonable amount of time. You will have to be ready in the same amount of time it would take an attorney to get ready. You will receive no extra time to prepare for motions or trial in this matter just because you're representing yourself and are not familiar with the law. Do you understand?
- Understanding all of these dangers, do you still want to represent yourself?
- The law requires me to ask you some additional questions to determine whether your decision to represent yourself is voluntary. What is your educational background? Have you ever had any mental illness?

- Understanding your right to an attorney free of charge if you can't afford one, do you waive and give up your right to an attorney?

FINDINGS

The court [finds / does not find] that the citee has expressly, knowingly and understandingly waived and given up [his/her] right to be represented by counsel, that [his/her] waiver is unequivocal, timely, and unconditional. The waiver has [not] been freely and voluntarily made with an understanding of the seriousness of the charges and the dangers, and disadvantages of self-representation. Therefore, the request for self-representation is [granted/denied].

USE NOTES

- Use this waiver if you learn that citee wants to self-represent. In this scenario, use this script before using the arraignment script, 8.2. The advisement regarding willfulness and the bracketed advisement regarding ability to pay are intended to comply with the procedural safeguards stated in *Turner v. Rogers* (2011) 131 S.Ct. 2507. That case requires that a civil contempt contain three safeguards: 1) notice to defendant that his "ability to pay" is a critical issue in the contempt proceeding, 2) the use of a form (or the equivalent) to elicit relevant financial information, 3) an opportunity at the hearing for defendant to respond to statements and questions about financial status (e.g., those triggered by responses on the form), and 4) the court's express finding that defendant has the ability to pay. (*Id.* at p. 2510.) In California, a family law contempt using the judicial counsel forms is criminal in nature. Therefore, the accused has a right not to provide information regarding financial status under the Fifth Amendment. This script is intended to comply with the procedural safeguards in *Turner* consistent with citee's privilege against self-incrimination.
- Please note that judges do not have "discretion" to grant or deny a *Faretta* request. If the citee is mentally competent to conduct the trial themselves, as long as the required findings are made, as stated in the findings section here, the request must be granted.
- By custom, *Faretta* waivers in criminal cases are normally taken by the judge and not delegated to the prosecutor. In *People v. Weber* (2013) 217 Cal.App.4th 1041 the court noted that judges use scripts to take *Faretta* waivers, but not doing so was not error. In *Weber*, the defendant repeatedly interrupted the trial judge during the *Faretta* advisement. The trial judge's not covering all of the advisements presented here was not error when the judge emphasized that defendant would be held to the standard of an attorney, and that because of his lack of legal training he could lose a case he should win. Nonetheless it is recommended to use this script whenever a *Faretta* issue presents itself in family court.

SOURCES AND AUTHORITY

- The constitutional right to self-representation, the *Faretta* right, was recognized in *Faretta v. California* (1975) 422 U.S. 806.
- The list of dangers and disadvantages is from *People v. Phillips* (2006) 135 Cal.App.4th 422, 428 and *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 719.
- The special advisements required in contempt proceedings when citee is self-represented are from *Turner v. Rogers, supra*, 131 S.Ct. 2507.

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FINDINGS AND CONCLUSIONS—VARIOUS BASES TO DISMISS A
CONTEMPT CHARGE—AT OR AFTER ARRAIGNMENT

SUFFICIENCY OF AFFIDAVIT

The filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding. The affidavit (or declaration) must state facts constituting the contempt. This requirement has [not] been met.

Therefore, the order to show cause-re-contempt is dismissed [without prejudice].

Because all of the essential allegations are not contained in the affidavit, the court will permit the affidavit's amendment as authorized by Code of Civil Procedure section 1211.5(b). The amendment may be at any stage of the proceedings without a right to continuance unless there is prejudice to the citee. [However, the court grants citee's motion to continue this matter to _____ *date* _____ at 8:30 a.m. in this Department. Citee is ordered to return on that date at that time in this department without further order, notice or subpoena.]

PERSONAL SERVICE

The contempt citation must be personally served. Service by mail or by other means is insufficient. This requirement has [not] been met. [Therefore, the contempt is dismissed.]

PENAL CODE SECTION 1385 AUTHORITY

The court, on its own motion, is setting this matter to determine whether the order to show cause-re-contempt should be dismissed in furtherance of justice under Penal Code section 1385. The court will consider the citor's and society's interest in the enforcement of the court order. Against this the court will weigh the possibility of harassment against the citee, the burden to citee in going through a trial, and whether citee has already suffered some punishment or detriment as a result of the alleged contempt. The court sets this matter for hearing on the court's motion on _____ *date* _____ at _____ a.m. in this department. Citee is ordered to appear without further

order, notice or subpoena on that date at that time in this department. Do both sides waive notice?

USE NOTES

- This findings and conclusions 8.4 presents various reasons for the pretrial dismissal of contempt.
- **Warning:** It is not entirely clear if the court has authority to dismiss under Penal Code section 1385, as discussed in more detail below.

SOURCES AND AUTHORITY

- (*Koehler v. Superior Court* (2010) 181 Cal.App.4th 1153, 1169 (must personally serve contempt, and contempt affidavit must make all essential allegations).) An exception to the personal service requirement may arise if citee conceals his or her location. (*Cedars-Sinai Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1286; *Smith v. Smith* (1953) 120 Cal.App.2d 474, 484-486.)
- (Code Civ. Proc., § 1211.5(b) (court may permit amendment of contempt at any stage to cure defect, and continuance may be granted if citee's substantial rights would be compromised).)
- (Pen. Code, § 1385.) Please note that under this section only the prosecution and the court can make a motion. The citee cannot make a motion under this section but may invite the court to do so. Also note that use of Section 1385 authority must be done with care. The court must carefully articulate its reasons, and those reasons must be stated orally on the record and also in the minutes if requested, or in the minutes if there is no record. No authority clearly applies Section 1385 to contempt. In *Pepper v. Superior Court* (1977) 76 Cal.App.3d 252 the Court of Appeal upheld a trial court's dismissal of contempt in a pretrial setting. However, the authority the court used to dismiss the contempt is not discussed.

SCRIPT—PLEA OF GUILTY TO CONTEMPT

STATEMENT OF CHARGES

Is _____ your true and correct name?

You are charged in this contempt matter with _____ counts of contempt. Specifically, it is alleged that

_____ *explain* _____.
(Use Note: Summarize or read all counts to which the citee will plead.)

TERMS OF PLEA

- My understanding is that you want to enter a guilty plea. Is that correct?

At this time will the citor please state the terms and conditions of the agreement?

OR

The court has given an indicated sentence. The court has stated that upon a guilty plea the court will sentence you as follows: _

_____ *explain* _____.

OR

My understanding is that no one has given you any promises regarding how you will be sentenced. Is that correct?

Do you understand the [agreement / indicated sentence]? Other than what has just been stated to you, has anyone made promises or threats to get you to plead guilty? Has anyone made any threats or promises to anyone near or dear to you to get you to enter this plea?

WAIVER OF RIGHTS

- Before you enter your plea, you must understand and willingly give up certain rights. Do you understand?
- You have the right to a [court/jury] trial. At a trial both sides can present evidence. The other side has to prove that you committed contempt beyond a reasonable doubt. Do you waive and give up your right to a trial?

- At a trial you have the right to confront and cross-examine witnesses. This requires you to be present in court when the witnesses testify. You can ask questions of the witnesses. Do you waive and give up your right to confront and cross-examine the witnesses?
- You have the right to remain silent, also known as the privilege against self-incrimination. This means that you do not have to testify and your silence cannot be used against you. If you plead guilty you give up this right because you are admitting that you are guilty. Do you waive and give up your privilege against self-incrimination?
- Although you don't have to present any defense, you have the right to subpoena witnesses to present a defense. You can testify if you want, but you don't have to. A subpoena is a legal document that orders witnesses to appear in court. Do you waive and give up your right to subpoena witnesses and to present a defense?

CONSEQUENCES

- I must also advise you of all the potential consequences for this type of plea. I'm not saying this is what you will receive at this time. These are the maximum consequences.
- The maximum possible penalty for [all/the] count[s] of contempt to which you are pleading is ____ days in the county jail, and a fine of up to \$_____. Do you understand?
 - The court is going to place you on probation for up to ____ [months/years]. If you violate the terms and conditions of your probation the court can sentence you up to the maximum. Do you understand?
- If you are currently on probation or parole in any other matter, your plea today will result in a probation or parole violation. Do you understand?
- This finding of contempt can be used to enhance your sentence if you are found in contempt again in the future. Do you understand?

If you are not a citizen of the United States, this plea may result in your deportation, exclusion from admission to the United States, and denial of naturalization. Do you understand?

You will be ordered to pay the amount of \$_____ for [child support arrearages / _____ .

- Have you had an adequate opportunity to discuss this case and any defenses you may have with your attorney?
- Are you entering this plea freely and voluntarily, and because that is what you want to do?

PLEA

- In case no. _____, how do you now plead to count _____, which charges you with _____ *explain* _____ on or about _____ *date* _____? (Use Note: Continue with each charge in like manner.)
- Counsel, do you join in the plea, concur in the waivers, and stipulate that the court may consider the declarations-re-contempt in determining whether the plea has a factual basis?
 - Does the citor make a motion to dismiss all remaining counts of contempt with prejudice? Motion granted.

FINDINGS

The court finds that the citee has expressly, knowingly, intelligently and understandingly waived their constitutional and statutory rights. The court further finds that the plea was freely and voluntarily made with an understanding of the nature of the charges pending and the consequences of the plea. The court finds a factual basis for the plea. The court accepts the plea, and finds the citee guilty thereon.

USE NOTES

- In criminal cases, it is customary for the court to delegate taking a plea to the prosecutor. This could also happen in family court. The court or attorney can use this script. If the parties arrive at a stipulated settlement of a contempt matter involving

an admission to contempt, the advisements should be either on the record or in writing and signed by the citee.

- This script is intended primarily for use when the citee agrees to plead under an agreement with citor or based on the court's indicated sentence. In the unlikely event that no promises or indications have been made, use the appropriate checkbox.
- It is unclear when, if ever, the advisement following the checkbox regarding immigration consequences needs to be made. See the sources and authorities below.
- Whether the court can order probation is a subject of controversy, as discussed in the use notes and sources and authorities to script 8.8.

SOURCES AND AUTHORITIES

- (See generally California Criminal Law: Procedure and Practice (Cont.Ed.Bar 13th ed. 2013), ch. 26, p. 733.)
- The author is unaware of any authority that the judge needs to determine a factual basis for an admission to a contempt charge. This finding is placed here out of caution.
- Regarding immigration consequences, Penal Code section 1016.5 requires such an advisement only in pleas to "any offense punishable as a crime," which this is not. Nonetheless, conduct not constituting a conviction may have an immigration impact. For example, a judicial determination that someone violated a domestic violence protection order, even absent a conviction, may result in deportation. (8 U.S.C. § 1227(a)(2)(E)(ii) (however, such violations specifically do not include support or child custody orders or provisions).) If this is the nature of the contempt, the court should give the advisement. In addition, counsel is obligated to advise the citee regarding potential immigration consequences and should consult with an expert if any question regarding this issue arises.

FINDINGS AND CONCLUSIONS—CONTEMPT TRIAL—
NONSUPPORT CASE—OR SUPPORT ORDER
NOT RECENTLY MADE

The court finds from the evidence presented and legally admitted that count[s] _____ have [not] been proven beyond a reasonable doubt [, but count[s] _____ have not been proved beyond a reasonable doubt].

To prove contempt, all of the following elements must be proved:

1. (Use Note: **Warning**—see source notes regarding this element.) The court must have jurisdiction over the citee because they were personally served with the order to show cause-re-contempt. This element has [not] been established. [The court takes judicial notice of the proof of service in the court file.]

2. There must be a valid written court order. This element has [not] been met. There was a court order on _____ *date* _____, which required citee to

*explain*_____.
[However, that court order was not valid because

*explain*_____.]
[However, that court order was not reduced to writing because

*explain*_____.]

3. The citee must have had knowledge of that order. This element has [not] been met. [The proof of this element is insufficient because _

*explain*_____.] [The citee signed the stipulation containing this order, which stated that it was to be a court order, / was present in court when the court made the order / , and / was served with the order on or about _____ *date* _____.]
[The citee's attorney was present in court when the order was made and was thereafter served with the orders, creating a permissive inference that citee had knowledge of the order sufficient to sustain contempt in the absence of evidence overcoming the inference.]
[Thereafter, the citee complied with the order in certain months.]
[Thereafter, the citee had conversations about this court order with

_____ name _____ on or about _____ date _____.]
[_____ any additional comments _____.]

4. The citee must have had the ability to comply with the order. This element has [not] been proved.

[_____ explain if desired _____.]

5. The citee must have willfully failed to comply with the order. This element has [not] been proved. The citee did not comply because _

_____ explain _____.]

Therefore, citee is [not] guilty of _____ counts of contempt.

USE NOTES

- Use this findings and conclusions in nonsupport contempt trials or when a support order was not *recently* made. If the alleged contempt is the failure to pay a recent child or family support order, use findings and conclusions 8.7. If the alleged contempt involves failure to pay a recent spousal support or attorney's fee order, then whether to use this findings and conclusions or 8.7 is somewhat ambiguous. See the discussion in the use notes and sources and authority to findings and conclusions 8.7 regarding this issue.
- A contempt finding must state evidentiary facts supporting a finding of each of the elements, except that it need not state such facts in support of the finding of willfulness, which may be inferred from the circumstances. (*Koehler v. Superior Court* (2010) 181 Cal.App.4th 1153, 1169.) Use of this findings and conclusions, if the blanks are sufficiently filled in, should comply with this requirement.
- Regarding element 1, jurisdiction, it is not clear whether this needs to be established in the case-in-chief. See the discussion below in the sources and authorities. It is recommended that attorneys prove this element to avoid the issue.

SOURCES AND AUTHORITY

- The statement of elements for contempt is mostly from *Board of Supervisors of San Diego County v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736 and *In re Ivey* (2000) 85 Cal.App.4th 793, 798.
- The requirement of a written order for indirect contempt proceedings is explained in *In re Marcus* (2006) 138 Cal.App.4th 1009, 1016.
- Knowledge of the court order may be inferred—when the citee's counsel was present in court and served with a copy of the order, that knowledge is imputed to the citee. (*Ivey, supra*, 85 Cal.App.4th at pp. 804-805.)

- Jurisdiction over the citee through personal service (unless he is evading service and alternative service was authorized) must be affirmatively shown. (*Cedars-Sinai Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1287-1288; and *Kroneberger v. Superior Court* (1961) 196 Cal.App.2d 206, 209 (jurisdiction must be affirmatively shown).) However, the cases such as *Ivey* discussing the legal elements of contempt do not include personal service as one of the legal elements. Therefore, it is not entirely clear whether personal service should have been included as an element of contempt in this findings and conclusions. By comparison, in a criminal case, the court only has “jurisdiction” over crimes committed in that county. However, failure to raise this venue issue results in a waiver. (*People v. Sering* (1991) 232 Cal.App.3d 677, 685-686, overruled on related grounds in *People v. Posey* (2004) 32 Cal.4th 193, 205.) *Posey* holds that venue is an issue not to be submitted to the jury, but to the court pretrial. (*Id.* at p. 204.) A strong argument can be raised that the result should be the same regarding jurisdiction in a contempt proceeding.

FINDINGS AND CONCLUSIONS—CONTEMPT TRIAL—CHILD AND
FAMILY SUPPORT ORDER—AND POSSIBLY SPOUSAL SUPPORT
AND ATTORNEY’S FEES ORDERS—UNDERLYING ORDER RECENTLY
MADE

The court finds from the evidence presented and legally admitted that count[s] _____ have [not] been proven beyond a reasonable doubt [, but count[s] _____ have not been proved beyond a reasonable doubt].

To prove contempt, all of the following elements must be proved:

1. (Use Note: **Warning**—see sources and authority regarding this element.) The court must have jurisdiction over the citee because they were personally served with the order to show cause-re-contempt. This element has [not] been established. [The court takes judicial notice of the proof of service in the court file.]

2. There must be a valid written court order. This element has [not] been met. There was a court order on _____ *date* _____, which required the citee to
_____ *explain* _____.
[However, that court order was not valid because
_____ *explain* _____.]
[However, that court order was not reduced to writing because
_____ *explain* _____.]

3. The citee must have had knowledge of that order. This element has [not] been met. [The proof of this element is insufficient because _
_____ *explain* _____.] [The citee signed the stipulation containing this order, which stated that it was to be a court order, / was present in court when the court made the order / , and / was served with the order on or about _____ *date* _____.] [The citee’s attorney was present in court when the order was made, and was thereafter served with the orders, creating a permissive inference that the citee had knowledge of the order sufficient to sustain contempt in the absence of evidence overcoming the inference.] [Thereafter, the citee complied with the order in certain

months.] [Thereafter, the citee had conversations about this court order with _____ *name* _____ on or about _____ *date* _____.] [_____ *any additional comments* _____.]

4. The citee must not have complied with that order. This element has [not] been proved. [Specifically, payments were [not / made in less than the ordered amounts] as follows:
_____ *explain* _____.]

5. The affirmative defense of inability to pay has [not] been shown. The underlying order in this case was recently made. At that time, the court necessarily concluded that the citee had the ability to pay; therefore, the citee bears the burden of showing an inability to comply, that [his/her] noncompliance was not willful in this regard, by a preponderance of the evidence. The citee did [not] meet this burden. [Willfulness can be inferred from the fact that citee failed to make any payment whatever for the months in question. In other words, he/she did not make partial payments and clearly he/she could have made some payment. This shows there was no good faith effort to comply.] OR [The citee demonstrated a good faith effort to comply with the court's orders by complying with them in part.] [The court considered the following additional evidence on the issue of ability to pay. Specifically,
_____ *explain* _____.]
Therefore, the citee has [not] established this affirmative defense.

An argument has been made that ability to pay is not an affirmative defense, but is an element of the contempt. The court notes that even if it had resolved this legal issue differently, the case's outcome would be the same. The reason is that evidence presented in citor's case-in-chief was sufficient to prove the ability to pay, and the willfulness of the noncompliance beyond a reasonable doubt. Based on all the evidence, the court is convinced beyond a reasonable doubt of an ability to pay and willfulness.

Therefore, citee is [not] guilty of _____ counts of contempt.

USE NOTES

- Use this findings and conclusions in child and family support contempt trials when the support order was recently made. If the alleged contempt involves failure to pay spousal support or attorney's fees, then whether to use this findings and conclusions or 8.6 is somewhat ambiguous. This issue is discussed in more detail under sources and authorities that follow. Because of this slight ambiguity, the trial judge will have to decide whether ability to pay is an element or affirmative defense in cases involving spousal support and attorney's fees. The last checkbox paragraph provides the judge with the opportunity to state that resolution of this legal issue would not have affected the cases' outcome, if applicable.
- As to element 1, jurisdiction, it is not clear whether this needs to be established in the case-in-chief. See the discussion in the sources and authorities for findings and conclusions 8.6.

SOURCES AND AUTHORITY

- The statement of contempt elements here is primarily from *In re Ivey* (2000) 85 Cal.App.4th 793, 798. (See also additional authorities cited in sources and authority to findings and conclusions 8.6.)
- California case law establishes that in child support contempt matters, the elements of ability to comply and willfulness are not part of the prima facie case if the orders in question were recently made. This is because the court necessarily made a finding of ability to pay when the orders were made. (*In re Ivey, supra*, 85 Cal.App.4th at pp. 798-799 (when family order is for support or attorney's fees, and family court already determined ability to pay in making order, ability to pay is not an element of the contempt); see also *Moss v. Superior Court* (1998) 17 Cal.4th 396, 425, and 428 (in child support contempt, inability to comply was affirmative defense to be proved by preponderance of the evidence).) The same logic also applies to family support orders. Family Code section 4501 makes family support orders enforceable "in the same manner and to the same extent as a child support order." Therefore, the removal of ability to pay as an element in child support cases should apply equally in family support cases. *Ivey* clearly holds that this logic equally applies also to attorney's fee orders and spousal support orders. (*Ivey, supra*, 85 Cal.App.4th at p. 801; but see *Koehler v. Superior Court* (2010) 181 Cal.App.4th 1153, 1170, fn. 8. (implying that child support is the exception to the rule that ability to pay is an element, and holding that ability to pay was element of contempt for failure to pay discovery sanctions).) Part of the reason for the ambiguity is that Code of Civil Procedure section 1209.5 eliminates ability to pay as an element of the prima facie case only in child support cases. That section states the prima facie showing for contempt of child support orders slightly differently than in this findings and conclusions. Under that section, a prima facie case is made by showing that 1) a court of competent jurisdiction made an order for child support, 2) the order was filed and served on the citee or the citee was present in court, and 3) the citee did not comply with the order. (Code Civ. Proc., § 1209.5.) These elements are consistent with this findings and conclusions, which tracks language taken from case law.

Under section 1209.5, showing an inability to pay becomes an affirmative defense in child support cases.

- If the support order was not of recent origin, then ability to pay must be proved. (*Mery v. Superior Court* (1937) 9 Cal.2d 379 (the finding of ability to pay made at time of original order is not proof of that fact 10 years later).)
- Knowledge of the court order may be inferred—when citee’s counsel is present in court and served with a copy of the order that knowledge is imputed to the citee. (*Ivey, supra*, 85 Cal.App.4th at pp. 804-805.)

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SCRIPT—CONTEMPT SENTENCING
AND WAIVER OF TIME FOR SENTENCING

The citee has a right to a postponement of not less than six hours after the verdict, and has a right to be sentenced within five days of the verdict.

Does the citee waive his/her right to a postponement so he may be sentenced now?

Does citee waive his/her right to be sentenced within five days and agree to continue the sentencing to _____ *date* _____? Does counsel join?

Does the citee waive arraignment for judgment, time for sentencing, no legal cause why sentencing should not be pronounced?

On count[s] _____, [imposition of sentence is suspended and the court places the citee on informal probation for _____ months from today's date on the following terms and conditions:] *OR* [Sentence is imposed as follows:]

Citee is to serve _____ days in the county jail on count _____. [Citee is to serve a [consecutive/concurrent] _____ days in the county jail on count _____.] (*Use Note: continue for each count.*)

The jail sentence is stayed until _____ *date* _____ at 8:30 a.m. at which time citee is ordered to report to this court, department _____. This stay becomes permanent on _____ *explain or insert date or conditions for stay* _____.

Citee is to report to the _____ County Jail at _____ *address* _____ at _____ [a.m./p.m.] on _____ *date* _____ to serve [his/her] sentence.

Citee is to pay a fine of \$_____ for count _____. (*Use Note: continue for each count.*)

Citee is to perform _____ days of Cal Trans / graffiti removal / beach cleanup.] *OR* [Citee is to perform _____ hours of community

service at a provider approved by the Los Angeles County Probation Department.] Citee is to begin this service by _____ date _____ and complete it by _____ date _____.

Citee is ordered to pay \$_____ to [petitioner/respondent] at the minimum rate of \$_____ per month on the _____ of each month commencing _____ date _____. [The amount due, \$_____, accrues interest from today's date, at the rate of 10 percent per annum on the unpaid balance.]

Citee shall return to this court, department _____, at _____ a.m./p.m. on _____ date _____ for [proof of enrollment / proof of completion / surrender.]

Citee shall obey all rules, laws and court orders.

Mr./Ms. _____, you do not have to accept probation, in which case the court will impose sentence now. Do you understand and accept the terms and conditions of your probation?

[The court has been requested to grant attorney's fees under Code of Civil Procedure section 1218(a). The court may order citee to pay the citor's reasonable attorney's fees in prosecuting the contempt action. The court will [not] make an attorney's fees order because

_____ explain _____.]
[Citee shall pay \$_____ to [the attorney for / citor] at the rate of \$_____ per month on the first of each month commencing _____ date _____ and continuing until the entire balance is paid in full.]

SO ORDERED

Dated this _____ day of _____ 20_____. _____
Judge of the Superior Court

USE NOTES / SOURCES AND AUTHORITY

- The times for sentencing are based on Penal Code section 1449. It is unknown if this section applies to contempt.

- **Warning:** Whether probation for contempts is authorized is currently the subject of some controversy. This controversy stems from dicta in an unpublished case, which is not citable in court as authority. (*Bunyard v. Superior Court* (2012) 2012 Cal.App.Unpub. Lexis 8783, 26-27.) For this reason, this script specifically asks the citee whether they will accept probation, something that must be done anyway if probation is to be granted. The script adds the admonishment that the citee does not have to accept probation (something not typically done in criminal cases). In the extraordinarily rare instance in which citee does not accept probation, sentence should be imposed. If citee accepts probation, then this issue might be waived for appellate purposes. Please note that in *Moss v. Superior Court* (1998) 17 Cal.4th 396, 404, the trial court suspended execution of sentence and placed the citee on “informal probation.” The citee asserted that the court lacked statutory authority to impose the penalty. Although not specifically discussing probation, the Supreme Court upheld the trial court’s sentencing stating:

“We also reject Brent’s claim that express legislative authorization should be required before a contempt sanction is permitted in these circumstances. This claim needs little discussion. Express statutory authorization for both contempt sanctions and criminal penalties already exists for any willful violation of a court order. (Code Civ. Proc., § 1209 et seq.; Pen. Code, § 166(a)(4).)”

(*Moss, supra*, 17 Cal.4th at p. 423.) Therefore, although less than perfectly clear, the *Moss* court appears to have approved of probation for contempts. Also, the legislature has approved of community service as a penalty for contempt under Code of Civil Procedure section 1218(c). Such a penalty is always associated with a probationary sentence; otherwise if the community service is not performed the court could not simply revoke probation and impose sentence—rather, a new contempt action based on the nonperformance of community service would have to be filed and proved.

- Code of Civil Procedure section 1218 provides for a fine of \$1,000 and up to five days of jail for each count of contempt. For contempt for failing to comply with an order pursuant to the Family Code, for the first finding of contempt, the court may impose up to 120 hours of community service or up to five days of jail. (Code Civ. Proc., § 1218(c).) Penal Code sections 19 and 1203.1(b) (which may not apply to contempt) authorizes a fine up to \$1,000 when the court suspends the imposition or execution of sentence and grants probation.
- The court in *Tripp v. Sup. Ct.* (1923) 61 Cal.App. 64, 68-69 concluded that after finding someone in contempt for failure to pay a total sum due under the judgment, it would seem inappropriate to order that the sum be paid in installments. Such a result would put the citee in better position than before the contempt. (*Id.*)
- Please note that some additional penalties apply to contempts for violations of the Domestic Violence Prevention Act. (Code Civ. Proc., § 1218(d).)

PRACTICE POINTERS—NEGOTIABLE ASPECTS OF CONTEMPT MATTERS

- First, the settlement officer should determine what the parties' stated goals and objectives are in seeking or resisting a contempt finding. For example, the primary concern could be receiving delinquent payments or addressing co-parenting difficulties—failures to comply with custody orders. Contempt may not always be the best means of achieving these goals. For example, if the real issue is co-parenting, will sending someone to jail necessarily improve the co-parenting difficulties? Isn't it possible that an order for co-parenting counseling or other interventions might be more effective? Such modified orders can be made under the court's authority to make child custody and visitation orders. Once the goals are known, a mutually satisfactory agreement can often be reached.
- Agreement to dismiss with prejudice. The citor may agree to take the matter off calendar with prejudice. This might be done in exchange for payment on arrearages.
- Agreement not to proceed without prejudice. The parties may agree to take the matter off calendar without prejudice. This preserves the option of re-filing the matter at a later date. As part of such an agreement, the parties can also agree on any requirements for re-filing the matter. For example, they can agree that the matter will be re-filed only if the court determines by a preponderance of the evidence that a new violation occurred between the present date and the re-filing date.
- "Prosecutor probation" option. The parties (with the court's consent) could agree to continue the contempt hearing for a significant time, typically about six months, for example. Additional orders could also be added, such as the requirement of completing a counseling program, making certain payments, etc. For example, the parties could even agree that a live-in residential drug or alcohol program must be completed before the continuance date (this must be by agreement, since the family court cannot order live-in programs under Fam. Code, § 3190). If the conditions of the agreement are met and the court finds by a preponderance of the evidence that no further violations occur between the current date and the continuance date, the contempt

hearing will be dismissed with prejudice. This option requires that the accused waive their right to a timely hearing and agree to continue the matter to the continuance date. Time waivers should be taken. (See script 8.1) This option gives the same benefits of probation without any trial or conviction. This option is best suited to cases in which good reason to believe that citee is in contempt exists, but the outcome is unpredictable and both sides desire to minimize their exposure. It is also suited to cases in which the contempt finding does not really address the underlying problems causing the contempt to begin with.

- Count bargaining. The parties may agree on which of several counts there will be a guilty plea in exchange for dismissing the remaining counts. This option is most applicable if the court will likely determine that at least some counts have been proved and the citee desires to limit exposure.
- Sentencing bargaining. The parties also may agree on the sentencing, although the court retains authority to approve or disapprove of such sentence. This option should be considered if it is highly likely that the court will find citee in contempt. Consider:
 - Probation or no probation? Length of probation?
 - Will jail will be imposed and how much?
 - Will there be a fine and for how much?
 - Will there be community service and how much, and what type?
 - Will there be an order for repayments and what are its likely terms?
 - Will the parties agree on other terms and conditions of probation, such as counseling or conduct orders?
- Plea with a lid. The parties may agree, with the court's consent, that a guilty plea will be entered, but that citee may not be sentenced to anything greater than the agreed "lid." Although very uncommon, the parties, with the court's consent, could also agree to a "floor."

- Consider indicated sentence. The citee may ask the judge what the intended sentence would be in the event of a guilty plea to all counts.
- Consider a “package deal” with pending criminal matter. Some contempt actions also involve companion criminal proceedings arising out of the same or similar events. Settlement of the contempt should be carefully coordinated with the settlement of the criminal matter with the participation of all counsel involved in both cases.
- As with any matter, assuming the parties cannot agree to anything else, they may agree on how the dispute will be solved. Will they stipulate that certain payments were not made or the amount of payments that were made? Will they stipulate to the date and contents of the court order in question? Will they stipulate to the admissibility or authenticity of certain evidence? Etc.

USE NOTES / SOURCES AND AUTHORITY

- Do not present more than two alternatives at a time for consideration, as this may confuse the decision maker. The settlement officer should consider the pleadings and then discuss the case with the attorneys before determining appropriate solutions, which can then be suggested.
- Compiled by author from his experience and conversations with other bench officers and practitioners.

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