

Prosecutors wage fight over contempt issue

CONTEMPT, FROM PAGE 15

announced this month that it will hear the case in the fall.

Central to the prosecutors' claim is the argument that Sullivan, despite his statement to the contrary, held the attorneys in criminal contempt, not civil. The dispute poses a rare opportunity for an appeals court to decipher the sometimes fuzzy line between the two different forms of contempt, lawyers who specialize in legal ethics said.

"Contempt of court is a fluid and subjective concept," said Jackson & Campbell's Arthur Burger, who leads the Washington firm's professional responsibility practice. "Surprisingly, it's not more nailed down than it is."

Judges typically use civil contempt to compel an action. Criminal contempt is punitive, a sanction for disrespect of the court or obstruction of the administration of justice. Different procedural rules apply to civil and criminal contempt. Criminal contempt is punishable, without a jury trial, by up to six months in jail.

Morris' lawyers, Hogan Lovells partners Catherine Stetson and Charles Rosenberg, a former U.S. attorney for the Eastern District of Virginia, declined to comment. Covington & Burling partner Mark Lynch, who represents Welch with William Taylor III, a Zuckerman Spaeder partner, also declined to comment.

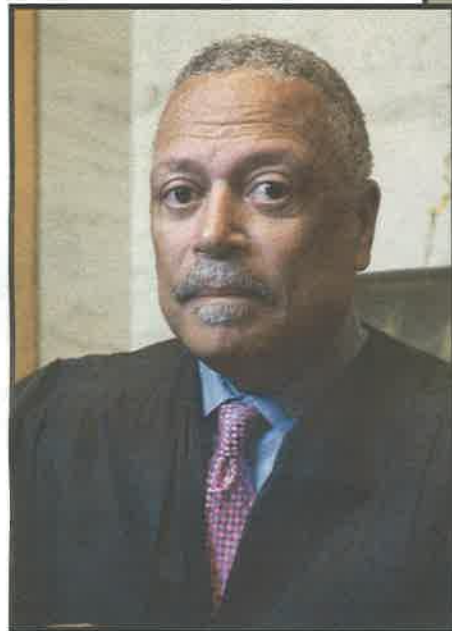
To advocate for the interests of Sullivan, the appeals court appointed Steven Goldblatt, a Georgetown University Law Center professor who serves as the director of the school's appellate litigation program. Goldblatt is expected to respond to Morris and Welch in the D.C. Circuit next month. Judges Merrick Garland and Judith Rogers, sitting with Senior Judge Harry Edwards, will hear the dispute in October.

'OUTRAGEOUS CONDUCT'

The appeal is narrowly focused on a hearing in February 2009, several months after a jury found Stevens guilty of filing false Senate financial-disclosure reports. Sullivan ordered the prosecution, led by Welch and Morris, to turn over documents connected to an FBI agent's claims of government misconduct.

A prosecutor, Kevin Driscoll, who joined the Stevens team in the post-trial phase, told Sullivan the government did

CONTEMPTUOUS: Judge Emmet Sullivan, below, held several DOJ lawyers in contempt in 2009. He lifted the finding but didn't vacate it. Hogan Lovells' Catherine Stetson, right, represents Brenda Morris.



not have a reason for holding onto the documents.

Sullivan called the government's conduct "outrageous," held the prosecutors in contempt and said he'd tackle sanctions at a later proceeding. Prosecutors disclosed the disputed documents hours after the judge's contempt finding. (Sullivan removed Driscoll from the contempt finding the next day.)

Lawyers for Morris and Welch said if Sullivan's order was actually civil contempt, it should have been lifted and purged as soon as the prosecutors complied with the judge's order. Last October, Sullivan said that when he removed the prosecutors from contempt his finding was civil, not criminal. It was designed, he said, to get the government to act.

The prosecutors' attorneys said the contempt was criminal because of the judge's harsh language and his plan to hold a sanctions hearing. In the end, there was no follow-up action. Sullivan did not fine or imprison any of the prosecutors.

"It is no solace to Ms. Morris and Mr. Welch that the court did not follow through with its stated intent to impose further sanctions or that it later

characterized the contempt as civil, for they remain adjudicated contemnors," the prosecutors' attorneys said in court papers filed June 29. "[T]he personal and professional records of Ms. Morris and Mr. Welch will forever include a conviction of criminal contempt."

The attorneys for the prosecutors said Welch and Morris could be denied the ability to practice in federal trial courts around the country if the contempt finding is not vacated. Morris and Welch, and two other prosecutors, remain under a separate, broader criminal investigation into whether they suppressed favorable information from Stevens' defense lawyers at Williams & Connolly. Sullivan said the civil contempt finding was unrelated to the events that led to the appointment of the prosecutor, Henry Schuelke III of Washington's Janis, Schuelke & Wechsler, in the broader criminal investigation.

The D.C. Circuit in 2003 grappled with the line between civil and criminal contempt in a high-profile Indian trust class action. In that case, a different three-judge panel threw out a contempt ruling, saying the trial judge, Royce Lamberth, who chastised the government for allegedly failing to follow court orders, did not fairly treat two Interior Department officials.

The appeals court said a contempt proceeding is civil or criminal by its "character and purpose" and not how the judge denominates it. "Although one may be

held in civil contempt for refusing to comply with a court order, a sanction for one's past failure to comply with an order is criminal in nature," the appeals court said.

Morris and Welch said Sullivan should have given them the usual protection of criminal law—including the opportunity to prepare a defense. Lawyers for the prosecutors are hopeful the appeals court vacates Sullivan's contempt finding rather than send it back to the trial court.

Burger of Jackson & Campbell said Sullivan's handling of his contempt finding has created "a little bit of a puzzle" for the appeals court. "If it's a civil contempt it should have been purged and not an issue any more," he said. Under that scenario, the court could find it doesn't have jurisdiction to review the dispute.

Paul Knight, a white-collar defense partner in Nossaman's Washington office, said the dispute presents an array of what he called "tricky" legal issues that are of importance to lawyers who practice in the professional-responsibility arena.

"It's a crazy situation," said Knight, who represents attorneys facing bar investigations. "It can only be criminal because civil contempt is ordered to compel you to do something. Here, the judge slammed the prosecutors for violating one of his orders."

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CIVIL ACTIONS

The following cases were recently filed in the Washington-area district courts. This information is provided by the district courts' official online bulletins.

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Jaurigue v. Epstein Becker & Green (No. 11-CV-01289, July 15)
Assigned to Judge Amy Berman Jackson. Fair Labors Standards Act. Demand: \$100,000. Attorney for plaintiff: **George**

Doumar, Doumar Martin, Arlington, Va. Attorney for defendant: **Brian Steinbach**, Epstein Becker & Green, Washington.

U.S. DISTRICT COURT IN GREENBELT, MD.

Coakley & Williams Construction Inc. v. Selective Insurance Co. of America (No. 11-CV-01990, July 20)
Assigned to Judge Roger Titus. Breach of contract. Demand: \$1.29 million. Attorneys for plaintiff: **Leonard Sacks**,

Leonard A. Sacks & Associates, Rockville, Md., and **David Mulquin**, Brault Graham, Rockville, Md.

Zaremba v. Global International Inc.

(No. 11-CV-01983, July 19)
Assigned to Judge J. Frederick Motz. Fair Debt Collection Practices Act. Attorney for plaintiff: **Robinson Rowe**, Rowe Barnett, Rockville, Md.

Graham v. Focus LLC

(No. 11-CV-01949, July 15)
Assigned to Judge Alexander Williams

Jr. Complaint for declaratory judgment. Attorney for plaintiff: **Daniel Ball**, Ball Law Offices, Rockville, Md.

U.S. DISTRICT COURT IN ALEXANDRIA, VA.

Kramer v. Computer Sciences Corp. (No. 11-CV-00751, July 15)
Assigned to Judge T.S. Ellis III. Securities Exchange Act. Demand: \$5 million. Attorney for plaintiff: **Elizabeth Tripodi**, Levi & Korsinsky, Washington. ■