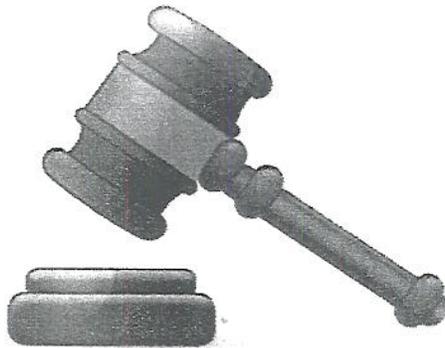


**MISSOURI  
2010  
BENCH BOOK**



**CIRCUIT COURT – MUNICIPAL DIVISIONS**

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The opinions expressed herein are those of the authors and not necessarily those of the Supreme Court or the Subcommittee on Training and Certification of Municipal Judges.

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December 31, 2009

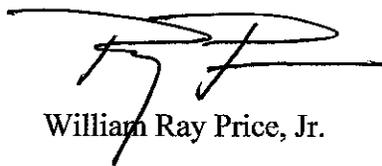
Dear Municipal Division Judges:

I am pleased to present the newly revised bench book for municipal division judges. The bench book is published under the direction of the Supreme Court Subcommittee on Training and Certification of Municipal Judges with the assistance of the Office of State Courts Administrator and numerous contributing authors and reviewers. On behalf of the judiciary, I thank these judges, attorneys, and staff members for their contributions.

The only contact most Missourians have with the court system is the municipal division. Public opinion of all courts is often based on this experience. It is thus critical that the municipal division operates in a fair, consistent and efficient manner. This publication helps achieve this goal.

I hope this bench book will make the difficult job of serving as a municipal judge a bit easier.

Sincerely,



William Ray Price, Jr.

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TO: ALL MUNICIPAL JUDGES AND ASSOCIATE CIRCUIT JUDGES PRESIDING OVER  
MUNICIPAL COURTS

The Bench Book has been a guide for municipal judges since 1972. The last edition of the Bench Book was printed in 1998. Realizing how much the laws have changed since the last edition was printed, MMACJA has endeavored to seek funding to no avail. All efforts having failed, the Board of Directors of MMACJA voted for the Association to update this book and distribute to all municipal courts.

We realize this is an expensive endeavor but considering the benefits for our municipal courts to have this information readily available to the courts, we are proud to present to you the 2010 BENCH BOOK for municipal courts. There have been many changes in the laws and rules over the past twelve years and we suggest you use this book as necessitated by your court cases. Since many of you preside over more than one court, a book will be provided for each municipal court and should be left in possession of the court. If you should leave your position as judge of any court, please leave the book for your successor.

We wish to express our thanks to the many authors, as well as previous authors, for devoting the many hours necessary to write and update these chapters and to Charles Billings, editor of the 2010 Bench Book for his diligent work in coordinating these chapters. We also wish to express our thanks to OSCA for their cooperation in providing updates for all of the Rules. (An updated electronic copy of the Bench Book may be found on OSCA's web site.)

MISSOURI MUNICIPAL & ASSOCIATE  
CIRCUIT JUDGES ASSOCIATION  
2009 Board of Directors

# **TABLE OF CONTENTS**

---

---

## **I. INTRODUCTION**

---

### 1.1 Scope of Chapter

#### **Missouri Court System**

### 1.2 The Missouri Judicial Branch

#### **Statutes/Rules/Ordinances**

### 1.3 Statutes

### 1.4 Supreme Court Rules

### 1.5 Local Court Rules

### 1.6 Ordinances

#### **The Municipal Division Judge**

### 1.7 The Role of the Judge

### 1.8 The Judicial Office Defined

### 1.9 The Court and Its Place In The Administration of Justice-Judge Wilson's Famous "Box Theory"

### 1.10 The Opening Statements by The Judge

### 1.11 Personal Characteristics

### 1.12 Conclusion

## **II. ADMINISTRATION OF THE MUNICIPAL DIVISION**

---

### 2.1 Introduction

#### **General Administration**

### 2.2 Presiding Judge

### 2.3 Municipal Judge

#### 2.3.1 Marriages

### 2.4 Court Clerk/Court Administrator

### 2.5 Municipal Division Budget

#### 2.5.1 Fidelity Bonds

### 2.6 Establishment of a Violations Bureau

#### **Record-Keeping Procedures**

### 2.7 In General

### 2.8 Court Docket

### 2.9 Case Numbers

### 2.10 Case Index

### 2.11 Closed Records

### 2.12 Reporting Requirements

### 2.13 Confidential and Closed Records

### 2.14 Records Transfer/Destruction

## **Court Facilities**

- 2.15.1 In General
- 2.15.2 Court Location
- 2.15.3 Court Security
- 2.15.4 Courtroom
- 2.15.5 Clerk's Office

## **Accounting Guidelines**

- 2.16 In General
- 2.17 Judicial Education Fund
- 2.18 Appointed Counsel Fund
- 2.19 Domestic Violence Shelter Fund
- 2.20 Inmate Security Surcharge
- 2.21 Law Enforcement Training Surcharge
- 2.22 Municipal Division Costs

## **III. JURISDICTION-VENUE-TIME**

---

- 3.1 Scope of Chapter
- 3.2 Source and Distribution of Judicial Power

### **Jurisdiction - Definition and Principles**

- 3.3 Definition
- 3.4 Principles of Jurisdiction
- 3.5 Subject Matter Jurisdiction
- 3.6 Jurisdiction Over the Case
- 3.7 Jurisdiction Over the Person

### **Special Problems Involving Jurisdictional Issues**

- 3.8 Defects in the Information
- 3.9 Statute of Limitations
- 3.10 Disqualification of Judge and Waiver of Disqualification
- 3.11 Limitation of Probationary Period; Revocation of Probation

### **Venue**

- 3.12 Definition
- 3.13 Proof of Venue and Subject Matter Jurisdiction

### **Time Computations**

- 3.14 Rule
- 3.15 Tolling
- 3.16 Enlargement of Time
- 3.17 Court Deemed Always Open

## **IV. THE VIOLATION NOTICE, INFORMATION, SUMMONS AND WARRANT \_\_\_**

### 4.1 Scope of Chapter

#### **Violations Notices**

### 4.2 Contents of Violation Notice

### 4.3 Form of Violation Notice

#### **Information**

### 4.4 Form and Contents

- A. Leading Cases on Sufficiency of Information
- B. Sufficiency of Information v. Jurisdiction
- C. Plain, Concise, and Definite Statement of the Essential Facts
- D. Lack of Prosecutor's Signature on the Information
- E. Lack of Reference to the Charge or Punishment by Chapter and Section
- F. Lack of Date and Place - Venue

### 4.5 Pretrial Motions, Defenses, and Objections to Pleadings

### 4.6 Joinder

### 4.7 Severance

### 4.8 Incorrect Name of Defendant

### 4.9 Amendment of Information

- A. Amendment that Charges a New or Different Violation
- B. Test for Prejudice Due to Amendment

### 4.10 Unavailability of Original Information

### 4.11 Nonprejudicial Defects of an Information

#### **Appearance of the Defendant**

### 4.12 Voluntary Appearance of the Defendant

### 4.13 Compelling the Appearance of the Defendant

- A. Appearance by Summons
- B. Appearance by Warrant for Arrest

#### **Form**

Form 37.A Uniform Citation – Abstract of Court Record

## **V. RIGHT TO COUNSEL\_\_\_\_\_**

### 5.1 Introduction

#### **Defendant Represented By Counsel**

### 5.2 Restrictions on the Court

### 5.3 When Presence of Attorney is Required

### 5.4 When Presence of Defendant is Not Required

#### **Defendant Not Represented By Counsel**

### 5.5 Informing Defendant of Right to Counsel

- 5.6 Waiver of Counsel
- 5.7 Defendant Who Refuses to Hire Counsel or Sign Waiver
- 5.8 Necessity of Counsel When Defendant Faces Commitment for Contempt
- 5.9 General Considerations
- 5.10 Requirement of Waiver

**Indigency and the Appointment of Counsel**

- 5.11 Requirement of Appointment of Counsel
- 5.12 Determining “Indigency”
- 5.13 Arranging for Appointment of Counsel
- 5.14 Drug- and Alcohol-Related Offenses

**Forms**

- MBB5-01 Memorandum: Finding Defendant Has Waived Counsel and Has Been Advised of Rights
- CR210 Waiver of Counsel

**VI. BAIL AND SURETIES**

---

- 6.1 Scope of Chapter

**Right to Bail**

- 6.2 Purpose of Bail
- 6.3 Driver’s License as Bond
- 6.4 Conditions of Release and Setting Bail
- 6.5 Re-Arresting the Accused

**Modification of Bond Conditions**

- 6.6 Modification in Division
- 6.7 Modification by “Higher Court”

**Forfeiture and Judgment**

- 6.8 Declaring Forfeiture, Setting Aside Forfeiture, and Penalty for Failure to Appear
- 6.9 Judgment on Bond
- 6.10 Surrender of Accused by Surety
- 6.11 Administrative Enforcement of Judgment

**Sureties**

- 6.12 Uncompensated Sureties
- 6.13 Compensated Sureties
- 6.14 Surety Corporations
- 6.15 Affidavit of Justification

**Forms**

- 6-01 Notice of Hearings
- 6-02 Motion to Enter a Judgment of Default on Bond Forfeiture and Execution Thereon
- 6-03 Judgment on Bond Forfeiture

## **VII PRETRAIL POCEEDINGS**

---

- 7.1 Scope of Chapter
- 7.2 Court Docket: Separation of Traffic and Non-Traffic Cases (Docket Control)
- 7.3 Arraignment
- 7.4 Violation Bureau and Violations Clerk
- 7.5 Continuances
- 7.6 Disqualification of Judge
- 7.7 Pretrial Motions
- 7.8 Discovery
- 7.9 Severance
- 7.10 Witness—Subpoena
- 7.11 Service
- 7.12 Return of Service
- 7.13 Failure to Appear

### **Forms**

- CR210 Waiver of Counsel
- MU95 Subpoena Order to Appear

## **VIII. ARRAIGNMENT**

---

- 8.1 Scope of Chapter
- 8.2 Informing the Defendant
- 8.3 The Arraignment Process

### **Guilty Plea**

- 8.4 Rights Waived
- 8.5 Determining Factual Basis of Plea
- 8.6 Equivocal Pleas
- 8.7 The Range of Punishment
- 8.8 Recording the Plea
- 8.9 Entering Judgment
- 8.10 Withdrawing Guilty Pleas and Setting Aside Judgments

### **Other Pleas**

- 8.11 Not Guilty Pleas
- 8.12 Failure to Plead or Appear
- 8.13 Pleas of “No Contest” or “Nolo Contendere”
- 8.14 Setting Bail

### **Plea Negotiations**

- 8.15 Role of the Judge
- 8.16 Disclosure of Agreement
- 8.17 Acceptance of the Plea
- 8.18 Rejection of the Plea

- 8.19 Summary
- 8.20 Request for Jury Trial
- 8.21 Waiver of Jury Trial

**IX. TRIALS**

---

- 9.1 Scope of Chapter
- 9.2 Presence of Defendant
- 9.3 Opening Remarks—Calling the Case for Trial

**Order of Trial/Presentation of Evidence**

- 9.4 Pro Se Litigants

**Order of Trial - Presentation of Evidence - Rule 37.62**

- 9.5 General Considerations
- 9.6 Opening Statements
- 9.7 Evidence for the City
- 9.8 Motion for Directed Judgment of Acquittal at the Close of the City’s Case-In-Chief
- 9.9 Opening Statement by the Defendant
- 9.10 Evidence for the Defendant
- 9.11 Rebuttal Evidence
- 9.12 Motion for Judgment of Acquittal at Close of Evidence
- 9.13 Closing Arguments

**The Judgment - Rule 37.64**

- 9.14 General Considerations
- 9.15 Acquittal
- 9.16 Finding of Guilty
- 9.17 Sentence
- 9.18 Duty to Advise Defendant of Right to Trial De Novo
- 9.19 Setting Aside Judgment
- 9.20 Motion to Withdraw a Plea of Guilty

**X. ESSENTIAL ELEMENTS**

---

- 10.1 Introduction
- 10.2 Scope of Chapter

**Traffic Ordinances**

- 10.3 Exceeding the Speed Limit
- 10.4 Failure to Yield Right of Way
- 10.5 Careless and Imprudent Driving
- 10.6 Leaving the Scene of an Accident
- 10.7 DWI – Alcohol/Drug Offenses

**Comparison of 1996 Amendment State Statute to Prior Statute**

**Establishing “Drugged Condition” Element**

- 10.8 Licenses – Driving Without License; Driving Under Suspension, Revocation, Cancellation

**Comparison of 1995 Amendment State Statute to Prior Law on Mental State Requirement**

- 10.9 Stealing (Larceny)
- 10.10 Peace Disturbance
- 10.11 Hindering and Interfering with a Police Officer
- 10.12 Weapons Violations

**XI. BASIC EVIDENCE** \_\_\_\_\_

- 11.1 Introduction
- 11.2 Definition of Evidence
- 11.3 Competency of Witnesses
- 11.4 Role of Judge
- 11.5 Forms of Questions (Presentation of Evidence)
- 11.6 Lay Opinion
- 11.7 Hearsay
- 11.8 Exception to the Hearsay Rule
- 11.9 Demonstrative and Real Evidence
- 11.10 Relevancy and Materiality
- 11.11 Impeachment
- 11.12 Judicial Notice
- 11.13 Conclusion

**XII. JUDGMENT AND SENTENCING** \_\_\_\_\_

- 12.1 Scope of Chapter

**Sentencing Considerations**

- 12.2 Penalty Limits
- 12.3 Other Considerations
- 12.4 Fines/Partial Payment/Failure to Pay
- 12.5 Presentence Investigations
- 12.6 Consecutive or Concurrent Sentences

**Alternative Sentences**

- 12.7 General Considerations
- 12.8 Probation
- 12.9 Parole
- 12.10 Traffic Offender Programs
- 12.11 Alcohol and Drug Programs

**Restitution/Community Service**

- 12.12 Restitution
- 12.13 Community Service Programs

**Form**

Traffic Offender Program Completion Form

**XIII. ENFORCEMENT OF FINES AND COSTS** \_\_\_\_\_

13.1 Introduction

**Voluntary Payment**

- 13.2 Payment in Full
- 13.3 Partial Payments
- 13.4 Bond on Stay of Execution
- 13.5 Applying Bond to Fine and Costs

**Compelling Payment**

- 13.6 General Considerations
- 13.7 Order to Show Cause/Motion for Contempt
- 13.8 Right To and Notice of Hearing/Right to Counsel
- 13.9 Written Payment Agreements
- 13.10 Suspension of Drivers' License for Non Compliance

**Commitment**

- 13.11 For Nonpayment's
- 13.12 For Contempt
- 13.13 Voluntary Commitments
- 13.14 Execution and Garnishments

**Forms**

- 13-01 Consent to Have Fine and Costs Deducted from Bond
- 13-02 Agreement to Pay
- 13-03 Show Cause Order
- 13-04 Judgment Finding Defendant in Contempt of Court
- 13-05 Failure to Appear on Traffic Violation (FACT) Forms

**XIV. TRIAL DE NOVO** \_\_\_\_\_

- 14.1 Scope of Chapter
- 14.2 Statutory Authority for Trial De Novo
- 14.3 Definition
- 14.4 Duty to Advise Defendant

**Procedure for Application for Trial De Novo**

- 14.5 Application Form
- 14.6 Ten-Day Filing Period
- 14.7 Computing the Ten-Day Period
- 14.8 Rule Against Extending Ten-Day Period
- 14.9 Rule 37.09 Time – Computation of – Enlargement

14.10 Costs of Filing

**Procedure After Filing of Application for Trial De Novo**

- 14.11 Stay of Execution
- 14.12 Bond Pending Trial De Novo
- 14.13 Transmittal of Record
- 14.14 Disposition of Trial De Novo

**Forms**

- 14-01 Application for Trial De Novo/Review

**XV. CONTEMPT OF COURT** \_\_\_\_\_

- 15.1 Introduction
- 15.2 Authority of Municipal Courts

**Direct Criminal Contempt**

- 15.3 Defined and Contrasted with Civil Contempt
- 15.4 Intent Requirement
- 15.5 Procedure for Imposing Punishment
- 15.6 Conduct Protected by First Amendment

**Indirect Criminal Contempt**

- 15.7 Defined and Contrasted with Direct Contempt
- 15.8 Summary Punishment Prohibited
- 15.9 Burden of Proof
- 15.10 Good Faith as Mitigating Factor
- 15.11 Disqualification of Judge

**Judgment**

- 15.12 Orders to Be in Writing

**Affiliated Forms**

- 15.13 Procedure for Review
- 15.14 Punishment

**Forms**

- 15-01 Show Cause Order
- 15-02 Motion for Contempt
- 15-03 Judgment of Contempt
- 15-04 Warrant of Commitment for Contempt of Court

**XVI. JUDICIAL ETHICS** \_\_\_\_\_

- 16.1 Introduction
- 16.2 Code of Judicial Conduct
- 16.3 Advisory Opinions

- 16.4 Methods of Study
- 16.5 Applicability of the Code to Part Time Judges

**The Code of Judicial Conduct and Related Advisory Opinions**

- 16.6 Canon 1-A Judge Shall Uphold the Integrity and Independence of the Judiciary
  - A. Definitions Pertaining to Cannon 1
  - B. Advisory Opinions Regarding Cannon 1
- 16.7 Canon 2-A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities
  - A. Definitions Pertaining to Canon 2
  - B(1). Advisory Opinions Regarding Canon 2A
  - B(2). Advisory Opinions Regarding Canon 2B
- 16.8 Canon 3-A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently
  - A. Definition Pertaining to Canon 3
  - B(1). Advisory Opinions Regarding Canon 3B
  - B(2). Advisory Opinions Regarding Canon 3C
  - B(3). Advisory Opinions Regarding Canon 3E
- 16.9 Canon 4-A Judge shall so Conduct the Judge’s Extrajudicial Activates as to Minimize the Risk of Conflict with Judicial Obligations
  - A. Definitions Pertaining to Cannon 4
  - B(1). Advisory Opinions Regarding Canon 4A
  - B(2). Advisory Opinions Regarding Canon 4B
  - B(3). Advisory Opinions Regarding Canon 4C
  - B(4). Advisory Opinions Regarding Canon 4C(2 &3)16.9(B)(4)-Advisory Opinions Regarding Canon 4C(2& 3)
  - B(5). Advisory Opinions Pertaining to Canon 4G
  - B(6). Advisory Opinions Regarding to Canon 4H
- 16.10 Canon 5-A Judge and Certain of the Judge’s Employees Shall refrain from Inappropriate Political Activity
  - A. Definition Pertaining to Canon 5
  - B(1). Advisory Opinions Pertaining to Canon 5A(1) and 5A(2)
  - B(2). Advisory Opinions Pertaining to Canon 5A(3)
  - B(3). Advisory Opinions Pertaining to Canon 5A(4)
  - B(4). Advisory Opinions Pertaining to Canon 5A(5)
  - B(5). Advisory Opinions Pertaining to Canon 5A(2)

**Functioning of the Commission on Retirement, Removal and Discipline of Judges**

- 16.11 Discipline of Judges
- 16.12 Complaint Process
- 16.13 What to Do When Faced with an Ethical Dilemma

**XVII. DEPARTMENT OF REVENUE ADMINISTRATIVE LICENSE ACTIONS\_\_\_\_\_**

- 17.1 Scope of Chapter

**Non-Alcohol Related Actions**

- 17.2 Assessment of Points

- 17.3 Review of Point Suspension/Revocation
- 17.4 Point Assessment for Speeding
- 17.5 Driving While Suspended/Revoked and License Reinstatement
- 17.6 Failure to Appear
- 17.7 Nonresident Violator Suspensions
- 17.8 Motor Vehicle Financial Responsibility
- 17.9 Citation for Examination
- 17.10 Child Support Enforcement Suspension

**Alcohol Related Actions**

- 17.11 Abuse and Lose
- 17.12 Ignition Interlock Devices (Including New Provisions Effective 07-01-2009)
- 17.13 License Denial/Ineligibility Periods
- 17.14 Implied Consent/Chemical Refusal Provisions
- 17.15 Administrative Alcohol Suspension and Revocation Actions
- 17.16 Limited Driving Privileges
- 17.17 Reinstatement Requirements

**Suspension/Revocation Reinstatement Requirements**

- 17.18 Driver's Privacy Requirements
- 17.19 Department of Revenue Records
- 17.20 Conclusion

# CHAPTER I. - INTRODUCTION

Judge Frank J. Vatterott

Section	Page Number
1.1 Scope of Chapter.....	3
<b>MISSOURI COURT SYSTEM .....</b>	<b>3</b>
1.2 The Missouri Judicial Branch.....	3
<b>STATUTES/RULES/ORDINANCES .....</b>	<b>5</b>
1.3 Statutes.....	5
1.4 Supreme Court Rules .....	5
1.5 Local Court Rules .....	6
1.6 Ordinances .....	6
<b>THE MUNICIPAL DIVISION JUDGE .....</b>	<b>7</b>
1.7 The Role of the Judge .....	7
1.8 The Judicial Office Defined.....	7
1.9 The Court and its Place in the Administration of Justice – Judge Wilson’s Famous “Box Theory” .....	7
1.10 The Opening Statement by the Judge .....	9
1.11 Personal Characteristics.....	11
1.12 Conclusion .....	12

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Judge Frank J. Vatterott received his A.B. degree from the University of Notre Dame and his J.D. from St. Louis University. He has served as a municipal judge since 1981 and is currently presiding in the city of Overland, and serving as a provisional judge in Bridgeton, Fenton and other cities, 21st Judicial Circuit. He has served as President of MMACJA for the years 1992 - 1993 and 1998 – 1999. This chapter is based upon the previous work of Kay Pedretti and Judge McCormick Wilson.

## **CHAPTER 1 INTRODUCTION**

### **1.1 SCOPE OF CHAPTER**

This chapter addresses the structure of the Missouri Judicial Branch, the legal references which govern procedure in municipal divisions and the role of the judge generally.

## **MISSOURI COURT SYSTEM**

### **1.2 THE MISSOURI JUDICIAL BRANCH**

Missouri's first constitution, adopted in 1820 as the state prepared to enter the Union, placed the judicial power in a Supreme Court, chancery courts, and circuit and other courts which were to be established by the legislature. Over the years, the structure of the judicial branch has changed; most recently in 1979. In that year, the state judicial system was reorganized in compliance with an amendment to Article V of the Constitution that had been adopted by the voters in 1976. The new judicial article reorganized all former courts of limited jurisdiction into a single trial court as part of Missouri's unified judicial system.

The Supreme Court is the state's highest court in this system, with statewide jurisdiction. The Court of Appeals, Missouri's intermediate appellate court, consists of three districts, established by statute, with general appellate jurisdiction in all cases not within the jurisdiction of the Supreme Court. The third tier is a circuit court, divided into 45 circuits, with original jurisdiction over all cases and matters, civil and criminal. The circuit court tier also contains four divisions: probate, associate, family (formerly juvenile), and municipal.

#### **A. THE SUPREME COURT**

The Supreme Court of Missouri is established by Article V, Section 1 of the Missouri Constitution. It is the highest court in the state and its decisions are controlling over all other state courts. The Supreme Court, which is comprised of seven judges, has extensive responsibilities in two areas: judicial proceedings and administration of the state courts.

The Supreme Court's judicial responsibilities are clearly defined in Missouri's Constitution. Article V, Section 3 gives the Supreme Court exclusive appellate jurisdiction in all cases involving the validity of a United States treaty or statute, the validity of a Missouri statute or constitutional provision, the construction of the revenue laws of Missouri and the title to any state office.

The Supreme Court also has authority to issue certain motions and writs. Cases which are not within the Supreme Court's exclusive appellate jurisdiction may be transferred to the Supreme Court from the Court of Appeals when important issues warrant a decision by the state's highest court.

In addition to its judicial responsibilities, the Supreme Court must administer the Judicial Branch of Missouri's state government. Under Article V, Section 4 of the Missouri Constitution, the

Supreme Court is vested with supervisory authority over all Missouri courts, including municipal courts, and is permitted to delegate this power.

The judicial article implemented in 1979 assigned broad administrative authority and responsibility to the Supreme Court. Under the administrative concept of a unified court system, the Supreme Court has the ultimate responsibility for superintending all courts in Missouri. To effectively execute these expanded responsibilities, the Supreme Court appoints a clerk of the Supreme Court to assist in administering the business of the Supreme Court and a state courts administrator to assist in administering the courts of Missouri.

Article V, Section 5 of the Missouri Constitution also requires the Supreme Court to promulgate general rules relating to practice, procedure and pleading in all state courts and administrative tribunals.

The Supreme Court has the authority and responsibility to establish rules regarding judicial transfers and to make temporary transfers of judicial personnel when justice requires.

## **B. THE COURT OF APPEALS**

Article V, Section 1 of the Missouri Constitution establishes a Court of Appeals consisting of districts as prescribed by law. The Missouri Court of Appeals is divided by Chapter 477, RSMo into three districts: the Eastern District, the Western District, and the Southern District.

The Court of Appeals has general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the Supreme Court as specified in Article V, Section 3 of the Missouri Constitution. The Court of Appeals also has original jurisdiction over remedial writs.

Each district of the Court of Appeals has appellate jurisdiction over cases which arise in the counties of that district. The Eastern District has appellate jurisdiction over those cases arising in 25 eastern counties and in the City of St. Louis. The Western District hears cases which originate in 45 counties of western Missouri. The Southern District has appellate jurisdiction over cases which arise in 44 counties of southern Missouri.

## **C. THE CIRCUIT COURT**

### **(Including the Municipal Divisions)**

The judicial article adopted in 1979 reorganized the courts of Missouri into one level of trial courts. Article V, Section 1 of Missouri's Constitution establishes Missouri circuit courts as the only trial court in the state with jurisdiction over all cases — criminal and civil.

The circuit court consolidates functions of previous limited jurisdiction courts: magistrate, probate, municipal, common pleas and the St. Louis Court of Criminal Corrections. The probate division hears probate matters, associate circuit division generally hears matters previously heard by magistrates, the family division hears juvenile and other domestic matters, and the municipal division hears local ordinance violations.

There may be other divisions as established by local court rule, such as family court commissioners and trial de novo commissioners on administrative traffic matters.

Cases originally filed in municipal court and in associate divisions may be reviewed through the process of filing an application for a trial de novo. A request for a jury trial must be certified directly to the presiding judge for assignment to be heard on the record, thereby eliminating the possibility of a trial being heard twice by a jury.

Article V dictates that the state of Missouri be divided into convenient judicial circuits of contiguous counties. There are now 45 judicial circuits comprising of from one to five counties and the city of St. Louis.

The circuit courts have three levels of jurisdiction: circuit, associate circuit, and municipal. Circuit jurisdiction includes all cases whether criminal or civil. Circuit judges may hear and determine all cases and matters within the jurisdiction of the circuit courts.

Associate circuit jurisdiction includes civil matters that do not exceed \$25,000, misdemeanor or infraction matters, and felony matters prior to the filing of the information. Associate circuit judges also hear municipal ordinance violations in municipalities that have less than 400,000 people, and have no municipal judge. They also hear small claims matters and various other matters. Associate judges may by agreement of the parties or assignment by the presiding judge, hear any matter pending in the circuit court.

Municipal division jurisdiction includes only municipal ordinance violations. The municipality may choose to designate a municipal judge or, as provided under Article V, the governing body of any municipality with a population less than 400,000 may elect to have an associate circuit judge hear municipal matters in the first instance. There are about 500 municipal courts and about 300 are held in the city chambers and several hundred cities have their cases heard by an associate circuit court judge at the county courthouse.

## **STATUTES/RULES/ORDINANCES**

### **1.3 STATUTES**

The laws of the state of Missouri as formulated and adopted by the legislature are found in Missouri Revised Statutes (typically cited as RSMo). Various chapters in the statutes address issues that concern municipalities and the courts, but Chapter 479, RSMo "Municipal Courts," is the chapter that primarily relates to municipal division courts.

### **1.4 SUPREME COURT RULES**

#### **A. PROCEDURAL RULES**

The Supreme Court, pursuant to its authority under Article V of the state constitution, promulgates rules of court practice and procedure which are published in the Missouri Rules of Court. Of particular importance to municipal divisions is Rule 37, discussed in this publication, which governs the procedures in all courts of this state have original jurisdiction of ordinance violations. Another important rule, Rule 18, involves mandatory municipal judge education requirements and non-lawyer judge certification.

In general, when there is a conflict between a statute and a Supreme Court procedural rule, the rule will supersede the conflicting statute regardless of the date either became effective. An exception to this hierarchy would be if the rule was intended to "change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right to trial by jury, or the right of appeal." In this situation, statute would supersede rule because the constitutional specifically prohibits the court from adopting rules that would change these procedures.

A second exception to the hierarchy of "rule over statute" is found in Article V, Section 5, which states "Any rule may be annulled or amended in whole or in part by a law limited to the purpose." Case law has indicated that in order to change a rule that is within power of the court to promulgate, the law must specify the rule number that is intended to be changed and be limited only to that particular rule change.

## **B. ADMINISTRATIVE RULES**

Article V, Section 4 of the state constitution gives the Supreme Court "general superintending control over all courts and tribunals." Pursuant to this authority, the court promulgates administrative rules that are published and distributed by the Office of State Courts Administrator. These rules deal with such topics as court automation, record keeping, preparing transcripts from electronic recordings, local court rules, circuit court personnel, accounting records retention and destruction, and the Judicial Finance Commission. Municipal divisions are specifically included in [Court Operating Rule 8](#), which deals with records retention and destruction, and [Court Operating Rule 13](#), which addresses the resolution of budget disputes between the municipal division court and the municipality.

[Court Operating Rule 4](#) deals with court accounting, and mandates accounting procedures. The judge is responsible for oversight of the accounting for the court.

### **1.5 LOCAL COURT RULES**

Authority to establish local court rules governing traffic and ordinance violations is found in Rule 37.05. These rules, which are drafted and approved by the circuit and associate division judges of the circuit, address the general administration of the courts; court procedures regarding case activities such as discovery, pretrial motions, continuances, and dismissals; and the internal organization of the courts themselves. Rules relating to particular actions, such as judge disqualifications, requests for jury trials or requests for trial de novo are also typically addressed.

All municipal judges should review the local court rules of their circuit and make certain that the practices and procedures of their courts are not inconsistent with these rules. Some circuits, for example, set maximum fines to be set for the traffic violations bureau. (To obtain a copy of the local court rules in your circuit, contact the presiding judge or the circuit clerk of the county where the municipal court is located.)

### **1.6 ORDINANCES**

Sections 77.590 and 79.110, RSMo authorize third and fourth class cities to enact ordinances to assist in maintaining order and effective government in the city as long as they are not inconsistent with the laws of this state. Section 478.230, RSMo, which addresses the jurisdiction

of municipal judges, states "A municipal judge may hear and determine municipal ordinance violation cases of the municipality or municipalities making provision for the particular municipal judge." The municipal judge may only hear cases based on violations of city ordinances; if there is no ordinance, there is no basis for prosecution in the municipal division.

Sections 77.590 and 79.470, RSMo establish the maximum penalties that may be imposed for ordinance violations in third and fourth class cities. The penalties written into city ordinances may not exceed these limits, and the municipal judge may not exceed or alter ordinance penalty provisions when imposing sentences for individual violations.

## **THE MUNICIPAL DIVISION JUDGE**

### **1.7 THE ROLE OF THE JUDGE**

This section originally was written in 1972 by the late Judge James May and revised in 1990 by the late Judge McCormick Wilson. The latest revisions are mainly in editing and are not substantive changes.

### **1.8 THE JUDICIAL OFFICE DEFINED**

Public impression of justice and its administration is formed more in municipal courts than in any other court of the state. The judge as judicial officer will instill in that individual his or her lasting image of our judicial system and this should never be forgotten.

If a judge loses control of the court, if a judge is discourteous, inattentive or antagonistic to any party, the judge creates a distrust of the judicial system.

A municipal judge should strive to be efficient, decisive, attentive, courteous, and possessed of good common sense. Humor has its place to place people at ease, but it should not be a common occurrence.

Judicial conduct off the bench is extremely important. This is even more important for the judges of the municipal court who are part-time judges. People will not ignore the way a judge behaves in other pursuits in determining what sort of judge he or she is. Most people would likely judge you, as a judge, by what they see you do away from the courtroom. A judge cannot expect to be permitted to behave poorly in his or her business or his or her private law practice and still have people consider that person to be a fair judge.

### **1.9 THE COURT AND ITS PLACE IN THE ADMINISTRATION OF JUSTICE – JUDGE WILSON’S FAMOUS “BOX THEORY”**

Years ago, persons viewed a municipal court as an arm of law enforcement. This impression is still somewhat prevalent today, especially in this era of red light cameras. There are ways to avoid this. One way is to have physical facilities that clearly show that the court is separate and independent from the police department. More importantly is to have an understanding of the judge's place. Judge McCormick Wilson developed and taught, for many years, his "box theory" to remind us of the court's place in the scheme of things within the criminal justice system.

Judge Wilson asked his listeners to imagine small wooden boxes, with lids which were used to hold chalk when the judge was in grade school.

Each box represents a separate person. The first of these boxes is assigned to the law enforcement officer. It is the officer's job to observe and investigate complaints or violations of municipal ordinances, and the officer alone decides whether or not to issue a citation or summons for a municipal ordinance violation or just a warning. The officer's box is of course subject to the instructions of his or her superior officer. An officer decides which persons sign a summons, promising to appear or which persons instead go to the station to post bond. These decisions are based on training and experience, and the seriousness of the situation. The law enforcement officer is a professional and this is his "box."

The second box in the sequence of things is the prosecutor's box. The prosecutor takes the facts from the first box and exercises discretion as to whether charges are to be filed. Each charge must be viewed in light of the municipal ordinances on the books. Is this a serious case? Can the case be made? The prosecutor must decide whether a case is frivolous or whether it is something that the city would want to pursue. The prosecutor should know which officers make good witnesses and which defendants make bad defendants. The prosecutor is a professional. He or she processes the case in his or her "box" and then, by signing the information and filing it with the judge's clerk, hands it into your box.

The third box is the box of the municipal judge. By the time the case has reached the judge, at least two persons have touched it. The municipal judge's job of course, is to adjudicate and penalize when necessary. But just as there is discretion an officer whether to write a ticket, and there is discretion in the prosecutor whether to sign the information, there is discretion in the judge more than saying "Guilty. Fine of \$25.00 plus costs."

A municipal judge, in his or her box, the court, must be responsible to the public to see that there is a fair balance between the rights of the individual and the rights of society. You should make sure that you explain what it is that you are doing. A good judge makes an extra effort to explain to each person whose case is being heard just what is happening. Judge Wilson advised that the judge should act somewhat like a schoolteacher explaining it to his or her class.

Judge Wilson cautioned that there is inevitably some mixing together of the boxes. Obviously, in trials and frequently during the taking of a plea of guilty, the officer will be called upon to tell his or her story and what if anything was told to him or her by the defendant. He or she does this as a witness and he or she does it in the judge's box. The prosecutor too, must present his or her case forcefully either at the trial level or at the time of sentencing. These are essential parts of what each does in the administration of justice, and they do them in the judge's box.

The fourth box is that of the circuit court system, which will hear cases that you have already heard, when an application for trial de novo is filed.

Judge Wilson's parable is simple but powerful. Everyone concerned with the administration of justice has a box and the system will work best if everyone stays in his or her own box.

Municipal judges do not live in a vacuum. Often, in front of a municipal judge is one who may be a friend of the mayor or an acquaintance of the president of the board of alderman. The

prosecutor and the judge may be friends. The judge may know that the mayor has certain pet peeves, for example, hot rodders or housing cases. The judge must make it clear to all that the court is independent and hears the cases brought before the court without any outside influence. Judge Wilson suggests that a judge should ask himself or herself this question, in order to monitor one's own conduct — "Is this really in my box?"

Sometimes police officers become upset if they lose their case. A police officer is an important person, but in court, he or she is just like any other witness. The police officers do not run the court, nor does the prosecutor. The prosecutor's job is to present evidence, not to run the court. Sometimes, a police officer will say to a defendant, "If you plead guilty, the judge will suspend the imposition of sentence and send you to traffic school." That is not the role of the police officer and the police officer should be told that he or she is not to predict what the judge will do. Similarly, the prosecutor, even though he or she has complete discretion in whether to prosecute a case, does not have the authority to set fines. If a case is plea-bargained, it is subject to the approval of the court as to the fine or other disposition.

In some jurisdictions, the prosecutor is a powerful personality and attempts to dominate the judge. This should never be the case in your court. The prosecutor should stay in the prosecutor's box, and you in your box.

What has been said about the officer and the prosecutor applies equally to the mayor and to the councilpersons. They have no business interfering with the court system. A city with a mayor who is permitted to "fix tickets", set bonds, or influence the prosecutor or judge what to do is a city with a poor judge. Neither the mayor, the board of aldermen, nor anyone outside the courtroom should talk to you about any particular case.

## **1.10 THE OPENING STATEMENT BY THE JUDGE**

Rule 37 requires the judge to inform the defendant of rights that are set forth in the rules. It would be very difficult in a typical municipal courtroom for the judge to recite every single right and procedure to each individual defendant. Most judges have adopted an "opening statement" which answers a lot of questions ahead of time. Many courts have a brochure entitled "Your Rights in Municipal Court" which further explains rights. It is suggested that the brochure be given out to all persons as they enter the courtroom and the judge should also make a statement.

The opening speech that I have developed over many years is as follows:

Each of you here has been charged with a violation or violations of one or more ordinances of the city. As your name is called you should come forward. The prosecutor will read the charge or charges that the city has made against you. After the prosecutor has done so, you may plead guilty, not guilty or guilty with an explanation as to each charge.

If you feel that you did not violate the ordinance or if you are uncertain whether you violated it or not, you may wish to enter a plea of not guilty. If you plead not guilty, we will set the case for trial. Either before me or before a jury, which ever you choose.

At the trial, the prosecuting attorney must prove beyond a reasonable doubt each of the essential elements of the charge that the city has brought against you. At the trial, you have all the rights of any defendant in a criminal trial in the state of Missouri. Among those rights are the right to be present when the witness testifies against you, the right ask those witnesses questions, or have your lawyers ask them questions, to make sure that the testimony that the city's witnesses are giving is not only truthful, but complete.

You have the right to call witnesses to testify on your behalf in the case. You yourself have the right to testify in the case if you want, but you do have to testify if you do not want to. If you do not testify, neither the jury nor I will draw any inference from your failure to testify.

If you are convicted here, you have the right to a trial de novo in the county circuit court unless you have a trial by jury.

You may also choose to plead guilty. If you plead guilty, you are saying that you admit that what you did violated the ordinance. You give up your right to a trial and to an appeal. If you plead guilty, I will generally set a fine. I may hear what the prosecuting attorney has to say, and listen to what you have to say about the circumstances in your case.

The penalty in this will be a fine instead of a jail sentence unless I specifically, personally, individually advise you there is practical possibility of a jail sentence in your case. If you do not hear anything from me regarding a jail sentence, there will not be one. If you do hear something, about that, then you may wish to continue the case to seek an attorney.

Each person here has a right to be represented by a lawyer of his or her choice at his or her own expense, at any stage of this proceeding, if you want to hire a lawyer, tell me that you would like to do so and I will continue your case for a reasonable time for this purpose. I have no authority to appoint a public defender in a case where there is a practical possibility of a jail sentence so if your case is one in which the only penalty will be a fine, there is no reason for you to request the appointment of an attorney. However, if there is a practical possibility of a jail

sentence in your case and you do not have an attorney to represent you and no money with which to hire a lawyer, I will appoint a public defender to represent you.

You may plead guilty with an explanation. This is not the opportunity to tell me a story you just made up while you were sitting here. But if you have something that you feel is important for me know, please tell me. It may or may not affect what I do. An example is to plead guilty with an explanation to not producing an insurance card when requested to do so by the police officer. If there was insurance on the car you were driving at the time of the stop, but you could not at the time find the card, but now you have located it, you may show it to me and that will most likely affect what I do with the case.

If you still have any questions about what I have talked about, wait until the charge has been read to you and then ask me your question and I will try to answer it. However, I cannot give legal advice.

(You should mention payment of fines, continuances for payment, etc.)

## 1.11 PERSONAL CHARACTERISTICS

There are several important characteristics a judge must possess which are obvious but sometimes ignored. They are as follows:

**Patience:** As a judge, you must take time to make sure that the defendant has time to explain himself or herself in court and has an option to bring out everything he or she has in his or her defense. You should give him or her your undivided attention and listen. If he or she wants to hand you a paper, such as the repair bill to fix a speedometer, or an insurance card, you should look at it carefully. If you decide to rule against the defendant anyway, you should explain why the defense offered was not really a defense. Tell the defendant if you are going to take his or her explanation into consideration when setting the penalty. By your patience, you have helped that person and the others in the courtroom understand our system of justice.

**Courtesy:** It goes without saying that judges must always strive to be courteous. This is particularly important in night court where the judge may have worked all day as a lawyer or in another profession, and may be understandably tired. It is extremely important to remember that the person in front of you is a human being and has dignity and should be treated with respect.

You should not diminish another's importance or self worth by being demeaning to them. Judges should address a person by Mr., Mrs., Miss, or Ms. In your courtroom the town drunk and the chief of police should be treated in an identical courteous manner.

Judge Wilson made it a rule that he was going to be the most polite person in the courtroom and he was going to be the last one to behave in an unmannerly manner.

**Common Sense:** Never overlook common sense. In a minimum housing case, should the defendant be fined heavily when he fixed the problem immediately at great expense to himself, such as putting on a new roof? Should a person be given a month to try to obtain a valid license?

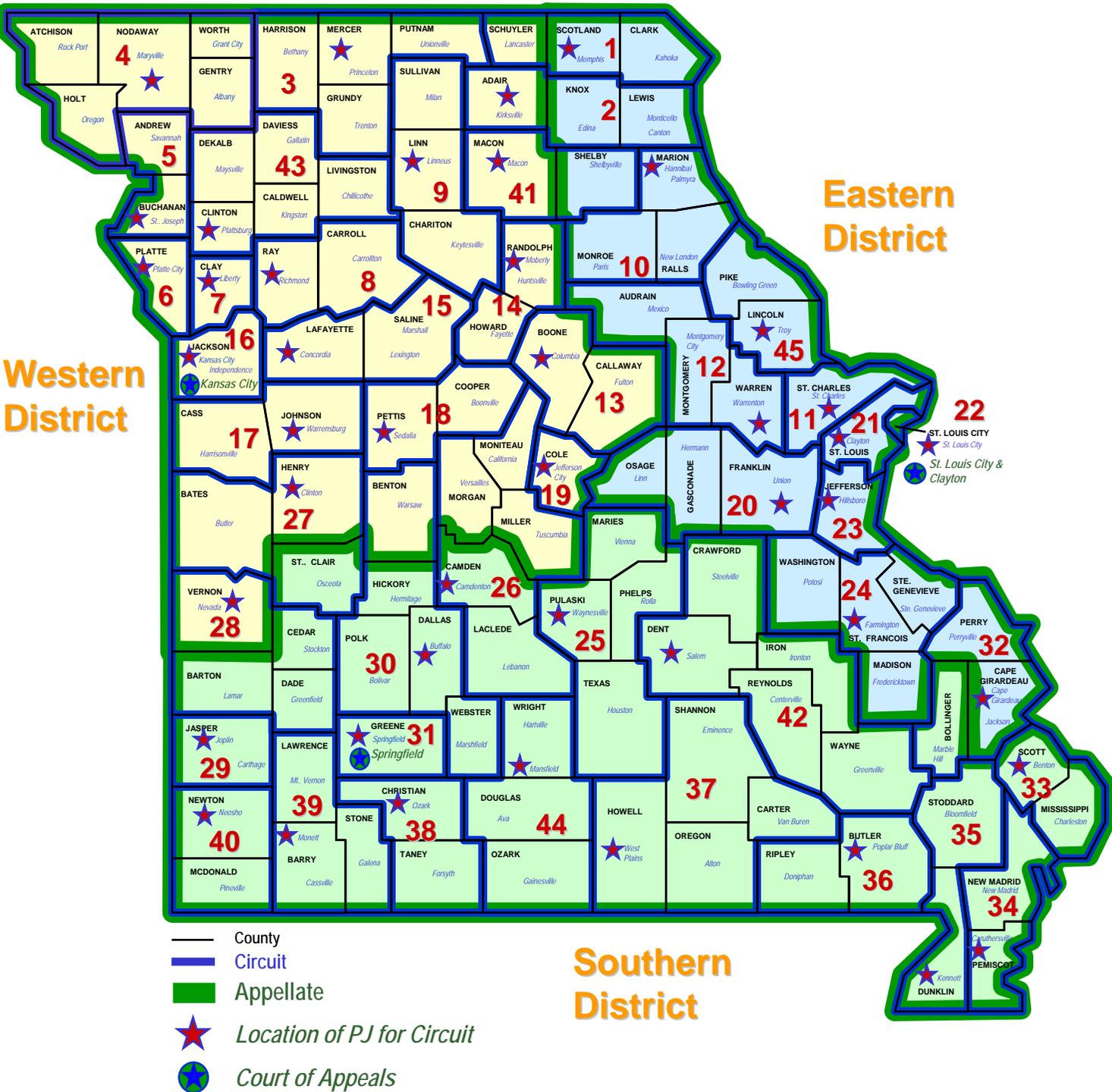
It is easy to fine people and not think about the consequences. A good judge should use common sense to determine what is fair. As Judge Wilson aptly put it, "It is much worse to apply the rules unfairly than to have failed to apply the rules exactly in an attempt to be fair."

## **1.12 CONCLUSION**

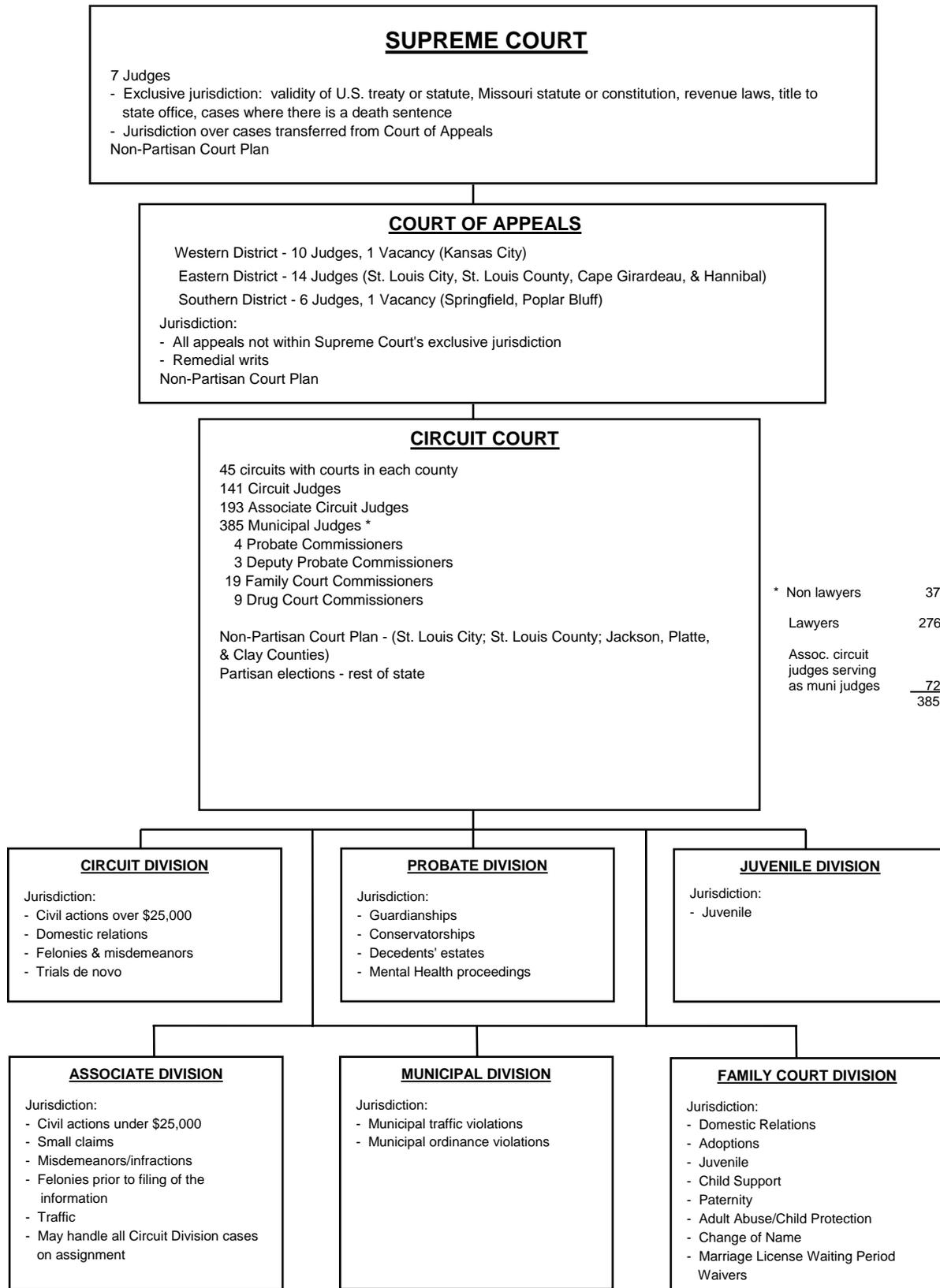
Being a judge is continuing learning experience. Each judge should strive with all of his or her strength to uphold the dignity of the court at every court session. Each court session should be a better display of patience, courtesy and common sense than the last. As each defendant appears before you, make it clear that, to you, this is an important case. Defendants want to know that you have paid attention to them, have thought about what to do, and have come up with a fair and equitable ruling.

A good judge is continually educated and continues to do a better and better job. Those who do not care to improve are doomed to be a poor judge.

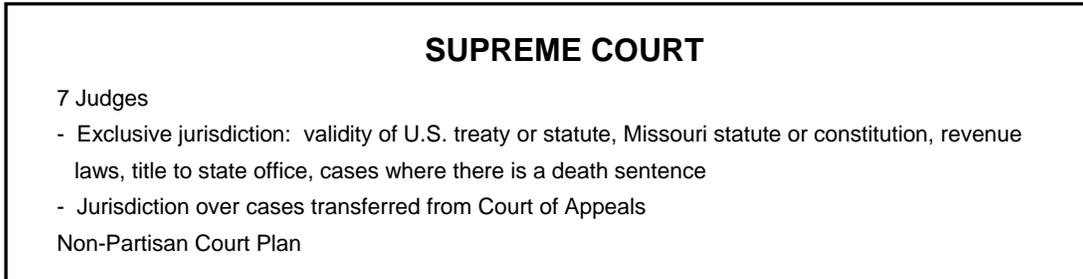
# Missouri's 45 Judicial Circuits and 3 Appellate Districts



# MISSOURI COURT SYSTEM



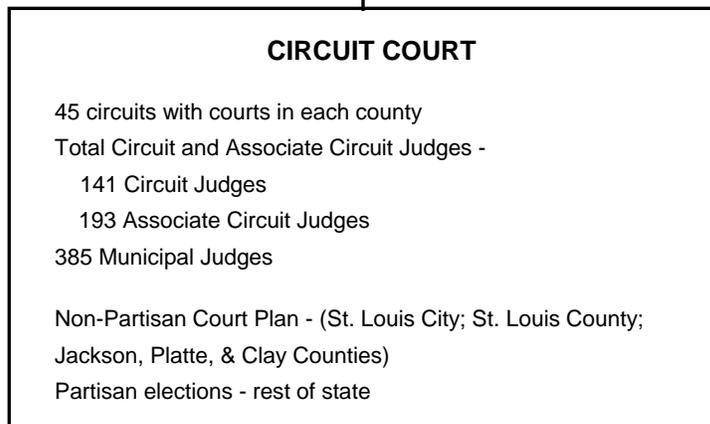
# MISSOURI COURT SYSTEM/BY GENDER



Females-3  
 Males-4  
 Females-43%

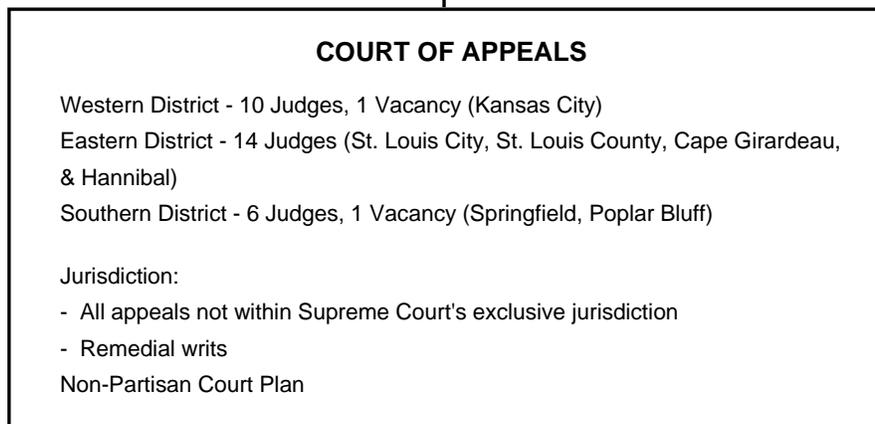
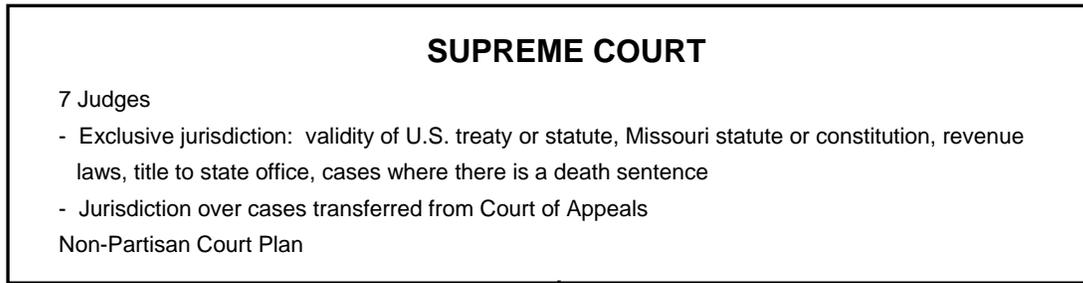


Females-8  
 Males-22  
 Females-36%



Cir. & Assoc. Cir. Judges  
 Females-66  
 Males-268  
 Females-25%

# MISSOURI COURT SYSTEM/BY RACE



African Americans- 5  
17%



Circuit & Assoc. Cir. Judges  
African-Americans - 22  
Hispanic - 3  
Asian - 1  
8%

Municipal Judges Unknown

# NON-PARTISAN JUDGES

	<u>St. Louis City</u>	<u>St. Louis</u>	<u>Jackson</u>	<u>Platte (6th)</u>	<u>Clay (7th)</u>
Circuit Judges	24	20	19	2	4
Assoc. Circuit Judges	7	13	9	3	3

Total Non-Partisan Circuit Judges - 69 out of 141 = 49%

Total Non-Partisan Associate Circuit Judges - 35 out of 193 = 18%

## CHAPTER II - ADMINISTRATION OF THE MUNICIPAL DIVISION

Section	Page Number
2.1 Introduction .....	3
<b>GENERAL ADMINISTRATION .....</b>	<b>3</b>
2.2 Presiding Judge.....	3
2.3 Municipal Judge .....	3
2.3.1 Marriages.....	3
2.4 Court Clerk/Court Administrator .....	4
2.5 Municipal Division Budget .....	4
2.5.1 Fidelity Bonds .....	5
2.6 Establishment Of A Violations Bureau .....	5
<b>RECORD-KEEPING PROCEDURES .....</b>	<b>5</b>
2.7 In General .....	5
2.8 Court Docket .....	5
2.9 Case Numbers.....	5
2.10 Case Index .....	7
2.11 Closed Records.....	8
2.12 Reporting Requirements.....	8
2.13 Confidential And Closed Records .....	13
2.14 Records Transfer/Destruction.....	13
2.15 Court Facilities .....	14

2.15.1	In General .....	14
2.15.	Court Location.....	14
2.15.3	Court Security.....	14
2.15.4	Courtroom .....	14
2.15.5	Clerk's Office.....	15
<b>ACCOUNTING GUIDELINES.....</b>		<b>15</b>
2.16	In General .....	15
2.17	Judicial Education Fund .....	16
2.18	Appointed Counsel Fund.....	16
2.19	Domestic Violence Shelter Fund.....	16
2.20	Inmate Security Surcharge .....	16
2.21	Law Enforcement Training Surcharge .....	16
2.22	Municipal Division Costs.....	16

## **CHAPTER II ADMINISTRATION OF THE MUNICIPAL DIVISION**

### **2.1 INTRODUCTION**

This chapter discusses the administrative responsibilities of judicial personnel in the municipal division courts, recommended procedures for case record keeping, and recommended minimum standards for municipal division facilities.

## **GENERAL ADMINISTRATION**

### **2.2 PRESIDING JUDGE**

Article V, Section 15(3) of the Missouri Constitution, adopted by the voters in 1976, creates the position of presiding judge for each judicial circuit. The presiding judge has general administrative authority over all divisions of the circuit court within the circuit, including the municipal divisions.

If the municipal judge has any questions concerning the administration of the court, the presiding judge may be contacted for assistance.

### **2.3 MUNICIPAL JUDGE**

The municipal judge is the chief judicial officer of the municipal division and, as such, assumes the primary responsibility for the administration of the court. General administrative duties of the municipal judge include the following:

- Preparing the municipal division budget
- Supervising the court staff
- Ensuring that complete and accurate case records and accounting records are being maintained

In most municipalities, at least one clerk (or court administrator) is appointed to perform the routine clerical functions required of the court, but it is the municipal judge's responsibility to determine record keeping policy and procedure and to see that such policies and procedures are carried out correctly and efficiently. If the presiding judge of the circuit has not issued a Municipal Court Operating Order, it is recommended that the municipal judge do so to give the clerk (court administrator) guidance as to his/her administrative responsibilities. (See the template for the Municipal Court Operating Order following this chapter.)

#### **2.3.1 MARRIAGES**

If the judge performs marriages, the municipal division administrator shall communicate with parties desiring to have a marriage solemnized by the judge. The court administrator shall require that the parties provide a marriage license and a Certificate of Marriage blank form to the court at least 24 hours before a scheduled wedding to ensure adequate review of such license.

The court administrator shall assist the judge in completing the license and the Certificate of Marriage. The court administrator shall retain a full record of the solemnization performed by

making a copy of the completed marriage license and a copy of the executed Certificate of Marriage, and keeping both documents in a permanent binder or folder. The court administrator shall cause the executed marriage license return to be sent to the appropriate licensing official as soon as possible, but not later than 10 days after the marriage is performed. [See section 451.110 - 451.130, RSMo for further details.]

## **2.4 COURT CLERK/COURT ADMINISTRATOR**

[Section 479.060\(1\), RSMo](#) provides that "where municipal violations are to be tried before a municipal judge or judges, the governing body of the municipality shall provide by ordinance for a clerk or clerks..." The position of chief clerk may also be titled court administrator. These two terms will be used interchangeably in this document. The primary duty of the clerk/court administrator is to carry out the day-to-day ministerial duties of the court. In this capacity, the clerk/court administrator files cases, calendars cases, maintains all case records, and accounts for all money due the court as well as all money paid to the court.

In small communities, many court clerks by necessity assume additional responsibilities for the city such as those of police dispatcher, police clerk, prosecutor's clerk, or city clerk. In these situations, the city mayor, chief of police, or another non-court city employee often exercises administrative authority over the clerk in all job capacities, including record-keeping responsibilities for the court. This practice is inappropriate due to the constitutional provision of separation of powers. The judge, not the mayor or the chief of police, is primarily responsible for the records of the court and as such, should direct the record-keeping operations of the court. The clerk/court administrator reports directly to the judge concerning the record-keeping of the court. The duties of the court clerk/court administrator are separate and independent from any other duties performed for the city. Records of the court, both public and closed, should not be made available to nonjudicial personnel (such as the prosecutor, the city attorney, police officers, the mayor, city council members, or the public) except under the supervision of the court clerk/court administrator or the judge as authorized by statute.

## **2.5 MUNICIPAL DIVISION BUDGET**

Each municipal division should have its own operating budget that is set apart from other city departments' budgets. The municipal judge is responsible for preparing the budget and supervising expenditures.

If the municipality and the municipal judge are unable to resolve a budget dispute, [Supreme Court Operating Rule 13](#) gives either party the authorization to file a request for a settlement conference with the presiding judge of the circuit. The municipal division has the burden of proof that the budget request is reasonable. The presiding judge will issue a written recommendation following the conference.

The municipality may seek review of any recommendation of the presiding judge regarding the municipal division's budget request by filing a petition for review with the Judicial Finance Commission acting as the Municipal Finance Commission. The municipal judge has the burden of proof that the budget request is reasonable. The commission will issue a written recommendation following review of the issues.

## **2.5.1 FIDELITY BONDS**

The court administrator shall request the city maintain fidelity bonds covering the clerk/court administrator and other personnel who handle the court's receipts. The court administrator should keep a copy of the "dec.sheets" of any such bonds obtained by the city to keep in the court files.

## **2.6 ESTABLISHMENT OF A VIOLATIONS BUREAU**

[Supreme Court Operating Rule 37.49](#) states that any judge having original jurisdiction of any animal control violation, housing violation, or traffic violation may establish by court order a violations bureau. The establishment of a violations bureau allows defendants to dispose of their violations without a court appearance; i.e., they may waive a trial, enter a plea of guilty and pay the fine and costs through the mail or at the clerk's office and never have to appear before a judge. The violation bureau shall be prominently displayed at the payment window so that defendants wishing to pay tickets out of court may view the schedule.

# **RECORD-KEEPING PROCEDURES**

## **2.7 IN GENERAL**

[Section 479.070, RSMo](#) provides that the municipal judge:

Shall keep a docket in which he shall enter every case commenced before him and the proceeding therein and he shall keep such other records as required. Such docket and records shall be records of the circuit court. The municipal judge shall deliver said docket and records and all books and papers pertaining to his office to his successor in office or to the presiding judge of the circuit.

The following sections cover recommended record keeping procedures for municipal divisions. These recommendations are generally consistent with record-keeping practices recommended for the circuit and associate circuit divisions.

## **2.8 COURT DOCKET**

The court docket lists all cases set for trial on a particular date. The docket is typically prepared a day or two before court and includes information such as the court case number and defendant's name. It may also include the date of the offense, the charge, the name of the attorney representing the defendant, if any, and name(s) of the arresting officer(s). In many courts, the judge and the clerk use a copy of the docket as a worksheet to record the activity that occurs in each case during the court hearing. This practice assists the court with case record keeping after the hearings on the docket are complete.

## **2.9 CASE NUMBERS**

[Supreme Court Operating Rule 4.04](#) sets forth standard case numbering for municipal division cases. The following is an excerpt from Court Operating Rule 4:

**2.9.1 Courts Using an Automated Case Management System Approved for Statewide Use by the State Judicial Records Committee**

The uniform citation number, as assigned by the Missouri State Highway Patrol, shall serve as the file number for less serious traffic cases and for watercraft and conservation cases initiated by uniform citation.

For cases filed by a document other than a uniform citation:

Numbers assigned shall be in the following format for all except cases initiated by uniform citation:

- (1) 2-digit year (numeric)
- (2) 2-digit location code (alpha, alphanumeric, or numeric) – circuit number can be used in a single county, consolidated court
- (3) Hyphen
- (4) 2-digit case category (alpha)
- (5) 5-digit sequential number, starting with “00001” for the first case filed within case category and location (numbering starts over at the beginning of each year)
- (6) Hyphen
- (7) 2-digit sub-case code

The following comprise the minimum list of 2-digit case categories used in the municipal divisions:

<u>Case Category</u>	<u>Code</u>
Municipal Ordinance	MU
County Ordinance	CY
Miscellaneous	MC
Treatment Court	TC

**2.9.2 Courts Not Using an Automated Case Management System Approved by the State Judicial Records Committee**

A uniform case numbering system, comprised of the following, shall be used:

- (1) 2-digit alphabetic prefix for the case category – MU;
- (2) 2-digit physical filing location number as assigned by the Office of State Courts Administrator;
- (3) 2-digit numeric code representing the year that the case was filed, e.g. “02” for cases filed in 2002;
- (4) Sequential case number:
  - a) Each case shall be numbered consecutively within each filing location and case category, except traffic cases shall be numbered separately from other criminal cases.
  - b) The first case filed in each category at the beginning of the calendar year shall be assigned the number “1”.

- (5) Alphabetic suffix for the specific case type within a case category:
- a) Within the municipal category, the following suffixes shall be used:

<u>Case Type</u>	<u>Suffix</u>
Traffic	MT
Other Ordinance	MO

- b) The suffix for cases that are referred to a treatment court, e.g., drug court or mental health court, shall be appended with a “TC”.

Courts may use the uniform citation number, as assigned by the Missouri State Highway Patrol, as the file number for cases initiated by uniform citation.

## **2.10 CASE INDEX**

A case index should be maintained for each case filed (whether a traffic or non-traffic violation). If index cards are used, they should be filed alphabetically. The pending case index cards should be kept in a convenient location, separate from the disposed case cards. Supreme Court Operating Rule 4.09 sets forth the requirements for the case index.

### **Court Operating Rule 4.09.1 Courts Using an Automated Case Management System Approved by the State Judicial Records Committee**

- 1) Courts shall have the capability to access case records through an automated search of the database by:
  - a) Name of party;
  - b) Case number; or
  - c) Date filed.
- 2) Confidential case records shall not be accessible through an automated search of the database by persons who are not authorized to view such records.
- 3) Courts shall not maintain manual indexes for cases disposed of after implementation of the automated system.

### **Court Operating Rule 4.09.2 Courts Not Using an Automated Case Management System Approved by the State Judicial Records Committee**

- 1) Separate index cards, bearing the full name of the party, shall be kept in alphabetical order for each defendant in municipal cases.

NOTE: A separate index card naming the State or municipality as plaintiff in a municipal case shall not be prepared.

- 2) The defendant index for criminal, traffic, and municipal cases shall contain:
  - a) Full name of the defendant;
  - b) Case number; and
  - c) Date filed.

3) Indexes for confidential cases shall be stored separately and shall be accessible only by authorized personnel.

## **2.11 CLOSED RECORDS**

Closed records as defined in [Chapter 610, RSMo](#) are those records that are to be inaccessible to the general public (for example, cases that have been nolle prossed or dismissed, or where the accused was found not guilty). In addition, if imposition of sentence is suspended in the case, the records are closed when the case is finally terminated, i.e. probation is successfully completed and defendant is discharged from supervision of the court. [See Section 12.8 for S.I.S. discussion.] Closed records are to be accessible only to the defendant and to specific agencies for specific purposes as allowed in [Section 610.120, RSMo](#). However, the court's judgment or order of final judgment may be accessed. Id. [Section 610.105](#).

The court should designate an area that is inaccessible to the public, preferably a locked cabinet, where all closed records can be kept together. A closed record includes the case file, case index card, financial records where a name is listed, and any other information pertaining to the confidential case.

## **2.12 REPORTING REQUIREMENTS**

### **2.12.1 Reporting To Office of State Courts Administrator – Municipal Division Summary Reporting Form**

Each court is required by [Court Operating Rule 4.28](#) to report to the Office of State Courts Administrator (OSCA) on a monthly basis. The report is due by the 15<sup>th</sup> day of each month with data from the previous month. Data from the report is published in the annual report of the Supreme Court of Missouri and is used to provide information on the workload of the municipal divisions and predict the impact of legislative or procedural changes effecting the municipal divisions. Courts shall report on forms supplied by or in a format approved by OSCA. Courts shall comply on a timely basis with requests from OSCA to correct reporting errors or to supply information omitted from a previous report.

Courts with JIS, the automated case management system approved for statewide use, should not submit this report as OSCA can query the system for this information

### **2.12.2 Reporting to the Municipality**

[Chapter 479, RSMo](#) requires the court to submit to the municipality a list of all cases heard during the preceding month. Within the first ten days of every month, the court must submit to the municipality a list of all cases heard or tried during the preceding month. However, [Court Operating Rule 4.29](#) allows the municipal division to submit the Municipal Division Summary Reporting Form to fulfill this requirement.

If the municipal division continues to provide a list and a case on that list is closed under [Chapter 610, RSMo](#), the court should not include the name of the defendant in the monthly report. Closed cases are those that are nolle prossed, those that are dismissed, and those in which the defendant is found not guilty or there is a suspended imposition of sentence in which the related probation

was completed successfully. For these cases, the court should provide the case numbers and outcome of the case, but black out or leave off the defendant's name.

### **2.12.3 Reporting To the Missouri State Highway Patrol ([Section 43.503, RSMo](#))**

For applicable charges (see Charge Code List, OCN required column), the municipal division clerk shall furnish the Missouri State Highway Patrol (MSHP) Central Repository a record of charges filed, added subsequently, amended and all final dispositions including acquittals or pleas, sentence, probation set asides, termination of a sentence, or resentencing. The reporting must be by official cycle number from the fingerprint card and must be on standard forms supplied by MSHP or electronically in a method approved by MSHP.

The reporting must be done as soon as practical, which is generally considered to be within 30 days of the applicable reporting event.

For courts with JIS, manual completion of the fingerprint card is not required as these records are transmitted electronically to the Highway Patrol.

### **2.12.4 Reporting to the Department of Revenue**

#### **A. Case Disposition**

The court shall report case disposition information on alcohol- and drug-related traffic offenses and commercial drivers' licenses and commercial drivers' license holders, including suspended imposition of sentences (SIS), not guilty and dismissals; and all convictions of moving driving violations, to the Missouri Department of Revenue (DOR). The report is to be received by DOR within seven days of disposition; this does not include the 10-day timeframe for filing a trial de novo. The report is made by submitting the completed "Abstract of Court Record" portion of the Uniform Citation, or by completing a "Record of Conviction" form or by electronic reporting approved by the Department of Revenue. See Appendix C, Traffic Display Reporting for additional information. [See [Section 302.225.1, RSMo](#) and Supreme Court Rule 37.68 for further details.]

For municipal divisions that are currently using JIS, the automated case management system approved for statewide use, this data is electronically transferred to DOR. The disposition is determined as the sentence signed date for guilty type dispositions and the date for disposition for non-guilty dispositions.

#### **B. Abuse and Lose Procedures**

The law allows a court to suspend or revoke the driving privileges of persons involved in certain drug or alcohol-related offenses, depending upon the age of the individual. When an order of suspension or revocation has been entered, the law states the court must require the defendant to surrender any license to operate a motor vehicle. The order of suspension or revocation and any surrendered license collected must be forwarded by the court to DOR.

There are also provisions in the law that require the court to order an offender who is under age 21 to complete a Substance Abuse Traffic Offender Program (SATOP).

A defendant whose driving privileges have been suspended or revoked may petition the circuit court (not the municipal division) or the DOR for limited driving privileges. For license reinstatement, the defendant must pay DOR a reinstatement fee and successfully complete a Substance Abuse Traffic Offender Program that meets or exceeds minimum standards established by the Department of Mental Health (DMH). The defendant is to pay for the cost of the program. [See Section 577.500-577.510, RSMo for further details.]

### **C. Failure to Appear or Pay Fine License Suspension**

The law requires courts to notify defendants within 10 days who fail to dispose of moving traffic violations, that the Director of Revenue will suspend their license in 30 days. The Failure to Appear in Court on Traffic Violation (FACT) Form can be used in this situation. [See [Section 302.341, RSMo](#) for further details.]

The sequence of events should occur in the following manner:

1. Defendant receives a citation for a moving traffic offense.
2. Defendant fails to dispose of the charges by either:
  - a. Pre-payment through the violations bureau (VB), or
  - b. Appearing on the return date or at any subsequent court date to which the case has been continued, or without good cause fails to pay any fine or court costs assessed against them.
3. Within 10 days of the failure to comply, the court sends a notice by ordinary mail to the defendant. The notice should inform the defendant the court will order the Director of Revenue to suspend the defendant's driving privileges if the charges are not fully disposed of in 30 days of the date of mailing the notice. The notice should be mailed to the defendant's last know address in the court records.

If DOR-4558 is returned to the court as undeliverable, proceed when appropriate with the suspension notice to DOR and check the returned to court undeliverable box.

4. If noncompliant after the 30 days has lapsed, the court shall notify the Director of Revenue to suspend the defendant's driving privileges.
5. The defendant may reinstate their driving privileges after disposition of charges and payment of court costs and fines, if applicable, by submitting a notice of compliance from the court, and a \$20.00 reinstatement fee to DOR.

The clerk is responsible for indicating in the appropriate area of the form if the violation involved a commercial motor vehicle (CMV) or a CMV carrying hazardous materials (HAZ/MAT). The Uniform Citation will indicate whether either box should be marked.

Notice of compliance may be given to the defendant, or can be mailed or faxed to DOR at:

Department of Revenue  
Driver and Vehicle Services Bureau

P.O. Box 3950  
Jefferson City, MO 65105-3950  
Fax: (573) 526-2511

**D. Withholding Renewal of License**

Under these provisions, if a driver fails to appear, the court must notify DOR within 10 days of the failure to appear. This report will cause DOR to withhold the renewal of the offender's license or the issuance of a duplicate license until the case is disposed.

DOR requests that clerks report the failure to appear using the "Lieu of Bail" form that is supplied by DOR. When the case is disposed, report the disposition as indicated in "Sub-Section A". [See [Section 544.045, RSMo](#) for further details.]

This reporting is not required if the court has submitted the "Failure to Appear in Court on Traffic Violation" (FACT) form.

**E. Non-Resident Violator Program**

In the event a defendant who is not a resident of Missouri fails to appear, the defendant shall be notified by regular mail and given a specific amount of time to dispose of the traffic ticket before notification is made to DOR. If the defendant fails to comply, the court administrator shall forward to DOR the Non-Resident Violator Compact Form provided by DOR. This provision shall be in effect for non-resident defendants from all other states in the United States, which are members of the Non-Resident Violator Compact. [See [Section 544.046, RSMo](#) for further details.]

**F. Driver Improvement Program**

An offender, upon order of the court, may complete an approved driver improvement program within 60 days of the date of conviction. Successful completion within 60 days will result in DOR staying the assessment of points against the offender's driving record for the offense if the court permits the stay of points. However, the offense remains on the defendant's driving record. The completion of a driver improvement program shall not be accepted in lieu of points more than one time in any 36-month period. [See [Section 302.302, RSMo](#) for further details.]

Individuals possessing a commercial driver's license (CDL) are disqualified from participating in a driver improvement program in lieu of points.

The clerk must send notice of any driver improvement program completion to DOR within 15 days of program completion to:

Director of Revenue  
Driver License Bureau  
P.O. Box 200  
Jefferson City, MO 65105-0200

The individual must complete the program within 60 days of conviction in order to be accepted in lieu of the assessment of points. If the program is not completed with 60 days, DOR will assess points.

The court may order a defendant to complete a program without staying the assessment of points. Only report program participation and completion if the court orders a stay of assessment of points and the program is completed within 60 days of conviction.

### **G. Ignition Interlock**

Courts are required to order the installation of an ignition interlock device for any person found guilty or pleading guilty to a second or subsequent intoxication-related offense. The court may order installation of the device on a first intoxication-related traffic offense. The installation shall be for a period of not less than one month from the date of reinstatement of the person's license.

When the court orders installation of an ignition interlock device, DOR is sent a copy of the order. The court order, including the beginning and ending dates of the order will be entered into the driving record of the defendant. This information will be used by law enforcement personnel when making a stop to determine if the person has been ordered to have an ignition interlock installed on all vehicles they operate.

Within 30 days of the court order to install an ignition interlock device, the defendant must provide proof of compliance of installation to the court or the probation officer. The defendant must also report to either the court or the probation officer at least once per year. [See Section 577.600 through 577.614 for further details.]

### **H. Court Automation and City Funds**

Report the amount of funds being disbursed each month for Crime Victims Compensation Fund – State Court Automation Fund (JIS courts only) and Clerk Fees if applicable, on the City Fees Form 4583. A separate check should be issued for each fee. If the number of cases paid in full is readily available, the court should note this on the form. This form should be mailed to the Department of Revenue by the 20<sup>th</sup> of each month for the collections of the previous month. The City Fees Form 4583 can be obtained from the Missouri Department of Revenue Web site: [www.dor.mo.gov/tax/citycounty/forms/4583.pdf](http://www.dor.mo.gov/tax/citycounty/forms/4583.pdf).

Forward the City Fees Form 4583 to:

Missouri Department of Revenue  
County Tax Section  
P.O. Box 453  
Jefferson City, MO 65105-0453

### **2.12.5 Reporting to the Department of Public Safety**

A \$1 Peace Officers Standards and Training (POST) Fund surcharge shall be charged on all municipal ordinance violations, including non-moving traffic violations (excluding dismissed cases, or cases where the state, county, or municipality are liable for the costs).

The total amount collected should be remitted monthly to the Department of Public Safety. [See [Section 488.5336, RSMo](#) for further details.]

### **2.13 CONFIDENTIAL AND CLOSED RECORDS**

A. The court administrator shall identify all court records that contain confidential information and maintain all confidential records in accordance with those procedures set for the in Section 5.1 of the Municipal Clerk Handbook. The court administrator shall permit closed records to be inspected by the defendants, courts, and those agencies as are set forth in 610.120, RSMo. The court administrator shall identify all court records (including docket entries for cases that have been nolle prossed, dismissed, SATOP, the defendant found not guilty, or there is a suspended imposition of sentence in which the related probation was completed successfully) that contain confidential information. The city should provide adequate and secure file cabinets for the retention of confidential records and closed files. [See [Sections 610.120, RSMo](#) for further details.]

B. If the court orders the defendant to participate in a SATOP program, the court administrator shall file all documents received from the program provider in the case file, and all documents relating to the program assessment, assignments and completion shall remain confidential, in accordance with 42 CFR Part 2, (42 U.S.C. 290 dd-3).

### **2.14 RECORDS TRANSFER/DESTRUCTION**

Supreme Court of Missouri [Court Operating Rule 8](#) provides for the transfer and destruction of court records. The Rule shall apply to all records not transferred, destroyed, or offered for transfer prior to January 1, 2010. The Rule describes specific procedures that must be followed if a municipal division wishes to transfer or destroy court records. The court does not have the option to transfer or destroy records unless the provisions of COR 8 have been met.

#### **Court Operating Rule 8.03 (E) Procedure for Destruction of Open and/or Confidential Records.**

“(1) After following procedures from COR 8.03(C) "Records Eligible for Offer and/or Transfer to Archives" and receiving no acceptable request for transfer the records can be destroyed. [Note this is not applicable to municipal division records.]

(2) Upon approval of the respective court en banc or the committee, each court, or the chair of the fine collection center advisory committee may issue orders of destruction of paper, microfilm or electronic records of the court, district, circuit or center, respectively that have met the retention schedules pursuant to the provisions of COR 8.

(3) Paper records may be destroyed prior to meeting the retention schedule if records have been reduced to archival-quality microfilm.

(4) Electronic records may be destroyed after meeting the retention schedule for electronic records retention.

(5) Orders of destruction shall include the period of time during which such records were filed or prepared, whether the records include civil, criminal, domestic relations, juvenile, mental health, municipal, probate, traffic, or other types of action, the media being destroyed and the method of destruction. All orders shall be provided to and maintained by the courts or the director of the fine collection center.”

If the COR 8 conditions have been met, the municipal division judge must request that the presiding judge of the circuit issue an order of destruction or transfer of records. [See [Court Operating Rule 8](#), for a more thorough explanation of these requirements as well as sample forms that can be used for this process.]

## **2.15 COURT FACILITIES**

### **2.15.1 IN GENERAL**

The following section provides general guidelines for facilities of municipal divisions. Some of the recommendations can be implemented by rearranging existing facilities, while others may entail remodeling or the purchase of furniture or equipment. Not all courtrooms can be arranged as recommended, but each judge should strive to establish a court that operates professionally, efficiently, and safely with the resources and facilities available.

### **2.15. COURT LOCATION**

The municipal division should be located in a quiet and easily accessible area. The court should not be located in a private residence, on the property of a private citizen, in a building used by the judge for private business purposes, or at a police station, sheriff's office or other law enforcement agency office.

### **2.15.3 COURT SECURITY**

Policies and procedures should be established to ensure, as much as possible, that persons appearing before the court or employed by the court are safe from harm, and that all the records and property of the court are protected against theft or accidental or intentional damage.

Preventive measures should be taken where possible. For example, the presence of a bailiff or a police officer at all court proceedings will reduce the possibility of violence or general disruption; a barrier, such as a railing, in the courtroom may help prevent unwelcome intrusions in the trial or bench area of the courtroom. Defendants should not be allowed to handle their case files without court supervision; collection of money should not occur in an area where theft and escape could occur easily.

### **2.15.4 COURTROOM**

The courtroom should be separate from the clerk's office, the judge's chambers, the conference room, the restrooms, and the storage areas. The courtroom should be large enough to accommodate all interested parties, without overcrowding, including witnesses, attorneys, court personnel, and the general public. Special attention should be given to cleanliness, acoustics, lighting, heating and ventilation. No commercial advertising should be displayed anywhere in a courtroom.

The courtroom should be clearly divided into a trial area and a spectator area. The trial area should be separated from the spectator area by a railing or space. Where possible, entrances should be at the rear of the spectator area for the public and at the front of the trial area for the judge. Each entrance should have a door that can be closed to minimize outside noise while court is in operation.

The trial area should include an elevated bench area, a clerk's desk and chair, a counsel table (preferably two) with chairs, and a witness chair. The bench area should be elevated so the judge's level is two or three steps higher than the rest of the room. The bench area should include a chair for the judge and a large desk with at least one drawer for storage. An American and a state flag should stand behind the bench, one on each side of the judge. A witness chair should be placed to one side of the judge's desk at the front of the elevated area.

The remainder of the trial area should include (1) a desk and chair for the clerk; (2) two counsel tables, each with two or more chairs located at least six feet away from the bench; and (3) a blackboard and magnetized traffic board with cars and accessories for clarifying testimony.

The spectator area should have enough fixed chairs or benches to accommodate the court's usual number of observers. Benches or seats should be far enough apart to provide leg and elbow room and to avoid causing discomfort.

### **2.15.5 CLERK'S OFFICE**

The clerk's office should be located far enough away from the courtroom to minimize any office noise that might occur during court proceedings.

The clerk's work area in the office should be separated from the public entrance area by a counter or a large work table. This arrangement allows for convenience in conducting business, and also helps to prevent unauthorized people from routinely entering work or records storage areas while in the office.

## **ACCOUNTING GUIDELINES**

### **2.16 IN GENERAL**

The municipal division must have an organized and efficient accounting system that ensures accurate reporting of all transactions and provides sufficient documentation for audit purposes. It is the judge's responsibility to ensure that all necessary accounting records are prepared and retained.

In some municipalities, the court has turned over all accounting-related duties to a city employee other than a court employee. Relinquishing these duties to non-court personnel does not relieve the court of its responsibility to ensure that all accounting records are prepared and retained. For this reason, courts are strongly encouraged to maintain their own financial records.

If the city presently handles these duties and, upon the court's request, refuses to authorize the court to establish and maintain its own financial records and bank accounts, the court should document this refusal. The documentation may prove useful in the event an audit determines that the court monies were improperly handled or that the financial records are incomplete.

The Office of State Courts Administrator has established recommended accounting procedures for municipal divisions. Refer to these guidelines for specific accounting recommendations. See Section 4.5 *Recommended Accounting Procedures for Municipal Divisions* (Municipal Clerk Handbook) following this chapter.

## **2.17 JUDICIAL EDUCATION FUND**

Each municipal division may establish, by judicial order, a Judicial Education Fund to provide for the continuing education and certification of municipal judges and the judicial education and training of the court administrator and clerks of the municipal division. In August 2009, legislation was enacted to allow the fund to also be used for appointed counsel, see below. If the fund has been established, the municipal division withholds \$1 from “all fees collected” on each case and deposits it in the Judicial Education Fund administered by the municipal division. Any fund balance that exceeds \$1,500 for each court employee shall be turned over quarterly to the municipal treasury. [See [Section 479.260, RSMo](#) for further details.]

## **2.18 APPOINTED COUNSEL FUND**

Each municipal division may establish an appointed counsel fund. This fund is covered by the same \$1 referenced in the Judicial Education Fund. The fees collected are to be allotted between the two funds as determined by the court. The appointed counsel fund shall be used only to pay for legal representation where Supreme Court rules or laws prescribe such appointment. Any fund balance that exceeds \$5,000 shall be paid over to the municipal treasury. [See [Section 479.260, RSMo](#).]

## **2.19 DOMESTIC VIOLENCE SHELTER FUND**

If the municipality enacts an ordinance, a maximum of \$2 may be assessed on each municipal ordinance violation case to be used for local area domestic violence shelters. No surcharge shall be collected in any proceeding when the proceeding or defendant has been dismissed by the court or when costs are to be paid by the state, county or municipality. The amounts collected are disbursed to the city treasury. [See [Section 488.607, RSMo](#) for further details.]

## **2.20 INMATE SECURITY SURCHARGE**

If the municipality enacts an ordinance, an amount of \$2 shall be assessed on each municipal ordinance violation case to develop biometric verification systems to ensure that inmates can be properly identified and tracked within the local jail system. No surcharge shall be collected in any proceeding or defendant has been dismissed by the court or when costs are to be paid by the state, county or municipality. [See [Section 488.5026.1, RSMo](#) for further details.]

## **2.21 LAW ENFORCEMENT TRAINING SURCHARGE**

If the municipality enacts an ordinance, an amount of \$2 shall be assessed on each municipal ordinance violation case to pay for training of the law enforcement personnel employed or appointed by the municipality. Nor surcharge shall be collected in any proceeding when the proceeding or defendant has been dismissed by the court or when costs are to be paid by the state, county or municipality. The amounts collected shall be disbursed monthly to the city treasurer. [See [Section 488.5336.1, RSMo](#) for further details.]

## **2.22 MUNICIPAL DIVISION COSTS**

The following costs may be charged in municipal division cases. The first set of costs applies to costs for municipal ordinance violations that are filed in a separate municipal division. The

second set of costs applies to costs for municipal ordinance violations that are filed in an associate circuit division.

<b><u>Court cost: Cases filed in a Municipal division</u></b>	<b><u>RSMo.</u></b>	<b><u>Amount</u></b>
Clerk Fee.....	479.260 & 488.012.3.6.....	\$12.00
Court Automation Fund Surcharge (JIS Courts only) (Requires an agreement with the State Courts Administrator & a city Ordinance)	COR 21.01(a)(4) & 476.056.....	7.00
Peace Officers Standards and Training Fund Surcharge	..488.5336.1.....	1.00
Crime Victim’s Compensation Surcharge .....	595.045.6.....	7.50
Total Non JIS Courts / JIS Courts .....		20.50 / 27.50

**Possible Additions**

Domestic Violence Shelter Fund Surcharge..... (Requires a city ordinance)	488.607.....	2.00
Inmate Security Fund Surcharge..... (Requires a city ordinance)	488.506.....	2.00
Law Enforcement Training Fund Surcharge..... (Requires a city ordinance)	590.140.....	up to 2.00
Law Enforcement Arrest/Recoupment Arrest Costs..... (Alcohol and drug related traffic offenses)	488.5334.....	Variable
Judicial Education Fund/Appointed Counsel Fund .....	479.260.....	1.00*
(Requires a judicial order)		
* The \$1.00 amount is not an additional amount collected but is retained by the court from the \$12.00 clerk fee.		

<b><u>Court cost: Cases filed in a Associate Circuit Division</u></b>	<b><u>RSMo.</u></b>	<b><u>Amount</u></b>
Clerk Fee.....	479.260 & 488.012.3.6.....	\$15.00
Court Automation Fund Surcharge.....	COR 21.01(a)(4) & 476.056 .....	7.00
Peace Officers Standards and Training Fund Surcharge .....	588.5336.1.....	1.00
Crime Victim’s Compensation Surcharge .....	595.045.6.....	7.50
Total .....		30.50

**Possible Additions**

Domestic Violence Shelter Fund Surcharge.....	488.607.....	1.00
(Requires a city ordinance)		
Inmate Security Fund Surcharge.....	488.506.....	2.00
(Requires a city ordinance)		
Law Enforcement Training Fund Surcharge.....	488.5336.1 .....	2.00
(Requires a city ordinance)		
Law Enforcement Arrest/Recoupment Arrest Costs.....	488.5334.....	Variable

*NOTE: This Order is intended as a template for courts to use in implementing a local municipal court rule. It contains informational notes within the body of the order which should be deleted before signing the final order. Other sections may contain several options where those that do not apply should be deleted, and/or blanks which must be filled in before signing the final order.*

**IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI  
\_\_\_\_\_ JUDICIAL CIRCUIT**

**MUNICIPAL DIVISION – THE CITY OF \_\_\_\_\_**

**MUNICIPAL COURT OPERATING ORDER #1  
CITY OF \_\_\_\_\_**

**Effective Date - \_\_\_\_\_**

The Court, on its own motion, makes the following General Orders with respect to the administration of the Court:

I. Court Administrator. The Court Administrator, and all deputy court administrators, shall be responsible for the orders contained in Paragraphs II through X. The Court Administrator shall when applicable request the City Finance Department (“City”) to assist the Court Administrator to effectuate applicable provisions of Sections II, III, IV, V, VII, VIII and IX herein.

II. General Administrative Procedures.

A. Case Numbering. All cases filed by the prosecutor shall be assigned a unique number and indexed. All forms used by the Court shall be numbered sequentially and accounted for, including receipt slips, bond forms, tickets, summons, complaint forms, and payment agreements. (*Source: Supreme Court Operating Rule (“COR”) 4.04.; payment agreement source State Auditor recommendation.*)

B. Violation Bureau Schedule. Court Administrator \_\_\_\_\_ is appointed Violation Bureau Clerk. The Violation Bureau Schedule (which has been established by a separate court order) shall be prominently displayed at the payment window so that defendants wishing to pay tickets out of court may view the Schedule. (*Source: Supreme Court Rule (SCR) 37.49.*)

C. Budget. The Court Administrator shall communicate regularly with the Judge and the City regarding any budget issues involving the Court. Any budget disputes shall be resolved through a settlement conference with the Presiding Judge, if necessary. (*Sources: Mo. Constitution, Article II; COR 13.*)

### III. Reporting Requirements.

A. Reporting to the City. Within the first ten (10) days of each month, the Court Administrator shall submit to the City Clerk the dockets of all cases heard during the preceding month by the Court and those cases in which there was an application for a trial de novo. The City Clerk shall make a copy of the previous month's docket showing all case dispositions. If a record is closed under Chapter 610, RSMo., the Court Administrator shall not include the name of the defendant in the monthly report. For all cases that are nolle prossed, dismissed, or those in which the defendant is found not guilty, the Court Administrator shall supply all the required information, but black out the defendant's name. The Judge should receive a copy of the redacted docket. Supreme Court Operating Rule 4.29 allows the Court Administrator to substitute submission of the dockets to the City Clerk with a report for the previous month's activities showing the detailed income of the Court and the number of cases handled by the Court. (*Source: 479.080.3 RSMo.*)

#### B. Reporting to the Department of Revenue.

1. Case Disposition. The Court Administrator shall report case disposition information on all moving traffic violations, alcohol and drug-related traffic offenses, including suspended imposition of sentence, all convictions while driving a commercial motor vehicle, including commercial drivers license holders driving a personal vehicle, to the Missouri Department of Revenue ("DOR"). The Court Administrator shall complete the report by submitting a completed "Abstract of Court Record," portion of the Uniform Citation, or by submitting a completed "Record of Conviction" form referenced in Supreme Court Rule form 37.B – *Record of Conviction*, or by reporting electronically in a form approved by DOR. The Court Administrator shall abide by the "Traffic Case Processing Procedures" found in Chapter 3 of the then current Missouri Municipal Clerk Manual ("Clerk Manual") published by the Office of State Court Administrator ("OSCA").

The above disposition reporting shall be sent by the Court Administrator to be received by the DOR within seven days of disposition (*Source: 302.225.1 RSMo.*)

3. Crime Victims Compensation Fund. The Court Administrator shall cause a \$7.50 Crime Victims Compensation Fund ("CVC") surcharge to be assessed on all nonmoving and moving traffic violations and all other nontraffic municipal ordinance violations, unless the case has been dismissed. The Court Administrator shall forthwith cause the CVC charge to be reported to DOR and disbursed as follows:

95% (\$7.13 of each fee) shall be sent to the DOR no less than monthly and  
5% (\$.37 of each fee) to the general fund of City in accordance with IV.C,  
*infra.* (*Source: 488.5339 & 595.045 RSMo.*)

4. Abuse and Lose Procedures. In the event that the Judge shall enter an order suspending or revoking the defendant's driving privileges under the Abuse and Lose law, the Court Administrator shall send any Missouri license surrendered to the Court, along with the certified copy of the Order of Suspension on the official DOR form, to the DOR.

The Court Administrator shall follow those procedures regarding Abuse and Lose reporting as set forth in Chapter 3 of the then current Clerk Manual. (*Source: 577.500-577.505 RSMo.*)

5. Failure to Appear or Pay -- License Suspension. The Court Administrator shall notify defendants within ten (10) days of that defendant's failure to dispose of a moving traffic violation, that the Court will order the DOR to suspend that defendant's license in thirty (30) days, if the charges are not disposed of or fully paid. Such notification may not be sent until a summons has been sent to the defendant and there shall thereafter be no appearance. The Court Administrator shall send the F.A.C.T. form to the DOR when a defendant has failed to appear on a court date after a summons has been issued to the defendant, when the defendant fails to appear on a subsequent court date to which the case has been continued, or, when the defendant, without good cause, fails to pay any fine or costs assessed against him or her.

Upon payment of all fines and costs, or, if earlier ordered by the Judge, a compliance notice on forms approved by the DOR shall be issued to the defendant, and the Court Administrator shall forthwith advise the DOR of such compliance. (*Source: 302.341 RSMo.*)

6. Withholding Renewal of License. In the event a driver shall fail to appear when ordered, and without being first granted a continuance, the Court Administrator shall notify the DOR within ten (10) days of the failure to appear, by using the "Lieu of Bail" form then supplied by the DOR except such notification shall not be required if the Court Administrator has utilized the notification procedures set forth in Paragraph 5, *supra*. When the case is disposed of, the Court Administrator shall report the disposition as on any other traffic case. (*Source: 544.045.4 RSMo.*)

7. Non-Resident Violator Program. In the event a defendant who is not a resident of Missouri fails to appear, the defendant shall be notified by regular mail and given a specific amount of time to dispose of the traffic ticket before notification is made to DOR. If defendant fails to comply, the Court Administrator shall forward the Non-Resident Violator Compact Form provided by DOR, to DOR. This provision shall be in effect for non-resident defendants from all other states in the United States which are members of the Non-Resident Violator Compact. (*Source: 544.046 RSMo.*)

8. Driver Improvement Programs. In the event that the Judge has ordered a defendant to complete the Driver Improvement Program, the Court Administrator shall send notice of its completion to the DOR within fifteen (15) days of Program completion. The Court Administrator shall not send any notice of the Driver Improvement Program if the moving traffic violation has been amended to a nonmoving violation by the Prosecutor. (*Source: 302.302 RSMo.*)

9. Ignition Interlock Device. When the Judge shall order the use of an ignition interlock device, the Court Administrator shall forthwith send the Order to install ignition interlock device to DOR properly executed, containing the requirements for the

period of the use of the ignition interlock device. (Source: 577.600 through 577.614 RSMo.)

C. Reporting to OSCA.

*NOTE: Retain only the appropriate section [minus text in brackets] that applies to the type of case management system operating in the Court. The other sections, as well as this note, should be deleted.*

*[Courts Using Automated Case Management System Approved for Statewide Use]*

Due to the Court using an automated case management system approved for statewide use by the State Judicial Records Committee the Court Administrator shall insure the accuracy of data entered into the system, so that OSCA can automatically extract required reporting information as provided by Supreme Court Operating Rule 4.28.

*[Courts Using an Automated Case Management System Approved for Local Use]*

The Court Administrator shall insure that required reporting information is transmitted either electronically or manually in a format according to provisions of Supreme Court Operating Rule 4.28. The Court Administrator shall insure the accuracy of data entered in the case management system. This information shall be submitted to OSCA no later than the 15th day of each month, with data completed from the previous month's court activity.

*[Courts Not Using an Automated Case Management System]* The Court Administrator shall complete and deliver the "Missouri Municipal Division Summary Reporting" form to OSCA no later than the 15th day of each month, with data completed from the previous month's court activity. This data shall be delivered by e-mail or fax to OSCA on the then current form provided by OSCA. The Court Administrator shall complete the form in accordance with the instructions submitted from time-to-time by OSCA, and as contained in the then current Clerk Manual. A copy of the OSCA form shall be submitted to the Judge each month, and if requested, to the City. (Source: COR 4.28)

D. Reporting to the Highway Patrol.

The Court Administrator shall report to the Missouri Highway Patrol any violations of municipal ordinances involving alcohol or drug related driving offenses or any violations deemed to be "comparable ordinance violations" as defined by section 435.500 RSMo. and as listed in the Missouri State Charge Code Manual. The Court Administrator shall report violations by completing and sending to The Highway Patrol the State Criminal Fingerprint Card, which contains an Offense Cycle Number ("OCN"), within 30 days of case disposition. (Source: 43.503 RSMo.)

For any reportable violation, the Court Administrator shall report to the Missouri Highway Patrol a record of all charges filed, including all those added subsequent to the filing of the case, amended charges, and all final dispositions of cases where the central repository has a record of an arrest. (Source: 43.503 RSMo.)

At any court appearance for any required offense, the Court Administrator shall inform the Court that the defendant needs to be fingerprinted and photographed, if not already obtained. The order for fingerprints shall contain the offense, charge code, date of offense and any other information necessary to complete the fingerprint card. (*Source: 43.503RSMo.*)

#### IV. Fines, Court Costs, Surcharges and Fidelity Bonds.

A. Collection of Fines, Court Costs, and Surcharges. The Court Administrator shall use his/her best efforts so that on each case, fines assessed and general court costs in the amount as set forth by ordinance, CVC surcharges, Peace Officer Standards & Training Commission (POST) surcharges, Law Enforcement Training Fund (“LETTF”) surcharge, recoupment, domestic violence, inmate security and other surcharges as are set forth by City ordinance, are collected and remitted timely to City and to DOR, respectively, in accordance with this Order. The Court Administrator is not required to refund any overpayment of court costs of \$5.00 or less. In the event that there is an overpayment of \$5.00 or less, the Court Administrator shall cause such overpaid funds to be paid to the county on a regular basis. Underpayments of court costs less than \$5.00 are not required to be collected. (*Sources: Court Cost: City Ordinance; CVC 488.5339 RSMo. and 595.045 RSMo.; POST: 488.5336 RSMo.; and LETF: 488.5336RSMo.; Overpayments/Underpayments 488.014 RSMo.*)

B. Receipts for Payment of Fines, Court Costs and Surcharges. The Court Administrator shall issue a pre-numbered receipt for all collections and provide such a receipt to the payer if payment is made in person, and retain a duplicate copy of the receipt in the receipt book. If payment is made by mail, the Court Administrator shall file the original copy of the receipt with the case file information, or maintain the original receipt in a pre-numbered receipt book cross-referenced with the docket entry, unless the payer requests the receipt be returned by mail, and provides a self-addressed, stamped envelope.

C. Deposit of Fines, Costs, Surcharges and Bonds to be Placed into Applicable Accounts. The Court Administrator shall deposit all fines, costs, surcharges and bonds collected in the Court’s or City’s bank accounts on a daily basis, or when the amount on hand reaches \$100.00, if not on a daily basis. The Court Administrator shall, to the extent possible, work jointly with the City to effectuate all deposits by delivery of same for deposit by police officers or other City personnel. The Court Administrator shall cause specific surcharges, including, but not limited to, CVC, POST, LETF, police recoupment, and, if applicable, domestic violence and inmate security surcharges, to be placed as separate line items or in separate accounts and to be remitted to the proper entity or account no less than monthly.

D. Fidelity Bonds. In order to follow recommendations of the State Auditor, the Court Administrator shall request the City to maintain fidelity bonds covering the Court Administrator and other personnel who handle collection or deposit of fines, court costs and surcharges related to the Court. The Court Administrator shall obtain a copy of the “dec. sheets” of any such bonds obtained by the City to keep in the Court permanent files.

V. Surety Bonds and Warrants.

A. Bond Qualifications. The Court Administrator shall keep a list of those sureties who have qualified to post surety bonds. No person shall be accepted as a surety on any bail bond unless he or she is licensed by the Department of Insurance. (*Source: SCR 37.29; 374.710 RSMo.*)

No lawyer, elected or appointed official or municipal or state employee shall be accepted as a surety on any bond unless related to the defendant.

B. Surety Bond Receipts. The Court Administrator shall use his or her best efforts to act in conjunction with the City Police Department, to establish guidelines on cash bonds. The Court Administrator shall post the bond amount to the individual case and note the date and type of bond received.

The Court Administrator shall, whenever possible, request that personnel of the City or other court administrators together with the Court Administrator count all bond money. The Court Administrator shall deposit said bond money according to the City's guidelines. The Court Administrator shall maintain said bond account and reconcile said account on a monthly basis. An open bond case report shall be submitted monthly to the City by the Court Administrator. (*Source: Chapter 2, Clerk Manual*)

C. Unclaimed Bond Funds and other Funds. The Court Administrator shall follow those procedures set forth in the then current Clerk Manual to pay to the State Treasurer's Office Unclaimed Property Division, all funds unclaimed for three years and cash bonds unclaimed for one year, from the date the bond was due back to a person. The Court Administrator shall send a letter of notification and otherwise reasonably attempt to contact the person and return the funds. Said report shall be sent to the State Treasurer's Office by November 1<sup>st</sup> of each year, and the Court Administrator shall remit said unclaimed funds with the report. The Court Administrator shall request the City assist in processing, reporting and remitting to the State Treasurer. (*Source: 447.532 RSMo. and 447.595 RSMo.*)

VI. Warrants. The Court Administrator shall follow those procedures and guidelines concerning warrants as are set forth in Chapter 2 of the then current Clerk's Manual, unless otherwise directed by the Judge.

VII. Accounting Procedures. The Court Administrator shall to the fullest extent possible abide those accounting procedures as are mandated by COR 4.51 and which procedures are set forth in Chapter 4 of the then current edition of the Clerk Manual entitled "Recommended Accounting Procedures for Municipal Divisions." In particular, the Court Administrator shall:

A. Reconcile bank statements monthly and same shall be reviewed by a person independent of the Court.

B. Maintain all funds that are being held in trust by the Court and reconcile monthly. All unusual items or exceptions shall be investigated promptly.

C. Ensure all payments on accounts are receipted, recorded to the accounts, and deposited intact.

D. Work jointly with the Police Department to account for all traffic tickets in numerical sequence and maintain a record of the disposition of all tickets assigned and issued by the Police Department.

E. Maintain all the Court's records except for those permitted to be destroyed or transferred in accordance with Supreme Court Operating Rule 8.

F. Not waive any fine, court costs or surcharge, or agree to collect a different amount of fine, court costs or surcharge than that amount listed in the Violation Bureau Schedule or what has been assessed by a Court Order, except as discussed in IV.A *supra*.

G. Develop a system for independent monitoring, receiving and depositing monies as an independent task segregated from the recording and disbursement of collections. In the event that such duties cannot be segregated, at a minimum, the Court Administrator shall request the City develop a documented independent comparison of receipt slips issued in the amount and composition of deposits, and independent review of the bank statements and month-end reconciliations.

#### VIII. Confidential and Closed Records.

A. Identify Records. The Court Administrator shall identify all Court records that contain confidential information and maintain all confidential records in accordance with those procedures set forth in Chapter 5 of the then current Clerk Manual. The Court Administrator shall permit closed records to be inspected by the defendants, courts, and those agencies as are set forth in 610.120 RSMo. The Court Administrator shall identify all Court records (including docket entries for cases that have been nolle prossed, dismissed, Substance Abuse Traffic Offender Program (SATOP), or the defendant found not guilty) that contain confidential information. The Court Administrator on behalf of the Judge shall request the City provide adequate and secure file cabinets for the retention of confidential records and closed files. (*Source: 610.120 RSMo.*)

B. Confidentiality of SATOP Programs. If the Court orders the defendant to participate in a SATOP program, the Court Administrator shall file all documents received from the program provider in the case file, and all documents relating to the program assessment, assignments and completion shall remain confidential, in accordance with 42 CFR Part 2, (42 U.S.C. 290 dd-3).

IX. Record Retention and Destruction. The Court Administrator shall retain all Court records unless there shall be an order signed by the Presiding Judge of the Circuit Court to destroy same. The Court Administrator shall follow Missouri Supreme Court Operating Rule 8 and the City shall cooperate with the Court Administrator to follow a regular schedule to destroy and/or transfer cases eligible for transfer or destruction in accordance with Supreme Court Operating Rule 8. The Court Administrator shall abide by those recommended procedures set forth in Chapter 5 of the then current Clerk Manual. All requests to destroy or transfer records shall be signed by the Presiding Judge. (*Source: COR 8.03.*)

X. Marriage Records. If the Judge performs marriages, the Court Administrator shall communicate with parties desiring to have a marriage solemnized by the Judge. The Administrator shall require that the parties provide a marriage license and a Certificate of Marriage blank form to the Court at least \_\_\_ hours [*NOTE: Number of hours should be entered by local court based on local need*] before a scheduled wedding to ensure adequate review of such license.

The Court Administrator shall assist the Judge in completing the license and the Certificate of Marriage. The Court Administrator shall retain a full record of the solemnization performed by making a copy of the completed marriage license and a copy of the executed Certificate of Marriage, and keeping both documents in a permanent binder or folder. The Court Administrator shall cause the executed marriage license return to be sent to the appropriate licensing official as soon as possible, but not later than 10 days after the marriage is performed. (*Source: 451.110 – 451.130 RSMo.*)

So Ordered:

DATE \_\_\_\_\_

\_\_\_\_\_  
Judge, City of \_\_\_\_\_

# **Municipal Clerk Manual**

## **Chapter Four - Financial Procedures**

### **4.5 - RECOMMENDED ACCOUNTING PROCEDURES FOR MUNICIPAL DIVISIONS**

#### ***References***

*Statutes: 479.080 and Chapter 610*

*Supreme Court Rules: 37*

*Court Operating Rules: 4, 8, and 21*

*Publication Date: July 2007*

*Revised: April 2010*

#### **INTRODUCTION**

The following recommendations describe minimum accounting procedures, records, and reports for the municipal divisions of the municipal court, and apply to manual and automated accounting systems. The recommendations are intended to assist the municipal divisions in bringing the financial operation of the court into compliance with statute and Generally Accepted Accounting Principles (GAAP). These latter principles are those upon which all financial operations and financial audits are based, both in the public and private sectors.

The recommendations are typed in bold lettering. The indented wording following the recommendation is the commentary. The commentary, where provided, is intended to enlarge upon the recommendation and may provide suggestions for implementation of the recommendation.

If you find that your current procedures differ from the procedures described in this package, before making any changes, we suggest you discuss the changes with your judge.

#### **ACCOUNTING SYSTEM**

**Establish an organized and efficient accounting system that insures accurate reporting of all transactions and provides sufficient documentation for audit purposes. A properly designed accounting system includes:**

1. An efficient accumulation, recording, and reporting of all transactions;
2. Assignment of authority and responsibility;
3. Segregation of duties; and
4. Methods of detecting errors and fraud.

#### **CLERK'S DUTIES/PROCEDURES**

##### **COURTS WITHOUT JIS**

The recommended systems are a pegboard (one-write) system or a computer system. Both, if properly designed, provide for the most productive use of clerk time.

## **COURTS WITH JIS**

JIS has been designed to account for all the transactions typically handled by a municipal court. Procedures and reports developed for JIS have been designed to assist the court in properly accounting for the courts financials. In addition various reports have been designed to assist the court in detecting errors and possible misuse of funds.

**Include the following components in the court accounting system, regardless of whether it is a manual or automated system:**

## **COURTS WITHOUT JIS**

1. Pre-numbered receipts;
2. Pre-numbered checks;
3. A cash control record;
4. Case fee records;
5. Open items records;
6. Unpaid cost and fines records;
7. Investment records;
8. Monthly reconciliations; and
9. Monthly reports.

## **COURTS WITH JIS**

JIS provides a system that will automatically assign receipt and check numbers, and provided a general ledger to account for all financial transactions. A Case Party Fee report accounts for all financial transactions on a case, ([See Procedures: Accounting Case Party Fee Report in Gold](#)), and open item reports are maintained within the system and can be generated at any time allowing open items to be reconciled to a general ledger on a daily basis ([See Procedures: Accounting Open Items Report in Gold](#)) The system also provides summary and detail reports of outstanding costs. (CBRFAGE) as well as receipt, disbursement and deposit reports and an automated bank reconciliation is also available in JIS.

## **GENERAL POLICIES**

**Display the information the public will need to know when transacting financial business at a conspicuous location in the court office.**

The following information is recommended for display:

1. The type of payments that will be accepted (e.g., no two party checks, cash only, etc.).
2. The receipt policy (e.g., a receipt will be issued for every payment).

3. The return check policy (e.g., all "insufficient funds" checks will be turned over to the authorities for prosecution).
4. "No Cash Stored on the Premises Overnight."
5. Sanctions that may be imposed for failure to pay court ordered fines and costs in full by the specified due date (e.g., time payment fee, tax intercept through the Tax Offset Program, and possible collection efforts via the Debt Collection).

All traffic violations bureaus are required to display, "...the amount of fines and costs to be imposed for each traffic offense" as stipulated by [Supreme Court Rule 37.49\(d\)](#) effective January 1, 1986.

Allow only bonded employees to receive, deposit, disburse, or handle money. Check to see if the municipality has a bond that covers the municipal court clerk as well as any other employees that received, deposit, disburse or handle court funds.

Assign a case number to each case when it is submitted to the court and tie each financial transaction to the applicable case number(s).

### **COURTS WITHOUT JIS**

If a case number has not been assigned and cash is received (e.g., a bond posted before the case is filed) use another identifying number (e.g., the bond number). Establish procedures to account for all cases filed to insure that no case files are lost (e.g., file all disposed case files in case number sequence).

### **COURTS WITH JIS**

Cases filed by Uniform Citation will use the nine-digit Uniform Citation number as the case number. For cases not filed by Uniform Citation, a uniform case numbering system will be established and JIS will assign the case numbers as the cases are initiated. If money is received prior to the case being initiated on JIS (e.g. a bond posted before the case is filed) the bond can still be entered on the system using CZASPAY – Custom Payment Entry form-Bond Tab, and the case can be associated to the bond when the case is received.

**Segregate when possible, the responsibility for receipting and disbursing payments from the responsibility for posting to the case fee records and reconciling the accounting records.**

If there are more than two employees in the office, assign the responsibility for receipting and disbursing payments to one or more employees. Assign a different employee the responsibility of posting to the case fee record and performing the monthly reconciliation. When posting to the case fee record is simultaneous with completing the receipts and checks, assign the responsibility for performing the monthly reconciliations to an employee who is not responsible for receipting and disbursing payments.

**Establish all bank, investment and other court accounts in the name of the "Municipal Division of the Circuit Court of the Municipality of \_\_\_\_\_".**

## **CHANGE FUND**

Establish a fund for making change.

Establish a change fund by following these steps:

1. Designate employees with primary and back-up responsibility for the change fund.
2. Determine the amount of money needed for the change fund, limiting the amount to \$100.00 or less.
3. Obtain the amount of money needed for the change fund from the city.

As needed, have the large currency in the change fund converted into coins and smaller currency.

**Never allow the change fund to contain I.O.U.'s, do not use the fund to cash checks or purchase supplies, and maintain the change fund at a constant amount. Reconcile the change fund daily or as each bank deposit is made.**

Deduct the amount of money maintained in the change fund from the total cash on hand. The amount remaining is the amount of money collected since the last bank deposit. Reconcile this amount to the total of the receipts since the last bank deposit.

## **PAYMENTS RECEIVED**

**Establish a policy specifying the types of payments that will be accepted.**

A policy of accepting only cash, money orders, certified checks or personal checks guaranteed by the bank is recommended. A local court rule is the most effective method of implementing such a policy.

**Accept only those amounts authorized by statute or local court rule.**

**Designate employees with primary and back-up responsibility for receiving payments and writing receipts.**

Limit the responsibility for receiving payments and writing receipts to the employees designated.

**Secure all cash and checks received in a location that is inaccessible to the public and allow access to authorized personnel only.**

Keep the payments received locked in a place that is out of reach and out of sight of the public. Restrictively endorse all checks immediately; "For Deposit Only To (Account Name)."

**Establish procedures for payments received in the mail.**

If there are two or more employees in the court office, designate one or more employees to open and sort the mail and to restrictively endorse all checks received; "For Deposit Only to (Court's

Account Name)." If possible, designate employees persons to perform the mail duty who are not responsible for receipting payments or posting to the accounting records.

**Issue manual pre-numbered receipts for all payments received, unless the computer system automatically prints pre-numbered receipts.**

### **COURTS WITHOUT JIS**

Include the following information on each receipt:

1. Date;
2. Case number;
3. Name of person from whom the payment was received;
4. Amount received;
5. Type of payment (cash, check, etc.); and
6. Initials of person receiving the payment.

Receipts are required for all cash payments. Receipts are not required for non-cash payments if accounting is computerized and the computer:

1. Assigns a unique sequential receipt number to each payment received;
2. Automatically prints a receipt for all cash payments received and upon request, prints receipts for other types of payments; and
3. Automatically posts the receipt number to each record displaying the payment information.

In addition, the following receipting controls must be built into the computer program:

1. Only the programmer or appointing authority can set or reset the receipt number assigned by the computer.
2. Once a payment is received and the computer has assigned a receipt number, the computer can print a duplicate receipt or the payment can be voided or adjusted with another entry. The original computer entry of the payment cannot be changed or deleted.
3. If a paper receipt is not printed, the date received, receipt number, and initials of the clerk processing the payment are recorded on the check or money order received.

### **COURTS WITH JIS**

Courts using JIS should receipt all payments received immediately into JIS. Manual receipting should only be used as a back up for when the computers are not available. In addition, when manual receipts are used they should contain all the information noted above for COURTS WITHOUT JIS (1-6) and be crossed referenced to and from JIS as they are receipted on JIS.

Non-cash payments are accounted for in JIS using specific payment type codes and receipt reports can be generated displaying monetary, non-monetary, or both for review by the court.

**Record all payments received immediately on the cash control record and on the individual case fee record:**

### **COURTS WITHOUT JIS**

Record the following information on the cash control records:

1. Date the payment was received;
2. Case number;
3. Name of the person making the payment;
4. Receipt number;
5. Type of payment;
6. Amount received.

Record the following information on the individual case fee record:

1. Date the payment was received;
2. Name of the person making the payment if other than the defendant;
3. Receipt number; and
4. Amount received

### **COURTS WITH JIS**

As receipts are entered in JIS, the date the payment was entered, the payor, receipt number and amount received will automatically update the case/party information in the system. In addition, the general ledger will be updated each time the court performs the standard end of day procedures.

**Retain all voided receipts. Do not destroy them.**

### **COURTS WITHOUT JIS**

Void receipts by writing "void" across the receipt. Keep these receipts in a voided receipts file or attach them to the cash control record for the month in which the receipt was voided.

### **COURTS WITH JIS**

When a receipt is voided in JIS, a receipt number will be assigned to the "void" receipt. The "void" receipt will include the receipt number that was voided. The "void" receipt will be associated to the case and will also appear on the Case Party Fee report.

**Establish a method to account for all receipts issued.**

### **COURTS WITHOUT JIS**

Require that someone other than the person who issued the receipt review the accounting records to verify that the receipts are issued in sequence, recorded on the cash control record, and have actually been issued, voided, or are unused.

## **COURTS WITH JIS**

If the computer(s) are not available, manual receipts should be issued. All manual receipts issued should be receipted into JIS promptly and the JIS receipt number should be documented on the manual receipt. In addition, the JIS receipt should be cross-referenced to the manual receipt. Manual receipts used by the court should be reviewed periodically by someone other than the person who issues receipts. The reviewer should verify that the manual receipts are cross referenced to a JIS receipt and that the funds have been deposited.

## **CASE FEE RECORD**

**When a case is disposed, review the case file and the case fee record to insure that all costs have been assessed and recorded on the case fee record.**

## **COURTS WITH JIS**

Fines and costs will be added when the case is disposed by assessing the applicable fines and attaching the XMUNI docket code. In addition, other costs that are non-standard in nature will be added using **CBAACCD** – Custom Case/Party Account Detail as needed. Costs can be viewed on JIS using various forms in JIS.

**Establish and maintain a case fee record for each case filed. A case fee record is not required when fines are imposed and court costs are assessed, collected, and disbursed in one transaction on the cash control record.**

## **COURTS WITHOUT JIS**

A case fee record shows the costs accrued, the amounts collected, the amounts disbursed, and the balance held or due on the case. A case fee record includes the following:

1. Case number;
2. Defendant's name;
3. A list of each cost assessed;
4. A running balance of the total costs accrued;
5. Identification of the party requesting the service;
6. Date, amount and description of each type of service;
7. Amounts collected, dates of collection, and receipt numbers;
8. Amounts disbursed;
9. Balance held on deposit or due on account;

10. Amounts of checks issued, to whom issued, date issued, and check numbers;
11. The total costs assessed;
12. The name of the party against whom costs are assessed; and
13. The date notice of amount due and other collection notices were sent.

When a case fee record is not required, record in the case file, the date, receipt number, and amount of the payment that satisfied the court costs and fine in full.

## **COURTS WITH JIS**

Case/party information is automatically updated as parties are added to a case, fees are assessed, payments are made, and checks are issued. There are various forms and reports that display the case/party related data and financial data associated to the case.

**On each case fee record, record the date on which full payment for court costs is satisfied.**

**When all court costs are satisfied, file the case fee records with the case file or with all other disposed and paid-in-full case fee records.**

## **DISBURSEMENT POLICIES**

**Disburse all court costs in the same month the costs are collected.**

## **COURTS WITHOUT JIS**

When the costs are paid in installments, apply the amounts collected to the costs in the order the costs were incurred.

## **COURTS WITH JIS**

JIS will automatically apply the amounts collected to costs in accordance with the approved hierarchy. (See [Section 4.6 Cost Simplification and Distribution](#).)

**Instruct the printer of your checks to include "Void Six Months After the Date of Issuance" on all checks.**

Printing the expiration period on the checks encourages the payee to cash the check before it expires and reduces the number of outstanding checks.

When a check has not cleared the bank within six months, follow the procedures in the Outstanding Checks section.

## **PAYMENTS DISBURSED**

**Use prenumbered checks and establish a method to account for all checks issued.**

Require someone other than the person issuing checks to review the accounting records to verify that the checks were issued in sequence and recorded on the cash control record.

Designate employees with primary and back-up responsibility for issuing checks.

Limit responsibility for issuing checks to as few individuals as possible. If there are more than two employees in the office, assign one the responsibility for signing checks and the other the responsibility for issuing checks.

## **COURTS WITHOUT JIS**

Use of a check protector is recommended. Keep the check protector locked up when not in use and limit access to the check protector to individuals authorized to issue checks.

## **COURTS WITH JIS**

JIS assigns sequences of checks to specific check printers and does not allow checks assigned to a check printer to be issued out of sequence or to be back dated. Disbursement reports are available to assist the court in verifying the sequence of checks and to also verify if the checks have cleared the bank or remain outstanding.

**Designate employees with primary and back-up responsibility for signing checks.**

Limit responsibility for signing checks to as few individuals as possible. If there are more than two employees in the court office, assign one the responsibility for signing checks and the other the responsibility for issuing checks.

If there are more than two employees in the court office, it is recommended that a policy be established requiring the signature of the judge or two employees on any check over \$500.

**Monitor the bank records to verify that only authorized individuals are on the bank's list of those authorized to sign checks. Notify the bank immediately of any changes in the list of those authorized.**

**Put all blank checks in a location that is accessible only to authorized personnel.**

**Disburse all amounts by check, properly supported by the necessary documents and accounted for in the accounting records.**

Never pay in cash. When a check is issued to pay a bill (e.g., sheriffs' fees or witness' fees), put the bill in the case file and cancel the bill by writing "paid" on it, the date paid, and the check number.

**Distribute checks immediately.**

Prepare checks only when payment is to be made and issue checks in numerical sequence.

**Post all disbursements immediately on the case fee record and the cash control record.**

## **COURTS WITHOUT JIS**

On the cash control record for each check issued, post:

1. Date issued;
2. Case number;
3. To whom paid;
4. Check number; and
5. Check amount.

On the case fee record for each check issued, post:

1. Date issued;
2. To whom paid;
3. Check number; and
4. Check amount.

A breakdown of the court costs assessed and disbursed must be maintained for each case. If you are currently using the general ledger system, continue recording the breakdown of costs as you have in the past.

If you are using a pegboard system, and are currently going back at the end of each month to write on the case fee record of each case the date, payee, check number, and amount for each cost disbursed, we recommend that you discontinue this practice. There is an easier way. Because the breakdown of costs assessed is already on the case fee record, and the breakdown of the costs disbursed is on the pegboard cash control record, there is no reason to record the breakdown of the costs disbursed on the case fee record. Instead, post the disbursement of costs on the case fee record when the breakdown is recorded on the pegboard system. On the case fee record, write the approximate date disbursed (the last day of this month or the first day of next month), an "m" or some other code showing that disbursement is being made by the end of the month checks, and the total amount disbursed for the case at month end. Individual checks for one case must still be recorded on each case fee record (e.g., witness fees).

## **COURTS WITH JIS**

As disbursements are entered on JIS, the case/party information in the system will automatically be updated with the applicable information. In addition, the general ledger will be updated each time the court performs the standard end of day procedures.

### **Retain all voided checks.**

Write "void" across the check or cut off the signature line. Place all voided checks in a "voided checks" file, attach the voided check to the corresponding check stub or attach the voided check to the cash control record page on which it is shown as voided.

## **Establish a method to account for missing checks.**

If for the court has been notified that a check that was issued cannot be located, follow the procedures below:

1. Examine the most recent bank reconciliation to verify that the check has not cleared the bank.
2. Check with the bank to verify that the check has not cleared the bank since the last bank statement.
3. Authorize the bank to stop payment on the check (see note below).
4. Write an explanation of why, when, and by whom the stop payment was ordered. File the explanation in the void check file, attach the explanation to the corresponding check stub or attach the explanation to the cash control record page on which the check is shown as voided.
5. Back the check out of all accounting records through the following procedures:
  - 5.1 On the next available line of the current month's cash control record, write "Void Check No. \_\_\_\_" in the "Disbursed To" column and write the amount of the check as a negative entry in the "Check Amount" column.
  - 5.2 Follow the procedure in (a) for the case fee record.
  - 5.3 In the cash control record and case fee record for the month when the check was written, write "Void" and the date the check was backed out beside the original entries. In addition, write "Void" and the date the check was backed out beside the appropriate number on the most recent outstanding check list.

**NOTE:** If the bank charges the court for stopping payment on a check, require that the bank bill the court directly rather than deduct the charge from the checking account. Payment can then be made to the bank by the city in the same manner as any other operating expense.

If a replacement check is to be issued, follow the procedures below:

1. Issue a new check following the normal disbursement procedures.
2. Record the new check number on all accounting records beside the void check number.

## **COURTS WITH JIS**

Checks are accounted for in JIS and procedures can be located in GOLD regarding how to void, reissue, and clear checks. As checks are issued, voided, reissued, cleared etc... the case/party information will be automatically updated. In addition, the general ledger will be updated each time the court performs the standard end of day procedures. When a JIS court is notified that a check needs to be replaced, they will perform the same steps noted above for a COURTS WITHOUT JIS 1-4 prior to issuing a replacement check.

## **BANK DEPOSITS**

**Identify all bank accounts maintained by the court.**

**Establish all bank, investment and other court accounts in the name of the "Municipal Division of the Circuit Court of the Municipality of \_\_\_\_\_."**

**Keep the signature cards for all bank and investment accounts current.**

Notify the bank immediately of any changes in the list of employees included on the signature cards.

**Keep a list of all checking, investment, and other bank accounts which includes the name and address of the banking institution, the account number, the account name, the rate of interest, and the names of those authorized to sign checks.**

**Maintain agreements (with your banks) to provide collateral for amounts exceeding the \$100,000 FDIC insured amount.**

Bank accounts should be monitored your bank accounts to verify that all daily balances exceeding the \$100,000 FDIC- insured amount are covered by bank collateral. If the balance ever exceeds the amount covered by the bank collateral the bank will need to be contacted and the collateral pledged will need to be increased.

Verify that all securities pledged as collateral by the bank are held by a disinterested bank.

**Deposit all monies in the same form as received. Deposit should be made each day the total receipts exceeds \$100.**

Depositing daily protects against loss or theft and increases the interest earned.

Prohibit cashing personal checks or issuing I.O.U.s. Do not use monies received by the court to pay for expenses or supplies. Deposit all monies in the same form in which they were received; e.g., checks, bills, coins.

If due to unavoidable circumstances receipts must be kept overnight, secure the receipts in a vault or safe.

**Establish a method whereby all payments deposited can be identified to the individual case fee record and the cash control record.**

## **COURTS WITHOUT JIS**

Maintain a monthly record of the individual receipts included in each deposit. The cash control journal is adequate if it shows the total of each deposit, the date of each deposit, and the individual payments received that are included in each deposit.

## **COURTS WITH JIS**

In JIS, each court clerk that receipts money will have their own cashier session and will be responsible for the money in their cashier session. Each clerk will close their respective cashier session and remit their session and money to the supervisor who will approve and deposit the funds. The sessions approved should agree to the amount deposited in the bank each day. Cashier session reports document the receipts included in each session and a deposit report can also be run to document all the receipts included in a deposit.

## **UNCOLLECTED COSTS AND FINES**

**Establish procedures to identify cases where costs and fines due to the court remain unpaid.**

Monitor the cases where costs and fines due to the court remain unpaid in a separate file; or:

1. Placing in a separate file all case fee records where costs and fines due to the court remain unpaid; or
2. Placing a clip on the case fee records where costs and fines due to the court remain unpaid.

**Follow installment payment policies established by the judge.**

## **COURTS WITHOUT JIS**

If the judge authorized installment payments, record the payment schedule on the case fee record and monitor the payment due dates.

## **COURTS WITH JIS**

As costs are assessed to a case payment plans should be created whenever the costs are not paid in full. By creating payment plans in JIS, the court is provided an effective method to monitor costs that are unpaid. Various reports are available to the courts that indicate plans that are delinquent. In addition, courts that are using JIS can also participate in the Tax Offset and Debt Collection Programs that provide additional collection efforts for the courts.

## **OPEN ITEMS**

**Establish procedures so the case number and amount can be identified for all case fee records with amounts on deposit.**

**Prepare and retain a monthly record of the open items and at least annually identify the balances held in trust for each case number.**

## **COURTS WITHOUT JIS**

The monthly record of open items is the balance in each case that is held in trust and a total of these balances. The monthly record can be on adding machine tape. On December 31, or at the end of your county's fiscal year, a detailed record of open items must be prepared that identifies the balances held in trust for each case number.

## **COURTS WITH JIS**

JIS accounts for open items and bonds automatically. In addition, an Open Items Report can be run that provides a detail listing of all the open items and bonds on the system at a given time. This report should be run at month end and reconciled to the General Ledger Report. ([See Procedures: Accounting Open Items Reporting in GOLD](#)).

**Verify monthly that the total dollar amount on the record of open items agrees with the reconciled bank balance.**

**Establish procedures whereby all open items are reviewed for inactive disposed cases which still have a balance due the court.**

## **COURTS WITHOUT JIS**

If it is probable that the amount due on these cases will not be collected, prorate the amount collected following the procedures below: (Attorney General's Opinion #26 dated 1-24-75)

1. Total all costs accrued to the case.
2. Total all payments received for the case.
3. Divide the total of all payments received by the total of all costs accrued to obtain the percentage paid.
4. Multiply each cost accrued by the percentage paid to determine the portion of each to disburse.
5. Total the portion of each cost to be disbursed to verify that the total to be disbursed equals the total of all payments received.
6. Record on the case fee record the balance due for each cost.

If the total of the proration does not equal the total costs and fines due, the defendant is still liable for the unpaid amount.

## **COURTS WITH JIS**

As receipts are entered in JIS they will be automatically applied to costs. In some instances, a court may place money in open items and fail to apply the money to court costs. JIS courts should periodically review the Open Items report for cases having outstanding costs and apply the open items funds to the outstanding costs as appropriate.

## **RECONCILIATION**

**Reconcile and balance all accounting records at least monthly to verify that all receipts and disbursements are documented properly.**

## **COURTS WITHOUT JIS**

Perform the following reconciliations at least monthly and retain a copy of each reconciliation in the court's records:

1. Balance the cash control record/general ledger.
2. Reconcile the receipts with the deposits.
3. Prepare a bank reconciliation.
4. Reconcile the record of open items with all bank accounts and cash balances.

## **COURTS WITH JIS**

Perform the following reconciliations at least monthly and retain a copy of each reconciliation in the court's records

1. Reconcile the bank balance to the general ledger cash balance. ([See Procedures: Preparing a Bank Reconciliation CZABREC in GOLD.](#))
2. Reconcile the open items report with the respective general ledger accounts. ([See End of Month Procedures step 5 in GOLD.](#))

Retain the following for each bank account:

1. A copy of the bank reconciliation;
2. The record of outstanding checks;
3. The record of deposits in transit;
4. The bank statements;
5. The cancelled checks;
6. The cancelled deposit tickets; and
7. The bank issued debit and credit memos.

## **INTEREST EARNED ON COURT ACCOUNTS**

**There is no statutory authority for a municipal court to retain interest earned on the bank account, therefore, any interest earned on the account should be turned over to the city treasury.**

## **OUTSTANDING CHECKS**

**Investigate all checks outstanding for more than six months.**

Below are suggested procedures to follow if checks are outstanding more than six months.

1. Send a letter to the payee's last known address advising the payee that check number \_\_\_\_, issued to him/her, has not been cashed and, if the payee does not cash the check or contact the clerk within 30 days, payment will be stopped.
2. If the payee responds and has lost the check, reissue the check.
3. If the payee cannot be located, follow the procedures for remitting the funds to the Missouri State Treasurer's Office - Unclaimed Property Division ([See Section 4.4 Unclaimed Funds](#)).

## **BONDS**

**Require all agencies accepting cash or securities as bond to use court approved bond forms, to issue pre-numbered receipts for all cash or securities accepted, and to remit the cash or securities collected to the clerk of the court on the next working day.**

**Issue a receipt for all bond monies transmitted to the court by other agencies and deposit the monies in a court bank account.**

If the monies from more than one bond are remitted on the same day and a detailed listing of the individual bond amounts and a total amount remitted accompanies the dollars remitted, only one receipt for the total amount received is necessary. Post the receipt number on the detailed listing of the individual bond amounts.

**Disburse bond monies by check and only upon order of the court.**

## **MONTHLY REPORTING**

**Submit a report of disbursements to the city at least monthly.**

[Chapter 479 RSMo](#) requires the court to submit to the municipality a list of all cases heard during the preceding month. Within the first 10 days of every month, the court must submit to the municipality a list of all cases heard or tried during the preceding month. However, [Court Operating Rule 4.29](#) allows the municipal division to submit the Municipal Division Summary Report Form to fulfill this requirement.

If the municipal division continues to provide a list and a case on that list is closed under [Chapter 610 RSMo](#), the court should not include the name of the defendant in the monthly report. Closed cases are those that are nolle prossed, those that are dismissed, and those in which the defendant is found not guilty or there is a suspended imposition of sentence in which the related probation was completed successfully. For these cases, the court should provide the case numbers and outcomes of the case, but black out or leave off the defendant's name.

The clerk should also turn over all fines for the preceding month to the municipal treasurer within the first 10 days of the following month. ([Section 479.080 RSMo](#))

**Submit the Fees to the Department of Revenue**

Report the amount of funds being disbursed each month for Crime Victims Compensation Fund, Clerk Fees if applicable, and Court Automation (JIS courts only), on the City Fees Form 4583. A separate check should be issued for each fee. If the number of cases paid in full is readily available, the court should note this on the form. This form should be mailed to the Department of Revenue by the 20<sup>th</sup> of each month for the collections of the previous month. The City Fees Form 4583 can be obtained from the Missouri Department of Revenue website:

[www.dor.mo.gov/tax/citycounty/forms/4583.pdf](http://www.dor.mo.gov/tax/citycounty/forms/4583.pdf).

## **RETENTION AND DESTRUCTION OF RECORDS**

### **Retain accounting records in accordance with Supreme Court Operating Rule 8.**

Accounting records include:

1. Copies of the manual receipts;
2. Cancelled checks;
3. Cash control records;
4. Case fee records;
5. Record of open items;
6. Case files;
7. Investment records;
8. Monthly reports;
9. Bank statements and other reconciliations;
10. Deposit slips; and
11. Other similar records that reflect accounting transactions of the court.

**If a new judge assumes office, retain all accounting records created since the last audit until an audit of the accounting records has been performed.**

# CHAPTER III. - JURISDICTION - VENUE – TIME

Judge Dennis Budd

Section	Page Number
<b>JURISDICTION, VENUE, AND TIME COMPUTATIONS</b> .....	<b>3</b>
3.1 Scope of Chapter .....	3
3.2 Source and Distribution of Judicial Power .....	3
<b>JURISDICTION-DEFINITION AND PRINCIPLES</b> .....	<b>3</b>
3.3 Definition.....	3
3.4 Principles of Jurisdiction .....	4
3.5 Subject Matter Jurisdiction.....	4
3.6 Jurisdiction Over the Case.....	4
3.7 Jurisdiction Over the Person.....	4
<b>SPECIAL PROBLEMS INVOLVING JURISDICTIONAL ISSUES</b> .....	<b>5</b>
3.8 Defects in the Information.....	5
3.9 Statute of Limitations .....	5
3.10 Disqualification of Judge and Waiver of Disqualification .....	6
3.11 Limitation of Probationary Period; Revocation of Probation.....	6
<b>VENUE</b> .....	<b>7</b>
3.12 Definition.....	7
3.13. Proof of Venue and Subject Matter Jurisdiction .....	7
<b>TIME COMPUTATIONS</b> .....	<b>7</b>
3.14 Rule.....	7
3.15 Tolling .....	8
3.16 Enlargement of Time .....	8
3.17 Court Deemed Always Open.....	8

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Judge Dennis Budd received his Bachelor of Arts degree from Drury College in Springfield, Missouri, in 1970 and received his J.D. from the School of Law at the University of Missouri-Columbia in 1976. He spent 12 years as an assistant city attorney for Springfield, and has served as a municipal court judge for the City of Springfield since May 1994. He is currently a member of the Municipal Judge Education Committee.

## CHAPTER III

### JURISDICTION, VENUE, AND TIME COMPUTATIONS

#### 3.1 SCOPE OF CHAPTER

This chapter discusses principles of jurisdiction, venue, and time computations as applied to the municipal courts, with attention to some special problems.

#### 3.2 SOURCE AND DISTRIBUTION OF JUDICIAL POWER

The power vested in the Missouri court system is derived from Article V of the Missouri Constitution. “The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts,” Mo.Cons. Art. V, Sec. 1. Municipal courts are “... divisions of the circuit court of the circuit in which the municipality, or major geographical portion thereof, is located,” sec. 479.020.5, RSMo. (2000). Rule 37.06 defines “court” as “a division of the circuit court having jurisdiction to hear ordinance violations,” and “municipal division” as “any division of the circuit court presided over by a judge having original jurisdiction to hear and determine municipal ordinance violations.” By statute, municipal judges “...shall have original jurisdiction to hear and determine all violations against the ordinances of the municipality,” sec. 479.020.1, RSMo. (All references are to RSMo 2000 unless otherwise noted.)

### JURISDICTION-DEFINITION AND PRINCIPLES

#### 3.3 DEFINITION

“Jurisdiction connotes the power to decide a case on the merits,” Wigglesworth v. Wyrick, 531 S.W.2d 713, 721[5-7] (Mo.banc 1976), (citing 21 C.J.S. “Courts”, sec. 15c). As applied to criminal cases, jurisdiction refers to the power of a court to hear and resolve the case of a criminal offense, to render a valid judgment, and to declare punishment. See Searcy v. State, 981 S.W.2d 597 (Mo.App.W.D. 1998). As divisions of the circuit courts, the jurisdiction of municipal courts is limited to ordinance violations. Mo. Cons. Art. V, Sec. 23; see also sec. 479.020.1, RSMo. “A municipal judge may hear and determine municipal ordinance violation cases of the municipality or municipalities making provision for the particular municipal judge.” Sec. 478.230, RSMo. A municipal judge could also be assigned by the presiding judge of the circuit to hear and determine ordinance violation cases in another municipality within the circuit, so long as the other municipality has made arrangements for the compensation of the assigned judge, pursuant to the provisions of Sec. 478.240.2(1), RSMo. A municipal judge is specifically without jurisdiction to hear cases involving state law violations. City of Kansas City v. May, 760 S.W.2d 534 (Mo.App.W.D. 1988). “If, in the progress of any trial before a municipal judge, it shall appear to the judge that the accused ought to be put upon trial for an offense against the criminal laws of the state and not cognizable before him as municipal judge, he shall immediately stop all further proceedings before him as municipal judge and cause the complaint to be made before some associate circuit judge within the county.” Sec. 479.170, RSMo.

### **3.4 PRINCIPLES OF JURISDICTION**

In order to assert jurisdiction and exercise judicial power to decide a case on the merits, the municipal court must have subject matter jurisdiction, and must acquire jurisdiction over the particular case and over the person of the defendant. See, e.g., Schneider v. Sunset Pools of St. Louis, Inc., 700 S.W.2d 137, 138[1-3] (Mo.App.E.D. 1985). “The term ‘jurisdiction’ may bear one of several different meanings. It may be used with the connotation of jurisdiction over the subject matter. (Citation omitted.) Or, it may be used in the sense of the power to render the particular judgment in question. (Citation omitted.) Or, in the sense of venue. (Citation omitted.) Or, the term may refer to jurisdiction of the person. (Citation omitted.)” Jennings v. State, 631 S.W.2d 361, 363 [2] (Mo.App.S.D. 1982).

### **3.5 SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is defined as the type or class of cases that a court has been empowered to hear. Bass v. Director of Revenue, 793 S.W.2d 923, 926 (Mo.App.S.D. 1990); Farrar v. Moore, 416 S.W.2d 711, 713 (Mo.App.S.D. 1967). By constitutional provision, the class or type of cases the municipal courts have been empowered to hear is limited to adjudication of ordinance violations only. “A municipal judge shall hear and determine violations of municipal ordinances in one or more municipalities,” Mo. Cons. Art. V, Sec. 23. An ordinance is “... a law enacted by a municipality or county,” Rule 37.06. Municipal judges have original jurisdiction to hear and determine all violations against the ordinances of the municipality pursuant to sec. 479.040.1, RSMo. Subject matter jurisdiction cannot be conferred on the court by agreement of the parties and cannot be waived. Fitzgibbons v. Director of Revenue, 891 S.W.2d 566, 568[2-4] (Mo.App. E.D. 1995). It should be noted that the court is under a continuing obligation to notice lack of jurisdiction at any point during the pendency of a case. “Lack of jurisdiction or the failure of the information to charge an ordinance violation shall be noticed by the court at any time during pendency of the proceeding.” Rule 37.51(b)(2). Specifically, a defendant cannot be found to have waived lack of subject matter jurisdiction where no information has been filed by the prosecuting authority. Brown v. State, 3 S.W.3d 676, 678-79[4-6] (Mo.App.S.D. 2000).

### **3.6 JURISDICTION OVER THE CASE**

The municipal court acquires jurisdiction over a case upon the filing of an information by the prosecuting authority for the municipality. “All prosecutions for the violation of municipal ordinances shall be instituted by information and may be based upon a complaint.” Sec. 479.090 RSMo. See also Rules 37.34-37.41 regarding the filing of an information in municipal court. As provided in Rule 37.34, “The information shall be supported by a violation notice as prescribed by Rule 37.33.”

### **3.7 JURISDICTION OVER THE PERSON**

The most common method of acquiring jurisdiction over the person of the defendant is by service of a summons on defendant by any of the means authorized in Rules 37.42-37.44. As provided in Rule 37.42, the summons must be in writing and in the name of the prosecuting county or municipality; must state the name of the person summoned and his/her address if known; must describe the ordinance violation charged; must be signed by the judge or the clerk;

and must command the person to appear at a specified date and time. Rule 37.43 requires that, where an information has been filed, a summons shall be issued. Rule 37.44 permits service of the summons by mail addressed to defendant's last known address, or by an officer. The court also acquires jurisdiction over the defendant upon defendant's arrest for an ordinance violation, whether the arrest is accomplished with or without an arrest warrant provided that an information has been filed. Regarding arrest warrants, see Rules 37.45 and 37.46.

In the circumstance in which the person named in a violation notice, information, summons, or warrant appears in court to assert his innocence and to claim that another person, known or unknown, has wrongfully used his name, the court has thereby obtained jurisdiction over the person of the named defendant, notwithstanding his asserted defense of identity theft. Where the defendant has neither been served with a summons or violation notice, nor taken into custody, the defendant may nonetheless submit his person to the jurisdiction of the court by entering an appearance in a pending case either in person or by authorized representative, or by filing pleadings, motions, or other documents that submit defendant to the jurisdiction of the court. For a more detailed discussion of this topic, see Chapter IV of this deskbook.

## **SPECIAL PROBLEMS INVOLVING JURISDICTIONAL ISSUES**

### **3.8 DEFECTS IN THE INFORMATION**

It has been held that certain defects in the information deprive the trial court of jurisdiction. See, e.g., City of Joplin v. Graham, 679 S.W.2d 897, 899 (Mo.App.S.D. 1984) (lack of prosecutor's signature on information held to deprive trial court of jurisdiction); City of Cool Valley v. LeBeau, 824 S.W.2d 512 (Mo.App.E.D. 1992) (held that trial court acquired no jurisdiction because information was insufficient). However, the precedential value of these cases is now suspect for a number of reasons. In State v. Parkhurst, 845 S.W.2d 31, at 34-35 (Mo.banc 1992), the Missouri Supreme Court noted that "Subject matter jurisdiction of the circuit court and sufficiency of the information or indictment are two distinct concepts. \*\*\* Cases stating that jurisdiction is dependent upon the sufficiency of the indictment or information mix separate questions." The implication of Parkhurst is that the municipal court is not deprived of jurisdiction over a case merely because the information is found to be insufficient. Later appellate decisions have specifically held that insufficiency of the information does not deprive the trial court of subject matter jurisdiction. See State v. Sparks, 916 S.W.2d 234 (Mo.App.E.D. 1995); Wright-El v. State, 890 S.W.2d 644 (Mo.App.E.D. 1994); and State v. Patrick, 920 S.W.2d 633 (Mo.App.S.D. 1996). See also Rule 37.41: "An information shall not be invalid, nor shall the trial, judgment, or other proceedings on the information be stayed, because of any defect that does not prejudice the substantial rights of the defendant."

### **3.9 STATUTE OF LIMITATIONS**

There is no prescribed statute of limitations for commencement of prosecution of ordinance violations. However, sec. 556.036.2(2), RSMo establishes a one-year statute of limitations for prosecution of misdemeanors. In St. Louis County v. Corse, 913 S.W.2d 79 (Mo.App.E.D. 1995), the court considered a St. Louis County zoning code penalty provision which authorized the imposition of up to a five hundred dollar fine and up to six months in jail for a zoning violation. In determining whether the statute of limitations for institution of a prosecution under the zoning code was six months or one year, the court concluded "We hold the limitation for

filing a charge for an ordinance violation, punishable by fine and jail time, is one year.” Id. at 81. But see City of Chesterfield v. DeShetler Homes, Inc., 938 S.W.2d 671, (Mo.App.E.D. 1997), in which the court held that the applicable statute of limitations for filing a zoning violation case in municipal court under Chesterfield city ordinances was five years, where the defendant corporation had “...sought, and was granted, removal to circuit court,” id. at 674[10,11]. The court purported to distinguish DeShetler from Corse, supra, on the grounds that Corse involved a county ordinance and DeShetler involved a city ordinance.

### **3.10 DISQUALIFICATION OF JUDGE AND WAIVER OF DISQUALIFICATION**

“A change of judge shall be ordered upon the filing of a written application therefore by any party. The applicant need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or an attorney for any party. \*\*\* No party shall be allowed more than one change of judge pursuant to this Rule 37.53©.” See also sec. 479.220, RSMo. It has been held that a judge who has been disqualified may nonetheless rule on matters that were under submission at the time of the disqualification, but after that point the judge may then exercise no further jurisdiction over the case. See, e.g., State ex rel. Johnson v. Mehan, 731 S.W.2d 887, 888 (Mo.App.E.D. 1987). However, disqualification of a judge can be waived by the parties, thereby reestablishing that judge’s jurisdiction over the case. In State v. Purdy, 766 S.W.2d 476, 478 (Mo.App.E.D. 1989), the court held that disqualification of a judge can be waived by the parties either expressly or by conduct. Thus, when neither party objected to trial by the judge who had been disqualified on the case nearly a year earlier, both parties were held to have waived the disqualification by their conduct and the result of the trial was allowed to stand. See also Ferguson v. Pony Express Courier Corp., 898 S.W.2d 128, 130 (Mo.App.W.D. 1995); Holly v. State, 924 S.W.2d 868, 869-70 (Mo.App.S.D. 1996); State v. Baller, 949 S.W.2d 269, 274 (Mo.App.E.D. 1997). For further discussion of this topic, see Chapter VII of this deskbook.

### **3.11 LIMITATION OF PROBATIONARY PERIOD; REVOCATION OF PROBATION**

Rule 37.64(e) provides “If authorized by law, the judge may suspend the imposition or execution of sentence and place the defendant on probation or parole for a term not to exceed two years.” Sec. 479.190.1, RSMo authorizes the municipal court to grant probation or parole but does not place a time limit on the period of probation. Sec. 479.140.4, RSMo authorizes the court to modify or enlarge the conditions of probation at any time prior to expiration or termination of the probation term. Rule 37.70 “Revocation of Probation or Parole” provides that “A judge may revoke probation or parole upon compliance with section 559.036, RSMo but not otherwise, except that notice of the hearing may be mailed in the same manner as a summons.”

Courts examining questions about the extension and revocation of probation have held that where a maximum period of probation is prescribed by law, the probationary court cannot extend the period beyond the maximum, nor initiate action to terminate probation once the maximum period of probation has been reached. In the misdemeanor case of Jordan v. Flynn, 903 S.W.2d 261 (Mo.App.E.D. 1995), the court held that by operation of law, the trial court lost jurisdiction to revoke probation and impose sentence after the maximum two-year period of probation was reached, even though the trial court had entered orders during the two-year period which purported to “suspend” the running of the probationary period. However, with respect to state law violations, sec. 559.036.3, RSMo as amended in 1995 now authorizes state trial courts to

impose an entirely new maximum period of probation in cases where the defendant initially received a suspended imposition of sentence and is subsequently sentenced for violating conditions of probation. Does this mean municipal courts have the same power? In this regard, the reasoning in State ex rel. Musick v. Dickerson, 813 S.W.2d 75 (Mo.App.S.D. 1991) is persuasive: "...the basic limitation on probation is the classification of the crime for which probation is granted." Id. at 77. Rule 37.64 establishes a two-year limitation on the maximum period of probation allowable for an ordinance violation, without exception. Your author concludes that two years is the maximum period of probation that can be imposed for an ordinance violation without regard to whether defendant initially received an SIS or SES.

## VENUE

### 3.12 DEFINITION

"[V]enue denotes locality, the place where the suit should be heard." Wigglesworth v. Wyrick, supra, 531 S.W.2d at 721. "Violations of municipal ordinances shall be tried only before divisions of the circuit court as hereinafter provided in this chapter." Sec. 479.010, RSMo. Venue for an ordinance violation case lies in the municipal court of the municipality within which the offense occurred, sec. 479.020.1, RSMo unless the municipality has elected to have such cases heard and determined by an associate circuit judge, sec. 479.040.1, RSMo. In the latter instance, venue lies in the associate division of the circuit within which the municipality is located. Id.

### 3.13. PROOF OF VENUE AND SUBJECT MATTER JURISDICTION

In felony and misdemeanor cases, "... venue is not an integral part of a criminal offense and need not be proven beyond a reasonable doubt or by direct evidence, but it may be inferred from all the evidence." State v. Valentine, 506 S.W.2d 406, 410 (Mo. 1974). In ordinance cases, however, the fact that a violation was committed within the city limits is an integral part of the offense and must be proven to show that the municipal court is the proper venue and that the court has subject matter jurisdiction. "We note that it is basic to any criminal or quasi-criminal prosecution that the offense has to occur within the jurisdiction of the court hearing the case." City of Cool Valley v. LeBeau, supra, 824 S.W.2d at 513[2-4]. "A court has jurisdiction if it has judicial authority over the subject matter and parties." City of Springfield v. Waddell, 904 S.W.2d 499, 505[12,13] (Mo.App.S.D. 1995). Because the police power of a municipality is geographically limited to the area within its boundaries, the judicial power of the municipal court is likewise limited to adjudication of ordinance violations that occur within the corporate limits of the municipality. Proof that an offense occurred at a place located within the city limits may be established by direct evidence, or by circumstantial evidence such as by taking judicial notice of matters within the common knowledge of the residents of the municipality such as the location of particular landmarks or streets. See State v. Spain, 759 S.W.2d 871, 874 (Mo.App.E.D. 1988).

## TIME COMPUTATIONS

### 3.14 RULE

Rule 37.09 establishes the manner in which time periods are to be computed, and should be

referred to for any specific questions about computation. The day on which a specified period begins to run is not to be included in the total count of that period, and the final day of a period is never deemed to fall on a Saturday, Sunday, or legal holiday; Rule 37.09(a).

### **3.15 TOLLING**

The expiration of any period of time prescribed or allowed by Rule 37, by statute, or by order of the court is tolled until the next regular business day if the expiration date falls on a Saturday, Sunday, or legal holiday. If the period of time prescribed or allowed is less than seven days, intervening weekends and legal holidays are excluded from the count. Rule 37.09(a).

### **3.16 ENLARGEMENT OF TIME**

Pursuant to Rule 37.09(b) the court has discretion to expand the period of time for completion of an act, with the exception that the court may not order an extension of time for filing and perfection of an application for trial de novo; Rule 37.09(b), Rule 37.71(a). It should be noted that effective January 1, 2000, Rule 37.71(a) was amended to read, "An application for trial de novo shall be filed as provided by law." The applicable law is found in sec. 479.200.2, RSMo, which provides in relevant part "An application for a trial de novo shall be filed within ten days after judgment and shall be filed in such form and perfected in such manner as provided by supreme court rule." If a timely request for an extension of time is filed in an appropriate case, no motion or notice is required for the court in its discretion to grant the extension; Rule 37.09(b). If the request for an extension of time is made by motion and notice filed after the expiration of the period, the court may enlarge the period upon finding that the failure to act was the result of excusable neglect; Rule 37.09(b). When a party is notified by mail of an obligation or right to take some action within a specified period of time after service of the notice, three days must be added to the total period; Rule 37.09(b).

### **3.17 COURT DEEMED ALWAYS OPEN**

"The court shall be deemed always open for the purpose of filing proper papers, the issuance and return of process, and for the making of motions, applications, and orders." Rule 37.10(a).

**CHAPTER IV – THE VIOLATION NOTICE, INFORMATION, SUMMONS AND WARRANT**

**Judge D. Kimberly Whittle**

<b>Section</b>	<b>Page Number</b>
4.1 Scope Of Chapter .....	4
<b>Violaton Notices</b> .....	4
4.2 Contents Of Violation Notice .....	4
4.3 Form Of Violation Notice .....	5
<b>Informations</b> .....	5
4.4 Form And Content .....	5
A. Leading Cases On Sufficiency Of Information .....	6
B. Sufficiency Of Information V. Jurisdiction .....	7
C. Plain, Concise, And Definite Statement Of The Essential Facts .....	8
D. Lack Of Prosecutor’s Signature On The Information.....	11
E. Lack Of Reference To The Charge Or Punishment By Chapter And Section.....	12
F. Lack Of Date And Place - Venue.....	13
4.5 Pretrial Motions, Defenses And Objections To Pleadings.....	13
4.6 Joinder.....	14
4.7 Severance .....	14
4.8 Incorrect Name Of Defendant.....	14
4.9 Amendment Of Information .....	15
4.10 Unavailability Of Original Information .....	16
4.11 Nonprejudicial Defects Of An Information .....	16
<b>Appearance Of The Defendant</b> .....	16
4.12 Voluntary Appearance Of The Defendant .....	16

4.13 Compelling The Appearance Of The Defendant ..... 16

- A. Appearance By Summons..... 16
- B. Appearance By Warrant For Arrest ..... 17

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## CHAPTER IV

### THE VIOLATION NOTICE, INFORMATION, SUMMONS AND WARRANT

#### 4.1 SCOPE OF CHAPTER

This chapter discusses the difference between violation notices and informations, summarizes the Supreme Court Rules related to informations, and outlines the procedures for using a summons or an arrest warrant to compel a defendant's attendance in court.

### VIOLATION NOTICES

#### Rule 37.33; Form 37.A

#### 4.2 CONTENTS OF VIOLATION NOTICE

##### Rule 37.33. Violation Notice – Contents.

A violation notice is typically the first method by which an accused is notified that he or she will be prosecuted for a municipal ordinance violation. Rule 37.33(a) specifies the requirements of a violation notice. It must be in writing and it shall: “(1) State the name and address of the court; (2) State the name of the prosecuting county or municipality; (3) State the name of the accused or, if not known, designate the accused by any name or description by which the accused can be identified with reasonable certainty; (4) State the date and place of the ordinance violation as definitely as can be done; (5) State the facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it; (6) State the facts contained therein are true; (7) Be signed and on a form bearing notice that false statements made therein are punishable by law; (8) Cite the chapter and section of the ordinance alleged to have been violated and the chapter and section that fixes the penalty or punishment; and (9) State other legal penalties prescribed by law may be imposed for failure to appear and dispose of the violation.”

Additionally, Rule 37.33(b) states that when the violation is one which the judge has designated within the authority of a violation bureau, then the violation notice must state: “(1) The specified fine and cost for the violation; and (2) That a person must respond to the violation notice by: (A) Paying the specified fine and court costs; or (B) Pleading not guilty and appearing at trial.”

The requirements of a violation notice were expanded when the Supreme Court of Missouri amended Rule 37.33, effective July 1, 2004. Although the “date and place” requirement was broadened in subsection (4) from the previous “time and place” requirement, the Supreme Court rule became more specific with the fact-stating subsection (5). The previous rule simply stated the notice shall “state facts constituting the claimed violation.” The rule now declares a notice shall state “facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it.” In addition, the Supreme Court added subsections (6), (7), and (8) to section(a).

### 4.3 FORM OF VIOLATION NOTICE

When the Supreme Court of Missouri amended [Rule 37.33](#), it also added section (c), which requires the violation notice be substantially in the form of the Uniform Citation set out in Form 37.A. It should be noted that Form 37.A is a five-part document initially utilized by officers when issuing traffic violations. The front side of each part is identical, with the backside having variations depending on its purpose. Each part is used as follows: (1) abstract court record, (2) information; (3) arrest record; (4) violator's copy; and (5) officer's record. (See form 37.A following this chapter.)

## INFORMATIONS

### Rules 37.34 through 37.41, Rule 37.51, and Rule 37.60; Forms 37.A and 37.E Section 479.090 RSMo (2004)

### 4.4 FORM AND CONTENT

#### Rule 37.35. Information – Form of – Contents.

Rule 37.34 requires all ordinance violations to be prosecuted by information. An information may be based on the prosecutor's information and belief that the ordinance violation was committed. However, the rule further states that the information *shall* be supported by a violation notice as prescribed by Rule 37.33. Section 479 of the Revised Statutes of Missouri governs Municipal Courts and Traffic Courts, and specifically § 479.090, RSMo (2004) references informations by stating ordinance violations “shall be instituted by information and *may* be based upon a complaint.”<sup>1</sup> To the extent that § 479.090 is inconsistent with any section of Rule 37, the Rule controls. See [Rule 37.02](#).

Form 37.A (part two entitled Uniform Citation – Information), as well as Form 37.E, are the forms that may be used by a prosecutor instituting a charge or charges against the defendant. The forms contain blank spaces to insert the requirements set out in Rule 37.35. First, the information must “be in writing, signed by the prosecutor and filed in the court having jurisdiction of the ordinance violation.” Further, the information shall: (1) state the name of the defendant or, if not known, designate the defendant by any name or description by which the defendant can be identified with reasonable certainty; (2) state plainly, concisely, and definitely the essential facts constituting the ordinance violation charged, *including facts necessary for any enhanced punishment*;<sup>2</sup> (3) state the date and place of the ordinance violation charged as definitely as can be done; and (4) cite the chapter and section of the ordinance alleged to have been violated and the chapter and section providing the penalty or punishment. The 2004 amendment of Rule 37.35 deleted the requirement that the information state the name of the prosecuting county or municipality, as well as the requirement that the information be in substantially the same form as set forth in Form 37.A.

Missouri courts have addressed various questions regarding the adequacy of informations. The most widely addressed concern is that of Rule 37.35(b)(2) which requires that the information state plainly, concisely and definitely the essential facts constituting the ordinance violation charged. A wide sampling of decisions regarding the sufficiency of informations follows.

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<sup>1</sup> “Complaint” was the word used for a “violation notice” prior to the 2000 amendment of Rule 37.33.

<sup>2</sup> This italicized clause was added in the Rule's 2004 amendment.

### ***A. Leading Cases on Sufficiency of Information***

The leading and most often-cited case regarding the sufficiency of an information is *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). In this case the defendant was charged with unlawful use of a weapon. Although the word “knowingly” was an element of the charge, it was omitted from the information. The defendant first raised the issue of the omission of the essential fact of “knowingly” in his appeal brief. The court held that when the issue of an essential element missing from the charge is raised for the first time only after the verdict, the “information will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of acquittal are prejudiced.” *Parkhurst*, 845 S.W.2d at 35 (footnote omitted). The court further stated that “[i]n either event, a defendant will not be entitled to relief based on a post-verdict claim that the information or indictment is insufficient unless the defendant demonstrates actual prejudice.” *Id.*

A more recent Supreme Court of Missouri case addressing the sufficiency of an information is *State v. Baker*, 103 S.W.3d 711 (Mo. banc 2003). In this case the defendant was charged with creation of a controlled substance. The amended information charged that defendant knowingly possessed “methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid . . .,” listing the precursor substances in the disjunctive form.<sup>3</sup> *Id.* at 721. The state conceded that it should not have charged possession of each chemical disjunctively in a single count, as possession of anyone of the listed chemicals, by itself, is a separate and distinct offense. *Id.* It appears this defendant also failed to raise the validity of the information issue until his appeal. The court stated that “[f]ailure to challenge the validity of an information or indictment before a verdict is entered severely limits the scope of available appellate review.” *Id.* at 721-722. Then the court went on to recite its rule from *Parkhurst*, as noted above, and found the defendant was not prejudiced by the language in the information.

The Missouri Court of Appeals, Southern District, recently noted that any “analysis of the sufficiency of an information must begin with a discussion of *State v. Parkhurst*.” *State v. McCullum*, 63 S.W.3d 242, 248-250 (Mo.App. S.D. 2001). Noting that *Parkhurst* “dealt only with a question of an untimely challenge to the information,” the court stated that “the standard of review for timely-challenged objections to the information remains to be decided.” *Id.* at 249 (footnote omitted). In making its analysis, the court stated “[a] sufficient charging instrument serves three constitutional purposes: (1) inform the accused of the charges against him or her so that he or she may prepare an adequate defense, (2) prevent retrial on the same charges in case of an acquittal, and (3) inform the court of the facts alleged to determine if those facts as alleged are sufficient, as a matter of law, to withstand motions (such as to dismiss) or support a conviction if one is to be had. . . . Omitting an essential element from a charging instrument hinders these aforementioned purposes, but the extent and prejudicial effect of the hindrance must be judicially determined.” *Id.* (citation omitted). Since the defendant in *McCullum* suffered no prejudice at all, the information charging him was not fatally defective. *Id.* at 250.

The Supreme Court of Missouri Rule 37.41 sets forth its own “prejudicial” standard for ordinance violation informations, outlined below at 4.11 Nonprejudicial Defects of an

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<sup>3</sup> The original information listed many of the same substances, just not in the disjunctive form.

Information. As in *Parkhurst, Baker, and McCullum*, Rule 37.41 provides that an information shall not be invalid because of any defect that does not prejudice the substantial rights of the defendant.

Typically, most cases concerning the issue of sufficiency of the information are cases where the issue is not addressed until the appeal. As a practical matter, defendants who raise the issue prior to or during trial simply prompt the prosecutor to request an amendment. When allowing the prosecutor to amend, a municipal judge should grant defendant additional time to properly prepare for his or her trial if the amendment would consequently affect the defendant's defense. This issue is more fully outlined below in Section 4.9 Amendment of Information.

### ***B. Sufficiency of Information v. Jurisdiction***

In reviewing cases regarding the sufficiency of an information, numerous cases state that a conviction based on an offense not properly charged in the charging instrument is a nullity, as the trial court acquires no jurisdiction over the non-charged offense. The Supreme Court of Missouri has noted a “confusing statement of law found in a number of cases that if an indictment is insufficient, the trial court acquires no jurisdiction of the subject matter.” *Parkhurst*, 845 S.W.2d 31, 34 (Mo. banc 1992). Subject matter jurisdiction of the court and the sufficiency of an information are two distinct concepts. The blending of those concepts serves only to confuse the issue to be determined. *Id.* at 34-35. “[A] defendant may for the first time on appeal raise either the issue of the trial court’s jurisdiction to try the class of case of which defendant was convicted or a separate claim that the indictment or information was insufficient to charge the crime of which defendant was convicted.” *Id.* at 35.

In *State v. Richter*, 241 S.W.3d 368 (Mo.App. S.D. 2007), a speeding case tried in circuit court, defendant claimed that the trial court lacked jurisdiction, and its actions were a nullity, because the information was insufficient. The court of appeals reiterated the *Parkhurst* rule that jurisdiction and a charging document’s sufficiency are two distinct concepts. *Id.* at 369. “Circuit courts obviously have subject matter to try crimes . . .” *Id.* at 370 (citing *Parkhurst*, 845 S.W.2d at 35). It is equally obvious that a municipal court has subject matter jurisdiction to hear and determine municipal ordinance violation cases. While *Parkhurst* was a felony case, the distinction between sufficiency of the information and subject matter jurisdiction applies in ordinance violation cases as well.

In *State v. Hicks*, 221 S.W.3d 497 (Mo.App. W.D. 2007), the defendant argued that the court lacked jurisdiction as the state failed to file an information formally charging him with two counts of assault of a law enforcement officer in the third degree, misdemeanors. The original complaint against defendant charged two counts of second-degree assault of a law enforcement officer, class C felonies. The court opined that the line of cases relied upon by defendant, in holding there was a lack of subject matter jurisdiction, totally ignore the Supreme Court of Missouri holding in *Parkhurst*. *Id.* at 501-502. The court went on to outline the *Parkhurst* rule regarding subject matter jurisdiction, but stated the defendant could argue the information was insufficient. *Id.* at 502.

## ***C. Plain, Concise, and Definite Statement of the Essential Facts***

### ***1. Insufficient Informations***

In *Griffin v. State*, 185 S.W.3d 763 (Mo.App. E.D. 2006), the defendant pled guilty to first degree assault of a law enforcement officer. Defendant moved for post-conviction relief, claiming that the information filed by the state was defective because it did not contain all the essential elements as set forth by statute for first degree assault of a law enforcement officer. *Id.* at 766. The information stated that the acts of defendant caused “physical injury” to the officer rather than “serious physical injury” pursuant to the statute for first degree assault of a law enforcement officer. As the appellate court found the information was not substantially consistent with the approved form set forth in the Supreme Court Rules, it proceeded to a two-part analysis to determine the sufficiency of the information: “(1) whether the information contains all essential elements of the offense as set out in the statute creating the offense, and (2) whether it clearly apprises the accused of the facts constituting the offense.” *Id.* The court concluded that the information did not meet the test, in that defendant could have reasonably believed a jury may have acquitted him of the higher standard of “serious physical injury” rather than the standard in the information. *Id.* at 767.

In *City of Montgomery v. Christian*, 144 S.W.3d 338, (Mo.App. E.D. 2004), the defendant was charged with four ordinance violations: (1) resisting arrest; (2) driving while revoked; (3) hazardous driving, and (4) careless and imprudent driving. The appellate court noted in its opinion that the City failed to file a brief.<sup>4</sup> The appellate court found that the first two charges failed to allege essential facts of the underlying charge. It held that “resisting arrest by flight” was insufficient because the defendant could have violated the ordinance in a variety of ways, none of which are clear from the information. *Id.* at 341-342. The court found that the information on the driving while revoked charge was equally insufficient, as the information omitted the essential element of the defendant’s culpable mental state. *Id.* at 342. As for the hazardous driving and careless and imprudent driving charges, the court found that those informations did contain sufficient essential facts to apprise the defendant of the charges against him. However, the court held on those two charges, since the informations failed to name the municipality prosecuting the violation and the chapter and section providing the penalty or punishment, that those informations were also deficient.<sup>5</sup> At no point in its opinion does the court discuss whether the defendant suffered any prejudice as a result of the insufficiencies in the informations.

The Court of Appeals, Western District, had occasion to consider the sufficiency of an amended information in *State v. Frances*, 51 S.W.3d 18 (Mo.App. W.D. 2001). The defendant had originally been charged with three counts of assault, as well as three counts of armed criminal action, involving three separate victims. When the state filed an amended information charging the defendant as a prior offender, it made typographical errors in two of the three armed criminal action counts. The amended information referred to the same victim in each armed criminal

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<sup>4</sup> “When one party fails to file a brief, this court is left with the dilemma of deciding the case (and possibly establishing precedent for future cases) without the benefit of that party’s authority and point of view. Appellate courts should not be asked or expected to assume such a role.” *Christian*, 144 S.W.2d at 340.

<sup>5</sup> The other two counts also failed to name the municipality prosecuting the violation and the chapter and section providing the penalty or punishment. It should be noted that since the amendment to Rule 37.35, effective July 1, 2004, naming the municipality prosecuting the violation is no longer a requirement of an information.

action count. The defendant was found guilty on all six counts and on appeal raised the issue of double jeopardy. The court noted that *Parkhurst* is “not directly apposite because *Parkhurst* does not relate to double jeopardy concerns.” *Id.* at 23. Although *Parkhurst* expresses “a philosophical position that an otherwise valid charge should not be considered invalid merely because of a minor technical omission”, it was unacceptable to simply ignore the appearance that the defendant’s double jeopardy rights have been violated. *Id.* at 23-24. The court vacated the convictions on two of the three armed criminal action counts.

Defendant’s conviction for “‘assault’ on January 30, 1989, in violation of Ordinance 15-46” was reversed in *City of El Dorado Springs v. Edmiston*, 821 S.W.2d 913 (Mo.App. S.D. 1992). The court held “[n]o facts constituting the assault were alleged”, and that the “bare conclusional allegation violated Rule 37.35(b)(2,)” which requires the information to state “plainly, concisely, and definitely the essential facts constituting the ordinance violation charged.” *Id.* at 914.

In a similar case, where the information simply charged defendant with “STEALING/SHOPLIFTING AT WALMART,” the court found the information to be “so patently devoid of any allegation of facts as to require little or no discussion.” *City of Excelsior Springs v. Redford*, 795 S.W.2d 123, 124 (Mo.App. W.D. 1990). “The statement concerning the violation is at most a bare legal conclusion.” *Id.* The court held that since the information in the case did not state the essential facts constituting the offense charged, the conviction could not stand.

In *City of Berkeley v. Stringfellow*, 783 S.W.2d 501 (Mo.App. E.D. 1990), the information alleged that the defendant did “unlawfully resist a lawful arrest.” On appeal, the defendant alleged the information was in violation of Rule 37.35, requiring the information to “state plainly, concisely, and definitely the essential facts constituting the ordinance violation charged . . .” *Id.* at 503. The court of appeals noted that “[a]lthough an information charging an ordinance violation is not subject to the same degree of strictness and particularity applicable to testing the sufficiency of indictments and informations in criminal cases, it must nevertheless set forth facts which if found true would constitute the offense prohibited by the ordinance.” *Id.* The court set forth the test for sufficiency of an information as (1) whether it states the essential elements of the offense so as to adequately apprise the defendant of the charge against her and (2) whether final disposition of the charge will bar further prosecution for the same offense. *Id.* The court held that the information charging defendant with resisting lawful arrest did not comply with Rule 37.35 nor did it comply with the test for sufficiency. “It does not set forth an ordinance violated as required by the rule; it does not allege any essential facts constituting a violation of an ordinance; it does not allege any elements of the crime intended to be charged.” *Id.*

In *City of Perryville v. LaRose*, 701 S.W.2d 202 (Mo.App. E.D. 1985), the information charged the defendant with the ordinance violation of “improper passing in violation of ordinance § 19-74.” The prosecutor subsequently amended the information, changing the ordinance number to § 19-76. Section 19-76 listed two ways in which a driver could pass improperly. The appellate court noted that Rule 37 requires a plain, concise and definite statement of essential facts, and that the purpose of the information is to inform the defendant of the charge against him so that he may prepare an adequate defense and plead former jeopardy if he is acquitted. *Id.* at 204. The court held that the information failed the stated tests in that it did not allege the offense prohibited. The ordinance with which appellant was charged may be violated a number of ways.

“Merely alleging that appellant made an improper passing maneuver . . . in violation of § 19-76 does not inform appellant of the charge against him so that he may prepare a defense.” *Id.*

In *City of Joplin v. Graham*, 679 S.W.2d 897 (Mo.App. S.D. 1984), the defendant was convicted of assaulting a police officer in violation of a city ordinance. Although an element of the violation was that the officer had to be in the discharge of official duty, this element was not stated in the information. “[W]hile an information charging an ordinance violation is not tested by the same degree of strictness and particularity as is one charging a criminal offense, . . . it must allege specific facts amounting to a violation in order to be sufficient.” *Id.* at 899 (citations omitted). The court held that the information in this case failed to allege any facts constituting the offense and was, therefore, defective. *Id.*

## 2. Sufficient Informations

In *State of Missouri v. Richter*, 241 S.W.3d 368 (Mo.App. S.D. 2007), defendant was convicted of speeding in circuit court. The court of appeals held that the information was sufficient as it plainly alleged defendant was driving 108 mph in a 70 mph zone. The court noted that “a charging document first challenged on appeal is deemed insufficient only if it is so defective that it (1) by no reasonable construction charges the offense of which the defendant was convicted, or (2) prejudices the defendant’s substantial rights to prepare a defense and plead former jeopardy in case of acquittal. . . . In either event, the defendant also must prove actual prejudice. . . . Defendant has not even argued nor has he met his burden on either of the two prongs.” *Id.* at 370 (citations omitted).

The Court of Appeals, Southern District, recently held that an information charging defendant with second degree assault was sufficiently specific even though allegations that the injury was inflicted by means of a dangerous instrument was omitted. *State v. Carlock*, 242 S.W.3d 461 (Mo.App. S.D. 2007). The court noted that the information correctly identified the offense with which defendant was charged, the proper grade of the offense, the date of the offense, the name of the alleged victim, the proper mental state for the offense, the injury inflicted and the act that inflicted the injury. *Id.* at 464-465. “The only thing omitted was an allegation that injury was inflicted ‘by means of a dangerous instrument.’” *Id.* at 465. As the court determined that the issue was presented for the first time on appeal, the *Parkhurst* test was applicable. Pursuant to *Parkhurst*, the defendant was required to demonstrate actual prejudice. On appeal, defendant failed to explain how his defense would have changed if the “dangerous instrument” language had been included in the information. *Id.*

In *State of Missouri v. Chavez*, 165 S.W.3d 545 (Mo.App. E.D. 2005), the defendant was convicted of violating an order of protection and harassment. The defendant asserted that the information was insufficient, and that the trial court lacked jurisdiction due to the insufficient information. The court of appeals stated that as the issue is raised for the first time on appeal, the scope of its review is severely limited. *Id.* at 548. “Further, whether a trial court has jurisdiction does not depend upon the sufficiency of an information.” *Id.* The information referenced the charging and punishment statute, the date and place of the offense, and stated the defendant violated the order of protection by “abusing, threatening to abuse or molesting or stalking or disturbing the peace of [the victim] or entering upon the premises of her dwelling.” *Id.* After reciting the law as dictated by *Parkhurst* and *Baker*, the court held that the defendant did not demonstrate actual prejudice as a result of the language of the information.

In *City of Chesterfield v. Deshelter Homes*, 938 S.W.2d 671 (Mo.App. E.D. 1997), the court of appeals reversed the trial court's dismissal of the case and remanded. Defendant had filed a motion to dismiss based partly on an allegation of insufficiency of the information. After outlining the requirements of Rule 37.35, and noting that this type of information is not held to the same rule of strictness as charges presented in criminal cases, the court held that all the procedural requirements of Rule 37.35 had been met. As the city's information was in writing, signed by the prosecutor, filed in Municipal Court of Chesterfield, named the defendant, stated the dates the violation took place, noted the ordinance number, and stated specific facts as to how the ordinance was violated, the court found that the city's information satisfied the requirements of Rule 37.35. *Id.* at 672-674.

In a case where defendant was convicted pursuant to a city's nuisance ordinance, the court of appeal held that failure to include an element of the charge in the information is not necessarily grounds for reversal. *City of Hurdland v. Morrow*, 861 S.W.2d 585 (Mo.App. W.D. 1993). Defendant claimed the city failed to allege in the information that defendant was given notice as required by the ordinance. In its ruling, the court relied upon Rule 37.03: "Rule 37 shall be construed to secure the just, speedy and inexpensive determination of . . . all ordinance violations." *Id.* at 587. Additionally, the court relied upon Rule 37.41: "No information shall be invalid . . . because of any defect therein that does not prejudice the substantial rights of the defendant."<sup>6</sup> *Id.* Defendant did not show how he was prejudiced by the incomplete information, did not object at trial to the city's evidence of notice, nor did he ever request a bill of particulars before trial.

In *City of Peculiar v. Dorflinger*, 723 S.W.2d 424 (Mo.App. W.D. 1986), defendant was convicted of violating a zoning ordinance by constructing a utility shed on a lot not authorized for that use. Defendant claimed that the information was defective as it did not inform defendant of the charge with particularity of the facts. The court of appeals found the information to be a sufficiently plain, concise and definite statement of facts which charged that "defendant did then and there unlawfully construct a utility shed on Lot 13, Lea Land, in violation of the zoning ordinance of the City of Peculiar, Ordinance Number 120379 of said city." *Id.* at 426. The court ruled that the "information in the present case does allege facts and, indeed, probably all the facts which could be set out pertinent to the charge made." *Id.*

#### ***D. Lack of Prosecutor's Signature on the Information***

Although Rule 37.35(a) clearly states an information shall be signed by the prosecutor, the majority of cases hold that the lack of signature is a mere formal defect. If applying Rule 37.41, it would seem that the lack the prosecutor's signature would be a defect not prejudicing the substantial rights of the defendant. In most cases where the prosecutor's failure to sign the information voids the conviction, the courts base their rulings on the trial court's lack of jurisdiction. However, the Supreme Court of Missouri has made it abundantly clear in *Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992), that insufficiency of the information and lack of jurisdiction are separate and distinct concepts. *See* Section 4.4B Sufficiency of Information v. Jurisdiction.

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<sup>6</sup> The current 2008 version of Rules 37.03 and 37.41 are substantially the same as when this case was decided in 1993.

In *Walster v. State*, 439 S.W.2d 1 (Mo. 1969), it was held that when a defendant who had been charged with a felony had entered a guilty plea to an amended information, the fact that the information was not subscribed and sworn to by the prosecuting attorney was a mere formal defect. “This court has held repeatedly that deficiencies in an information, such as the failure of the state’s attorney to sign and verify the information . . . may be waived, and that the information will be treated as valid if the accused does not attack it by a motion to quash; that such mere formal defects are waived by proceeding to trial without objection.” *Id.* at 3.

In *State v. Knight*, 764 S.W.2d 656 (Mo.App. E.D. 1988), the court of appeals, relying on *Walster*, held “that lack of a signature by a prosecutor on an information is a minor defect not affecting substantial rights where the defendant has alleged no prejudice therefrom.” *Id.* at 658. After determining that the lack of the prosecutor’s signature was a minor defect only, the court then relied on Rule 37.41 for its holding. Rule 37.41 states that an information shall not be invalid because of any defect that does not prejudice the substantial rights of the defendant. *See also, State v. Cobb*, 898 S.W.2d 124, 127 (Mo.App. E.D. 1995) (deficiencies in an information, such as the failure of the state’s attorney to sign and verify the information may be waived by proceeding to trial without objection; an information will be treated as valid if the accused does not attack it by a motion to quash).

#### ***E. Lack of Reference to the Charge or Punishment by Chapter and Section***

Rule 37.35(b)(4) requires the information to cite the chapter and section of the ordinance alleged to have been violated, as well as the chapter and section providing the penalty and punishment. As with the prosecutor’s signature, many courts have found the lack of reference to the particular ordinance or statute a mere technical defect and, unless the defendant is prejudiced, should not invalidate a conviction.

In fact, the Supreme Court of Missouri has held that mentioning a statute number in an information is treated as “surplusage.” *State v. Madison*, 997 S.W.2d 16, 19 (Mo. banc 1999). In this case of child endangerment charges, the information erroneously referenced the less stringent mental state of “criminal negligence”, a class A misdemeanor, rather than the mental state required for the Class D felony of “knowingly acts.” All other references in the information were correct: title of the offense; the statute creating the offense; the classification of the offense; and the jury instructions stating the law as to the offenses, including the requisite mental state “knowingly acts.” The court stated that “a careful reading of the information might have served to put Madison on notice of the crime with which he was charged since the statutory reference and the classification were accurate.” *Id.* “However, mentioning a statute number in an information is not conclusive as to the offense charged and is ‘treated as surplusage’.” *Id.* Here, the court found that since the defendant claimed he did not do the act, his mental state was irrelevant and did not prejudice his defense. *Id.* at 20.

In *State v. Angle*, 146 S.W.3d 4 (Mo.App. W.D. 2004), defendant was charged with possession of a chemical with intent to manufacture methamphetamine. The information referenced the incorrect statute, § 195.235 rather than § 195.233. The appellate court held that “[c]iting an incorrect statute or omitting a statutory reference does not necessarily render an information fatally deficient.” *Id.* at 10. The court stated that the test for sufficiency is whether the information contains all essential elements of the offense and clearly apprises the defendant of the facts constituting the offense. *Id.* “Here, the factual allegations and evidence were clearly

sufficient to convict Angle under Section 195.233 despite the State’s failure to cite that statute.” *Id.* The court concluded that defendant was unable to show any prejudice caused by the omission of the correct statute.

Other cases include *State v. Knight*, 764 S.W.2d 656, 658 (Mo.App. E.D. 1988) (DWI case where information failed to state penalty provision; court held that absent any showing of prejudice, the omission of statutory section numbers is not error where the information notified the defendant of the offense charged); *but cf. City of Montgomery v. Christian*, 144 S.W.3d 338 (Mo.App. E.D. 2004) (court found that lack of chapter and section providing the penalty or punishment voided defendant’s convictions; this case is more fully discussed above on page 6.)

#### ***F. Lack of Date and Place - Venue***

Rule 37.35(b)(3) requires that the information state the date and place of the ordinance violation charged as definitely as can be done. When Rule 37.35 was amended, effective July 1, 2004, subsection (b)(5) was deleted, requiring the information to state the name of the prosecuting county or municipality.

In a case in which a jury convicted defendant of driving under the influence and driving while revoked, the defendant raised the question of venue for the first time at his sentencing hearing. *State v. Mack*, 903 S.W.2d 632 (Mo.App. W.D. 1995). The appellate court stated two reasons for denying defendant’s venue argument. First, venue must be proved but it can be inferred from all the evidence, and this case produced facts sufficient for such an inference. Second, venue is “a personal prerogative which is waived by proceeding to trial without objection.” *Id.* at 627. The Court of Appeals, Eastern District, appears to take a stricter view of the Rule 37.35(b)(3) requirement as opined in *City of Cool Valley v. LeBeau*, 824 S.W.2d 512 (Mo.App. E.D. 1992). LeBeau was convicted for violations of municipal ordinances involving the city’s property maintenance code. As the information failed to allege that the offenses were committed within the city or that the building was located within the city, the Eastern District court reversed the conviction based on the premise that the trial court “lacked jurisdiction.”<sup>7</sup> *Id.* at 513.

### **4.5 PRETRIAL MOTIONS, DEFENSES AND OBJECTIONS TO PLEADINGS**

#### **Rule 37.51. Pleadings and Motions Before Trial – Defenses and Objections – Hearing on Motion**

Rule 37.51 outlines the timing of defenses and objections to the pleadings. Any defense or objection capable of determination without trial may be raised before trial by motion. However, defenses and objections based on defects in the institution of the prosecution or in the information *must* be made by motion *before* trial unless it’s an objection based on the information failing to show jurisdiction in the court or the information failing to charge an ordinance violation. The failure to present any such defense or objection constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Further, “[I]ack of jurisdiction or the failure of the information to charge an ordinance violation shall be noticed by the court at any time during the pendency of the proceeding.” Rule 37.41(b)(5).

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<sup>7</sup> The court did not do any type of “prejudice” analysis.

## 4.6 JOINDER

### **Rule 37.36. Information – Joinder of Violations**

### **Rule 37.37. Information – Joinder of Defendants**

Rule 37.36 allows violations of similar character that are connected or constitute parts of a common scheme to be charged in the same information in separate counts. Rule 37.37 allows two or more defendants to be charged in the same information if they are alleged to have participated in the same act(s) or transaction(s) constituting an ordinance violation(s). Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

Joinder addresses the basic question of what violations and what defendants can be charged in a single proceeding as a matter of law. In a criminal case, liberal joinder is favored in order to achieve judicial economy. *State v. Woodson*, 140 S.W.3d 621, 626 (Mo.App. S.D. 2004); *State v. Kelley*, 901 S.W.2d 193, 202 (Mo.App. W.D. 1995); *State v. Davis*, 860 S.W.2d 369, 372 (Mo.App. E.D. 1993).

## 4.7 SEVERANCE

### **Rule 37.60. Severance**

The rule regarding severance was recently amended<sup>8</sup> requiring a *written motion* for severance by the defendant when seeking a separate trial due to multiple defendants or by a party when seeking a separate trial of multiple violations.

In two distinct paragraphs, this rule addresses severance of multiple defendants and severance of multiple violations. The first paragraph of the rule concerns an information where more than one defendant has been charged. Under a multiple defendant case, all defendants shall be tried together unless the court orders a defendant to be tried separately. A defendant may only receive a separate trial if he or she files a written motion requesting a separate trial and the court finds a probability of prejudice exists.

The second paragraph sets forth the requirements for allowing separate trials on different violations which were all filed in one information. A violation shall be tried separately only if: (1) a written motion is filed requesting a separate trial; (2) a party makes a showing of substantial prejudice if the violation is not tried separately; and (3) the court finds a bias or discrimination against the party that requires a separate trial of the violation.

All three appellate districts recognize that joinder and severance are separate and distinct issues. Severance assumes that joinder is proper and leaves to the discretion of the trial court to determine whether prejudice may result if the defendant or charges are tried together. *See State v. Simmons*, 158 S.W.3d 901, 908-909 (Mo.App. S.D. 2005); *State v. Reeder*, 182 S.W.3d 569, 576 (Mo.App. E.D. 2005); *State v. McQuary*, 173 S.W.3d 663, 670 (Mo.App. W.D. 2005).

## 4.8 INCORRECT NAME OF DEFENDANT

### **Rule 37.38. Information – Incorrect Name of Defendant**

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<sup>8</sup> Rule 37.60 was amended Dec. 23, 2003, effective July 1, 2004.

This rule allows a defendant charged under an incorrect name to furnish the correct name and to have the correct name substituted in the information. If the defendant fails to furnish the correct name, that failure will not invalidate the proceedings against him or her.

#### **4.9 AMENDMENT OF INFORMATION**

##### **Rule 37.39. Information – Amendment – Delay**

This rule allows a prosecutor to amend an information at any time before a judge’s finding (guilty or not guilty), provided that (1) no additional or different ordinance violation is charged and (2) defendant’s substantial rights are not prejudiced by the amendment. No delay of a trial after such amendment is allowed unless the judge finds that the defendant requires additional time to defend against the amended charge.

##### ***A. Amendment that Charges a New or Different Violation***

Typically, it is obvious when an amendment changes the charge to a new or different violation. When the amendment to the information charges a different violation, it for all purposes becomes a new information. *State v. Simpson*, 846 S.W.2d 724, 727 (Mo. banc 1993); *State v. Mattic*, 84 S.W.3d 161, 166 (Mo.App. W.D. 2002). It has been held that this rule prohibiting amending to a new charge would not apply if the subsequent charge is a lesser-included offense of the initial charge. *Messa v. State*, 914 S.W.2d 53, 54 (Mo.App. W.D. 1996) (applying Rule 23.08, which is substantially similar to Rule 37.39). An offense is a lesser-included offense if it is impossible to commit the greater without necessarily committing the lesser. *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002). The prohibition of amending to a new or different charge “does not apply if the subsequent charge is a lesser included offense of the initial charge because, in the contemplation of law, they are the same.” *Messa*, 914 S.W.2d at 54.

In *State v. Messa*, 914 S.W.2d 53 (Mo.App. W.D. 1996), the prosecutor amended the information on the morning of trial from felony sodomy, in that the defendant had deviate sexual intercourse, to felony sodomy, in that defendant attempted to have deviate sexual intercourse. The court held that the prosecutor’s amendment of the information was not prejudicial to defendant, in that the “attempt” charge was a lesser included offense of the completed offense charged. *Id.* at 55. As such, the same evidence and defense available to defendant prior to the amendment were equally available to defendant after the amendment. *Id.* at 54-55.

##### ***B. Test for Prejudice Due to Amendment***

All three appellate district courts have announced the test for prejudice within the meaning of the rule allowing a prosecutor to amend an information. When an amendment is allowed by the prosecution, the test for prejudice is whether a defendant’s evidence would be equally applicable and his defense equally available. *State v. Hoover*, 220 S.W.2d 395, 399 (Mo.App. E.D. 2007); *State v. Fitzpatrick*, 193 S.W.3d 280, 284 (Mo.App. W.D. 2006); *State v. Love*, 88 S.W.3d 511, 517 (Mo.App. S.D. 2002). Stated another way, the test for prejudice is whether the planned defense to the original charge would still be available after the amendment. *Love*, 88 S.W.3d at 517.

#### **4.10 UNAVAILABILITY OF ORIGINAL INFORMATION**

##### **Rule 37.40. Information – Unavailability of Original**

When the original information is unavailable for any reason, a copy, certified by the clerk or by the prosecutor, may be substituted. For example, a certified copy may be used to replace a lost, burned, or misplaced original.

#### **4.11 NONPREJUDICIAL DEFECTS OF AN INFORMATION**

##### **Rule 37.41. Information – Nonprejudicial Defects**

Rule 37.41 makes it clear that an information is not invalid simply because it contains a defect. An information shall only be invalid if the defect prejudices the substantial rights of the defendant. Some of the cases discussed above in Section 4.4.C.2 Sufficient Informations are examples of informations with nonprejudicial defects. *See, State v. Richter*, 241 S.W.3d 368 (Mo.App. S.D. 2007); *State v. Chavez*, 165 S.W.3d 545 (Mo.App. E.D. 2005); *City of Hurdland v. Morrow*, 861 S.W.2d 585 (Mo.App. W.D. 1993).

### **APPEARANCE OF THE DEFENDANT**

#### **4.12 Voluntary Appearance of the Defendant**

If a defendant is present in court on the charge, no other proceedings are necessary to obtain jurisdiction of the person. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992) (citing *State v. Conway*, 351 Mo. 126, 171 S.W.2d 677, 683 (Mo. 1943)).

#### **4.13 Compelling the Appearance of the Defendant**

##### **A. Appearance By Summons**

##### **Rules 37.42 through 37.44; Form 37.L**

Rule 37.42 describes what a summons must contain, and Form 37.L is a sample summons setting forth those requirements. The summons shall: (a) be in writing and in the name of the prosecuting county or municipality; (b) state the name of the person summoned and the address, if known; (c) describe the ordinance violation charged; (d) be signed by a judge or by a clerk of the court when directed by a judge; and (e) command the person to appear before the court at a stated time and place in response thereto.

When an information charging the commission of an ordinance violation is filed, Rule 37.43 requires a summons to be issued upon the defendant. Upon this Rule's amendment, effective July 1, 2004, violation notices (tickets given by officers to defendants) are no longer equivalent to a summons. The violation notice given to a defendant by an officer at the time of the violation is simply a notice (1) of the violation and (2) of the first date and time the case will appear on the court's docket. The 2004 amendment added subsection (d) to the Rule, requiring the summons to be signed by the judge or the court clerk. Typically, if the defendant fails to voluntarily appear on the first docket date, the court clerk will issue a summons for the defendant to appear on the next court date.

Rule 37.44 allows the summons to be served by the clerk to defendant's last known address, by first class mail, or by an officer in the manner provided by Rule 54.13 (personal service within the state) or Rule 54.14 (personal service outside the state). If the clerk serves the summons by mail, then the clerk certifies on the "Certificate of Mailing" (Form 37.L) the date on which the summons and copy of the information were mailed to the defendant.

***B. Appearance By Warrant For Arrest***

**Rules 37.43 through Rule 37.46; Form 37.M  
Section 479.100 RSMo (2004)**

Rule 37.44 states that "[i]f the defendant fails to appear in response to a summons and upon a finding of probable cause that an ordinance violations has been committed, the court may issue an arrest warrant."

Under certain circumstances, Rule 37.43 allows for the issuance of an arrest warrant without a summons having been issued. There are three conditions that are required before an arrest warrant may be issued prior to a summons being issued: (1) an information charging an ordinance violation is filed; (2) the court finds sufficient facts stated to show probable cause that an ordinance violation has been committed; and (3) reasonable grounds for the court to believe that the defendant will not appear upon the summons *or* a showing has been made to the court that the accused poses a danger to a crime victim, the community, or any other person.

Rule 37.45(b) specifies the required contents of an arrest warrant, and Form 37.M is the recommended form containing all the requirements for a warrant. The rule states that the warrant shall: (1) contain the name of the person to be arrested or, if not known, any name or description by which the defendant can be identified with reasonable certainty; (2) describe the ordinance violation charged in the information; (3) state the date when issued and the jurisdiction where issued; (4) command that the defendant named or described therein be arrested and brought forthwith before the court designated in the warrant; (5) specify the conditions of release; and (6) be signed by a judge or by a clerk of the court when directed by the judge for a specific warrant.

It is important to note that the clerk of the court may sign the arrest warrant only in the circumstance stated in Rule 37.45(b)(6), *i.e.*, when directed by the judge for a specific warrant. It is recommended that the judge review and sign each of the court's arrest warrants in lieu of the court clerk using a "judge's signature stamp."

Rule 37.46 allows all warrants ordered for ordinance violations to be directed to any peace officer in the state. The officer executes the warrant by arresting the defendant. The officer need not possess the warrant at the time of the arrest, but shall inform the defendant of the ordinance violation charged and the fact that a warrant has been issued. Upon request, the officer shall show the warrant to the defendant as soon as possible. The court, by its written order, may withdraw any warrant previously issued if the warrant has not been executed.

Section 479.100 RSMo (2004) allows the issuance and executions of arrest warrants by a municipal or associate circuit judge hearing violations of municipal ordinances to be directed to the city marshal, chief of police, or any other police officer of the municipality, or to the sheriff of the county. Under this statute, the warrant may only be executed within that particular county

unless it is endorsed in a manner provided for warrants in criminal cases, and, when so endorsed, shall be served in other counties.

Form 37.A Uniform Citation -  
Abstract of Court Record

9945678292

UNIFORM CITATION

STATE OF MISSOURI IN THE CIRCUIT COURT OF				DIVISION	
COURT ADDRESS (Street, City, Zip)				COUNTY	
COURT DATE	COURT TIME <input type="checkbox"/> AM <input type="checkbox"/> PM	COURT PHONE NO. ( )			
<b>I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:</b>					
ON/ABOUT (Date)	AT TIME HRS	HWY CLASS	UPON/AT OR NEAR (LOCATION)		
<b>WITHIN CITY/COUNTY AND STATE AFORESAID,</b>					
NAME (LAST, FIRST, MIDDLE)					
STREET ADDRESS					
CITY			STATE	ZIP CODE	
DATE OF BIRTH	AGE	RACE	SEX	HEIGHT	WEIGHT
DRIVER'S LIC. NO.				CDL: <input type="checkbox"/> YES <input type="checkbox"/> NO	STATE
<b>LEAVE THIS LINE BLANK</b>					
EMPLOYER					
ADDRESS (Street, City, State, Zip)					
<b>DID UNLAWFULLY</b> <input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK			<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ. MAT		
V E H I C L E	YEAR	MAKE	MODEL	STYLE	COLOR
	REGISTERED WEIGHT	L I C NUMBER	STATE	YEAR	
<b>DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:</b>					
<input type="checkbox"/> <b>Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)</b>					
DRIVING MPH	POSTED SPEED LIMIT MPH	DETECTION METHOD <input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE <input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER			
IN VIOLATION OF: <input type="checkbox"/> RSMo <input type="checkbox"/> ORD.		CHARGE CODE:		<input type="checkbox"/> IN FATAL ACCIDENT <input type="checkbox"/> IN ACCIDENT <input type="checkbox"/> DWIBAC	
SEAT BELT VIOLATION: <input type="checkbox"/> ORD. <input type="checkbox"/> _____ RSMo		CHARGE CODE			
OFFICER			BADGE	TRP/ZONE	DATE
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.
PROSECUTOR'S SIGNATURE				DATE	
I promise to dispose of the charges of which I am accused through court appearance or prepayment of fine and court costs.					DR. LIC. POSTED <input type="checkbox"/> YES <input type="checkbox"/> NO
SIGNATURE X _____					

## Reverse Side, Abstract of Court Record

<b>FOR ISSUANCE OF A WARRANT COMPLETE AT LEAST ONE OF THE FOLLOWING:</b>				
<input type="checkbox"/> Defendant will not appear because _____ _____				
<input type="checkbox"/> Defendant poses a danger to the victim or the community/other person because _____ _____				
<b>DOR USE ONLY</b>	VIOL CODE	DESCRIPTION CODE	SENT CODE	LIC SURRENDERED
	ADD POINTS			
DOR MICROFILM NUMBER				
COURT ORI <b>MO</b>		COURT NAME (SPECIFY COUNTY, DIVISION)		
COURT CASE NUMBER	DATE FILED	DATE OF SENTENCE (CONVICTION, SIS)		
CHARGE AS DISPOSED <input type="checkbox"/> FELONY <input type="checkbox"/> MISDEMEANOR <input type="checkbox"/> INFRACTION _____ <input type="checkbox"/> RSMo _____ <input type="checkbox"/> ORD		MO CHARGE CODE		
		DESCRIPTION OF OFFENSE		
FINE ORDERED \$	DAYS OF CONFINMENT ORDERED		SEAT BELT CONVICTION \$ FINE	
<input type="checkbox"/> SUSPENDED IMPOSITION OF SENTENCE (SIS)		<input type="checkbox"/> SENTENCE SUSPENDED (SES)		
PROBATION TERM:		DAYS SUSPENDED _____		
		FINE SUSPENDED _____		
MANDATORY INSURANCE: <input type="checkbox"/> ORDER OF SUPERVISION DO NOT ASSESS POINTS <input type="checkbox"/> ORDER OF SUSPENSION ASSESS POINTS <input type="checkbox"/> YES <input type="checkbox"/> NO				
<input type="checkbox"/> DRIVER IMPROVEMENT PROGRAM (IN LIEU OF POINT ASSESSMENT)				
LICENSE SURRENDERED AT CONVICTION <input type="checkbox"/> YES <input type="checkbox"/> NO		<input type="checkbox"/> PROPERTY DAMAGE/PERSONAL INJURY RESULTED FROM VIOLATION, ASSESS TWO ADDITIONAL POINTS		
BOND FORFEITURE PREVIOUSLY SENT TO DOR <input type="checkbox"/> YES <input type="checkbox"/> NO	DEFENDANT REPRESENTED BY COUNSEL <input type="checkbox"/> YES <input type="checkbox"/> NO	DEFENDANT WAIVED RIGHT TO COUNSEL IN WRITING <input type="checkbox"/> YES <input type="checkbox"/> NO		
NAME OF JUDGE			LAWYER JUDGE <input type="checkbox"/> YES <input type="checkbox"/> NO	
REMARKS:          				
I CERTIFY THIS TO BE A TRUE ABSTRACT OF RECORD IN THIS CASE NAME & TITLE				

Form 37.A Uniform Citation -  
Information

9945678292

UNIFORM CITATION

STATE OF MISSOURI IN THE CIRCUIT COURT OF		COUNTY		DIVISION	
COURT ADDRESS (Street, City, Zip)					
COURT DATE	COURT TIME <input type="checkbox"/> AM <input type="checkbox"/> PM	COURT PHONE NO. ( )			
<b>I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:</b>					
ON/ABOUT (Date)	AT TIME HRS	HWY CLASS	UPON/AT OR NEAR (LOCATION)		
<b>WITHIN CITY/COUNTY AND STATE AFORESAID,</b>					
NAME (LAST, FIRST, MIDDLE)					
STREET ADDRESS					
CITY		STATE	ZIP CODE		
DATE OF BIRTH	AGE	RACE	SEX	HEIGHT	WEIGHT
DRIVER'S LIC. NO.			CDL: <input type="checkbox"/> YES <input type="checkbox"/> NO	STATE	
<b>LEAVE THIS LINE BLANK</b>					
EMPLOYER					
ADDRESS (Street, City, State, Zip)					
<b>DID UNLAWFULLY</b> <input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK			<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ. MAT		
V E H I C L E	YEAR	MAKE	MODEL	STYLE	COLOR
	REGISTERED WEIGHT	L I C	NUMBER	STATE	YEAR
<b>DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:</b>					
<input type="checkbox"/> <b>Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)</b>					
DRIVING MPH	POSTED SPEED LIMIT MPH	DETECTION METHOD <input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE <input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER			
IN VIOLATION OF: <input type="checkbox"/> RSMo <input type="checkbox"/> ORD.		CHARGE CODE:		<input type="checkbox"/> IN FATAL ACCIDENT <input type="checkbox"/> IN ACCIDENT <input type="checkbox"/> DWI/BAC	
SEAT BELT VIOLATION: <input type="checkbox"/> ORD. <input type="checkbox"/> _____ RSMo		CHARGE CODE:			
OFFICER		BADGE	TRP/ZONE	DATE	
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.
PROSECUTOR'S SIGNATURE				DATE	
I promise to dispose of the charges of which I am accused through court appearance or prepayment of fine and court costs.					DR. LIC. POSTED <input type="checkbox"/> YES <input type="checkbox"/> NO
SIGNATURE X _____					

Reverse Side, Information

FOR COURT USE ONLY			
BOND AMOUNT \$		BOND POSTED BY	
BOND EXPIRES		BOND FORFEITURE NUMBER	REFUND \$
DATE	TIME	TFRD TO	REASON CONTINUED
	<input type="checkbox"/> AM <input type="checkbox"/> PM		
	<input type="checkbox"/> AM <input type="checkbox"/> PM		
	<input type="checkbox"/> AM <input type="checkbox"/> PM		
COURT ORI <b>MO</b>		COURT NAME (SPECIFY COUNTY, DIVISION)	
COURT CASE NUMBER	DATE FILED	DATE OF SENTENCE (CONVICTION, SIS)	
CHARGE AS DISPOSED <input type="checkbox"/> FELONY <input type="checkbox"/> MISDEMEANOR <input type="checkbox"/> INFRACTION _____ <input type="checkbox"/> RSMo _____ <input type="checkbox"/> ORD		MO CHARGE CODE	DESCRIPTION OF OFFENSE
FINE ORDERED \$	DAYS OF CONFINMENT ORDERED	SEAT BELT CONVICTION \$ FINE	
<input type="checkbox"/> SUSPENDED IMPOSITION OF SENTENCE (SIS)		<input type="checkbox"/> SENTENCE SUSPENDED (SES)	
PROBATION TERM:		DAYS SUSPENDED _____ FINE SUSPENDED _____	
MANDATORY INSURANCE: <input type="checkbox"/> ORDER OF SUPERVISION DO NOT ASSESS POINTS <input type="checkbox"/> ORDER OF SUSPENSION ASSESS POINTS <input type="checkbox"/> YES <input type="checkbox"/> NO			
<input type="checkbox"/> DRIVER IMPROVEMENT PROGRAM (IN LIEU OF POINT ASSESSMENT)			
LICENSE SURRENDERED AT CONVICTION <input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> PROPERTY DAMAGE/PERSONAL INJURY RESULTED FROM VIOLATION, ASSESS TWO ADDITIONAL POINTS		
BOND FORFEITURE PREVIOUSLY SENT TO DOR <input type="checkbox"/> YES <input type="checkbox"/> NO	DEFENDANT REPRESENTED BY COUNSEL <input type="checkbox"/> YES <input type="checkbox"/> NO	DEFENDANT WAIVED RIGHT TO COUNSEL IN WRITING <input type="checkbox"/> YES <input type="checkbox"/> NO	
NAME OF JUDGE		LAWYER JUDGE <input type="checkbox"/> YES <input type="checkbox"/> NO	
REMARKS			
PLEA <input type="checkbox"/> GUILTY <input type="checkbox"/> NOT GUILTY	FINDING <input type="checkbox"/> GUILTY <input type="checkbox"/> NOT GUILTY	COURT COSTS \$	

Form 37.A Uniform Citation -  
Arrest Record

9945678292

UNIFORM CITATION

STATE OF MISSOURI IN THE CIRCUIT COURT OF				DIVISION	
COURT ADDRESS (Street, City, Zip)				COUNTY	
COURT DATE	COURT TIME	<input type="checkbox"/> AM <input type="checkbox"/> PM	COURT PHONE NO. ( )		
<b>I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:</b>					
ON/ABOUT (Date)	AT TIME	HWY CLASS	UPON/AT OR NEAR (LOCATION)		
<b>WITHIN CITY/COUNTY AND STATE AFORESAID,</b>					
NAME (LAST, FIRST, MIDDLE)					
STREET ADDRESS					
CITY			STATE	ZIP CODE	
DATE OF BIRTH	AGE	RACE	SEX	HEIGHT	WEIGHT
DRIVER'S LIC. NO.			CDL: <input type="checkbox"/> YES <input type="checkbox"/> NO	STATE	
<b>LEAVE THIS LINE BLANK</b>					
EMPLOYER					
ADDRESS (Street, City, State, Zip)					
<b>DID UNLAWFULLY</b> <input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK			<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ. MAT		
V E H I C L E	YEAR	MAKE	MODEL	STYLE	COLOR
	REGISTERED WEIGHT	L I C	NUMBER	STATE	YEAR
<b>DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:</b>					
<input type="checkbox"/> <b>Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)</b>					
DRIVING	POSTED SPEED LIMIT	DETECTION METHOD			
MPH	MPH	<input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE <input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER			
IN VIOLATION OF:		<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.	CHARGE CODE:	<input type="checkbox"/> IN FATAL ACCIDENT <input type="checkbox"/> IN ACCIDENT <input type="checkbox"/> DWI/BAC	
SEAT BELT VIOLATION:		<input type="checkbox"/> ORD. <input type="checkbox"/> _____ RSMo	CHARGE CODE:		
OFFICER			BADGE	TRP/ZONE	DATE
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.
PROSECUTOR'S SIGNATURE				DATE	
I promise to dispose of the charges of which I am accused through court appearance or prepayment of fine and court costs.					DR. LIC. POSTED
SIGNATURE X _____					<input type="checkbox"/> YES <input type="checkbox"/> NO



Form 37.A Uniform Citation –  
Violator's Copy

9945678292

UNIFORM CITATION

STATE OF MISSOURI IN THE CIRCUIT COURT OF		COUNTY		DIVISION	
COURT ADDRESS (Street, City, Zip)					
COURT DATE	COURT TIME	<input type="checkbox"/> AM <input type="checkbox"/> PM	COURT PHONE NO. ( )		
<b>I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:</b>					
ON/ABOUT (Date)	AT TIME	HWY CLASS	UPON/AT OR NEAR (LOCATION)		
<b>WITHIN CITY/COUNTY AND STATE AFORESAID,</b>					
NAME (LAST, FIRST, MIDDLE)					
STREET ADDRESS					
CITY			STATE	ZIP CODE	
DATE OF BIRTH	AGE	RACE	SEX	HEIGHT	WEIGHT
DRIVER'S LIC. NO.			CDL: <input type="checkbox"/> YES <input type="checkbox"/> NO	STATE	
<b>LEAVE THIS LINE BLANK</b>					
EMPLOYER					
ADDRESS (Street, City, State, Zip)					
<b>DID UNLAWFULLY</b> <input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK			<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ. MAT		
V E H I C L E	YEAR	MAKE	MODEL	STYLE	COLOR
	REGISTERED WEIGHT	L I C	NUMBER	STATE	YEAR
<b>DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:</b>					
<input type="checkbox"/> <b>Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)</b>					
DRIVING	POSTED SPEED LIMIT	DETECTION METHOD			
MPH	MPH	<input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE <input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER			
IN VIOLATION OF:		<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.	CHARGE CODE:	<input type="checkbox"/> IN FATAL ACCIDENT <input type="checkbox"/> IN ACCIDENT <input type="checkbox"/> DWI/BAC	
SEAT BELT VIOLATION:		<input type="checkbox"/> ORD. <input type="checkbox"/> _____ RSMo	CHARGE CODE:		
OFFICER			BADGE	TRP/ZONE	DATE
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.
PROSECUTOR'S SIGNATURE				DATE	
I promise to dispose of the charges of which I am accused through court appearance or prepayment of fine and court costs.					DR. LIC. POSTED
SIGNATURE X _____					<input type="checkbox"/> YES <input type="checkbox"/> NO

**YOUR FAILURE TO APPEAR IN COURT AT THE TIME SPECIFIED ON THIS CITATION OR OTHERWISE RESPOND TO THE CITATION AS DIRECTED MAY RESULT IN THE SUSPENSION OF YOUR DRIVER'S LICENSE AND DRIVING PRIVILEGE AND MAY RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST.**

APPEARANCE, PLEA OF GUILTY AND WAIVER – ONLY FOR OFFENSES NOT REQUIRING A COURT APPEARANCE.

I, the undersigned, do hereby enter my appearance on the offense specified on the other side of this citation. I have been informed of my right to a trial, that my signature to this plea of guilty will have the same force and effect as a judgment of court, and that this record will be sent to the licensing authority of this state. I do hereby plead guilty to this offense as specified, waive my right to a hearing by the court, and agree to pay the penalty prescribed for my offense.

DEFENDANT'S SIGNATURE

STREET ADDRESS

CITY, STATE, ZIP

DRIVER'S LICENSE NUMBER

Form 37.A Uniform Citation –  
Officer Record

9945678292

UNIFORM CITATION

STATE OF MISSOURI IN THE CIRCUIT COURT OF				DIVISION	
COURT ADDRESS (Street, City, Zip)				COUNTY	
COURT DATE	COURT TIME	<input type="checkbox"/> AM <input type="checkbox"/> PM	COURT PHONE NO. ( )		
<b>I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:</b>					
ON/ABOUT (Date)	AT TIME	HWY CLASS	UPON/AT OR NEAR (LOCATION)		
<b>WITHIN CITY/COUNTY AND STATE AFORESAID,</b>					
NAME (LAST, FIRST, MIDDLE)					
STREET ADDRESS					
CITY			STATE	ZIP CODE	
DATE OF BIRTH	AGE	RACE	SEX	HEIGHT	WEIGHT
DRIVER'S LIC. NO.			CDL: <input type="checkbox"/> YES <input type="checkbox"/> NO	STATE	
<b>LEAVE THIS LINE BLANK</b>					
EMPLOYER					
ADDRESS (Street, City, State, Zip)					
<b>DID UNLAWFULLY</b> <input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK			<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ. MAT		
V E H I C L E	YEAR	MAKE	MODEL	STYLE	COLOR
	REGISTERED WEIGHT	L I C	NUMBER	STATE	YEAR
<b>DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:</b>					
<input type="checkbox"/> <b>Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)</b>					
DRIVING	POSTED SPEED LIMIT	DETECTION METHOD			
MPH	MPH	<input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE <input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER			
IN VIOLATION OF:		<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.	CHARGE CODE:	<input type="checkbox"/> IN FATAL ACCIDENT <input type="checkbox"/> IN ACCIDENT <input type="checkbox"/> DWI/BAC	
SEAT BELT VIOLATION:		<input type="checkbox"/> ORD. <input type="checkbox"/> _____ RSMo	CHARGE CODE:		
OFFICER			BADGE	TRP/ZONE	DATE
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					<input type="checkbox"/> RSMo <input type="checkbox"/> ORD.
PROSECUTOR'S SIGNATURE				DATE	
I promise to dispose of the charges of which I am accused through court appearance or prepayment of fine and court costs.					DR. LIC. POSTED
SIGNATURE X _____					<input type="checkbox"/> YES <input type="checkbox"/> NO

## Reverse Side, Officer Record

DISOBEYED SIGNAL (WHEN LIGHT TURNED RED)		<input type="checkbox"/> PAST MIDDLE OF INTERSECTION	<input type="checkbox"/> MIDDLE OF INTERSECTION	<input type="checkbox"/> NOT REACHED INTERSECTION
DISOBEYED STOP SIGN		<input type="checkbox"/> STOPPED WRONG PLACE	<input type="checkbox"/> WALK SPEED	<input type="checkbox"/> FASTER
IMPROPER TURN				
<input type="checkbox"/> LEFT	<input type="checkbox"/> RIGHT	<input type="checkbox"/> "U"	<input type="checkbox"/> NO SIGNAL	<input type="checkbox"/> INTO WRONG LANE
<input type="checkbox"/> CUT CORNER		<input type="checkbox"/> FROM WRONG LANE		<input type="checkbox"/> PROHIBITED
<input type="checkbox"/> IMPROPER PASSING		<input type="checkbox"/> WRONG SIDE OF PAVEMENT	<input type="checkbox"/> AT INTERSECTION	<input type="checkbox"/> ON RIGHT
<input type="checkbox"/> IMPROPER LANE USE		<input type="checkbox"/> WRONG LANE	<input type="checkbox"/> ON HILL	<input type="checkbox"/> BETWEEN TRAF
		<input type="checkbox"/> LANE STRADDLING	<input type="checkbox"/> ON CURVE	<input type="checkbox"/> CUT IN
SLIPPERY PAVEMENT		CAUSED PERSON TO DODGE		
<input type="checkbox"/> RAIN	<input type="checkbox"/> SNOW	<input type="checkbox"/> ICE	<input type="checkbox"/> PEDESTRIAN	<input type="checkbox"/> JUST MISSED ACCIDENT
		<input type="checkbox"/> OPERATOR		
VISIBILITY		AREA		
<input type="checkbox"/> NIGHT	<input type="checkbox"/> RAIN/SNOW	<input type="checkbox"/> FOG	<input type="checkbox"/> RESIDENTIAL	<input type="checkbox"/> RURAL
		<input type="checkbox"/> SCHOOL	<input type="checkbox"/> BUSINESS	<input type="checkbox"/> OTHER
OTHER TRAFFIC PRESENT		<input type="checkbox"/> CROSS	<input type="checkbox"/> SAME DIRECTION	<input type="checkbox"/> ONCOMING
		<input type="checkbox"/> PEDESTRIAN		
ROAD TYPE: <input type="checkbox"/> 2-LANE <input type="checkbox"/> 3-LANE <input type="checkbox"/> 4-LANE <input type="checkbox"/> 4-LANE DIVIDED <input type="checkbox"/> 6-LANE DIVIDED				
IN ACCIDENT				
<input type="checkbox"/> HEADS ON	<input type="checkbox"/> PEDESTRIAN	<input type="checkbox"/> VEHICLE	<input type="checkbox"/> INTERSECTION	<input type="checkbox"/> RIGHT ANGLE
<input type="checkbox"/> SIDESWIPE	<input type="checkbox"/> REAR-END	<input type="checkbox"/> RAN OFF ROAD	<input type="checkbox"/> HIT FIXED OBJECT	
<b>NAMES AND ADDRESSES OF WITNESSES</b>				
<b>REPORT OF ACTION IN CASE</b>				
<b>NON CONVICTION DISPOSITION DATA ONLY</b>				
COURT ORI		COURT CASE NUMBER		
DATE OF HEARING		DEF. REP. BY COUNSEL	DEF. WAIVED COUNSEL	
		<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO	
COURT FINDINGS (NOT GUILTY, SIS, NOLLE PROSSED, DISMISSED, ETC.)				

## V. RIGHT TO COUNSEL

### Judge Kenneth Foster Thompson

Section	Page Number
5.1 Introduction .....	3
<b>DEFENDANT REPRESENTED BY COUNSEL .....</b>	<b>3</b>
5.2 Restrictions on the Court .....	3
5.3 When Presence of Attorney is Required .....	3
5.4 When Presence of Defendant is Not Required .....	3
<b>DEFENDANT NOT REPRESENTED BY COUNSEL.....</b>	<b>4</b>
5.5 Informing Defendant of Right to Counsel.....	4
5.6 Waiver of Counsel.....	4
5.7 Defendant Who Refuses to Hire Counsel or Sign Waiver .....	4
5.8 Necessity of Counsel When Defendant Faces Commitment for Contempt .....	5
5.9 General Considerations .....	5
5.10 Requirement of Waiver .....	5
<b>INDIGENCY AND THE APPOINTMENT OF COUNSEL .....</b>	<b>6</b>
5.11 Requirement of Appointment of Counsel.....	6
5.12 Determining “Indigency” .....	6
5.13 Arranging for Appointment of Counsel.....	7
5.14 Drug and Alcohol Related Offenses.....	7

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Judge Kenneth Foster Thompson graduated Drury University in 1973 and University of Missouri - Columbia J.D. in 1976. He practiced law for 25 years as a partner in Haymes, Sims, and Thompson. He was appointed Associate Circuit Judge of Webster County (30th Judicial Circuit) in 2001, and elected in 2002 and 2006. Judge Thompson has been a part-time municipal judge since 1994, currently the municipal judge of Marshfield, Rogersville, Seymour, Fordland, and Niangua.

Acknowledgement is also due to Judge Keith Sutherland for his original work on this chapter. Judge Sutherland is currently Circuit Judge, 12<sup>th</sup> Judicial Circuit Court of Missouri.

## **CHAPTER V**

### **RIGHT TO COUNSEL**

#### **Rules 37.13 and 37.50**

##### **5.1 INTRODUCTION**

Every defendant in every ordinance violation case has the right to be represented by a lawyer, regardless of the seriousness of the violation charged. The purpose of this chapter is to explain the court's responsibilities when a defendant is or is not represented by counsel, and to explain when the appointment of counsel is required.

#### **DEFENDANT REPRESENTED BY COUNSEL**

##### **5.2 RESTRICTIONS ON THE COURT**

If a defendant is represented by an attorney, there are no restrictions on the court. If the defendant is found guilty of the ordinance violation charged, either upon a plea of guilty or after trial following a plea of not guilty, the court may impose any sentence authorized — either a fine or a jail sentence or both.

##### **5.3 WHEN PRESENCE OF ATTORNEY IS REQUIRED**

The court should not accept a plea from the defendant or conduct a trial without the defendant's attorney being present. There are exceptions to this. For example, an attorney may instruct a client to appear for arraignment, enter a plea of not guilty, and request that the case be set for trial. There is no problem with this because the rights of the defendant have not been prejudiced.

Sometimes a plea agreement will be negotiated between the city prosecutor and the defendant's attorney, but the attorney will not appear at the time the plea is to be entered. It is discretionary with the judge as to whether the defendant should be allowed to plead guilty when the attorney is not present. This should be permitted only for the most minor violations and with the full knowledge and consent of the defendant. It is advisable to have a written plea or a memorandum of the plea agreement signed by both the defendant and the attorney.

##### **5.4 WHEN PRESENCE OF DEFENDANT IS NOT REQUIRED**

An attorney may enter a plea of guilty for a client in the absence of the defendant, but with the consent of the defendant, the prosecutor and the court. [See [Rule 37.57](#).] To avoid problems, this practice should be confined to minor violations, and the fine and costs should be paid immediately. A written plea or memorandum of the plea agreement signed by the defendant and the attorney is advisable in this situation.

## **DEFENDANT NOT REPRESENTED BY COUNSEL**

### **5.5 INFORMING DEFENDANT OF RIGHT TO COUNSEL**

Most defendants in municipal courts do not have attorneys. As a matter of good court procedure, the court should inform all defendants that they have the right to counsel as specified in Rule 37.59(b). That Rule and [Rule 37.50](#) also require the judge to inform a defendant of his right to have counsel appointed for him if he is indigent and it is likely that the defendant will be sentenced to jail in the event of a conviction

### **5.6 WAIVER OF COUNSEL**

In cases where a jail sentence is likely, if the defendant does not want an attorney, a written Waiver of Counsel form [see form CR 210 following this chapter] should be obtained from the defendant before trial or entry of a plea of guilty by the defendant. Under no circumstances should a defendant be coerced or tricked into signing a Waiver of Counsel form. A defendant who has not "knowingly, voluntarily and intelligently" waived the right to counsel cannot be put in jail unless the defendant hires an attorney or the court appoints an attorney for the indigent defendant. (See Sections 5.11 - 5.13 for a discussion of indigency.)

### **5.7 DEFENDANT WHO REFUSES TO HIRE COUNSEL OR SIGN WAIVER**

Occasionally, a defendant will appear who fails or refuses to hire an attorney, even though the defendant could afford to do so, and who refuses to waive the right to counsel. In these circumstances, it is proper for the court to hold a hearing to determine whether the defendant is or is not indigent. If the court determines that the defendant is not indigent, a written order or memorandum to that effect should be prepared. If the defendant then fails or refuses to hire an attorney, the court can incarcerate the defendant upon a plea of guilty or a finding of guilty after trial. Extreme caution is advised in a situation such as this, and a defendant who has been found not to be indigent should be given every reasonable opportunity to hire an attorney.

A written waiver of counsel as specified in [Section 600.051, RSMo](#) (1994), is not required for a defendant who is not indigent but refuses to hire an attorney. However, before proceeding with the trial of such a defendant, the judge should make sure that the defendant understands the violation charged, the range of punishment, the advantages of being represented by a lawyer, and the disadvantages of not being represented by a lawyer. A written record should then be made reflecting these things (see form 5-01 following this chapter).

In [State vs. Yardley](#), 637 S.W.2d 293 (Mo.App.S.D., 1982), at 296 the Court of Appeals stated that Section 600.051, RSMo, which requires written waivers of counsel "does not apply to the action of a defendant in refusing to hire a lawyer." In the [Yardley](#) case the trial court had inquired specifically about the defendant's financial condition, found him not to be indigent and continued the case several months to give him an opportunity to hire counsel. In [State vs. Wilson](#), 816 S.W.2d 301 (Mo.App.S.D., 1991), at 305, the Court of Appeals agreed that the defendant's inaction "failure to retain an attorney after being afforded ample opportunity to retain one manifested a decision to represent himself, and the trial court properly found an implied waiver of his right to counsel due to his conduct." Nevertheless, the Court of Appeals reversed the conviction in the [Wilson](#) case (at 308) on the grounds "that the defendant's implied

waiver of counsel was invalid because it was not made knowingly and intelligently.” In order for the implied waiver to be knowingly and intelligently made, there must be something in the record which establishes that the defendant was informed early enough to do something about it of the perils of self-representation and that he would go to trial without an attorney if he did not hire one.

Every judge should always keep in mind that even though every defendant has the right to counsel, a defendant is not entitled to unlimited continuances in order to hire an attorney. A defendant is entitled to no more than a fair opportunity to hire an attorney and adequate time to prepare a defense. The prosecution has the right to proceed after the defendant has had sufficient time. See the discussion of these issues in State vs. Boyd, 842 S.W.2d 899 (Mo.App.S.D., 1992), at 902.

## **5.8 NECESSITY OF COUNSEL WHEN DEFENDANT FACES COMMITMENT FOR CONTEMPT**

When a defendant has not paid all or a portion of a fine and costs which have been assessed, the court is faced with the question of whether the defendant should be committed for contempt of court for nonpayment. (See Chapter XIII, "Enforcement of Fines and Costs," and Chapter XV, "Contempt of Court.") At this point, a jail sentence for contempt of court is likely, and the defendant should have an attorney or file a Waiver of Counsel for the contempt hearing regardless of whether the defendant had an attorney at the time of the guilty plea or the finding of guilty of the ordinance violation.

## **5.9 GENERAL CONSIDERATIONS**

As stated above, the best procedure is for the judge to inform all defendants that they have the right to be represented by counsel. In addition, although not absolutely required, a Waiver of Counsel form (see form CR 210 following this chapter) should be obtained from all defendants who do not wish to be represented by an attorney.

## **5.10 REQUIREMENT OF WAIVER**

If a defendant is not represented by an attorney and there is the likelihood of a jail sentence, a Waiver of Counsel must be obtained from the defendant before the court can either accept a plea of guilty or proceed with trial. For a Waiver of Counsel to be valid it must be made as follows:

1. Knowingly. The defendant must have been informed of the right to be represented by an attorney and the right to have an attorney appointed in cases of indigency.
2. Voluntarily. The defendant cannot have been tricked or coerced in any manner into signing the Waiver.
3. Intelligently. The defendant must understand the right to counsel. It is the duty of the judge to make sure the defendant understands this right.

At a minimum the appellate courts have required that a defendant must be advised of the perils of self-representation and given an opportunity to retain an attorney in sufficient time before

having to go to trial that the right becomes meaningful. The court can only determine if a Waiver of Counsel is knowingly and intelligently made if the court makes inquiry of the defendant. In State vs. Yeargin, 926 S.W.2d 883 (Mo.App. S.D. 1996) at 886 the Court of Appeals reversed the defendant's convictions because there was "nothing in the record . . . That reveals defendant was advised of the perils of self-representation by the trial court. There is no showing of any investigation to determine that defendant made a knowing and intelligent waiver of counsel." Similarly, in State vs. Davis, 934 S.W.2d 331 (Mo.App. E.D., 1996), at 334, reversed defendant's conviction because "There is nothing in the record to indicate that defendant understood the dangers and disadvantages of self-representation. The (335) trial court did not inform defendant of the elements of the charged offense, the range of punishment nor the possible defenses and mitigating defenses and mitigating circumstances. Further, the trial court did not inform defendant that he would be at an extreme disadvantage by appearing *pro se*. The trial court simply informed the defendant that he would have to represent himself if he failed to obtain counsel."

If a defendant makes a valid Waiver of Counsel, the court may then assess any punishment authorized following a plea of guilty or a finding of guilt after trial, including a jail sentence.

Caution should be used in obtaining a written Waiver of Counsel (or any other preprinted form) from defendants. A surprising number of people cannot read well enough to truly understand documents such as the Waiver of Counsel form. Therefore, the best procedure is either to read the form to them or to explain it to them before they sign.

**Affiliated form:** See form MBB 5-01 following this chapter. (That defendant has refused to hire lawyer and refused to sign waiver of counsel form.), OSCA MBB 5-01

## **INDIGENCY AND THE APPOINTMENT OF COUNSEL**

### **5.11 REQUIREMENT OF APPOINTMENT OF COUNSEL**

Under Rule 37.50, an attorney must be appointed for any indigent defendant charged with an ordinance violation, the conviction of which would likely result in confinement, unless that defendant knowingly, voluntarily and intelligently waived his right to have counsel. An indigent defendant is one who is "unable to employ counsel."

### **5.12 DETERMINING "INDIGENCY"**

Indigency is a term of art, not science, and must be judged on the circumstances of each defendant individually. For state offenses, defendants are entitled to the appointment of a public defender to represent them if they are "unable, without substantial financial hardship to [themselves] or [their] dependents, to obtain a lawyer." [Section 600.048.1\(2\), RSMo \(1994\)](#).

All of a defendant's assets — house, motor vehicles, etc. — should be taken into account in determining whether he or she is indigent, not just income. Financial responsibilities — support for dependents, mortgage or rent payments, etc. — should also be considered.

### **5.13 ARRANGING FOR APPOINTMENT OF COUNSEL**

If a defendant wants to be represented by an attorney but is unable to afford one, and the court is unable or unwilling to appoint an attorney, the defendant cannot be sentenced to a term of confinement under any circumstances. As there are certain defendants whose violations justify confinement but who are indigent, it is incumbent upon the judge to make arrangements for the appointment of counsel. Because the state public defender does not represent defendants in municipal ordinance violation cases, a municipal judge must make other arrangements for appointed counsel. There are two ways to do this. First, the municipality can hire and pay appointed counsel. Second, the court or the local bar association can maintain a rotating roster of volunteer local attorneys who will accept appointments to represent indigent defendants. Attorneys who regularly appear before the municipal court should be willing to accept appointment.

### **5.14 DRUG AND ALCOHOL RELATED OFFENSES**

[Section 577.023, RSMo](#) (1994), has significantly increased the importance of obtaining a written waiver of counsel from unrepresented defendants charged with either drug or alcohol-related offenses (DWI, DUI, BAC) in municipal courts.

Among many other things, the statute provides that, effective July 1, 1992, a plea of guilty or finding of guilt after trial of a municipal ordinance violation of DWI, DUI, BAC, or driving under the influence of drugs shall count as a prior offense for purposes of enhancing punishment for subsequent offenses. The Abuse and Lose Law, Sections [577.500](#) to [577.530](#), RSMo (1994) also applies to these municipal ordinance violations. However, only those municipal ordinance violations “where the judge in such case was an attorney and the defendant was represented by or waived the right to an attorney in writing” can be used as prior offenses or under the Abuse and Lose Law. If the municipal judge is not an attorney or if the defendant is not represented by counsel and does not sign a written waiver of counsel, these provisions do not apply.

For a discussion of the Abuse and Lose Law, see Chapter XII - Judgment and Sentencing.



IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:
City of _____	
	vs. _____ (Date File Stamp)
Defendant's Name:	

**Memorandum Finding Defendant Has Waived Counsel  
And Has Been Advised of Rights**

Now on this \_\_\_\_\_ day of \_\_\_\_\_, the court finds that the defendant herein has been advised in open court as follows:

1. That defendant is charged with the ordinance violation of \_\_\_\_\_ which is punishable by a fine of \_\_\_\_\_ and/or a jail term of \_\_\_\_\_;
2. That defendant has the right to a trial either by the court or by a jury;
3. That defendant has the right to be represented by a lawyer and of the disadvantages of proceeding to trial without a lawyer; and
4. That the Court finds that defendant is not indigent because defendant has a net worth exceeding \$ \_\_\_\_\_, and/or is employed earning \$ \_\_\_\_\_ per week/month;

The court further finds that the defendant has declined to hire a lawyer in this case; that defendant has refused to sign a waiver of counsel form as provided in Section 600.051 RSMo, and that there is not reasonable likelihood that the defendant will obtain counsel if granted an additional continuance to do so.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge



Judge or Division:	Case Number:
State of Missouri vs.	

(Date File Stamp)

### Waiver of Counsel

I request that the Court allow my waiver of attorney with full understanding that I am entitled to an attorney if I so desire, and with full knowledge and understanding of the following additional considerations:

1. That the offense charged is \_\_\_\_\_ with the punishment range of \_\_\_\_\_.
2. That I have a right to be represented by an attorney and that, if indigent, and unable to employ an attorney, I have a right to request the judge to appoint an attorney to assist me in defending against the charge, and that the Court will appoint an attorney to assist me if it finds that I am indigent and not able to employ one.
3. That I have a right to a trial or trial by jury with assistance of an attorney to confront and cross-examine witnesses; that a guilty plea waives any right to a trial.
4. That I have the right to remain silent and not make any statement which may be used in the prosecution of the criminal charges filed against me.
5. I am aware that any recommendation by the prosecutor is not binding on the judge who may accept or reject such recommendation.
6. That if a guilty plea is entered or if found guilty by trial of the charge, the judge is most likely to impose a sentence of confinement in jail or prison.
7. That I have the right to appeal the Court's judgment (decision) or the jury's verdict should I exercise my right to trial and be found guilty.

The above rights have been read to me by the judge in open court. I understand these rights and request the court to accept my request of waiver of an attorney.

\_\_\_\_\_  
Defendant

On this date, the defendant personally appeared before me and was read the above information by me and stated these rights were understood and the defendant signed this request in my presence.

The Court finds that the defendant has made a knowledgeable and intelligent waiver of the right to assistance of an attorney.

Therefore, the Court accepts the defendant's waiver of right to representation by an attorney and further permits the defendant to proceed to trial without legal counsel.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge

# CHAPTER VI – BAIL AND SURETIES

By Judge Glenn Norton and Jennifer Krings, Attorney at law

Section	Page Number
6.1 Scope Of Chapter .....	3
<b>RIGHT TO BAIL.....</b>	<b>3</b>
6.2 Purpose Of Bail.....	3
6.3 Driver's License As Bond .....	3
6.4 Conditions Of Release And Setting Bail .....	4
6.5 Re-Arresting The Accused.....	6
<b>MODIFICATION OF BOND CONDITIONS .....</b>	<b>6</b>
6.6 Modification In Divison.....	6
6.7 Modification By "Higher Court" .....	7
<b>FORFEITURE AND JUDGMENT.....</b>	<b>8</b>
6.8 Declaring Forfeiture, Setting Aside Forfeiture, And Penalty For Failure To Appear ....	8
6.9 Judgment On Bond .....	9
6.10 Surrender Of Accused By Surety.....	9
6.11 Administrative Enforcement Of Judgment .....	10
<b>SURETIES.....</b>	<b>10</b>
6.12 Uncompensated Sureties.....	10
6.13 Compensated Sureties.....	10
6.14 Surety Corporations .....	11
6.15 Affidavit Of Justification .....	12

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Judge Glenn Norton received his B.A. in English from Westminster College, and his J.D. from the University of Missouri Columbia. He formerly served as Associate Circuit Judge for Ralls County, and the Municipal Judge for New London, Center, and Perry. He currently sits on the Missouri Court of Appeals for the Eastern District.

Jennifer Krings received her B.A. in Political Science and her J.D. from Saint Louis University. She currently works as an attorney in Judge Norton's chambers.

# CHAPTER VI

## BAIL AND SURETIES

### 6.1 SCOPE OF CHAPTER

This chapter discusses the right of an accused to bail, modification of bond conditions, forfeiture and judgment, and qualifications for various types of sureties. As the vast majority of the law in this area is contained within Missouri Supreme Court Rule 37 (2008),<sup>1</sup> it is discussed at some length and should be referenced while using this chapter. This chapter also discusses statutes found in Chapter 544, RSMo Supp. 2008<sup>2</sup> which concern bail and may apply to municipal courts and proceedings.<sup>3</sup>

### RIGHT TO BAIL

### 6.2 PURPOSE OF BAIL

#### [Rule 37.15\(a\)](#)

Any person arrested for an ordinance violation is entitled to be released from custody while awaiting trial, after trial pending trial *de novo*, and after trial *de novo* pending appellate review. Rule 37.15(a). Upon entry of each judgment, each court shall review the conditions of release, including any condition requiring bail, and modify them as provided in Rule 37.19. *Id.*; *See* Rules 37.15(c)(3) and 37.15(c)(5) (providing that an appropriate condition of bond is requiring execution of a bond in a stated amount). The purpose of bail is not to punish the accused ahead of trial or to enrich the treasury, but to enforce the criminal laws by requiring the accused to appear in court. *State v. Hinojosa*, 271 S.W.2d 522, 524 (Mo. 1954); *Ex parte Chandler*, 297 S.W.2d 616, 616-17 (Mo. App. 1957).

### 6.3 DRIVER'S LICENSE AS BOND

#### [Section 544.045](#)

A person arrested and charged with violating a traffic law or ordinance may post his or her driver's license or chauffeur's license as security for his appearance in court in lieu a of cash bond. Section 544.045.1. This provision is applicable only to traffic offenses and does not apply to the following charges:

- (1) Driving while intoxicated;
- (2) Driving under the influence of intoxicating liquors or drugs;
- (3) Leaving the scene of a motor vehicle accident;
- (4) Driving while the license is suspended or revoked; or

---

<sup>1</sup> All references to Rules are to Missouri Supreme Court Rules (2008).

<sup>2</sup> All statutory references are to RSMo Supp. 2008.

<sup>3</sup> Statutory sections in Chapter 544 that refer only to courts of record, associate circuit courts, or criminal proceedings indicate they do not apply to municipal courts or proceedings and, therefore, are not referenced in this chapter.

- (5) Those charges that result from a motor vehicle accident in which a death has occurred.

*Íd.* The posting of the license is discretionary to both the officer and the person arrested. *Íd.*

The person arrested may choose to pay fifty dollars per traffic offense allegedly committed instead of depositing his or her license as security for appearance in court. Section 544.045.2. The officer must issue a receipt for such bond and deposit the bond with the court. *Íd.*

Processing of the license or money received as security for appearance is set out in detail in section 544.045.3.

The court shall notify the director of revenue within ten days if the driver fails to appear at the proper time to answer the charge(s) placed against him or her. Section 544.045.4. The court should also notify the director of revenue when the charges against the driver have been reduced to final judgment. *Íd.*

#### **6.4 CONDITIONS OF RELEASE AND SETTING BAIL**

Rules [37.15\(b-e\)](#),<sup>1</sup> [37.16](#), and [37.17](#), and [Section 544.457](#)

The court shall release the accused upon written promise to appear unless the court finds: (1) that the promise alone will not reasonably assure the accused's appearance; or (2) that the accused poses a danger to a crime victim, the community, or any other person. Rule 37.15(b).

Under Rule 37.15(c), if the court determines that the imposition of conditions will assure that the accused is reasonably likely to appear and will not pose a danger to a crime victim, the community, or any other person, the court shall impose one or more of the following conditions for the release of the accused:

- (1) Place the accused in the custody of a designated person or organization consenting to supervise the accused;
- (2) Place restrictions on the accused's travel, association, and place of abode during the period of release;
- (3) Require the execution of a bond in a stated amount with sufficient solvent securities or a sum of cash or negotiable bonds be deposited with the court
- (4) Require the accused to report regularly to an officer of the court or peace officer in such way as the court directs;
- (5) Require the execution of a bond in a stated amount and a deposit with the court of up to 10% of that amount in cash or negotiable bonds; or
- (6) Impose any other condition(s) reasonably necessary to assure the accused's appearance, including a condition requiring that the accused return to custody after specified hours.

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<sup>1</sup> Section 544.455 is applicable to municipal judges hearing and determining ordinance violations and contains many similar provisions to those found in Rule 37.15(b-e). Section 544.455.8.

The court shall consider the following factors, based on available information, to determine which conditions of release will reasonably assure the accused's appearance:

- (1) The nature and circumstances of the ordinance violation;
- (2) The weight of the evidence against the accused;
- (3) The accused's family ties, employment, financial resources, character, and mental condition;
- (4) The length of the accused's residence in the community;
- (5) The accused's record of convictions; and
- (6) The accused's record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Rule 37.15(d).

Section 544.457, which appears to apply to municipal courts, provides that:

Notwithstanding the provisions of section 20 of article 1 of the Missouri Constitution to the contrary, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may use such information in determining the appropriate amount of bail, to increase the amount of bail, to deny bail entirely or impose any special conditions which the defendant and surety shall guarantee.

A court is authorized to impose special conditions requiring the defendant to "obey all laws and ordinances" and "not to consume any alcohol or drugs" under section 544.457 when the conditions are rationally related to the legitimate goal of protecting the community. *See State v. Wurtzberger*, 265 S.W.3d 329, 344-45 (Mo. App. E.D. 2008) (finding that the special conditions were rationally related to the legitimate goal of protecting the community from a person charged with the crime of possession with the intent to manufacture methamphetamine).

A court releasing an accused under Rule 37.15 shall enter an order stating the conditions imposed. Rule 37.15(e). The court shall inform the accused of the conditions imposed and of the penalties applicable to violations of the conditions of release, and shall advise the accused that a warrant for arrest will be issued immediately upon any such violation. *Id.*

A court issuing a warrant for the arrest of an accused shall set the conditions for release of the accused, and those conditions shall be stated on the arrest warrant. Rule 37.16(a). The court shall impose one of the following conditions: the written promise of the accused to appear; or the execution of a bond in a stated amount under either Rule 37.15(c)(3) or Rule 37.15(c)(5). Rule 37.16(a)(1-3). The court may also impose other conditions for release as provided in Rule 37.15(c). If the arrest of the accused upon a warrant occurs in a county other than that in which the ordinance violation occurred, the peace officer making the arrest and the county having jurisdiction of the ordinance violation must act in accordance with Rule 37.16(b).

"When an arrest is made without a warrant, the peace officer may accept bond in accordance with a bail schedule furnished by the court having jurisdiction." Rule 37.17.

If a court requires bail as a condition of release, the court should keep in mind that the purpose of bail is not to punish the accused ahead of trial or to enrich the treasury, but to enforce the criminal laws by requiring the accused to appear in court. *State v. Hinojosa*, 271 S.W.2d 522, 524 (Mo. 1954); *Ex parte Chandler*, 297 S.W.2d 616, 616-17 (Mo. App. 1957). Although the amount of bail is within broad limits of the discretion of the court, *Ex parte Chandler*, 297 S.W.2d at 617, excessive bond or bail is prohibited under the Eighth Amendment to the United States Constitution and Article 1, section 21 of the Missouri Constitution. Because the only legitimate purpose in setting bail is to ensure the accused's appearance at trial, any amount in addition to that figure is excessive. *State v. Dodson*, 556 S.W.2d 938, 944 (Mo. App. 1977). Bail is not excessive merely because the accused is unable to pay it or because the cost of obtaining bail is high. *Koen v. Long*, 302 F. Supp. 1383, 1391 (E.D. Mo 1969), *aff'd*. 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

## **6.5 RE-ARRESTING THE ACCUSED**

### **Rule 37.21**

The court may order the re-arrest of an accused who has been released if it appears that: (a) there has been a breach of any condition for release; or (b) the bail should be increased, new or additional security should be required, or new conditions for release should be imposed. [Rule 37.21](#). Upon application, the accused is entitled to a hearing about the reasons for the order. *Id.*

## **MODIFICATION OF BOND CONDITIONS**

### **6.6 MODIFICATION IN DIVISION**

#### **Rules [37.19](#) and [37.20](#)**

Once a court has established the conditions of release, the court may modify those conditions only after notice to the parties and a hearing. Rule 37.19(a). A hearing may be conducted upon motion by the prosecutor, upon motion by the accused, or upon the court's own motion. *Id.* At the conclusion of the hearing, the conditions of release may be modified if the court finds that:

- (1) That new, different, or additional requirements for release are necessary;
- (2) That the conditions for release that have been set are excessive;
- (3) That the accused has failed to comply with or has violated the conditions for his or her release; or
- (4) That the accused has been convicted of the ordinance violation for which he or she was charged.

*Id.*

If the conditions for release are modified to make them more stringent, the accused shall be remanded to the custody of the corrections official until compliance with the modified conditions occurs. Rule 37.19(b). If the accused is not in custody, the court may order an arrest warrant setting forth the new conditions for the release of the accused in accordance with Rule 37.16, which is set out above. *Id.*

Any person for whom conditions of release are imposed and who after 24 hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the court that imposed them. Rule 37.20; *See* section 544.455.4. The court shall determine the application promptly. *Id.* The court should act in accordance with Rule 37.19 if modifying any of the conditions of release.

## **6.7 MODIFICATION BY "HIGHER COURT"**

### **Rules [37.22](#), [37.23](#) and [37.28](#)**

The conditions for release set by the court may be reviewed by a "higher court" upon application filed by the accused or by the prosecutor. Rule 37.22(a). A copy of the application and notice of the time when the application will be presented to the court shall be served on all parties. *Id.* Whenever the "higher court" finds that the accused is entitled to be released and no conditions have been set, or finds that the conditions set are excessive or otherwise inadequate, the court shall enter an order setting or modifying the conditions for release of the accused. Rule 37.22(b). It is unclear from the Rule which court is a "higher court" for purpose of reviewing the conditions of release. Because the municipal court is a division of the circuit court, [See Rule 37.06](#)(e), another division of the same circuit court may or may not be a "higher court."

Should a "higher court" set or modify conditions for the release of the accused, the accused shall file with the clerk a signed and acknowledged written instrument in which he shall specify the address to which all notices in connection with his case thereafter may be mailed. Rule 37.22(c). The definition section of Rule 37 provides that the word "clerk" means the municipal division clerk, not the clerk of the "higher court." [See Rule 37.06](#) (b), (e) and (i); *See also* [Rule 37.01](#). Rule 37.22(c) provides some safeguard for the court where the case is pending so that contact with the accused will be possible. If the accused fails to file an instrument in accordance with Rule 37.22(c) so that he can be notified of future appearance requirements, and the accused subsequently fails to appear at a hearing, a court may declare forfeiture of the accused's bond under [Rule 37.26](#), which is set out below.

When a person is released by a court other than the court in which the person is required to appear, the clerk of the releasing court shall immediately transmit a record of the release, together with any conditions imposed, to the clerk of the court in which the person released is required to appear. [Rule 37.23](#). This requirement on the clerk of the "higher court" ensures that the clerk of the court where the charges are pending will have a record of the conditions of release.

[Rule 37.28](#) is related only to the extent that it requires a released person, and any surety for such person, to give written notice to the clerk of the court in which the case is pending of any change of address. Again, the purpose here is to ensure that an accused can be located when necessary.

## FORFEITURE AND JUDGMENT

### 6.8 DECLARING FORFEITURE, SETTING ASIDE FORFEITURE, AND PENALTY FOR FAILURE TO APPEAR

#### Rule 37.26 and Sections [374.770.1](#), [544.640](#) and [544.665.1\(4\)](#)

In *State v. Echols*, the Missouri Supreme Court discusses the history and distinction between cash bonds and surety bonds. 850 S.W.2d 344, 346-47 (Mo. banc 1993). In a cash bond, the depositor of cash bail does not have any obligation for the custody or appearance of the defendant. *Id.* at 347. In contrast, a surety in a surety bond has the responsibility for insuring the defendant's appearance. *Id.* at 346. The concept of forfeiture of bonds was developed to assess a financial penalty against the surety if he failed to produce the accused. *Id.* Courts should be aware that "forfeiture of a bond is a taking of property which raises due process considerations under Article I Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." *State v. Wurtzberger*, 265 S.W.3d 329, 346 n.6 (Mo. App. E.D. 2008).

In general, if the accused fails to appear at the hearing or there is any other breach of a condition of release, the court in which the case is pending may declare a forfeiture of the bond. Rule 37.26. Section 374.770.1 creates an exception to this rule when a surety informs the court that the defendant is incarcerated in the United States. 544.640, which may apply to municipal courts, directs that the court must enter in its record the reason for the forfeiture.

The court may set aside a forfeiture upon such conditions as the court may impose, if it appears that justice does not require enforcement of the forfeiture. Rule 37.26.

"Where the undertaking of the bond has clearly been violated and the defendant remains at large without reasonable excuse or explanation, there is no abuse of discretion in failing to set aside the forfeiture." *Echols*, 850 S.W.2d at 348 (applying rule similar to Rule 37.26). But, if a surety can prove that the defendant is incarcerated in the United States, the bond forfeiture shall be set aside and the surety is responsible for the defendant's return. Section 374.770.1.

In *Wurtzberger*, although the defendant never failed to appear at any court proceedings, he allegedly violated special conditions imposed under section 544.547 which required him to "obey all laws and ordinances" and "not to consume any alcohol or drugs." 265 S.W.3d at 339-41, 346 n.7. The purpose of these conditions was to protect the community or any other person from the dangers posed by the defendant. *Id.* at 346. The majority opinion found that the court abused its discretion in forfeiting the bond under a rule similar to Rule 37.26 because: (1) the court made no findings of fact regarding the alleged violations of the conditions; (2) the court made no findings to support its conclusion that "justice requires" a bond forfeiture; and (3) forfeiture of the defendant's bond occurred after the defendant had been sentenced and was no longer a threat to the community or any other person. *Id.* As an aside, the concurring opinion in that case would have held that: "where the defendant never failed to appear as required but violated only special conditions of his release on bond, 'justice' cannot require – or allow – the forfeiture of a cash bond." *Id.* at 348.

In addition to having their bond subject to forfeiture, any person arrested for the violation of a municipal ordinance who willfully fails to appear before a court as required shall be guilty of an offense and punished by a fine not to exceed five hundred dollars; provided that the fine imposed shall not exceed the maximum fine which could be imposed for the offense for which the accused was arrested. Section 544.665.1(4).

## **6.9 JUDGMENT ON BOND**

### **Rule 37.26**

The order of forfeiture is interlocutory (provisional) and must be reduced to judgment to be enforceable. *State v. Wynne*, 181 S.W.2d 781, 783 (Mo. App. 1944).

After the court has ordered a forfeiture, and if the forfeiture has not been set aside, the prosecutor may enforce the forfeiture by filing a motion for judgment of default and execution on the bond and a notice of hearing with the clerk. Rule 37.26. (See form 6-01 and 6-02 following this chapter.) Obligors, by entering a bond, submit to the jurisdiction of the court in which the accused is required to appear and irrevocably appoint the clerk as their agent for service of process. Rule 37.26. Thus, the clerk shall mail the prosecutor's motion for judgment on the bond and the notice of hearing to each obligor. *Id.*

On the date set for hearing on the motion for judgment on the bond, if the forfeiture has not been set aside previously, the court may enter a judgment of default on the bond and execution may be issued to enforce that judgment. Rule 37.26. (See form 6-03 following this chapter.) This proceeding was historically known as a writ of *scire facias*. See Section 544.640.

## **6.10 SURRENDER OF ACCUSED BY SURETY**

### **Rule 37.25**

Under Rule 37.25, the surety may surrender the accused to a peace officer and be released from its bond prior to rendition of judgment upon the forfeiture. After the court has ordered a forfeiture of a bond for the failure of the accused to appear, a surety is released from its bond and has a legal right to have the bond forfeiture set aside if: (1) the surety surrenders the accused prior to the rendition of judgment upon the forfeiture; and (2) the surety pays all costs and expenses associated with the accused's failure to appear. *Id.*; See *State v. Siemens*, 12 S.W.3d 776, 780 (Mo. App. W.D. 2000) (discussing rule similar to Rule 37.25). If the accused is captured or brought before the court through the efforts of the sheriff or others rather than through the efforts of the surety, the court is not required to set aside the order of forfeiture and may do so only if justice so requires. See *id.* (discussing rules similar to Rules 37.25 and 37.26).

If the surety surrenders the accused to a peace officer, the surety and peace officer must act in accordance with the procedures outlined in Rule 37.25. Any accused person surrendered by a surety may be conditionally released pursuant to Rule 37.15, which is set out above. Rule 37.25.

## 6.11 ADMINISTRATIVE ENFORCEMENT OF JUDGMENT

As a practical matter, it is seldom necessary to enforce judgment on a bond. In each judicial circuit, the presiding judge or the judge's designee maintains a list of sureties authorized to write bonds within the circuit. Statewide, the Office of State Courts Administrator maintains such a list. If a judge has ordered a bond forfeited, has entered a judgment on it, and if the judgment remains unsatisfied for any appreciable period of time, the judge or clerk should notify the presiding judge of the circuit. The presiding judge may then remove that surety from the list of approved sureties to do business in the circuit. Usually, merely advising the surety that such steps are about to be undertaken will bring immediate satisfaction of the judgment.

## SURETIES

### 6.12 UNCOMPENSATED SURETIES

#### [Rule 37.29](#)

Pursuant to Rule 37.29, an uncompensated individual may act as a surety if that person:

- (a) Is reputable, at least 21 years of age, and a resident of the State of Missouri;
- (b) Has net assets with a value in excess of exemptions at least equal to the amount of the bond subject to execution in Missouri;
- (c) Has not, within the past 15 years, been found guilty of or pleaded guilty or nolo contendere to: (1) a felony of any state or of the United States; or (2) any other crime of any state or the United States involving moral turpitude, whether or not a sentence was imposed; and
- (d) Has no outstanding forfeiture or unsatisfied judgment entered upon any bail bond in any court of Missouri or of the United States.

No lawyer, elected or appointed official, employee of the State of Missouri or any county or other political subdivision thereof can act as a surety on any bail bond except for bonds where the principal is the spouse, child, or family member of the surety. *Id.* Additionally, "[i]f there is more than one surety, the aggregate net worth of the sureties in excess of exemptions shall be at least equal to the amount of the bond." *Id.*

### 6.13 COMPENSATED SURETIES

#### [Rule 37.30](#)

Anyone who charges or receives compensation for signing a bond is a compensated surety. *See* Rule 37.30. In addition to all the qualifications of an uncompensated individual surety required by Rule 37.29, the compensated surety must, by appropriate affidavit, maintain approval to write bonds in each circuit in which the surety does business. *See* Rule 37.30; Rule 37.10; Form 37.K

in the Missouri Supreme Court Rules. Unless a jurisdiction requires that the municipal division of the circuit court approve and maintain its own qualified list of compensated sureties, it is advisable to utilize the list of approved compensated sureties maintained by the presiding judge of the circuit or by the judge's designee.

If a municipal division must maintain its own list of qualified compensated sureties, the court must require each surety to file, prior to the first day of each month, an affidavit under oath. Rule 37.30. The affidavit for the individual compensated surety, referred to as an Affidavit of Justification and set forth in Form 37.K of the Missouri Supreme Court Rules, must include the recitations that the surety is acceptable as required by Rule 37.29. The affidavit also must describe with particularity all real estate proposed to justify the surety's sufficiency to meet bond, including: an accurate legal description of the property, a description of the improvements located thereon, the location of the property by street address if it is located in a city or town, and the latest assessed value of such property. Rule 37.30(a) and (b). If personal property is proposed to justify the surety's sufficiency to meet the bond, then that personal property should be described with particularity and its reasonable market value should be stated. Rule 37.30(c). The affidavit should include a list of all undischarged bail bonds for which the surety is responsible, the amount of each bond, the name of the principal of the bond, the ordinance violation charged, and the court in which the bond is pending. Rule 37.30(d). In addition, the affidavit should set forth the consideration or security promised or received for suretyship for each bond, including the nature and amount thereof, and the name of the person by whom such promise was made or from whom such security or consideration was received. Rule 37.30(e).

The judge, clerk, or officer to whom an affidavit is submitted may investigate the qualifications of the surety. Rule 37.30.

## **6.14 SURETY CORPORATIONS**

### **Rule 37.32**

A surety corporation may be approved to act as a surety under Rule 37.32 if it submits evidence to the court showing that it is qualified under the provisions of [Section 379.010](#). Rule 37.32(a). An agent acting on behalf of such a corporation must:

- (1) Be a reputable person, at least 21 years of age, and a resident of Missouri;
- (2) Have not, within the past 15 years, been found guilty of or pleaded guilty or nolo contendere to: (a) a felony of any state or of the United States; or (b) any other crime of any state or the United States involving moral turpitude, whether or not a sentence was imposed;
- (3) Have no outstanding forfeiture or unsatisfied judgment entered upon any bail bond in any court of Missouri or of the United States; and
- (4) Be licensed as a bail bond agent as required by law.

Rule 37.32(b); Rule 37.29(a), (c), and (d).

## 6.15 AFFIDAVIT OF JUSTIFICATION

### Rule 37.31

When a surety is accepted upon a bond, the surety shall execute an affidavit of justification, *See* Form 37.K of the Missouri Supreme Court Rules, shall attach the affidavit to the bond, and file the affidavit and bond with the clerk of the court in accordance with the provisions of Rules 37.24. Rule 37.31. The clerk of the court shall preserve the file as set forth in Rule 37.31. *Id.*



IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:	(Date File Stamp)
	Court ORI Number:	
City of _____ vs.		
Defendant's Name:	Surety's Name/Address:	

**Notice of Hearing**

**TO: Clerk of the Municipal Court, City of \_\_\_\_\_ .**

Take notice, that the City, by its Prosecutor, will on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, request a hearing on the Motion to Enter Judgment of Default on Bond Forfeiture Execution Thereon before the Municipal Court of the City of \_\_\_\_\_ located at \_\_\_\_\_ at \_\_\_\_\_ (time).

\_\_\_\_\_  
City Prosecutor

I certify that I have mailed a copy of this Notice of Hearing and Motion of Bond Forfeiture to the above named defendant, surety and defendant's attorney, if applicable, by regular mail on \_\_\_\_\_ (date).

\_\_\_\_\_  
Date

\_\_\_\_\_  
Clerk of Court



IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:
	Court ORI Number:

(Date File Stamp)

City of \_\_\_\_\_ vs.

Defendant's Name:

Surety's Name/Address:

**Motion to Enter a Judgment of Default on Bond Forfeiture  
And Execution Thereon**

Comes now the City, by its Prosecuting Attorney and moves the Court pursuant to Missouri Supreme Court Rule 37.26 that a Judgment of Default be issued and Execution issued thereon. Plaintiff states that there was a bond of \_\_\_\_\_ by \_\_\_\_\_. They were sureties in the above entitled case. The defendant, having failed to appear, and a bond forfeiture having been declared previous to this time, the City moves that a Judgment of Default be entered and Execution issued thereon.

Wherefore, the City prays that the Court enter that a Judgment of Default on the above entitled matter on the forfeiture of the bond and Execution issued thereon against these sureties and the obligors of the bond be required to pay the same.

\_\_\_\_\_  
Prosecuting Attorney

I certify that on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, a copy of this Motion has been

personally served

mailed by first class mail

to the Clerk of the Municipal Court of the City of \_\_\_\_\_.

\_\_\_\_\_  
Prosecuting Attorney



IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:
	Court ORI Number:

(Date File Stamp)

City of \_\_\_\_\_ vs.

Defendant's Name:

Surety's Name/Address:

### Judgment of Bond Forfeiture

Now on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, comes the City, by and through its Prosecutor, and \_\_\_\_\_, surety and obligor on the bond, fails to appear, but makes default even though duly and properly notified as provided by law. Whereupon, said cause was taken up on Plaintiff's Motion to Enter and Judgment of Default on Bond Forfeiture And Execution Thereon and evidence being adduced, the court finds all the issues in favor of the City of \_\_\_\_\_, and against \_\_\_\_\_, surety and obligor on the bond and that \_\_\_\_\_, surety and obligor on said bond is indebted to the plaintiff in the amount of \$\_\_\_\_\_.

**Therefore, it is Ordered** that the City have judgment against \_\_\_\_\_, as surety and obligor on said bond in the amount of \$\_\_\_\_\_.

**It is further Ordered** that said judgment be satisfied by the Circuit Clerk of \_\_\_\_\_ County, Missouri, from the case bond previously deposited with the said Circuit Clerk by the said \_\_\_\_\_, surety and obligor, and that the said sum of \$\_\_\_\_\_ be paid by the said Circuit Clerk of the Treasurer of \_\_\_\_\_ County, Missouri, for the benefit of \_\_\_\_\_ fund as provided by law.

\_\_\_\_\_  
Judge

## VII. - PRETRIAL PROCEEDINGS

Judge Ronald J. Brockmeyer

<b>Section</b>	<b>Page Number</b>
7.1 Scope of Chapter .....	3
7.2 Court Docket: Separation of Traffic and Non-Traffic Cases (Docket Control).....	3
7.3 Arraignment.....	3
7.4 Violation Bureau and Violations Clerk .....	4
7.5 Continuances .....	5
7.6 Disqualification of Judge.....	5
7.7 Pretrial Motions .....	7
7.8 Discovery.....	7
7.9 Severance.....	8
7.10 Witness – Subpoena .....	8
7.11 Service .....	8
7.12 Return of Service .....	8
7.13 Failure to Appear .....	9

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Judge Ronald J. Brockmeyer received his bachelor's degree from Washington University in St. Louis, Missouri and his J.D. from St. Louis University. He has served as municipal judge for the City of Flordell Hills located in the 21st Judicial Circuit, St. Louis County, since 1992.

The format used herein is based on the original version of this chapter prepared by Judge J. Lloyd Wion, who served as municipal judge in the 21st Judicial Circuit, Overland, Missouri, since 1972 until his retirement in October, 1991.

## CHAPTER VII

### PRETRIAL PROCEEDINGS

#### 7.1 SCOPE OF CHAPTER

This chapter describes the pretrial activities as they occur in a typical municipal case. Arraignments, Violation Bureaus, pretrial motions and process for witnesses are among the topics covered.

#### 7.2 COURT DOCKET: SEPARATION OF TRAFFIC AND NON-TRAFFIC CASES. (DOCKET CONTROL)

##### Rule 37.61 (b)

If practical, traffic cases shall be heard and tried separately from other types of cases. Where a particular session of court has been designated a traffic case session, only traffic cases shall be tried except for good cause shown.

NOTE: This may mean separate dates or separate times on your docket; i.e., 7:00 p.m. to 8:00 p.m. traffic and an 8:00 p.m. start on the balance of your docket.

#### 7.3 ARRAIGNMENT

##### Rule 37.47(b)

The judge shall inform the defendant of the ordinance violation charged; his right to retain counsel, his right if indigent and there is a likelihood of a jail sentence to request the appointment of counsel, his right to remain silent and that any statement made by him may be used against him.

##### Rule 37.48

- (a) Upon request, a defendant shall be furnished a copy of a summons or information filed and shall not be required to plead until he has been afforded reasonable time to examine the charges against him and consult with counsel or others.
- (b) Arraignment shall be conducted in open court and shall consist of reading the information to the defendant or stating to him the substance of the charge and calling on him to plead thereto.

#### NOTES

There are several ways to accomplish advising the defendants of their rights. One commonly used way is for the judge to address all those present in the courtroom with a detailed statement of their rights. If done verbally, the judge must then ask the defendant in each case if he/she was present at the opening of court.

Another way to advise defendants of their rights is to give each of them a written statement to read and review and bring with them to the bench when their case is called. The judge should be sure that each defendant has signed this statement of rights, and after he/she is arraigned, same should be filed with the court and kept in that individual's file.

Since the judge should not know the facts of the charge, inquiry must be made of the prosecutor to determine if he/she is going to request jail time and to determine if the judge will accept that recommendation.

If it is likely that a defendant will receive a jail sentence and he/she has no attorney, the judge must review with that defendant the written "Waiver of Counsel" form and have him/her sign same. Form 37J or Form CR210. The judge him/her-self should then sign this "Waiver of Counsel" form before proceeding any further in a case where jail time is a likelihood. Since defendants are entitled to a circuit court review at to whether or not their guilty plea was voluntary and understood, the court record needs to be complete. (See form CR 210 following this chapter.)

NOTE: Even if a jail sentence is not likely, it is recommended that a "waiver of counsel" form be utilized. 302.060(9) requires a written waiver of counsel as a precedent to using the conviction for purposes of withholding license after a second conviction.

Having the arresting officers present at arraignment depends on whether or not trials are held on the first appearance of defendants; if such is the case, officers should be present and witnesses should be summoned. When trials are held at a later setting, each defendant should be advised at arraignment of his/her right to have and subpoena witnesses, his/her right of not being required to testify, his/her right to consult an attorney, and his/her rights during trial (e.g., cross examination of any and all witnesses who might appear against him/her, including police officers).

If the court has a separate trial docket, there is no need to have police officers in court on arraignments. In fact, it probably presents a bad appearance to the public to do so. It might appear that trials at the time of arraignment may have some built-in unfairness to the defendants as they have little time to reflect on their rights and trial procedures. Thus, some courts simply set the case for trial on the next docket after arraignment. (See Chapter IX, "Trials").

## **7.4 VIOLATION BUREAU AND VIOLATIONS CLERK**

### **Rule 37.49**

- (a) Any judge having original jurisdiction of any animal control violation, housing violation, or traffic violation may establish by court order a violation bureau, which shall be subject to the supervision of the circuit court.

A clerk shall be designated by the judge as the violations clerk. The clerk shall perform the duties designated by the court including accepting appearance, waiver of trial, plea of guilty, and payment of fine and costs for the designated violations, entering the plea on the record, and transmitting the violation record as required by law.

NOTE: The violation bureau clerk can also perform other functions within the municipal court office.

- (b) The violations within the authority of the bureau shall be designated by order of the judge, and such designated violations may be amended from time to time. However, Subparagraphs (1), (2), (3) and (4) provide that in no event shall the following be handled by a bureau: violations resulting in personal injury or property damage; operating a motor vehicle while intoxicated or under the influence of intoxicants or drugs; operating a vehicle with a counterfeited, altered, suspended or revoked license; fleeing or attempting to elude an officer.
- (c) The judge, by order prominently posted at the place where the fines are to be paid, shall specify by schedule the amount of fines and costs to be imposed for each violation.

NOTE: St. Louis County Circuit Court en banc has set the upper limits on certain fines in traffic violations bureaus in an effort to establish uniformity among the municipalities.

- (d) Within the time fixed by the judge and subject to the judge's order, any person charged with an animal control, housing, or traffic violation, except those requiring court appearance, may deliver by mail, automatic teller machine, or as otherwise directed, the specified amount of the fine and costs to the bureau. Said delivery constitutes a guilty plea and waiver of trial.

NOTE: Fines not covered by the Violations Bureau may also be standardized and paid, at the discretion of the court.

## **7.5 CONTINUANCES**

The prosecution and the defense in each case shall have the right to a speedy trial. Continuances may be granted for good cause shown.

## **7.6 DISQUALIFICATION OF JUDGE**

### **RSMo 479.220**

[Section 479.220, RSMo](#), provides that a municipal judge shall be disqualified to hear any case in which he is in any wise interested, or, if before the trial is commenced, the defendant or the prosecutor files an affidavit that the defendant or the municipality, as the case may be, cannot have a fair and impartial trial by reason of the interest or prejudice of the judge. Neither the defendant nor the municipality shall be entitled to file more than one affidavit or disqualification in the same case.

37.53. Ordinance Violation Cases Not Heard on the Record – Disqualification and Change of Judge

- (a) This Rule 37.53 governs the procedure for disqualification of a judge in all ordinance

violation cases, except those heard de novo or those in which there is a timely exercise of a right to a jury trial. (See Rule 37.53 following this chapter.)

- (b) Without Application. If the judge is related to any defendant or has an interest in or has been counsel in the case, the judge shall recuse.
- (c) With Application – Procedure. A change of judge shall be ordered upon the filing of a written application therefor by any party. The applicant need not allege or prove any reason for such change.

The application need not be verified and may be signed by any party or an attorney for any party.

The application must be filed not later than ten days after the initial plea is entered.

If the designation of the trial judge occurs less than ten days before trial, the application may be filed any time prior to trial. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to the commencement of any proceeding on the record, whichever is earlier.

No party shall be allowed more than one change of judge pursuant to this Rule 37.53(c) . However, no party shall be precluded from requesting any change of judge for cause at any time.

- (d) When a timely application for a change of judge is filed or a judge recuses, the judge shall:
  - 1. Comply with any circuit court rule that provides for the assignment of a judge; or
  - 2. Notify the presiding judge of the circuit who shall designate a judge to hear the case or request this court to transfer a judge to hear the case.
- (e) If an associate circuit judge or a circuit judge is designated to try the case, the designated judge shall determine the location of the trial at a place within the county.

*(Adopted May 14, 1985, eff. Jan. 1, 1986. Amended December 23, 2003, eff. July 1, 2004.)*

NOTE: 479.220 requires that an affidavit be filed by the parties, whereas Rule 37.53 requires a change of judge solely upon application of one of the parties. It should be emphasized that Rule 37.53 must be followed in any case initially before the municipal court, and that a change of judge be ordered without any supporting affidavit or cause. A judge should always disqualify himself, even when he feels that he can properly decide a case, if his being the judge could give the appearance of impropriety in any way.

## 7.7 PRETRIAL MOTIONS

### RULE 37.51(B) AND RULE 37.52

#### Rule 37.51(b) – Motions Raising Defenses And Objections

(1) Defenses and Objections That May Be Raised. Any defense or objection that is capable of determination without trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must be Raised. Defenses and objections based on defects in the institution of the prosecution or in the information other than that it fails to show jurisdiction in the court or to charge an ordinance violation may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the judge for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the information to charge an ordinance violation shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the judge may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. The motion shall be heard and determined before trial on application of the prosecutor or the defendant, unless the judge orders that the hearing and determination be deferred until the trial.

(5) Effect of Determination. If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand. If the judge grants a motion based on a defect in the institution of the prosecution or in the information, the judge may also order that the defendant be held in custody or that the conditions of his release be continued for a specified time pending the filing of a new information.

#### Rule 37.52 - Motions to Suppress

Requests that evidence be suppressed shall be raised by motion before trial; however, the judge in the exercise of discretion may entertain a motion to suppress evidence at any time during trial.

NOTE: A motion to suppress a confession as not being voluntary must be heard separate and apart from the principal trial. State v. Garrett, 595 S.W.2d 422. (Mo.App. S.D. 1980).

## 7.8 DISCOVERY

### Rule 37.54

Discovery shall be permitted solely in the judge's discretion as justice requires.

### Rule 37.61(e)

All jury trials shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure.

NOTE: Criminal Procedure Rules 25.03 and 25.05 list the discovery to which a defendant and the state are entitled without a court order, and Rules 25.04 and 25.06 list the discovery which may be obtained by court order on the showing of good cause. Rule 25.10 lists matters not subject to discovery (e.g., legal work product, informant's identity, and items which involve a substantial prejudice to national security). While discovery is permitted solely in the judge's discretion, the defendant is always entitled to a copy of the information or summons that has been filed pursuant to Rule 37.48. Release of the original information or summons is not considered discovery and is not discretionary.

## **7.9 SEVERANCE**

### **Rule 37.60**

When two or more persons are jointly charged with an ordinance violation they shall be tried jointly unless the judge finds that a probability for prejudice exists. When a person is charged with more than one ordinance violation in the same information, the violations shall be tried jointly unless the judge finds such trial would result in substantial prejudice.

## **7.10 WITNESS – SUBPOENA**

### **RSMo, 479.160 and Rule 37.55**

Form 37J or MU95 “SUBPOENA – ORDER TO APPEAR/PRODUCE DOCUMENTS” is the form to be used.

## **7.11 SERVICE**

### **Rule 37.55**

(a) A subpoena may be served by any peace officer or by any other person who is not a party and who is not less than eighteen (18) years of age. A subpoena may be served any place within the state. Fees and mileage need not be tendered to the witness upon service of a subpoena.

(b) The service of a subpoena shall be by reading same or delivering a copy thereof to the person to be summoned; provided, that in all cases where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read same or to deliver a copy thereof and such refusal shall be sufficient service of such subpoena.

## **7.12 RETURN OF SERVICE**

### **Rule 37.55(e)**

Every officer to whom a subpoena is delivered for service shall make return thereof in writing as to the time, place and manner of service of the subpoena and shall sign the return. If service of the subpoena is made by a person other than an officer, the person shall make affidavit as to the

time, place and manner of service thereof. (See form MU 95 following this chapter.)

### **7.13 FAILURE TO APPEAR**

#### **Rule 37.55(f)**

Whenever a witness in a proceeding has been once subpoenaed or required to give bail to appear before the court, he/she shall attend from time to time until the case is disposed of or he/she is finally discharged by the judge.

The witness shall be liable to attachment and bail may be forfeited for failure to appear if the witness has received notice of the time and place to appear.

If the trial is continued and he is requested to do so, the judge shall orally notify such witnesses present, as either party may require, to attend on the new date set for hearing to give testimony. The oral notice shall be valid as a summons. The names of the witnesses so notified shall be entered on the docket. It shall be the sole responsibility of the respective parties or their attorneys to notify any witnesses not orally notified by the judge of the new date set for hearing, and court process shall be provided for such purpose when requested.

NOTE: Rule 37.55(g) further provides that any person who, without good cause, does not obey a subpoena shall be subject to contempt of court proceedings.



Judge or Division:	Case Number:
State of Missouri vs.	

(Date File Stamp)

### Waiver of Counsel

I request that the Court allow my waiver of attorney with full understanding that I am entitled to an attorney if I so desire, and with full knowledge and understanding of the following additional considerations:

1. That the offense charged is \_\_\_\_\_ with the punishment range of \_\_\_\_\_.
2. That I have a right to be represented by an attorney and that, if indigent, and unable to employ an attorney, I have a right to request the judge to appoint an attorney to assist me in defending against the charge, and that the Court will appoint an attorney to assist me if it finds that I am indigent and not able to employ one.
3. That I have a right to a trial or trial by jury with assistance of an attorney to confront and cross-examine witnesses; that a guilty plea waives any right to a trial.
4. That I have the right to remain silent and not make any statement which may be used in the prosecution of the criminal charges filed against me.
5. I am aware that any recommendation by the prosecutor is not binding on the judge who may accept or reject such recommendation.
6. That if a guilty plea is entered or if found guilty by trial of the charge, the judge is most likely to impose a sentence of confinement in jail or prison.
7. That I have the right to appeal the Court's judgment (decision) or the jury's verdict should I exercise my right to trial and be found guilty.

The above rights have been read to me by the judge in open court. I understand these rights and request the court to accept my request of waiver of an attorney.

\_\_\_\_\_  
Defendant

On this date, the defendant personally appeared before me and was read the above information by me and stated these rights were understood and the defendant signed this request in my presence.

The Court finds that the defendant has made a knowledgeable and intelligent waiver of the right to assistance of an attorney.

Therefore, the Court accepts the defendant's waiver of right to representation by an attorney and further permits the defendant to proceed to trial without legal counsel.

\_\_\_\_\_  
Date Judge



**Instructions**

1. This subpoena will remain in effect until this trial is concluded or you are discharged by the Court. You must attend trial from time to time as directed. No additional subpoena is required for your future appearance at any trial of this case. If you fail to appear, you may be held in contempt of court.
2. If you have any questions regarding this subpoena, contact the person who requested it listed on the front.
3. Bring this form with you to court. This form must be completed, signed, and returned to the clerk as soon as you have testified or been dismissed.

**Witness Claim**

I have served \_\_\_\_\_ day(s) as a witness and I traveled \_\_\_\_\_ mile(s) round trip from my home to the courthouse to attend this proceeding.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Current Address

\_\_\_\_\_  
City, State, Zip

Subscribed and sworn to before me \_\_\_\_\_ (date)

\_\_\_\_\_  
Clerk

Total Claimed \$ \_\_\_\_\_

By: \_\_\_\_\_  
Deputy Clerk

### **Rule 37.53**

(a) This Rule 37.53 governs the procedure for disqualification of a judge in all ordinance violation cases, except those heard de novo or those in which there is a timely exercise of a right to a jury trial.

(b) If the judge is related to any defendant or has an interest in or has been counsel in the case, he/she shall disqualify him/herself.

(c) A change of judge shall be ordered upon the filing of a written application therefore by any party. The applicant need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or an attorney for any party.

The application shall be filed not later than ten (10) days after the initial plea is entered. If designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of designation of the trial judge or prior to commencement of any proceeding on the record, whichever is earlier. The judge, in the exercise of discretion, may allow an application to be filed any time before the trial commences.

No party shall be allowed more than one change of judge pursuant to this subdivision (c), however, no party shall be precluded from requesting a change of judge for cause at any time.

(d) When a timely application for a change of judge is filed or a judge disqualifies himself, the judge shall:

1. comply with any circuit court rule that provides for the assignment of a judge; or
2. notify the presiding judge of the circuit who shall designate a judge to hear the case or request the Missouri Supreme Court to transfer a judge to hear the case.

(e) If an associate circuit judge or a circuit judge is designated to try the case, the designated judge shall determine the location of the trial at a place within the county.

NOTE: 479.220 requires that an affidavit be filed by the parties, whereas Rule 37.53 requires a change of judge solely upon application of one of the parties. It should be emphasized that Rule 37.53 must be followed in any case initially before the municipal court, and that a change of judge may be ordered without any supporting affidavit or cause. A judge should always disqualify himself, even when he feels that he can properly decide a case, if his being the judge could give the appearance of impropriety in any way.

# CHAPTER VIII. – ARRAIGNMENT

Judge Kevin Kelly

Section	Page Number
8.1 Scope of Chapter .....	4
8.2 Informing the Defendant .....	4
8.3 The Arraignment Process .....	5
<b>GUILTY PLEA .....</b>	<b>6</b>
8.4 Rights Waived .....	6
8.5 Determining Factual Basis of Plea .....	7
8.6 Equivocal Pleas.....	7
8.7 The Range of Punishment .....	8
8.8 Recording The Plea .....	8
8.9 Entering Judgement .....	8
8.10 Withdrawing Guilty Pleas and Setting Aside Judgments .....	8
<b>OTHER PLEAS .....</b>	<b>9</b>
8.11 Not Guilty Pleas.....	9
8.12 Failure to Plead or Appear.....	9
8.13 Pleas of “No Contest” or “Nolo Contendere” .....	10
8.14 Setting Bail .....	10
<b>PLEA NEGOTIATIONS.....</b>	<b>11</b>
8.15 Role of the Judge .....	11
8.16 Disclosure of Agreement .....	11
8.17 Acceptance of the Plea .....	11
8.18 Rejection of the Plea.....	11
8.19 Summary.....	12

8.20 Request for Jury Trials .....	12
8.21 Waiver of Jury Trial .....	12

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Judge Kevin Kelly received his B.S. degree from Missouri Valley College in Marshall, Missouri and his J.D. from St. Louis University. He has served as a municipal judge since 1982 and is currently presiding in the cities of Cool Valley, Hazelwood, Maryland Heights and is the prosecuting attorney for the City of Dellwood all of which are located in the 21st Judicial Circuit, St. Louis County.

## **CHAPTER VIII**

### **ARRAIGNMENT**

#### **8.1 SCOPE OF CHAPTER**

This chapter describes the judge's role in the arraignment process. It explains how the judge should handle an arraignment docket, guilty and not guilty pleas, plea agreements, setting bail and requests for a jury trial. Also, the Supreme Court Rules applicable to the arraignment process will be cited.

#### **8.2 INFORMING THE DEFENDANT**

Individuals, who appear before a municipal judge, or an associate circuit judge hearing municipal cases, have been charged with ordinance violations. A majority of these offenses are traffic violations but the court also has jurisdiction to hear housing and municipal code violations as well as minor criminal offenses. For many whom appear before the court, it will be their first personal experience with the judicial system. Most will be unfamiliar with the procedure, let alone, apprehensive about their appearance before a judge.

Supreme Court Rules 37.47, 37.48, and 37.58 set the guidelines for the arraignment of a defendant appearing before a municipal judge, both where the defendant appears in response to a summons, and where the defendant appears following an arrest under a warrant. Supreme Court Rule 37.47(b) states: "The judge shall inform the defendant of the ordinance violation charged, his right to retain counsel, his right if indigent and there is a possibility of a jail sentence to request the appointment of counsel, his right to remain silent and that any statement made by him may be used against him." Supreme Court Rule 37.48 (b) states: "Arraignment shall be conducted in open court and shall consist of reading the information to the defendant or stating to him the substance of the charge and calling on him to plead thereto."

This rule seems to suggest that each defendant be individually informed of the particular rights set forth above. But is this practical when the number of defendants to answer an arraignment docket may well be two hundred or more? Of course it is not. Most judges have adopted an opening statement to be read aloud to all defendants present during the beginning of each court session. This statement should explain the procedure to be followed in court, the different pleas available to the defendants, the rights of the defendants, and the range of punishment for ordinance violations, the sentencing alternatives available to the court, and the right to appeal. Appearing in numerous municipal courts as I have (not as a defendant, yet), I have heard numerous versions of opening statements, all of which cover the essential information to be provided. There is no absolutely correct opening statement. Each judge should prepare an opening statement with which he/she is comfortable, and deliver it at the beginning of each court session. I have included a sample opening statement (see Sample Opening Statement following this chapter), which I find very helpful in assuring that all the necessary information is given to those defendants who are present at the beginning of court.

In many courts it is likely that not all defendants are present when the judge makes the opening remarks. Just as likely, many defendants seem to be in la-la land when the judge is speaking pay

no attention whatsoever. To give the defendants every opportunity to be informed of their rights, many courts have provided a handout to each defendant advising them of their rights and explaining the procedure in the particular court. Another tool which is very helpful is to have available a power point presentation setting out the information each defendant should know before being asked to enter a plea. This power point is repeated throughout the court session on screens in the front of court so even those defendants arriving late have the information contemplated by the Supreme Court Rules before they enter their plea. The ultimate goal is to assure the defendants enter their plea with an understanding of their rights in your court.

### **8.3 THE ARRAIGNMENT PROCESS**

After having read the opening statement, the first defendant will be called to appear before the judge. There are various means to accomplish this. Some courts have the bailiff call several defendants at the same time and have them form a line before the bench. In other courts, the judge or the prosecutor calls the defendants' names. Some courts have the defendants seated in the order in which they arrived, and then have the clerk pull the court files and give them to the prosecutor or the judge as each row is called before the bench. Any of these procedures, as well as others, is acceptable. Each judge must decide with which method he/she is most comfortable.

My personal preference is to have each defendant check in with the clerk to have their file pulled; then the names of only those defendants who are present are called by the judge. These defendants are instructed to form a line, and are called a second time to approach the judge one at a time. One of the reasons not to call all the names of the defendants as they appear on the court's docket is to avoid the situation where fifteen or more names are called, and only one person answers. Those defendants who appear may question why many people fail to appear, yet there seems to be no consequences for their absence. There may be legitimate reasons for those defendants not to be present (continuance granted, case disposed of previously), but the other defendants would have no way of knowing those reasons, thereby leading to a loss of respect for the judicial system.

When a defendant who is not represented by an attorney steps before the judge, the court should address the defendant formally, such as Mr. Jones or Ms. Jones. The judge should read the charge (or have the prosecuting attorney read the charge) to the defendant. The court should then ask the defendant how he/she pleads. If there is any possibility that the defendant is unclear about the charges against him/her, the court should explain the allegations contained in the summons. If the city is seeking a term of imprisonment in the case or there is a possibility a jail sentence may imposed, the court must remind the defendant of his/her right to retain counsel, and of his/her right to representation if he/she is indigent, as well as his/her right to waive representation by an attorney. The court may then proceed to accept the defendant's plea of not guilty, guilty, or guilty with an explanation. If the defendant is entering a plea of guilty where there is a strong possibility of a jail sentence, the court should have the defendant execute a plea of guilty and waiver from to be place in the court file. When a defendant executes such a form, the court should be sure to inquire of the defendant if the defendant understands the form and the rights he/she is waiving. Supreme Court Rule 37.58 (d).

Two other areas of concern during the arraignment process are defendants who are hearing-impaired or are unable to clearly understand the English language. Section 476.753.1, RSMo (1997) requires any court to provide a deaf person, who is a party to the action and is in need of

assistance, the services of an interpreter or other aids to assist the deaf person in the proceedings before the court. If the court is aware, prior to the arraignment date, that a defendant may need such services, the court may want to have available a qualified interpreter to facilitate the taking of the initial plea. Sections 476.750 through 476.763, RSMo (1997) provide the mechanism for arranging for an interpreter or other auxiliary aids for the deaf person, including providing for the payment of the costs involved. A list of qualified interpreters or other auxiliary aids may be obtained from the Missouri Commission for the Deaf, 1500 Southridge Drive, Suite 201, Jefferson City, MO 65109

As to defendants who are unable to speak or understand the English language, there are several options which the court may consider during the arraignment process to guarantee that the defendant's rights are protected. If the defendant is alone, and is unable to understand his or her legal rights or the charges against them, the case should be continued to allow the defendant to procure an interpreter, whether it be a friend, or someone provided by the court. Many of the defendants who are unable to speak English will come to their first court appearance with a friend who is willing to act as an interpreter. As long as this person is properly instructed as to his/her role (only interpreting what is said by the judge, the prosecutor and the defendant), this is an expeditious way to accept a plea at the time of arraignment. To further ensure that the defendant understands his/her rights, the court should provide a pre-printed form in the defendant's language which sets out the specific rights waived by the defendant when pleading guilty and the range of punishment available to the court following a guilty plea. (Each judge can determine which languages these forms should include from the makeup of the community, and the court's prior experiences, and provide a separate form for each defendant.) Certainly if there is any question as to the defendant's ability to understand the proceedings, the court should arrange for an interpreter to assist the defendant. This may be accomplished by entering a "not guilty" plea for the defendant and setting the case for trial when an interpreter can be made available, or by continuing the case for a plea with an interpreter present. If the charges are more serious than simple traffic violations, the defendant should be instructed to consult with an attorney before entering a plea, and the case should be postponed to allow such consultation.

## **GUILTY PLEA**

### **8.4 RIGHTS WAIVED**

A defendant who pleads guilty waives the following rights:

1. To be represented by an attorney, and, if the defendant is indigent, to have an attorney appointed by the court if it appears there would be a possibility of a jail sentence upon conviction;
2. To plead not guilty or to persist in that plea; by pleading guilty, the defendant waives his/her right to trial;
3. To confront and cross-examine the witnesses against the defendant;
4. To present witnesses on defendant's behalf, and to subpoena witnesses;
5. To require the prosecution to prove guilt beyond a reasonable doubt;

6. To have a jury trial; and
7. Not to be compelled to incriminate himself or herself.

Before accepting a plea of guilty, the judge should determine that the information actually and accurately states an offense [See Section 4] and be convinced that the defendant understands and voluntarily waives each right.

## **8.5 DETERMINING FACTUAL BASIS OF PLEA**

“The judge should not enter a judgment upon a plea of guilty without first determining that there is a factual basis for the plea.” S.Ct. Rule 37.58 (f). The factual basis for the plea may be established by asking the prosecutor to state the facts as the city's file reveals them, and then ask the defendant if the city's version of the incident is accurate; and, if not, to state any particulars in which the defendant's version of the facts differ from the city's version.

In the municipal court with large dockets, it may not be feasible to have the prosecutor state the essential facts for each case. If the defendant is informed that he has been charged with a stop sign violation, and responds by pleading guilty, the general practice is to accept the plea on its face and proceed to sentencing.

For particular cases such as stealing, assault and offenses against an officer (resisting arrest, failure to comply, etc.) it is advisable to ask the defendant to tell their side of the story. Because these offenses may adversely affect the defendant, should the defendant say he/she wants to plead guilty but then tells the court facts which do not form the basis for an offense; it may behoove the court to strongly advise the defendant to consult with counsel or to not accept the plea and set the matter for trial. (See 8.6) When this occurs in the presence of a large number of people in the courtroom, it affirms the court's interest in justice and avoids the appearance that the court is just interested in punishment.

## **8.6 EQUIVOCAL PLEAS**

A judge should never accept a plea of guilty that is equivocal. Where the defendant announces a plea of guilty, but goes on to say things such as "I didn't do it, but I just want to get it over with," or "I don't want to come back for trial," or "I know I didn't do what the officer said," the judge should inquire further as to the charges. If the defendant insists on not admitting the facts which constitute the offense, the judge should enter a plea of not guilty for the defendant, and set the case for trial. One advantage of accepting a plea of "*guilty with an explanation*" is to allow the defendant to make a statement to the court which includes the defendant's version of the facts. It is important to inform the defendant that the plea of guilty will be accepted, and that the explanation only goes to the punishment to be imposed. This also allows the judge to determine whether the defendant's plea is knowingly and intelligently made. If the judge feels the defendant is equivocal in his plea based upon his explanation, the judge may then set the case for trial.

## **8.7 THE RANGE OF PUNISHMENT**

The judge should inform each defendant as to the range of punishment for each offense with which the defendant is charged. This may be accomplished by the opening speech, or by informing each defendant individually. Most ordinance violations fall under a general punishment provision of the city code, but where a specific violation is governed by a special punishment section; the defendant should be informed of the special provision. (Many city ordinances provide that certain violations, usually housing violations, are continuing violations which may incur punishment on a daily basis). The court should have an up-to-date copy of the city ordinances in the courtroom. The alternative sentence of so many days in jail or so many dollars is not allowed. If there is a possibility of a jail sentence and the city has an ordinance which authorizes recovery of housing costs from a jailed defendant, the judge must inform the defendant at the time a plea of guilty is accepted.

## **8.8 RECORDING THE PLEA**

The plea of the defendant must be accurately and clearly stated and recorded on both the court file, and the judge's docket.

## **8.9 ENTERING JUDGEMENT**

Following a plea of guilty, judgment should be entered. If there is no legal cause presented why the judgment should not be entered, the court should then sentence the defendant within the guidelines of the ordinance. The court should impose sentence without unreasonable delay, but may defer sentencing for a pre-sentence investigation to be prepared, or to allow the completion of programs available to the court (SATOP, DIP, etc.). Although not a topic for this chapter, the clerk should forward to the appropriate agencies any disposition of cases which are required to be reported by state statute.

## **8.10 WITHDRAWING GUILTY PLEAS AND SETTING ASIDE JUDGMENTS**

Rule 37.67 (a) allows the court on its own initiative or upon motion of the defendant to set aside a judgment within ten days after the entry of judgment (sentence imposed) and prior to the filing of application for trial de novo. The grounds upon which a judgment may be set aside are:

- “(1) That the facts stated in the information filed and upon which the cause was tried do not state an ordinance violation;
- (2) That the court was without jurisdiction of the ordinance violation charged;
- (3) To correct manifest injustice.”

Supreme Court Rule 37.67 (a).

Rule 37.67(b) requires that a motion to withdraw a guilty plea be filed before sentence is imposed (judgment) when imposition of sentence is suspended, or after sentence is imposed to correct manifest injustice.

There is differing practice and interpretation whether a court may grant a motion to set aside a guilty plea filed more than ten days after judgment (sentence imposed). Some judges reason that 37.67(a)'s requirement of ten days also applies to a 37.67(b) judgment set aside and subsequent

withdrawal of a guilty plea, while others reason that the “manifest injustice” clause of 37.67(b) allows a longer time to set aside judgment when a plea of guilty is involved. Some judges allow use of rule 37.09 to enlarge the ten-day period where the reason for not filing within ten days after judgment is the result of excusable neglect. There are rational arguments for all of these approaches, and to date there has been no appellate case deciding or discussing this specific issue. If a judgment is set aside, the judge must record the grounds upon which the action was taken. Rule 37.67(a).

## **OTHER PLEAS**

### **8.11 NOT GUILTY PLEAS**

#### **Rule 37.59(a)**

The defendant has the right to plead not guilty. When a plea of not guilty is entered the case should be set for trial. Depending on the seriousness of the charges, (possibility of jail time, civil consequences) it may be appropriate to suggest the defendant consult with an attorney, continue the case for announcement. The matter can always be set for trial on the next appearance. The court may also, if the defendant declines to consult an attorney, to have the defendant sign a waiver of counsel form prior to setting the trial date. The defendant would not be bound by this waiver if he/she later appears with an attorney.

### **8.12 FAILURE TO PLEAD OR APPEAR**

#### **Rule 37.43**

If a defendant refuses to plead or if a corporation fails to appear, the court shall enter a plea of not guilty.

If the accused fails to appear as commanded by a summons and an information is filed, the judge may issue a bench warrant for the accused's arrest. [See Rule 37.44.] A Missouri resident who fails to appear in court or fails to dispose of the charges before his appearance may be subject to having his/her driving privileges suspended. Section 302.341, RSMo (2008) allows the municipal court to notify the defendant who "fails to dispose of the charges of which he is accused through authorized prepayment of fine and court costs and fails to appear on the return date or at any subsequent date to which the case has been continued, or without good cause fails to pay any fine or court costs assessed against him for any such violation within the time specified or in such installments as approved by the court..." that the court will order the director of revenue to suspend the defendant's driving privileges. The notice to the defendant shall be sent within ten days of the appearance date, and the defendant shall pay the fine and court costs within thirty days of the date of the mailing, or the defendant's license will be suspended. "Such suspension shall remain in effect until the court with the subject pending charge requests setting aside the noncompliance suspension pending final disposition, or satisfactory evidence of disposition of pending charges and payment of fine and court costs, if applicable, is furnished to the director by the individual."

For non-resident defendants, the municipal court may use the "Nonresident Violators Compact," Section 544.046, RSMo (2008) to insure compliance regarding traffic citations. The compact

guarantees that a nonresident motorist receiving a citation for traffic violations in a compact member state will receive the same treatment given resident motorists. A nonresident receiving a traffic citation in a compact member state must fulfill the terms of the citation or face the possibility of license suspension in the motorist's licensing state until the terms of the citation are met. The compact may be used for all traffic violations. The Missouri Department of Revenue will not transmit a report on any violation if the date of the transmission is more than six months after the date of the original citation.

### **8.13 PLEAS OF “NO CONTEST” OR “NOLO CONTENDERE”**

A defendant may wish to plead "no contest" and accept the police officer's report to be accurate. The "no contest" plea is often attractive when the defendant fears that a civil case based on the same incident may arise and that a plea of guilty will be used against the defendant in the civil suit. Pleas of "no contest" or "nolo contendere" do not exist in Missouri. The judge should enter a plea of not guilty for the defendant and set the case for trial. If the defendant wishes to submit the facts contained on the summons, or in the police report, to the court as the stipulated facts of the case, and the city consents, the court should review the submitted documents and render a verdict.

### **8.14 SETTING BAIL**

As previously discussed in Chapter 6, "Bail and Sureties," reasonable bail shall be set; however, there may be circumstances in which bail should be considered and reduced.

Supreme Court Rule 37.15 states “any person arrested for an ordinance violation shall be entitled to be released from custody pending trial.” If the defendant is being held, “the court shall order the person released upon the person’s written promise to appear unless the court finds:

- (1) The promise alone is not sufficient reasonably to assure the appearance of the person;  
or
- (2) The person poses a danger to a crime victim, the community or any other person.”

Supreme Court Rule 37.15 (b), (2004)

Section (c) of Rule 37.15 sets forth conditions the court may impose if the court determines they are necessary to assure the appearance of the defendant and the defendant does not pose a danger to a crime victim, the community or any other person.

The gist of the Rule changes enacted in 2004 makes it evident that defendants are entitled to be released pending arraignment or trial when charged with municipal violations.

Pursuant to Supreme Court Rule 37.19 either the prosecutor or the accused may requests the court to review the conditions of a bond. This allows both the city and the defendant to have the conditions of the bond be reviewed by the court whether the defendant is still incarcerated or whether the defendant is free on bail or is at large.

"(a) Upon motion by the prosecutor or by the accused, or upon the judge's own motion, the judge before whom the procedure is pending may modify the requirements for release after notice to the parties and hearing when the judge finds that:

- (1) New, different or additional requirements for release are necessary; or
- (2) The conditions for release that have been set are excessive; or
- (3) The accused had failed to comply with or has violated the conditions for his release; or
- (4) The accused has been convicted of the ordinance violation charged.

(b) When the requirements for release are increased by the judge or new requirements are set, the accused shall be remanded to the custody of the corrections official until compliance with the modified conditions. If the accused is not in custody, the judge may order that a warrant for his arrest be issued."

## **PLEA NEGOTIATIONS**

### **8.15 ROLE OF THE JUDGE**

"The judge shall not participate in any plea negotiation discussions, but after an agreement has been made between the city and the accused and presented to the judge, the judge may discuss with the attorneys the agreement and any alternative that would be acceptable." Supreme Court Rule 37.58 (e).

### **8.16 DISCLOSURE OF AGREEMENT**

If plea negotiations result in an agreement, the judge shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. The judge may accept the plea agreement, reject the plea agreement, or defer accepting the plea agreement until there has been an opportunity to consider the presentence report.

### **8.17 ACCEPTANCE OF THE PLEA**

Should the judge accept the plea agreement, the judge will inform the defendant that the judgment and sentence agreed upon between the parties will be entered as the court's judgment, and the matter will be disposed of in accordance with the plea agreement.

### **8.18 REJECTION OF THE PLEA**

Should the judge reject the plea agreement, the judge should inform the parties of that decision and advise the defendant personally, in open court or, on showing of good cause, in camera, that the judge is not bound by the plea agreement.

The judge must then advise that the defendant that he/she has the right to withdraw the plea of guilty. The judge must also advise the defendant that should he/she persist in the plea of guilty,

the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

## **8.19 SUMMARY**

In summary, plea agreements are made between the defendant (or the defendant's lawyer) and the prosecutor, not the judge. They are presented to the judge for a ruling of acceptance or rejection. The final decision is the judge's.

## **8.20 REQUEST FOR JURY TRIALS**

### **Rule 37.61**

A request for a jury trial must be made by a motion filed at least 10 days prior to the scheduled hearing date. The judge should rule promptly on a motion for a jury trial. If the motion is sustained, the case should be certified to the presiding judge for assignment for trial by jury, or handled in accordance with any applicable local court rule. In municipal courts where the trial judge is not designated more than ten days prior to trial, the application for jury trial may be filed at any time. The judge should consult the local court rules for any rules that govern assignments for jury trials from municipal divisions.

## **8.21 WAIVER OF JURY TRIAL**

Section (f) to Rule 37.61 provides that a defendant may file a written motion and attach to it a waiver of his right to jury trial; the defendant's case may be remanded to the municipal division for trial. This section applies to ordinance violations being tried in the associate division.

## Sample Opening Statement

- ▶ City of
  - A Great Judge
  - Municipal Court
- ▶ Court procedure
- ▶ Your rights in Municipal Court
- ▶ DOCKET CALL
- ▶ When your name is called, please form a line along the wall from the podium to the rear of the room.
- ▶ When the Judge calls your name, please step up to the bench.
- ▶ The charges against you will be read to you one charge at a time.
- ▶ TYPES OF PLEAS
- ▶ After the charge is read to you, you must enter a plea.
- ▶ There are three types of pleas:
  1. Not guilty.
  2. Guilty.
  3. Guilty with an explanation.
  4. NOT GUILTY PLEA
- ▶ You should plead not guilty if you in fact believe you are not guilty of the charges.
- ▶ If you plead not guilty your case will be set for trial.
- ▶ You will be given a date to return to this Court for your trial.
- ▶ If you fail to appear on time for trial, a warrant will be issued for your arrest.
- ▶ GUILTY PLEA
- ▶ When you plead guilty you will not have a trial and you admit you are guilty.
- ▶ You give up a number of rights when you plead guilty.
- ▶ RIGHTS YOU GIVE UP
- ▶ You have a right to a trial.
- ▶ You have a right to have an attorney represent you at your trial.
- ▶ If you are indigent, and the City is requesting you serve a jail sentence, the Court may appoint an attorney for you.
- ▶ You may request a jury trial.
- ▶ If you have a jury trial, all 12 jurors must find you guilty.
- ▶ At any trial, you have the right to ask questions of witnesses that appear to testify against you.
- ▶ You have the right to subpoena witnesses to testify for you.
- ▶ You may testify at trial, but you **have the right to remain silent** and cannot be forced to testify at your trial.
- ▶ You are presumed innocent
- ▶ At trial, the City must prove you guilty beyond a reasonable doubt.
- ▶ RIGHT TO APPEAL
- ▶ If you have a trial and you are found guilty, you may appeal your case.
- ▶ Your appeal is held in the Circuit Court of St. Louis County in Clayton before a different Judge.
- ▶ GUILTY PLEA
- ▶ If you plead guilty you give up all of the rights previously mentioned.
- ▶ PUNISHMENT
- ▶ If a fine is assessed in your case, it can range from \$1.00 to a maximum of \$1,000.00.

- ▶ The Judge has the authority to impose a jail sentence of up to 90 days in jail.
- ▶ RIGHT TO COUNSEL
- ▶ If your case may result in a jail sentence, the Judge may recommend you speak with an attorney before entering a plea on your case.
- ▶ It is a good idea to follow the Judge's suggestion.
- ▶ GUILTY WITH AN EXPLANATION
- ▶ If you plead guilty with an explanation, it is a plea of guilty.
- ▶ You still may be fined and may have to pay court costs.
- ▶ You cannot change your mind when you find out what the punishment is.
  - Cases you may want to plead guilty and give an explanation
    - No proof of insurance
    - Displaying expired or improper plates
    - Failure to register a motor vehicle
    - No driver's license
    - Equipment violations
    - Housing violations (if you have corrected the violations)
    - NO INSURANCE
- ▶ You must have proof of insurance if you are driving a vehicle *even if it is not your vehicle.*
- ▶ In Missouri, a no insurance ticket will give you 4 points on your driving record.
- ▶ 8 points in 18 months will cause you to lose your license.
- ▶ If you show an insurance card, in your name or the owner's name, for the vehicle you were driving, which was valid on the date you received the ticket your case will be dismissed.
- ▶ If you show an insurance card which is effective after the date of the ticket, you will not receive points on your record, but there will be a larger fine.
- ▶ DEFENSIVE DRIVING SCHOOL
- ▶ If you plead guilty to a moving violation you will receive points on your driving record.
- ▶ You may be eligible to avoid points by attending Defensive Driving Classes.
- ▶ You must pay your fines and costs, pay a fee to the school, and complete the class within 60 days.
- ▶ DEFENSIVE DRIVING SCHOOL
- ▶ If you want to attend Defensive Driving School, you must ask the Judge.
- ▶ If the Judge approves your request to attend the school, you must sign up tonight.
- ▶ After you pay your fines and court costs, the clerk will direct you to the school representative to sign up for class.
- ▶ PAYMENT
- ▶ If you are assessed a fine, you **must** see the court clerk before you leave.
- ▶ Please proceed to the payment window in the hall.
- ▶ ***You are expected to pay your fines and costs tonight before you leave.***
- ▶ COURTROOM RULES
- ▶ During court, there is no talking except for court business.
- ▶ All electronic devices (cell phones, pagers, etc.) must be turned off or on silent.
- ▶ All hats must be removed.
- ▶ Parents who are with a child because the child has a case pending before the court, should approach the bench when the child's case is called.
- ▶ COURTROOM RULES
- ▶ You must follow the instructions given to you by the court personnel and bailiffs.

- ▶ **Inappropriate actions during court or inappropriate statements made, or directed towards court personnel in court or outside the courtroom will result in your arrest for Contempt of Court.**

# CHAPTER IX. – TRIALS

## Judge Celeste Leritz Endicott

Section	Page Number
9.1 Scope of Chapter .....	3
9.2 Presence of Defendant .....	3
9.3 Opening Remarks Calling the Case for Trial.....	3
<b>ORDER OF TRIAL/PRESENTATION OF EVIDENCE.....</b>	<b>4</b>
9.4 Pro Se Litigants.....	4
<b>ORDER OF TRIAL – PRESENTATION OF EVIDENCE – Rule 37.62.....</b>	<b>5</b>
9.5 General Considerations.....	5
9.6 Opening Statements .....	5
9.7 Evidence for the City .....	6
9.8 Motion for Directed Judgement of Acquittal at the Close of the City’s Case—In--Chief ..	6
9.9 Opening Statement by the Defendant .....	6
9.10 Evidence for the Defendant.....	6
9.11 Rebuttal Evidence .....	7
9.12 Motion for Judgment of Acquittal at Close of Evidence .....	7
9.13 Closing Arguments.....	7
<b>THE JUDGMENT – RULE 37.64 .....</b>	<b>8</b>
9.14 General Considerations .....	8
9.15 Acquittal.....	8
9.16 Finding of Guilty .....	8
9.17 Sentence.....	8
9.18 Duty to Advise Defendant of Right to Trial De Novo .....	9
9.19 Setting Aside Judgment.....	10
9.20 Motion to Withdraw a Plea of Guilty.....	10

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## **CHAPTER IX TRIALS**

### **9.1 SCOPE OF CHAPTER**

This chapter describes each stage of a typical municipal trial, from the judge's opening remarks to the attorneys' closing arguments. It also discusses judgment, sentencing, and post-trial motions.

### **9.2 PRESENCE OF DEFENDANT**

Rule 37.57 compels the presence of the defendant at all times during the course of the trial unless the defendant's presence is waived by both the defense and the prosecutor with the consent of the judge.

### **9.3 OPENING REMARKS CALLING THE CASE FOR TRIAL**

After the bailiff opens court in the usual manner, the court first announces the case (City v. Doe) and asks if the parties are ready for trial. Rule 37.56 states that both parties to the case have a right to a speedy trial and that continuances may be granted for good cause shown. A trial continuance should be granted only if the non-ready party convinces the court that substantial injustice would otherwise result. Parties should be advised at arraignment that they will be expected to try their case on the day and time set for trial. If they wish to have an attorney, present witness testimony or other evidence at the trial, they should be told to bring all of the above to court on the day of trial. It is wise to suggest that the parties subpoena witnesses well in advance of the trial.

The mere absence of a witness is not, in and of itself, sufficient reason for the court to grant a continuance. The court should consider what the testimony would be if the witness were in fact present. If such testimony is immaterial, irrelevant, redundant or merely cumulative, then the court should refuse the continuance request and order the trial to proceed. If, however, the court believes that the party made a good faith effort to procure the witness and the absence of the testimony would result in the loss of material and relevant evidence necessary to a fair and impartial determination of guilt or innocence, then a continuance should be granted.

If both parties agree, the testimony of the absent witness may be submitted to the court through affidavit. The court may consider the facts set forth in the affidavit as evidence as if the witness were personally present.

One common attempt to obtain a trial continuance is a defendant's request for a trial by jury. Often such request is made on the day set for trial. Rule 37.61(d) requires that a motion for a jury trial be filed at least 10 days prior to the trial date, unless the designation of the trial judge occurs less than 10 days prior thereto. Therefore, if a defendant attempts to avoid going to trial by demanding a jury trial at the last minute, the trial judge can advise him or her that they are "out of time" and the trial must proceed.

Another common method of attempting to obtain a last minute continuance is to request a change of judge on the day of trial. Rule 37.53(c) provides that a party has a right to a change of judge, and need not allege any reason therefore. However, an application for change of judge must be made no later than ten days after the initial plea. However, if the trial judge is designated less than ten days prior to the trial date, the defendant has the right to a change of judge on the day of

trial. And while a party is entitled to only one change of judge, he or she may make the request at any time for just cause. Of course, a judge must recuse him or herself if he or she is related to a defendant or has an interest in or has been counsel in the case. Rule 37.53(b).

**Rule 37.61(f) provides “If the defendant files a written notice so requesting and attaches thereto a waiver of the right to a jury trial, the case may be remanded to the municipal division for trial.” In other words, if a defendant changes his mind about wanting a jury trial, he can do so in writing and the case comes back to municipal court; it does not stay in associate circuit court for trial.**

## **ORDER OF TRIAL/PRESENTATION OF EVIDENCE**

### **9.4 PRO SE LITIGANTS**

Many of the defendants appearing for trial in municipal divisions are not represented by attorneys and have no knowledge of trial procedure or the required order of trial. Although judges are prohibited from aiding or assisting either the defendant or the city in the presentation of their respective cases, the court must at least acknowledge and consider the pro se defendant's lack of knowledge. It is therefore recommended that, before the trial commences, the court advise the pro se defendant as to the order of the trial. An example of such a statement is as follows:

Mr. Doe, you are charged with (name of the offense, such as peace disturbance, careless and imprudent driving, etc.) The case will now be tried. The city attorney may make an opening statement, outlining what evidence he or she expects to present at trial. You may, if you wish, make an opening statement after the city's, or you may present your opening statement later in the case. You are not required to give an opening statement. The city will present their evidence. Witnesses will be sworn and will be questioned by the city. You will then have the right to cross examine those witnesses, that is to ask any questions of those witnesses that you feel is important to your side of the case. The city may offer other evidence, such as photographs, maps, or objects pertaining to the offense. You have the right to object to any evidence presented by the city that you feel is unfair, inappropriate or irrelevant. I will rule on those objections as they arise. After the city has rested, that is, finished its side of the case, you have a right to call witnesses on your own behalf and ask them questions; they will be subjected to cross examination by the city. You may also present other physical evidence that supports your case. The city has the right to raise objections to your questions or evidence as well.

You have the further right to testify on your own behalf, that is to tell your side of the story. If you testify you will be placed under oath and subject to cross examination by the city. However, the law does not compel you to testify, you have the right to remain silent and this court will not consider your failure to testify as any indication of guilt. The burden of proving you guilty rests entirely with the city, and this burden of proof is beyond a reasonable doubt. You do not have to prove yourself innocent. After all the evidence has been heard the court will make a determination as to your guilt or innocence.

If at any time you have a question concerning the proceedings, please so indicate. I will stop the proceedings and attempt to answer your questions.

## **ORDER OF TRIAL – PRESENTATION OF EVIDENCE – RULE 37.62**

### **9.5 GENERAL CONSIDERATIONS**

Either party may request the court to exclude witnesses from the courtroom during the course of the trial. The purpose of this rule is to insure the purity of the testimony. One witness may very innocently and subconsciously favor or change his or her impression of the facts because of a previous witness' testimony. To guard against this, the court may, on its own motion or on the motion of either party, invoke the rule of exclusion of witnesses. In the event the exclusionary rule is invoked, the court should announce:

All witnesses, excluding the defendant, are to leave the courtroom until you are called to testify. You will remain in close proximity but under no circumstances will you listen to or attempt to hear the testimony of any other witness. While you are excluded, you will not discuss the case with anyone other than the attorneys for the parties. This admonition is given under the penalty of contempt of court if you disobey.

### **9.6 OPENING STATEMENTS**

Opening statements for the city or the defendant should be limited in scope. The purpose of an opening statement is to inform the court of the nature of the case, outline the anticipated proof, and inform the defendant of the contemplated course of prosecution. Opening statements that include arguments about the respective parties' theories of the case or interpretation of the facts are objectionable.

Neither the city attorney nor the defendant are required to give opening statements. Either party may choose to give a statement but there are no sanctions for failing to do so. However, if the city elects to give an opening statement, the court must direct a judgment of acquittal at the close of such statement if the prosecutor fails to state facts which, if proven, would fail to convict the defendant. See, e.g. State v. Whites, 538 S.W.2d 70 (Mo. App. 1976).

So, for example, if the defendant was charged with possession of marijuana and the city's opening statement only referred to the defendant's possession of drug paraphernalia, the court must direct a judgment of acquittal at the close of the city's opening statement. However, such dismissals are unusual and should only be granted if the city presents no facts, along with inferences most favorable to the city, which support the elements of the offense charged.

The defendant has the choice of making an opening statement immediately after the conclusion of the city's statement, reserving the opening statement until the conclusion of the city's case in chief, or waiving the opening statement entirely. Rule 37.62.

## **9.7 EVIDENCE FOR THE CITY**

After the opening statement stage of the trial, the city will present its evidence to support the ordinance violation charged in the information. As noted, the defendant has the right to cross examine the city's witnesses and object to evidence submitted by the city.

## **9.8 MOTION FOR DIRECTED JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE CITY'S CASE—IN--CHIEF**

At the close of the city's case, the defendant may move for a directed judgment of acquittal. Rule 37.62(c). This is similar to a motion for judgment of acquittal after the conclusion of the city's opening statements. If the court determines that the city has not offered sufficient evidence to support the charges against the defendant, the court should sustain the motion of acquittal, and the defendant should be discharged. Conversely, if the defendant's motion is overruled by the court, the defense then proceeds with its testimony and evidence.

At this point in the trial, the court should not concern itself with the ultimate burden of proof - "beyond a reasonable doubt." The test is not guilt or innocence but whether there has "been evidence admitted as to each and every distinct element of the offense charged." If the court determines that the city has failed to prove an element of the offense, then, of necessity, the defendant is acquitted.

## **9.9 OPENING STATEMENT BY THE DEFENDANT**

If the defendant elected to preserve his or her opening statement, that statement can be presented immediately after the city finishes presenting its evidence. As previously discussed, the defendant's opening statement must also be restricted to facts and the reasonable inferences to be drawn from those facts. The defense cannot argue its case, and the limitations placed on the prosecutor apply equally to the defendant.

## **9.10 EVIDENCE FOR THE DEFENDANT**

After its opening statement, the defense may present its testimony and evidence. When the defendant is not represented by an attorney, often the only evidence presented is the testimony of the defendant. In such cases, before the actual trial commences, the court should advise defendants that they are not compelled to testify on their own behalf and that there is no inference of guilt in the event they elect not to testify. This is also applicable to spouses. Rule 37.63(a) specifies that: "If the defendant shall not avail himself or herself of the right to testify or of the testimony of the wife or husband on the trial in the case, it shall not be construed to affect the innocence or the guilt of the defendant nor shall the same raise any presumption of guilt, nor be referred to by any party or attorney in the case, nor be considered by the court or jury before whom the trial takes place."

The defense, in lieu of offering evidence, may elect to stand on or re-offer its motion for a directed judgment of acquittal. If this occurs, the case is closed and rather than determining only if the city has made a prima facie case (presented evidence covering each element of the offense charged), the court must decide the defendant's guilt or innocence. To do that, the court must determine whether the city has presented credible evidence that convinces the court the

defendant is guilty beyond a reasonable doubt. [See Section 9.14 for further discussion of guilt beyond a reasonable doubt.]

### **9.11 REBUTTAL EVIDENCE**

If the court has sustained the defendant's motion for a directed judgment of acquittal, the defendant is immediately discharged, and the remainder of the trial is aborted. However, if the court has overruled the motion, then, and only then, are the parties permitted to offer rebuttal evidence; the city first and the defense second. The parties may waive. If the city chooses not to offer rebuttal, the defense is prohibited from offering further evidence.

The rebuttal evidence rule is not designed to automatically reopen the case for any and all evidence. Rebuttal evidence is that which tends to explain, counteract, repel or disprove evidence offered by the other party. The scope of such evidence rests within the broad discretion of the trial court. State. v Caldwell, 695 S.W.2d 484 (Mo. App. 1985).

Rule 37.62(f) provides that "the parties, respectively, may offer evidence in rebuttal." If either party requests leave to reopen its case, the court should determine why this evidence was not previously offered. If the court determines that there was good cause, the request to reopen should be granted. An example would be where either of the parties announces the discovery of a formerly unknown witness whose testimony is essential to the party's case.

### **9.12 MOTION FOR JUDGMENT OF ACQUITTAL AT CLOSE OF EVIDENCE**

While Rule 37.62(g) provides that a defendant may offer a motion for a judgment of acquittal at the close of all evidence, the motion is a carry-over from previously jury-tried municipal cases and serves no real purpose in a court-tried case other than to avoid the final stage of the trial reserved for closing argument. The rule was designed to take the case away from the jury if the court believed that as a matter of law the defendant is not guilty. However, if such a motion is offered, the court must decide the guilt or innocence of the defendant based upon the evidence heard, as the court would do at the conclusion of the entire trial. If the court finds in favor of the defendant, the court sustains the motion and discharges the defendant.

### **9.13 CLOSING ARGUMENTS**

Subject to the comments above, the parties are entitled to offer "closing arguments" to the court but are not required to do so. Quite often in municipal non-jury cases, closing arguments will be waived because the case has been short, the evidence is fresh, and argument would be superfluous. The court may limit the time that each party has for argument, with the city arguing first, the defendant second, and the city having the right of closing by final rebuttal argument. When the court limits the time for argument, each party has an equal time limit; however, the city prosecutor must announce in advance how the city's time will be divided, how many minutes for the opening final argument and how many for the rebuttal argument.

The scope of final argument can include any statement based upon the facts in evidence and all reasonable inferences to be drawn from those facts. However, the argument cannot include evidence that was excluded by the court during trial or any inferences drawn from the excluded evidence. The most common objections raised during final arguments are: (1) that the argument

is not supported by facts in evidence; and (2) that the argument is inflammatory. Because there is no jury, the judge has latitude in restricting or allowing broad final arguments.

## **THE JUDGMENT – RULE 37.64**

### **9.14 GENERAL CONSIDERATIONS**

After closing arguments, the case is concluded, and the court must determine the facts, the credibility of the witnesses, and the weight of the evidence to decide whether the defendant is guilty beyond and reasonable doubt. Reasonable doubt has been defined in Missouri as follows: "A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt." MAI-CR3d 302.04.

If the court believes that the city has not sustained this burden of proof, that there is a reasonable doubt as to the defendant's guilt, the court is charged with finding the defendant not guilty. The court is not obligated to make an on the spot decision. It may take the case as fully heard and submitted and continue it to a date certain for adjudication. This is commonly done to enable the court to reflect on the evidence just as a jury (if present) would do during its deliberations. The court may also take a case under submission to research a question of law. The judge should expedite all cases under submission .

### **9.15 ACQUITTAL**

If the court determines the defendant is not guilty, the court announces, "The court finds and adjudges that the defendant is not guilty and is herewith discharged."

### **9.16 FINDING OF GUILTY**

If the court determines that the defendant is guilty, it announces, "On the evidence heard and adduced, the cause having been fully submitted, the court finds and adjudges the defendant guilty as charged." A finding and adjudication of guilt must be done without unreasonable delay, and the defendant must be present in court unless excused by both the city and the defendant with the consent of the judge. Rule 37.57.

### **9.17 SENTENCE**

The court may immediately impose sentence or may defer sentencing for a reasonable period, either to reflect on what it considers to be proper punishment, or to order a presentence investigation and report for sentencing or probation purposes. In either instance, the court should set a sentencing date, ordering the defendant to reappear on that date.

The court should never presume the range of penalty and should take care to learn what the range of penalty is for the particular offense for which the defendant has been convicted. Usually the court should ask the prosecutor what the penalty range is and which ordinance provides for the penalty, and then personally review the sentencing provisions of the ordinance. The prosecutor should have access to the defendant's prior record, if any, and may have a

recommendation to make to the court concerning sentencing. Of course, the judge is not obligated to follow the prosecutor's recommendation.

The court has great latitude in sentencing and should take care to learn what the range of penalty is for the particular offense for which the defendant has been convicted. The court should ask the prosecutor what the penalty range is and which ordinance provides for the penalty, and then personally review the sentencing provisions of the ordinance.

The court may impose the minimum to the maximum penalty provided for in the ordinance. The court may impose a sentence and suspend execution thereof; or may suspend imposition of any sentence if not prohibited by ordinance. If a defendant receives a suspended execution of sentence or suspended imposition of sentence, he or she must be placed on probation for a specific period of time, not to exceed two years. Rule 37.64(e). The court may impose conditions of probation, the violation of which may cause defendant's probation to be revoked. In the case of a suspended execution of sentence, the previously imposed sentence would be executed. In the case of a suspended imposition of sentence, the court is free to impose any sentence within the applicable range of punishment in the event that probation is revoked.

The court also has jurisdiction to stay execution of payment of a fine or jail sentence for a period not to exceed six months from the date the sentence is imposed. This stay is commonly granted to allow the defendant additional time to obtain the money to pay the fine, or in case of a jail sentence, to allow time to place his or her affairs in proper order before being committed to jail. The judge may require the defendant to post a bond conditioned on the defendant appearing on a specified date and surrendering in execution upon the sentence. Rule 37.64 (f).

On occasion a defendant shall be convicted of two or more charges. In such event, the court should state whether the sentences shall run consecutively or concurrently. If the court fails to so state, the sentences shall run concurrently. Rule 37.64 (g).

## **9.18 DUTY TO ADVISE DEFENDANT OF RIGHT TO TRIAL DE NOVO**

Immediately after sentencing, the court must inform the defendant of the right to a trial de novo. Rule 37.71. **An application for trial de novo shall be filed as provided by law. No judge may order an extension of time for filing or perfecting an application for trial de novo.**

Subsection (b) prohibits the filing of such an application if the defendant has paid any portion of the fine or costs. The court may make a statement such as the following to the defendant:

Mr. Doe, the court has found you guilty and sentenced you to pay a fine of \$200.00 and to pay court costs. You have ten days from today's date to file an application for a trial de novo, that is, a new trial in front of the circuit court of this county. If you intend to seek a trial de novo, do not pay the fine and costs because if you do pay any part of the fine and costs, you waive your right to a new trial.

**Once an application for trial de novo has been filed, execution of the judgment is suspended, and the defendant is not required to pay the fine or go to jail. However, if the defendant changes his mind about wanting a trial de novo or if the court enters a finding that the defendant has "abandoned" the request, the judgment shall be executed and the defendant must pay the fine or go to jail. Rule 37.72**

## **9.19 SETTING ASIDE JUDGMENT**

The court has jurisdiction to set aside the judgment within a period of ten days from the date it is entered. Rule 37.67. After the ten-day period, the court loses its jurisdiction and cannot interfere with the judgment. The court, once an application for trial de novo has been filed, also loses all further jurisdiction to set aside the judgment. Within these restrictions, the court may, on its own application, or on the motion of the defendant, entertain a motion to set aside the judgment upon any one or more of the following grounds:

1. The facts set forth in the information and upon which the case was tried do not constitute a violation of the ordinance;
2. The court did not have jurisdiction of the ordinance violation charged; or
3. Setting aside judgment is necessary to correct a manifest injustice.

In the event the judgment is set aside, the court must also issue a written order to this effect setting forth the reasons for so ruling.

## **9.20 MOTION TO WITHDRAW A PLEA OF GUILTY**

The court has the further jurisdiction, either on its own application or by motion of the defendant, to withdraw a plea of guilty. While technically this can be done only before sentence has been imposed or after the court has suspended the imposition of sentence, the court, at any time within the ten-day period, may set aside the guilty plea, regardless of sentencing, to correct a “manifest injustice.” Rule 37.67(b).

# CHAPTER X. - ESSENTIAL ELEMENTS

Judge Jess W. Ullom

Section	Page Number
10.1 Introduction.....	3
10.2 Scope of Chapter.....	3
<b>PART I TRAFFIC ORDINANCES.....</b>	<b>3</b>
10.3 Exceeding the Speed Limit.....	3
10.4 Failure to Yield Right of Way.....	6
10.5 Careless and Imprudent Driving.....	9
10.6 Leaving the Scene of an Accident.....	10
10.7 DWI – Alcohol/Drug Offenses.....	13
<b>COMPARISON OF 1996 AMENDMENT STATE STATUTE TO PRIOR STATUTE.....</b>	<b>15</b>
<b>ESTABLISHING "DRUGGED CONDITION" ELEMENT.....</b>	<b>17</b>
10.8 Licenses – Driving Without License; Driving Under Suspension, Revocation, Cancellation.....	17
<b>COMPARISON OF 1995 AMENDEDMENT STATE STATUTE.....</b>	<b>19</b>
<b>TO PRIOR LAW ON MENTAL STATE REQUIREMENT.....</b>	<b>19</b>
10.9 Stealing (Larceny).....	21
10.10 Peace Distrubance.....	22
10.11 Hindering and Interfering With a Police Officer.....	25
10.12 Weapons Violations.....	27

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Judge Jess Ullom received his J.D. from St. Louis University in 1973 after a transfer from Duquesne University in Pittsburgh, Pennsylvania. He has served as a municipal judge since 1979, most recently for the St. Louis County Municipal Court since 1992.

He was assisted in the preparation of this chapter by Joy D. McMillen, who works with him at the law firm of Doster, Robinson, James, Hutchison and Ullom in Chesterfield, Missouri. Ms. McMillen received her J.D. from St. Louis University in 1994.

Substantial acknowledgement is also due to Judge Thomas E. Sims for his original work on this chapter for the 1990 edition, sections of which remain unchanged in this revision. Judge Sims is now retired, after having served as municipal judge for Kansas City since 1972.

## **CHAPTER X ESSENTIAL ELEMENTS**

### **10.1 INTRODUCTION**

Before a judge can hold government has made a prima facie case and, after the completion of all the evidence a finding of guilt, the judge must determine that every element essential to the commission of the offense charged has been proven beyond a reasonable doubt in accordance with Missouri law.

The key to determining the elements necessary to make findings is that any judge must first read the ordinance because it represents the only basis for the charge brought against the individual. That is so because the judge may not otherwise determine what elements of proof the law requires. These are essential determinations and constitute the basis for the findings.

As always, the necessary elements in addition thereto are identification of the party charged as the violator and the place of occurrence within the geographical jurisdiction of the court.

### **10.2 SCOPE OF CHAPTER**

An effort has been made to provide for users the essential elements of proof required to sustain judicial convictions in the most common ordinance violations heard and determined by those having jurisdiction over such offenses.

## **PART I TRAFFIC ORDINANCES**

### **10.3 EXCEEDING THE SPEED LIMIT**

#### **SAMPLE ORDINANCES: MAXIMUM SPEED LIMITS & POSTED SPEED LIMITS**

Except when a special hazard exists that requires lower speed for compliance with section #xxx, the limits hereinafter specified or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle at a speed in excess of such maximum limits:

- (a) Twenty-five miles per hour on all streets except those which have been designated as through streets.
- (b) Thirty-five miles per hour on all through streets. The maximum speed limits set forth in this section may be altered as authorized in section # xxx.
- (c) The speed limit posted and established by ordinance.

#### **MINIMUM SPEED LIMITS**

- (a) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is

necessary for safe operation or compliance with law.

- (b) When appropriate signs are erected, no person shall operate a motor vehicle on any controlled access street or highway at a speed of less than forty miles per hour except when reduced speed is necessary for safe operation or compliance with law.

### **TOO FAST FOR CONDITIONS**

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having due regard to the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or street or highway conditions.

### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) driving a motor vehicle within the city limits;
- (2) on a street or highway (city), (and at intersection, railroad grade crossings, curves, hillcrests, winding roadways, etc.);
- (3) (a) in excess of maximum speed limits specified or established (for street in this city); or  
(b) or at such a slow speed as to impede the normal and reasonable movement of traffic; or  
(c) unreasonable rate of speed plus specific hazardous conditions.
- (4) defendant is a resident of city - or prove signs properly posted (304.120).

\* \* \* \* \*

Except for an occasional oversight, the prosecution can generally be expected to prove the first element. If there is a failure of such proof, then the court has no jurisdiction at trial to do other than find the defendant not guilty and dismiss the charge.

On occasion the prosecution will fail to prove element (2) by omitting proof of the fact that the defendant drove at a speed above the maximum lawfully permitted on a city street or highway.

The failure of proof more often occurs in connection with element (3); that is, proof that the speed limit was exceeded. Various cases have dealt with this issue. Police officer opinion

testimony of a speed estimate of defendant's vehicle is receivable in evidence. City of Webster Groves v. Quick, 323 S.W.2d 386 (Mo. App. 1959). State v. Calvert, 682 S.W.2d 474 (Mo. App. 1984). Where the speed is measured by radar, (Radio Detection and Ranging) a speed detecting device, the supporting scientific principle is now accepted by the courts (judicially noticed) and when the unit is properly functioning and properly operated it is considered to accurately measure speed in terms of miles per hour. State v. Graham, 322 S.W.2d 188 (Mo. App. 1959). A "duality of tests" of the radar unit made almost immediately before the speed measuring occasion constitutes prima facie proof, when offered, to show the machine was functioning properly at the time a defendant's speed was measured, whether at a stationary site or in the "moving mode." Calvert, Graham. The accuracy of the radar as a speed-measuring device depends upon the accuracy of the measuring device against which it is tested. City of St. Louis v. Boecker, 370 S.W.2d 731 (Mo. App. 1963). Where the evidence introduced shows that the tuning forks used to measure the accuracy of the radar unit were calibrated by electronic equipment used for that purpose, that the arresting officer observed the calibration process both before and after the arrest, and that neither required adjustment, proof of such accuracy is sufficient to make a submissible case. Kansas City v. Hill, 442 S.W.2d 89 (Mo. App. 1969). No proof of the accuracy of the electronic equipment or master machine is necessary. City of Kansas City v. Tennill, 630 S.W.2d 173 (Mo. App. 1982). See also, State v. Moore, 700 S.W.2d 880 (Mo. App. E.D. 1985).

The reader's attention is specifically directed to Section 304.120.1, RSMo, which provides in pertinent part:

No person who is not a resident of such municipality and who has not been within the limits thereof for a continuous period of more than forty-eight hours, shall be convicted of a violation of such ordinances, unless it is shown by competent evidence that there was posted at the place where the boundary of such municipality joins or crosses any highway a sign displaying in black letters not less than four inches high and one inch wide on a white background the speed fixed by such municipality so that such sign may be clearly seen by operators and drivers from their vehicles upon entering such municipality.

Therefore, the municipal judge may regard this statute as requiring proof of an additional element in an ordinance prosecution, namely, that such a sign was posted and visible to nonresident transient motorists entering the municipality or briefly within it for less than 48 hours, once proof of either relationship is introduced. The proof is of a jurisdictional nature.

## **10.4 FAILURE TO YIELD RIGHT OF WAY**

### **SAMPLE ORDINANCES:**

#### **RIGHT-OF-WAY AT INTERSECTION - NO TRAFFIC CONTROLS**

The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway where the intersection is not controlled by traffic controls.

#### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Operating a motor vehicle within the city limits;
- (2) Upon a highway approaching an intersection; ("highway" is generic by definition for a public street or highway by statute, as well as case decision);
- (3) Fails to yield the right-of-way (to stop or give way) to a vehicle which has entered the intersection from a different street or highway, (a negative duty exists; i.e. to not enter the street or highway under the circumstances);
- (4) If there is no form of traffic control at such intersection;
- (5) In exercise of the highest degree of care (required by Section 304.012.1, RSMo).

### **SAMPLE ORDINANCES:**

#### **RIGHT-OF-WAY - VEHICLES APPROACHING OR ENTERING INTERSECTIONS**

When two vehicles approach or enter an intersection from different streets or highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

#### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) The operation of two separate vehicles on the public way within the city limits;
- (2) Approaching or entering the same intersection from different streets or highways at approximately the same time;
- (3) (Implied) with no form of traffic control;
- (4) The driver of the vehicle on the left fails to stop or give way to the vehicle on the right;

**SAMPLE ORDINANCES:**

**RIGHT-OF-WAY - VEHICLE TURNING LEFT**

The driver of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) The operation of a motor vehicle within the city limits;
- (2) By a driver intending to turn left;
- (3) Fails to yield the right-of-way (stop or give way) to any vehicle approaching from the opposite direction;
- (4) Which is so close as to constitute an immediate hazard.

**SAMPLE ORDINANCES:**

**RIGHT-OF-WAY AT INTERSECTION - STOP SIGNS AT INTERSECTION**

The operator of any vehicle who has stopped as required by law in obedience to a stop sign at an intersection shall yield to other vehicles within the intersection or approaching so closely on the protected street as to constitute an immediate hazard, but said operator having so yielded may proceed, and other vehicles approaching the intersection on the protected street shall yield to the vehicle so proceeding into or crossing the protected street.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Operating of a motor vehicle within the city limits;
- (2) Stopped at a street intersection in obedience to a stop sign;
- (3) Fails to yield right-of-way (give way - remain stopped or slow) to vehicles within the intersection or approaching so closely on the protected street as to constitute an immediate hazard;
- (4) But after having stopped and given way may proceed;
- (5) Other vehicles then approaching the intersection of the protected street shall "give way" to the vehicle proceeding or crossing the protected street.

**SAMPLE ORDINANCES:**

**RIGHT-OF-WAY AT INTERSECTION - YIELD SIGNS AT INTERSECTION**

The driver of a vehicle approaching a yield sign....after slowing or stopping, ....shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection or junction of roadways. Such driver shall yield the right-of-way to pedestrians within an adjacent crosswalk. Provided, however, that if such a driver is involved in a collision with a vehicle in the intersection or junction of roadways or with a pedestrian in an adjacent crosswalk after driving past a yield sign, such collision shall be deemed prima facie evidence of his failure to yield the right-of-way.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) The driving of a motor vehicle within the city limits;
- (2) Upon a roadway with a yield sign at an intersection or junction of another roadway;
- (3) (a) Fails to "give way" (stop, slow or swerve) to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard; or  
(b) Fails to "give way" (slow or stop) to pedestrians within an adjacent crosswalk;
- (4) During the time such driver is moving across or within the intersection or junction of roadways.

If a collision occurs after driving past a yield sign in the intersection, with a vehicle, or in the adjacent crosswalk with a pedestrian, a presumption arises from such collision that the driver passing the yield sign failed to yield the right-of-way. A prima facie case is made.

**SAMPLE ORDINANCES:**

**RIGHT-OF-WAY - PRIVATE ROAD**

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a vehicle within the city limits;
- (2) About to enter or cross a roadway from any place other than another roadway;
- (3) Fails to "give way" (stop, slow or swerve) to all vehicles approaching on the

roadway to be entered or crossed.

\* \* \* \* \*

There has been included in the foregoing elements of proof an element that the violation occurs upon a highway. Each of the subsections contains either a direct reference to "highway" or "roadway" or implicitly refers to it by language making obvious the legislative intent; i.e., "entered the intersection from a different highway"; "before entering the intersecting roadway," etc.

Though failure to yield the right-of-way is denominated specifically as an offense "an information charging careless driving by failure to yield the right-of-way at a place where required by statute to do so, includes the offense as descriptive of what happened and in what manner defendant drove imprudently." State v. Richards, 429 S.W.2d 351 (Mo. App. 1971). An information, however, failing to state that the offense occurred on a highway (because of Section 304.010, RSMo) did not charge a crime under the statute. State v. Rollins, 469 S.W.2d 46 (Mo. App. 1971); State v. Barlett, 394 S.W.2d 434 (Mo. App. 1965). "Highways" as pointed out by the Barlett court "is to be used in its popular, rather than technical, sense and was intended to apply to all roads traveled by the public." Id. at 436 (citing) Phillips v. Henson, 326 Mo. 282; 30 S.W.2d 1065(8) (Mo. 1930).

And finally, Barlett teaches that in pleading the elements, at 436:

"The test of the sufficiency of an information is usually said to be whether it contains all the essential ingredients of the offense set out in the statute and clearly apprises the court and the defendant of what facts constitute the offense whereof the defendant is charged; and also, whether it would be a bar to subsequent prosecution for the same offense."

## **10.5 CARELESS AND IMPRUDENT DRIVING**

### **SAMPLE ORDINANCES:**

#### **CARELESS AND IMPRUDENT DRIVING**

No person shall drive any vehicle within this city carelessly and imprudently in disregard of the rights or safety of others, or without due caution and in a manner so as to endanger or be likely to endanger any person or property.

#### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving any vehicle within the city limits;
- (2) Carelessly and imprudently:
  - (a) In disregard of the rights or safety of others; or
  - (b) Without due caution required by the circumstances;
- (3) And in a manner so as to endanger or be likely to endanger any person or

property.

\* \* \* \* \*

The general rule is that for a valid conviction of careless driving to be upheld, the ordinance does not require a showing that a specific person was actually put in danger. State v. McNail, 389 S.W.2d 214 (Mo. App. 1965). It is essential, however, to show the property or the life and limb of others was endangered by reason of defendant's driving. State v. Todd, 477 S.W.2d 725 (Mo. App. 1972). Both the pleading and proof must treat the offense as one separate from others in the law regarding the operation of vehicles. Operation of a motor vehicle in excess of the posted speed limit has been statutorily deemed as prima facie evidence of careless and imprudent driving. See RSMo § 304.351.7.

## **10.6 LEAVING THE SCENE OF AN ACCIDENT**

### **SAMPLE ORDINANCES:**

#### **ACCIDENTS INVOLVING DEATH OR PERSONAL INJURY**

The driver of any vehicle involved in an accident within this city resulting in the death of or injury to any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled all the requirements of this section.

The driver of any such vehicle involved in an accident resulting in the death of or injury to any person shall give his name, address and the registration number of the vehicle he is driving and shall upon request and if available, exhibit his license or permit to drive to any person injured in such accident, and shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

The driver of any such vehicle involved in an accident resulting in the death of or injury to any person shall immediately by the quickest means of communication give notice of such accident to the police department, and give the police such information as they require, and remain at the said scene until authorized to proceed by said police.

#### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a motor vehicle involved in an accident within the city limits;
- (2) Resulting in the death of or injury to any person;
- (3) Fails to immediately stop such vehicle at the scene of such accident or as close thereto as possible; and
- (4) Return to and remain at the scene until meeting obligations required by this law; i.e., fails to give the party injured his:
  - (a) name;

- (b) address; and
- (c) vehicle registration number; and
- (d) if requested, exhibit his driver's license or permit (to the party whose vehicle or property is involved);
- (5) Fails to render assistance to the injured party including:
  - (a) carrying him to a doctor or hospital; or
  - (b) arranging for medical care and attention;
- (6) By quickest means available give notice to the police department.

**SAMPLE ORDINANCES:**

**ACCIDENTS INVOLVING DAMAGE TO VEHICLE OR PROPERTY**

The driver of any vehicle involved in an accident within this city resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled all the requirements of this section.

The driver of any such vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, and shall, upon request, and if available, exhibit his license or permit to drive to the driver or occupant of or person attending any vehicle or other property damaged in such accident.

The driver of any such vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person, when said damage to all property is to an apparent extent of one hundred dollars (\$100) or more, shall immediately, by the quickest means of communication, give notice of such accident to the police department, and give the police such information as they shall require and shall remain at said scene until authorized to proceed by the police.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a motor vehicle involved in an accident within the city limits;
- (2) Resulting in damage to a vehicle or other property driven or attended by any person;
- (3) Fails to immediately stop such vehicle (he is driving) at the scene of such accident or as close thereto as possible; and
- (4) Return to and remain at the scene until meeting obligations required by this law; i.e., fails to give to the party (whose vehicle or property is damaged) his:
  - (a) Name;
  - (b) Address; and
  - (c) Vehicle registration number and if requested;

- (d) Exhibit his driver's license or permit (to the party whose vehicle or property is involved);
- (5) Give notice of the accident to the police department.

**SAMPLE ORDINANCES:**

**DUTY UPON DAMAGING UNATTENDED VEHICLE OR OTHER PROPERTY**

The driver of any vehicle which collides with or is involved in an accident within this city with any vehicle or other property which is unattended resulting in any damage to such other vehicle or property shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle or other property of his name, address and the registration number of the vehicle he is driving and shall without unnecessary delay notify the nearest office of the police department .

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a motor vehicle within the city limits;
- (2) Wwhich collides with any vehicle or other property, unattended, resulting in damage to such vehicle or property;
- (3) Fails to immediately stop and locate the operator or owner of the property involved; and
- (4) Fails to give to him his:
  - (a) Name;
  - (b) Address;
  - (c) Vehicle registration number of the vehicle being driven or fails to attach in written notice form such information in a conspicuous place in or on the property damaged;
- (5) Fails to notify without unnecessary delay the nearest office of the police department.

\* \* \* \* \*

The elements of proof in these ordinance examples require that the operator or driver be involved and similar proof thereof be offered. In short, mere presence at the scene of the accident obviously does not include such an operator within the reach of these ordinance examples.

Regarding the duty to report the accident to some police or judicial officer, it was held in State v. Hudson, supra, l.c. 735:

"It does not matter whether the person leaving the scene caused the injury by a culpable act, or whether it occurred through pure accident. It does not matter what kind of property it is . . ."

Further, in pleading the charge:

". . . It is no more necessary to describe the particular injury caused to the property than it is to describe the particular point in the road where it occurred."

"The crime consists in leaving the scene of the accident."

The offense was complete when the defendant, knowing a person had been injured, drove on without stopping and giving the information as required by law. State v. Harris, 212 S.W.2d 426 (Mo. 1948). It makes little difference that after leaving the scene:

"He reported to the 3rd District Police Station an hour and fifty minutes after the casualties, and there made a statement of the facts to the police...."

In order for the duty to attach under the law, it is essential the defendant "know" of injury or property damage caused by his culpability or the accident he precipitated. On that element, the Supreme Court of Missouri has held:

"We think the word "knowing," as used in the statute, means actual knowledge rather than mere constructive knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced the belief in the mind of a reasonable person." State v. Dougherty, 358 Mo. 734; 216 S.W.2d 467, 472 (Mo. 1949).

If there are several parties injured in the accident, the statutorily required information to be imparted to the victim or owner of property need only be imparted to one of them in order to "fully satisfy the statute and bar conviction." State v. Dougherty, 358 Mo. 734, 216 S.W.2d 467, 471 (Mo. 1949).

Such identification information may be imparted at the scene of the accident by defendant presenting to the victim his business card and "motor vehicle number." And that is so even though the defendant's business card does not set forth his street address as required by the statute. Dougherty, supra, l.c. 474.

## **10.7 DWI – ALCHOL/DRUG OFFENSES**

### **SAMPLE ORDINANCE DEFINITIONS:**

1. As used in the following ordinances, the term "drive," "driving," "operates," or "operating" means physically driving or operating a motor vehicle.
2. As used in the following ordinances, a person is in an "intoxicated condition" when he is under the influence of alcohol, a controlled substance, or drug, or any combination thereof.

### **SAMPLE ORDINANCES:**

**DRIVING WHILE INTOXICATED (OFFENSE A)**

A person commits the crime of "driving while intoxicated" if he operates a motor vehicle upon any street or highway of this city while in an intoxicated or drugged condition.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Operating a motor vehicle upon any street or highway of this city;
- (2) While in an intoxicated or drugged condition. (State v. Blumer, 546 S.W.2d 790 (Mo. App. 1977); State v. Dodson, 496 S.W.2d 272 (Mo. App. 1973).)

**SAMPLE ORDINANCES:**

**DRIVING WITH EXCESSIVE BLOOD ALCOHOL CONTENT (OFFENSE B)**

A person commits the crime of "driving with excessive blood alcohol content" if he operates a motor vehicle upon any street or highway of this city with ten-hundredths of one percent or more by weight of alcohol in his blood.

**ELEMENTS OF PROOF**

- (1) Operating a motor vehicle upon any street or highway of this city;
- (2) While having a blood alcohol content (B.A.C.) of .10% or more or as in the current statute (with excessive blood alcohol content). (State v. Blumer, 546 S.W.2d 790 (Mo. App. 1977).)

\* \* \* \* \*

The first of the essential elements of Offense A and Offense B each include:

Offense A (1) operating a motor vehicle;

Offense B (1) operating a motor vehicle.

Because it does not follow under the law that one having ten-hundredths of one percent or more by weight of alcohol in the blood is necessarily under the influence of intoxicating liquor or intoxicated at the time (each term is synonymous - City of Cape Girardeau v. Geiser, 598 S.W.2d 151 (Mo. App. 1979), the second essential element of Offense A and Offense B differs in that each requires proof that one is, at the time:

Offense A (2) in an intoxicated or drugged condition;

Offense B (2) having .10% or more by weight of alcohol in the blood.

Since the essential elements differ, Offense B may not be treated as a lesser offense of Offense

A. State v. Blumer, 546 S.W.2d 790 (Mo. App. 1977); State v. Saunders, 548 S.W.2d 276 (Mo. App. 1977).

"If the greater of the two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater." City of Mexico v. Merline, 596 S.W.2d 475 (Mo. App. E.D. 1980.)

The elements must coincide in order for one offense to be considered as a lesser included offense of the other. Blumer, supra. Offense B is regarded as a per se law; that is to say, upon a showing of the two essential elements of (1) operating a motor vehicle, and (2) while carrying a blood alcohol content of .10% or more (a cold medical fact), a submissible case is made without the need of proving by observation testimony the physical condition of the offender. Blumer, supra.

### **2001 Amendment of the State Statute, 577.012, RSMo, Lowering the Amount of B.A.C.**

In 2001, the State Legislature amended the statutory amount of B.A.C. from ten-hundredth of one percent or more (.10%) by weight of alcohol in such person's blood to the current eight-hundredth of one percent or more (.08%) by weight of alcohol in such person's blood.

## **COMPARISON OF 1996 AMENDMENT STATE STATUTE TO PRIOR STATUTE**

### **RESPECTING DEFINITION OF DRIVING OFFENSES**

Significantly in 1996, the State legislature amended the statutory definition of the "operation of a motor vehicle" element of the driving while intoxicated and driving with excessive blood alcohol content offenses to exclude the phrase "being in actual physical control of a motor vehicle" from the definition. The current Missouri statutory definition is set out as follows:

"Section 577.001.1, RSMo Chapter definitions --1. As used in this chapter, the term "drive", "driving", "operates", or "operating" means physically driving or operating a motor vehicle." (As amended in 1996).

This amendment directly changed the nature of what evidence is now required to prove that a defendant is driving her car while intoxicated or with an excessive blood alcohol content. Since the amendment, it is no longer sufficient for the prosecutor to merely prove that the defendant was found in her parked car on the side of a road with the engine running or with the keys in the ignition switch. Now the prosecutor must prove the element of driving, that is to say, the prosecutor must prove that the defendant was physically operating the motor vehicle involved at the time of the stop by the law enforcement officer.

Prior to the amendment of Section 577.001, the statute defined the terms "drive," "driving," and "operating" as "physically driving or operating or *being in actual physical control of* a motor vehicle." The phrase "being in actual physical control" was construed by the courts as meaning that even though the vehicle stood motionless at the time of the officer's stop and inquiry, so

long as the defendant is shown to have maintained the vehicle in restraint or the defendant was otherwise in a position to regulate the movements of the motor vehicle, she was "operating" the vehicle for purposes of satisfying that element of the driving while intoxicated and driving with an excessive blood alcohol content offenses. State v. Swinson, 940 S.W.2d 552 (Mo. App. S.D. 1997); City of Kansas City v. Troutner, 544 S.W.2d 295 (Mo. App. 1976). Thus, prior caselaw construing the former version of Section 577.001 held that the element of operation was met where the evidence showed that the defendant driver was found asleep in his parked car with the engine of his vehicle running. State v. Swinson, 940 S.W.2d 552 (Mo. App. S.D. 1997); State v. Dey, 798 S.W.2d 210 (Mo. App. W.D. 1990). Only where the evidence demonstrated that the driver was asleep, the vehicle was motionless, the engine of the vehicle was not running and the keys to the vehicle were found in the vehicle's console, did an appellate court refuse to find that the defendant was not in actual physical control of the vehicle for purposes of satisfying the operation element of driving while intoxicated. State v. Block, 798 S.W.2d 213 (Mo. App. W.D. 1990).

In Baptist v. Lohman, 971 S.W.2d 366 (Mo.App. E.D. 1998), the element of "physically driving or operating a motor vehicle" was established by circumstantial evidence. Although no witness actually saw the defendant drive his truck, the fact of his driving was established by both the witness and the arresting officer seeing the defendant sleeping in the truck for 45 minutes with the motor running and the transmission disengaged, and no one got in or out of the truck during that time. See also Krienke v. Lohman, 963 S.W.2d 11 (Mo.App. W.D. 1998), involving similar facts.

The amendment to Section 577.001 was made to provide an incentive to intoxicated drivers to pull over and park on the side of the road until such time that they are able to lawfully operate the motor vehicle. Recent cases, however, suggest courts will still find that the defendants were "operating the motor vehicle" by circumstantial evidence. In State v. Cross, 34 S.W. 3d 175 (Mo.App. 2000), circumstantial evidence was sufficient to establish the defendant was operating the car. In Cross, defendant was found slumped over, asleep or unconscious, lying across the front seats of a parked car with its engine running and its headlights on, and with the driver's door open and defendant's legs hanging out and touching the ground. After being awakened by a police officer, the defendant turned off the car's headlights and engine and removed the keys from the ignition. The court found that this was substantial evidence to establish defendant "operating the motor vehicle." The court noted that it was unimportant defendant was not causing the car to move and his legs were hanging out the car door because he was still causing the car to function. See also Hoyt v. Director of Revenue, 37 S.W.3d 356 (Mo.App. 2000) (following the reasoning in Cross, the court found that defendant's presence in a car with the engine running and then turning off the car's engine constituted operation of the car within the meaning of Section 577.001.)

It is important to note that local ordinances should be amended to reflect the change in the state law respecting the definition of the operation element of driving while intoxicated and driving with an excessive blood alcohol content offenses. Where the applicable ordinances have not been amended as such, they should nonetheless be construed by municipal judges in accordance with the current state law.

## ESTABLISHING "DRUGGED CONDITION" ELEMENT

Under the state law, operation of a motor vehicle while in a "drugged condition" meets the definition of driving while intoxicated. See RSMo. §577.010. If a motorist is under the influence of a drug to the extent that it impairs her ability, in any manner, to operate her vehicle, she is in a "drugged condition" and guilty of driving while intoxicated. State v. Falcone, 918 S.W.2d 288 (Mo. App. S.D. 1996). Absent a showing that the intoxicated condition is involuntary, use of prescription drugs is not a defense to charge of driving while intoxicated. State v. Walter, 918 S.W.2d 927 (Mo. App. E.D. 1996).

The Missouri Supreme Court has held that the proof required to establish driving under the influence of drugs should be no greater and no different from the proof required to establish driving under the influence of alcohol, other than the evidence must relate to the particular substance involved." State v. Meanor, 863 S.W.2d 884, 888 (Mo. banc 1993). However, an appellate court recently held that the evidence adduced at trial was insufficient to support a conviction of driving while intoxicated in absence of proof that the level of methamphetamine in defendant's body was sufficient to impair his driving ability. State v. Friend, 943 S.W.2d 800 (Mo. App. W.D. 1997). In reversing a conviction of driving while intoxicated, the *Friend* court explained:

It is clear that the defendant had ingested methamphetamine, but it also was established that the defendant was not under the influence of alcohol. Additional evidence bearing upon his driving ability was his driving in the wrong lane of traffic and his bizarre behavior and thought patterns. However, there was no evidence which connected his abnormal behavior with the methamphetamine....

Drugs do not necessarily produce readily recognizable symptoms and behavior patterns...**Proof of impaired driving due to drugs is not as easily proven as impaired driving due to alcohol, for which a prima facie case of impairment has been statutorily established when the blood alcohol concentration reaches ten-hundredths of one percent...In order for the fact finder to conclude with reasonable certainty that the drug caused the violation, it must have some connecting evidence.**

(Emphasis supplied) Id. at 802.

### 10.8 LICENSES – DRIVING WITHOUT LICENSE; DRIVING UNDER SUSPENSION, REVOCATION, CANCELLATION

#### SAMPLE ORDINANCES:

##### OPERATION OF MOTOR VEHICLE WITHOUT PROPER LICENSE

It shall be unlawful for any person to operate any motor vehicle upon any street or highway of this city, unless such person has procured a valid license as an operator from the state of

Missouri.

### ELEMENTS OF PROOF

The elements of proof required to prove violation of the provisions set forth in (B) above are:

- (1) Operating any motor vehicle;
- (2) Upon any street or highway of this city;
- (3) Without a valid operator's license from Missouri or a valid chauffeur's license.

### SAMPLE ORDINANCES (FROM STATE STATUTE):

#### DRIVING WHILE LICENSE SUSPENDED, REVOKED, OR CANCELED

A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked under the laws of this state and acts with criminal negligence with respect to knowledge of the fact that his driving privilege has been canceled, suspended or revoked.

### ELEMENTS OF PROOF

The elements of proof required for a **conviction** for driving while revoked/suspended **requires** the court to find:

- (1) The defendant was **operating** a motor vehicle; and
- (2) At that time the defendant's driver's license was **revoked/suspended**; and
- (3) The defendant acted with **criminal negligence**. (Should have known he was revoked or suspended).

\* \* \* \* \*

The admissibility of certified department of revenue records has had a tumultuous record in Missouri. In State v. Flowers, the court interpreted Section 302.312, RSMo 1986 to allow records to be received into evidence if certified by the appropriate custodian of records. 597 S.W.2d 276 (Mo.App. E.D. 1980). The Supreme Court of Missouri then held that certified copies of public documents were still subject to the foundational requirements of authentication and hearsay before being admitted into evidence, and that Section 302.312, RSMo 1986 only permits copies to be admitted with the same effect as with the originals. Hadlock v. Director of Revenue, 860 S.W.2d 335 (Mo.banc 1993.) In 1996, Hadlock was overruled by statute. Section 302.312, RSMo was amended and now states that copies of documents from the department of revenue are admissible into evidence so long as they are certified.

## COMPARISON OF 1995 AMENDED STATE STATUTE TO PRIOR LAW ON MENTAL STATE REQUIREMENT

The state law respecting driving while revoked, to-wit Section 302.321, RSMo, was amended effective August 28, 1995, to expressly include a scienter requirement which had previously not been included in the statute.

**A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked under the laws of this state and acts with criminal negligence with respect to knowledge of the fact that his driving privilege has been canceled, suspended or revoked.**

Significantly, the amended Section 302.321 establishes a major change in the proof required on one of the more common charges heard by municipal courts. Prior to this amendment the statute covering the offense of driving while revoked/suspended did not have any mental state requirement. However, beginning in 1987 Missouri courts had judicially imposed a requirement of proof that a defendant acted "knowingly" or "recklessly" in order to support a finding of guilt on a charge of driving while revoked/suspended. State v. Horst, 729 S.W.2d 30 (Mo. App. E.D. 1987). This decision has been repeatedly upheld. State v. Davis, 779 S.W.2d 244 (Mo. banc 1989); State v. Heard, 877 S.W.2d 644 (Mo. App. W.D. 1994); State v. Watson, 850 S.W.2d 372 (Mo. App. E.D. 1993); State v. Brown, 804 S.W.2d 396 (Mo. App. W.D. 1991); and State v. Counts, 783 S.W.2d 181 (Mo. App. S.D. 1990).

The primary effect of the 1995 amendment to Section 302.321 is to reduce the prosecution's burden of proof from this judicially imposed higher culpable mental state to the lowest culpable mental state provided in the law - "criminal negligence."

Missouri law establishes four levels of culpable mental states in Section 562.016. They are listed in the statute in the order of the difficulty of proof as follows: to act "purposely or knowingly or recklessly or with criminal negligence." To "act purposely" requires stronger proof than to "act with criminal negligence." "**Purposely**" and "**knowingly**" each refer to what is commonly thought of as intention. "**Reckless**" requires an actual awareness in fact of the risk and a conscious disregard of the risk. The lowest level of a culpable mental state is "**criminal negligence**," which requires only that the defendant should have been aware of the risk, because any reasonable person would have known of it. Of course, proof of any higher level of mental state also establishes the lower levels; i.e., proof of intent or actual awareness also satisfies the burden of proving criminal negligence.

Always remember it is the prosecutor who has the burden of proving all the essential elements of any charge. Accordingly, in a prosecution for driving while revoked/suspended it is the prosecutor's obligation to establish with proof that the defendant "should have known" that their driver's license was revoked/suspended. It is not the obligation of the defendant to establish they should not have known their driver's license was revoked/suspended. The element of criminal negligence is in accord with prior caselaw which imputed a scienter requirement of culpable

mental state notwithstanding the absence of such element on the face of the statute. A person "acts with criminal negligence" or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. RSMo §562.016.

The following is a brief list (which is not meant to be all-inclusive) of the some of the facts a prosecutor might prove, which alone or in combination, could be used to establish the defendant should have known of her revocation or suspension:

- (a) Prior citations for driving while revoked or suspended which are recent in time to the date of the present charge;
- (b) A driving record history of prior convictions for driving while revoked or suspended and/or driving with no operator's license;
- (c) The length of time the defendant had been revoked/suspended prior to the present citation;
- (d) The defendant not having a license on their person at the time they were stopped;
- (e) The driving record history showing the defendant had surrendered their license to the Department of Revenue;
- (f) The defendant's own statements that they were aware of the requirements and procedure for obtaining reinstatement;
- (g) The defendant's acknowledgment that they had received the notice of suspension from the Department of Revenue, even if they claim not to have understood what it meant;
- (h) At the time of the present offense the defendant was driving under a court order granting them a limited driving privilege;
- (i) Correspondence in the Department of Revenue file from the defendant indicating knowledge of the revocation/suspension; and/or
- (j) Often the reason for the suspension is helpful, such as with the circumstances surrounding a breath test refusal, where the police officer verbally warns the driver that a revocation shall result.

Note that proof of the converse of such foregoing facts however would tend to negate the element that the defendant should have known of the revocation or suspension. For example, proof that the defendant had possession of her driver's license at the time of her arrest for driving while revoked, or that the driving record history shows the revocation notice was very recent in relation to the date of the citation, or that the defendant had recent or multiple changes of address

that could have prevented her receipt of the suspension notice, or that the suspension was for points accumulation could all alone or in combination negate a finding of criminal negligence with respect to knowledge of the fact that her driving privilege had been suspended or revoked.

## 10.9 STEALING (LARCENY)

### SAMPLE ORDINANCES (FROM STATE LAW)

#### STEALING - GENERALLY

Section 570.030, RSMo Stealing

1. A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

#### ELEMENTS OF PROOF

The elements of stealing are:

- (1) An appropriation;
- (2) The appropriation is of property or services;
- (3) The property or services belong to another;
- (4) The appropriation is made with the purpose to deprive the other thereof; and
- (5) Such appropriation is accomplished either without the owner's consent or by deceit or coercion. See e.g. State v. Chapman, 876 S.W.2d 15 (Mo. App. E.D. 1994); State v. Reed, 815 S.W.2d 474 (Mo. App. E.D. 1991); and State v. Bradshaw, 643 S.W.2d 834 (Mo. App. E.D. 1982).

\* \* \* \* \*

It should be commonly recognized as fundamental that each of the elements aforesaid must be proven by the prosecution beyond a reasonable doubt. It is also fundamental that the person who has stolen be identified if conviction is to be sustained. That is sufficient when testimony is given which clearly identifies the defendant even though it is not elicited by direct question and answer, State v. Storll, 767 S.W.2d 602 (Mo. App. E.D. 1989), and even if he is one of a group stealing (committing the act).

Because elements of stealing typically require a completed act; i.e., the theft accomplished, an "attempted" stealing may not be prosecuted as stealing in violation of a city ordinance, whether "without consent," by "false pretense" or by "coercion." City of Kansas City v. Bibbs, 548 S.W.2d 264 (Mo. App. 1977). "Attempt" is separate and distinct from the offense itself and must be prosecuted under a separate ordinance. Bibbs, supra; State v. Thomas, 438 S.W.2d 441 (Mo. 1969).

## 10.10 PEACE DISTURBANCE

### SAMPLE ORDINANCE (FROM STATE LAW)

#### PEACE DISTURBANCE

§574.010, RSMo Peace disturbance

1. A person commits the crime of peace disturbance if:
  - (1) He unreasonably and knowingly disturbs or alarms another person or persons by:
    - (a) Loud noise; or
    - (b) Offensive language addressed in a face-to-face manner to a specific individual and uttered under circumstances which are likely to produce an immediate violent response from a reasonable recipient; or
    - (c) Threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out; or
    - (d) Fighting; or
    - (e) Creating a noxious and offensive odor; or
  - (2) He is in a public place or on private property of another without consent and purposely causes inconvenience to another person or persons by unreasonably and physically obstructing:
    - (a) Vehicular or pedestrian traffic; or
    - (b) The free ingress or egress to or from a public or private place.

#### ELEMENTS OF PROOF (WITH DISCUSSION)

- (1) Unreasonably and knowingly component:

The defendant must cause alarm to a person in circumstances where it is not reasonable to cause alarm. Causing alarm by yelling, "Watch out for the truck!" in order to avoid an accident is reasonable.

To satisfy the knowingly element, it must be shown that the defendant is aware that his conduct is causing alarm to others. Such knowledge can be shown by prior complaints to the defendant.

- (2) Disturbs or alarms component is limited to five methods under the state statute:

- (A) Loud noise or

A city ordinance penalizing shouting and breach of peace did not apply to shouting of a preacher at a religious meeting. City of Louisiana v. Bottoms, 300 S.W. 316 (Mo. App. 1927).

- (B) Offensive language addressed in a face-to-face manner to a specific individual and uttered under circumstances which are likely to produce an immediate violent response from a reasonable recipient; or

The Supreme Court has held that offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient. State v. Swoboda, 658 S.W.2d 24, 26 (Mo. banc 1983). "Missouri courts have held that statutes abridging speech are constitutional to the extent that they prohibit only that speech which is likely to incite others to immediate violence." Id. at 25 (citing) City of St. Louis v. Tinker, 542 S.W.2d 512 (Mo. banc 1976); City of Kansas City v. Thorpe, 499 S.W.2d 454 (Mo. 1973). In Swoboda, the Missouri Supreme Court held that former section 574.010.1(1)(b), RSMo 1978, was unconstitutionally overbroad because it sought to prohibit abusive language which unreasonably and knowingly causes alarm to any listener in the vicinity of speaker, even if not directed toward listener.

In a recent case, an appellate court reversed a conviction for peace disturbance where there was no evidence adduced in the record that the defendant used offensive language that was likely to produce immediate violent response from victim. State v. Bickings, 910 S.W.2d 370 (Mo. App. S.D. 1995).

In Bickings, defendant's wife had called the sheriff complaining that her husband had assaulted her. When the officers arrived, defendant was sitting on the front porch of the house and proceeded to tell the officers: "I'm not going to jail. You'll just have to shoot me" or "kill me." Defendant's wife told the officers that she and defendant were separated, that defendant had come uninvited to the house and began arguing with her, and that defendant had assaulted her by shoving her up against a wall and holding her there with his forearm. Defendant was subsequently convicted of disturbing the peace.

Upon review, the appellate court reversed the peace disturbance conviction because the state had not submitted any evidence to show that defendant committed any of the conduct proscribed by the state peace disturbance statute. Specifically, Defendant's wife had testified that defendant did not disturb her peace, did not assault her, and that she had only wanted defendant to leave. She did not testify about what words defendant used, and the record did not reveal elsewhere what type of language defendant used. The Bickings court observed:

Nowhere does the record reveal any evidence to indicate that [defendant] used offensive language that was likely to produce an immediate violent response from [defendant's wife.] The record is void of any evidence to lead a reasonable juror to find [defendant] guilty beyond a reasonable doubt of peace disturbance.

Id. at 372.

C. Threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out; or

The prosecutor must show that (1) defendant threatened to commit a felonious act; and (2) a substantial likelihood that such threatened criminal conduct would occur existed. The prior state disturbing the peace statute making it a crime to unreasonably and knowingly disturb or alarm another person by "threatening to commit a crime against persons" was held to be

unconstitutionally overbroad. State v. Carpenter, 736 S.W.2d 406 (Mo. banc 1987), certiorari denied 108 S.Ct. 1300, 485 U.S. 992, 99 L.Ed.2d 510. In *Carpenter*, the Supreme Court of Missouri explained:

The statute contemplates punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law. No distinction is made as to the degree of criminal activity that the provision encompasses. A person could be convicted regardless of how minor or insubstantial the purportedly threatened crime may be. Such prohibited offenses could include threatening to publicly display explicit sexual materials, section 573.060, RSMo 1986, or even threatening to steal a book from a library, section 570.210, RSMo 1986. The state's interest in prohibiting persons from threatening to commit offenses such as these does not outweigh the public interest in exercising free speech.

Moreover, there is no guarantee under the statute that a substantial likelihood exists that such threatened criminal conduct will ever occur. There may be many situations where the threatened activity will neither be imminent nor likely. Consequently, the statute acts to smother speech otherwise protected by the First Amendment in that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972).

D. Fighting or

An indictment charging that defendant unlawfully assaulted a prosecutor, and beat, struck, kicked, and bruised him, in an angry and quarrelsome manner, to the disturbance of others and against the peace and dignity of the state, was sufficient. State v. Dunn, 73 Mo. 586 (1881).

Under a statute which proscribed fighting in a public place an affray, an indictment charging defendant with fighting in a public road and highway was sufficient. State v. Warren, 57 Mo.App. 502 (1894).

E. Creating a noxious and offensive odor

A petition alleging that defendant had a tract of land near houses on which dead animals were at times left unburied for several days, causing the air to be polluted with odors, and that impurities from the bodies of the animals were carried by water through the soil so as to pollute water on the premises of adjoining landowners, stated facts showing a public nuisance. State ex rel. Lamm v. City of Sedalia, 241 S.W. 656 (Mo. App. 1922).

or

(3) Unreasonably and physically obstructing traffic and entrances

In City of St. Louis v. Goldman, 467 S.W.2d 99 (Mo. App. 1971), *certiorari denied* 92 S.Ct. 718, 404 U.S. 1040, 30 L.Ed.2d 731, the Court held that there was sufficient to sustain a conviction for violating a municipal disturbing the peace ordinance where the evidence showed that (1) defendant was picketing a department store; (2) defendant was handcuffed to the revolving doors of the store; (3) a substance was placed in the lock of handcuffs which prevented them from being opened with a key; and (4) a crowd of 40 to 50 people gathered to watch the spectacle, thereby impeding traffic.

*Goldman* should be read narrowly with regard to picketing activities because the phrase "physically obstructing traffic and entrances" connotes a physical barricade impeding the passage of persons and their vehicles where they have a lawful right to travel. Disturbing the peace ordinances are not violated where persons are not physically prevented from crossing picket lines and afforded ingress and egress to which they are lawfully entitled.

The successful prosecution of peace disturbance whether brought under a law so entitled or one entitled disorderly conduct requiring acts "calculated to disturb the peace," does not depend upon testimony from those persons in the presence of the offender that their peace was disturbed. City of DeSoto v. Hunter, 122 S.W 1092, 145 Mo. App. 430 (1909); City of St. Louis v. Goldman, 467 S.W.2d 99 (Mo App. 1971); cert. denied, 92 S.Ct. 718 404 U.S. 1040, 30 L.Ed.2d 731. The ultimate conclusion in that regard is for the fact finder. But one may not be convicted of such an ordinance violation when, while a member of a crowd gathered to confront the village marshal, he used loud and offensive language alone. Village of Salem v. Coffey, 88 S.W. 772, 93 S.W. 281, 113 Mo. App. 675. (1896).

## **10.11 HINDERING AND INTERFERING WITH A POLICE OFFICER**

### **SAMPLE ORDINANCES:**

#### **OBSTRUCTING AND RESISTING CITY OFFICER (PART 1 OF 2)**

Any person who shall in any way or manner obstruct, molest, resist or otherwise interfere with any city officer or inspector or any member of the police force in the discharge of his official duties, shall be guilty of a misdemeanor.

#### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) (a) Any person (identification) who within the city;
- (b) Shall in any manner hinder, obstruct, molest, resist or otherwise interfere with;
- (c) Any city officer or inspector or any member of the police force;
- (d) In the discharge of his official duties.

### **SAMPLE ORDINANCES:**

**OBSTRUCTING AND RESISTING CITY OFFICER  
(PART 2 OF 2)**

Any person who shall attempt to prevent any member of the police force from arresting any person, or shall attempt to rescue any person in the custody of a member of the police force, or from anyone called to assist the police officer, shall be guilty of a misdemeanor.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) (a) Any person (identification) who within the city;
- (b) Shall attempt to prevent any member of the police force from arresting any person; or
- (c) Shall attempt to rescue any person in the custody of a member (of the police force); or from anyone called to assist the police officer.

\* \* \* \* \*

It was established by Missouri law as long ago as June 30, 1891, that it is every citizen's duty to submit to arrest when informed of the warrant or the arrest effected or attempted. **State v. Bateswell, 105 Mo. 609, 16 S.W. 953 (1891); State v. Nolan, 192 S.W.2d 1016 (Mo. 1946).** Whether one knew of the arrest effected or attempted with or without warrant before resisting it, is a question for the fact finder. **Bateswell, supra.**

The citizen sought to be arrested is held to know the authority and character of a police officer uniformed and exhibiting a badge including the right to effect the arrest of such citizen. **State v. Lowry, 12 S.W.2d 469 (Mo. 1928).** It is only after the arrest is effected when the uniformed officer has the duty to inform the citizen of his authority (warrant or no warrant) and the cause or charge for which arrested. Notice is not required, however, where the arrest is made at the time the offense giving rise to it is committed in the officer's presence or at the conclusion of a "fresh pursuit." **State v. Nolan, 192 S.W.2d 1016 (Mo. 1946); State v. Caffey, 436 S.W.2d 1 (Mo. 1969); State v. Peters, 242 S.W. 894 (Mo. 1922).**

Therefore, it is no defense to an arrest on probable cause for peace disturbance that one is innocent of the offense; nor may acquittal of the underlying charge of peace disturbance (or the charge for which arrested) provide a defense compelling acquittal for resisting the officer's arrest on the original peace disturbance offense. **State v. Velas, 537 S.W.2d 881 (Mo. App. 1976); State v. Reynolds, 723 S.W.2d 400 (Mo. App. W.D. 1986).** Probable cause, the basis for the original charge, only requires that:

"the actions committed in his presence and the circumstances observed by him would lead a reasonable person to believe he was witnessing the commission of a misdemeanor by the person arrested. **State v. Sampson, 408 S.W.2d 84, 87 (Mo. 1966).**" **Velas, supra.**

". . . One who resists a lawful arrest, though he be innocent of the arresting charge or albeit the statute under which he is arrested proves to be unconstitutional, is subject to criminal prosecution for resisting. State v. Briggs, 435 S.W.2d 361, 364 [5] (Mo. 1968)." Velas, supra.

A separate issue from "resisting arrest," as made clear in State v. Nunes, 546 S.W.2d 759 (Mo. App. 1977) is that of self-defense to the use of force utilized in an assault upon an arrestee by the arresting officer so excessively as to put his life or limb in peril.

"This right of self-defense, it must be understood, does not resist the arrest but the excessive force. Therefore, self-defense is not available to the arrestee who uses more force for self- protection than reasonably appears necessary. As corollary, an arrestee who provokes the use of force against him may not excuse his resistance by self-defense."

## **10.12 WEAPONS VIOLATIONS**

### **SAMPLE ORDINANCES:**

#### **UNLAWFUL USE OF WEAPONS**

- (A) A person commits the crime of unlawful use of a weapon if he knowingly:
- (1) Carries concealed upon or about his person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or
  - (2) Exhibits, in the presence of one (1) or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or
  - (3) Possesses or discharges a firearm or projectile weapon while intoxicated; or
  - (4) Carries a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any school, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof, or into any public assemblage of persons met for any lawful purpose.
- (B) Subdivisions (1), (2) and (4) of subsection A of this section shall not apply to or affect any of the following:
- (1) All state, county and municipal law enforcement officers possessing the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;
  - (2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime;
  - (3) Members of the armed forces or national guard while performing their official duty;

- (4) Those persons vested by article V, section 1 of the Constitution of Missouri with judicial power of the state;
  - (5) Any person whose bona fide duty is to execute process, civil or criminal.
- (C) Subdivision (1), (3) and (4) of subsection A of this section do not apply when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible. Subdivision (1) of subsection A of this section does not apply when the actor is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game, or is in his dwelling unit or upon business premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state.

**ELEMENTS OF PROOF**

The essential elements of proof for a violation of section A of this ordinance may be separated out as follows:

- (A) (1)
  - 1. A person (identification);
  - 2. Knowingly carries concealed on or about his person within the city;
  - 3. A knife, firearm, a blackjack or any other weapon readily capable of lethal use; or
- (2)
  - 1. A person (identification) within the city;
  - 2. Knowingly exhibits, in the presence of one (1) or more persons;
  - 3. Any weapon readily capable of lethal use;
  - 4. Any weapon readily capable of lethal use; in an angry or threatening manner; or
- (3)
  - 1. A person (identification);
  - 2. Knowingly possesses or discharges a firearm or projectile weapon;
  - 3. While intoxicated; or
- (4)
  - 1. A person (identification) within the city;
  - 2. Knowingly carries a firearm or any other weapon readily capable of lethal use;
  - 3. Into any church or place where people have assemble for worship, into any school, into any election precinct on any election day, into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof, or into any public assembly of persons met for any lawful purpose.

The defendant must raise any of the elements of section B or C as special negative defense so as to come within an exempted class or activity. Prosecutor then has burden of proving defendant was not engaged in the exempted activity or class.

\* \* \* \* \*

### Discussion on Carrying a Concealed Weapon:

As long ago as 1925, the Missouri Supreme Court defined "carrying a concealed weapon" upon one's person as including weapons found "about" the person. State v. Scanlan, 273 S.W. 1062 (Mo. 1925). Proof that the loaded revolver was found by a trooper beneath the jacket upon which the defendant had laid his head in the rear seat of the car was sufficient to sustain conviction for carrying a concealed weapon "on or about" his person. State v. Tillman, 454 S.W.2d 923 (Mo. 1970).

However, where police officers observed a defendant place a gun in a paper sack and then place the sack immediately in the locked trunk of a car, it is clear the obvious intent was to place the gun in the trunk and not to carry it concealed. State v. Jordan, 495 S.W.2d 717 (Mo. App. 1973). It was, thereafter, obviously "not within defendant's easy reach and convenient control." The latter represents that "test" to determine whether the weapon is "on or about" the person. The "test" of "concealment" is "whether the weapon is carried so as not to be discernible by ordinary observation." Jordan, supra; Crone, supra; State v. Bordeaux, 337 S.W.2d 47 (Mo. 1960).

It is concealed "on or about" the defendant's person if found in the crevice between the seat portion and back portion of the driver's seat because "within his easy reach and convenient control" State v. Hall, 508 S.W.2d 200 (Mo. App. 1974), and "not discernible by ordinary observation" from outside the vehicle. State v. Achter, 514 S.W.2d 825 (Mo. App. 1974).

The prosecution is not required to plead and prove that the defendant charged does not come within any exceptions to the law permitting the carrying of a concealed weapon, Achter, supra.

Weapons discernible only when they are able to be seen from one vantage point are nevertheless concealed. State v. Miles, 101 S.W. 671 (1907).

Where a weapon is found during the routine inventory search under the front seat in accordance with South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976) procedures following defendant's arrest for careless and imprudent driving and driving under the influence he may be charged and convicted for carrying a concealed weapon. State v. Gibeson, 614 S.W.2d 14 (Mo. App. 1981); State v. Peterson, 525 S.W.2d 599 (Mo. App. 1975); State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979).

A prima facie case was made "of carrying a concealed weapon" where the arresting officer testified he approached the car in which the defendant was seated as a passenger and because he had seen him reach forward between his legs as if to conceal something, reached under the passenger seat and retrieved a sawed-off shotgun concealed within the meaning of the statute. State v. Shaw, 647 S.W.2d 612 (Mo. App. 1983).

Court established in State v. Baldwin, 571 S.W.2d 236 (Mo. banc 1978) a test to determine whether the . . . "enumerated weapon constituted a dangerous and deadly weapon. That it depended on a variety of factors such as: (1) the nature of the instrument; (2) the surrounding circumstances; (3) the person carrying the weapon; and (4) possible peaceful use of the instrument.

## **SAMPLE ORDINANCES:**

### **DISCHARGING FIREARMS - GENERALLY**

It shall be unlawful for any person within the city limits of the city to shoot or discharge any gun revolver, air rifle or air-gun, pistol or firearms of any description, whether the same is loaded with powder and ball or shot or with "blank" cartridges, or any kind of explosives whatsoever provided that nothing contained in this section shall apply to persons discharging firearms in the defense of person or property, not to legally qualified sheriffs or police officers and other persons whose bonafide duty is to execute process, civil or criminal, make arrests or aid in conserving the public peace, not to persons discharging "blank" cartridges as a final salute at a military funeral or memorial service as members of a ceremonial firing party or firing squad.

### **ELEMENTS OF PROOF**

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Any person (identification);
- (2) Within the limits of the city to;
- (3) Shoot or discharge any gun, revolver, air rifle, or air-gun, pistol or firearm of any description (whether loaded with powder and ball or shot with "blank" cartridges, or any kind of explosives).

The above provisions do not apply to:

- (1) Persons discharging firearms in the defense of person or property;
- (2) Qualified sheriffs or police officers;
- (3) Other persons whose bona fide duty is to execute process, civil or criminal, make arrests or aid in conserving the public peace; nor
- (4) Persons discharging "blank" cartridges as a final salute at a military funeral or memorial service as members of a ceremonial firing party or firing squad.

Again, the defendant must raise any of the foregoing as a special negative defense to come within the exempted class. The prosecutor then has burden to prove defendant was not engaged in such activity as claimed.

# CHAPTER XI. - BASIC EVIDENCE

Judge Charles Billings

Section	Page Number
11.1 Introduction.....	3
11.2 Definition of Evidence.....	3
11.3 Competency of Witnesses.....	3
11.4 Role of Judge .....	4
11.5 Forms of Questions (Presentation of Evidence) .....	4
11.6 Lay Opinion .....	5
11.7 Hearsay .....	5
11.8 Exception to the Hearsay Rule.....	6
11.9 Demonstrative and Real Evidence .....	8
11.10 Relevancy and Materiality .....	9
11.11 Impeachment.....	9
11.12 Judicial Notice .....	11
11.13 Conclusion .....	11

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## **CHAPTER XI BASIC EVIDENCE**

### **11.1 INTRODUCTION**

In municipal divisions of the circuit courts, the general rules of evidence are applicable because Rule 37.61 states all trials shall be held in open court in an orderly manner according to law. Municipal judges are charged with the responsibility of conducting trials applying the general rules of evidence.

### **11.2 DEFINITION OF EVIDENCE**

Evidence is defined as any species of proof legally presented at trial through witnesses, records, documents, exhibits or other physical objects by which any fact in dispute is established or disproved. The object of all evidence is to inform the trier of fact of the material, relevant facts in order that the truth may be elicited and a fair determination of the controversy be reached. Thus, courts are to decide a case only on the evidence introduced or presented during the trial.

The court must be mindful that its personal knowledge of facts regarding the case such as intersections of business or personal is not to be considered. The only facts that a court may consider are those elicited from the witness stand or through other evidentiary channels.

The party that seeks the admission of particular evidence whether through oral testimony or physical objects is responsible for securing its presence at trial. This can be done through subpoena to secure the attendance of a person or documents. In municipal trials, the city has the burden of presenting its evidence first. The defendant has the option to present evidence in his own defense. If the defendant does present evidence, the city may offer rebuttal testimony, generally aimed at refuting a particular piece of evidence introduced by the defendant. See Rule 37.62 on the order of trial.

### **11.3 COMPETENCY OF WITNESSES**

A witness must be competent in order to testify. The traditional test to determine competency is whether the witness has sufficient intelligence to understand and relate facts and understand the obligation of the oath. Witnesses are presumed to be competent. The burden of showing incompetency is on the objecting party. The determination of competency is within the sound discretion of the judge. Thus, a witness who must communicate through sign language or an interpreter is competent, as long as the interpreter is sworn to attest to those facts as given by the witness, State v. Howard, 24 S.W. 41 (1893). A child is competent to testify as long as he or she testifies that he or she understands what is meant to be sworn as a witness and what the truth is, that it is wrong to tell a lie and that if the witness does tell a lie, he or she would be punished, State v. Patterson, 569 S.W. 2d 266 (Mo.App. E.D. 1978).

Generally, witnesses for the prosecution are excluded from the trial until they are called to testify. This is often called the “rule” and insures that witnesses will testify as to their own observations as opposed to simply reciting what a previous witness has testified. However, it has

been ruled that it is not an abuse of discretion to allow the city's witness to testify, despite the fact that the witness was present during testimony of other witnesses, State v. Gilmore, 797 S.W. 2d 802 (Mo.App. W.D. 1990). In fact, it has been held to be an abuse of discretion to exclude the testimony of a witness who violates "the rule", where the violation occurred ". . . without the consent, connivance, or procurement of the party or counsel calling him . . ." State v. Tracy, 918 S.W. 2d 847 (Mo.App. W.D. 1996). The trial court has the discretion to refuse a request for exclusion as you deem applicable, State v. Gamble, 649 S.W. 2d 573 (Mo.App. S.D. 1983).

A person who is an accomplice of a defendant is competent to testify and can present testimony against the person charged at trial, State v. Boliek, 706 S.W. 2d 847 (Mo.banc 1986).

If a particular defendant is disruptive to the trial, he can be excluded, where his behavior has been disruptive or is degrading to the judicial system, State v. Irvin, 628 S.W. 2d 957 (Mo.App. E.D. 1982), Illinois v. Allen, 90 S.Ct. 1057 (1970).

#### **11.4 ROLE OF JUDGE**

The judge may participate in the presentation of testimony, but should not engage in conduct which compromises his or her position of neutrality. The court can ask questions of a witness to clarify the evidence that has been presented, State v. Moseley, 705 S.W.2d 613 (Mo.App. E.D. 1986); see also State v. Farmer, 978 S.W.2d 68 (Mo.App. S.D. 1998) the judge can put additional questions to witness to elicit truth more fully. If the court does examine a witness, the then city, the defendant or defendant's counsel should be allowed further interrogation, Bova v. Bova, 135 S.W.2d 384 (Mo.App. E.D. 1940). The court should never, either in questioning or in response to objections by defense, or in determining what the facts are in the judge's position of finder of facts, give any indication of his position in a trial or make any remark on the testimony as presented. The judge should never indicate, or make any statement indicative of, any hostility or bias. The court should never make any comment, such as "That is a falsehood. Proceed." Duncan v. Pinkston, 340 S.W.2d 753 (Mo. 1960).

#### **11.5 FORMS OF QUESTIONS (PRESENTATION OF EVIDENCE)**

The initial examination of a witness is conducted by direct examination by the party calling the witness. The purpose of direct examination is to afford counsel or the party calling the witness a fair opportunity, subject to the rules of evidence, to examine the witness in his own way and bring out such material facts as he or she desires.

Counsel or the opposing party has the right to cross-examine witnesses as to the exact matters he or she testified to on direct examination and issues of credibility. Leading questions are permitted during cross-examination. Leading questions are defined as those which suggest the desired answer or contain a material fact and the answer requires a simple yes or no. The effect of leading questions is to put words in the witness' mouth so that the testimony is that of the questioner.

The party who presented the witness is entitled to redirect examination of the witness to clarify any matters that came up during the cross-examination. The trial judge may allow questions outside the scope of the cross-examinations if he or she deems it proper.

The trial judge has considerable discretion in regulating the manner of examination of witnesses. It is within the discretion of the trial judge to exclude questions which that are not material to the merits of the case, wholly irrelevant to the issues, repetitive questions or questions that are designed to embarrass or harass a witness.

## **11.6 LAY OPINION**

It is a well-established rule that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and have actually observed the fact. This doctrine requires the witness give “facts” and not their inference, conclusion or opinion. The obvious exception to this rule is an expert but in the course of most municipal trials, the court will not have available expert witnesses. Cities may present testimony through police officers or other civilian witnesses who do not have particularized training or expertise in matters which they intend to testify. The court often must rely on lay opinions, where witnesses not testifying as an expert may offer testimony in the forms of opinions or inferences. Those opinions are limited to matters that are rationally based on the perception of the witness and are helpful to a clear understanding of the witnesses’ testimony. Witnesses should be limited to observed facts and not be allowed to give conclusions as to what the accused did, State v. Boyd, 706 S.W.2d 461 (Mo.App. E.D. 1986). Lay opinion testimony is generally allowed in two circumstances: “1) to provide the jury with descriptive facts that otherwise could not be detailed or reproduced for the jury; and 2) to give a judgment on matters where witness is shown to have an opinion which would aid the jury.” State v. Gardner, 955 SW2d 819, 823 (Mo.App. E.D. 1997). Section 490.640, RSMo (1994) provides “comparison of a disputed writing with any writing proved to the satisfaction of a judge to be genuine shall be permitted to be made by witnesses . . .” A witness testimony as to defendant’s own incriminating statement was “something to the effect that” was admissible, notwithstanding the witnesses qualification of that answer. That testimony would go to the weight of the evidence, not the admissibility, State v. Stigall, 700 S.W.2d 851 (Mo.App. S.D. 1985). Persons who have previously observed intoxicated persons may state opinion of intoxication of Defendant, based upon driving observed and personal actions, State v. Palmer, 606 S.W.2D 207 (Mo.App. E.D. 1980.)

Witnesses are allowed to give an opinion as to value of their own property. Typically, a victim will be allowed to testify as to the value of his property, State v. Jenkins, 776 S.W.2D 59 (Mo.App. S.D. 1989), State v. Freeman, 667 S.W.2D 443 (Mo.App. S.D. 1984).

## **11.7 HEARSAY**

Hearsay is evidence of an out of court statement made by someone other than the testifying witness and offered to prove the truth of the matter asserted. The statement can be oral or written. Although this definition seems simple, its application can be quite confusing. Hearsay evidence, if offered and there is no objection, can be admitted and is entitled to whatever appropriate value it may merit, Myer v. Christopher, 75 S.W. 750 (1903). The hearsay rule does not apply if the same statement is not offered for the truth of the matters contained therein, Bond v. R.R. Co., 363 S.W.2d 1 (Mo. 1962). Certain hearsay statements are customarily offered by the prosecution such as a police officer’s conduct based on statements from an informant prior to arrest and search. If such statements amount to foundational matters or are not

prejudicial, they are usually admissible. State v. Howard, 913 S.W.2d (Mo.App. E.D. 1995.) When confronted with a question of admissibility, it helps to keep in mind the principal reason for exclusion, namely the lack of the normal safeguards of oath, confrontation and cross examination to determine the credibility of the out of court declarant.

The following are examples of hearsay. A police report constitutes hearsay and would be excludible if offered for the truth of the statements made by third parties in the report. Likewise, it would be error to permit an investigating officer to testify that witnesses at the scene told him the traffic lights were off or red, or yellow, as direct testimony would be necessary to prove these elements, Jefferson v. Biggar, 416 S.W.2D 933 (Mo. 1967). It is not proper for the prosecution to ask a witness questions which include reference to declarations of an unavailable person, State v. Callahan, 641 S.W.2D 186 (Mo.App. W. D. 1982). An undercover agent could not testify, for example, that an unidentified person went to a home and stated that he bought marijuana, because that would be an out of court declaration that is offered for the truth that marijuana was being sold in the residence, State v. Schuh, 497 S.W.2D 136 (Mo. 1973).

Be aware that an admission of a declaration of a co-actor or an accomplice admitting commission of a crime is not admissible as proof of the defendant's participation in that crime. This testimony would have a number of constitutional implications and generally deprives the person on trial the right to confront the witness. Thus a city attorney could not present evidence that the co-defendant entered a plea of guilty or confessed to the crime implicating the defendant, if that witness was not called *to* testify in the trial, State v. Sykes, 569 S.W.2d 258 (Mo.App. E.D. 1978), Bruton v. United States, 88 S.Ct. 1620 (1968).

Explanatory words which accompany and give character to the transaction are not hearsay. For example, discussions between a bar employee and an underage bar patron in a minor in possession charge would be admissible as the statements themselves would be non-hearsay as they are not offered for the truth of the statements but would constitute observable, verbal acts which actually are part of the transaction under investigation, State ex. rel. 807, Inc. v. Saitz, 425 S.W.2d 96 (Mo. 1968.)

When the state of mind of the declarant is at issue, statements indicating intent and offered for the purpose of showing conduct in conformity with the intent are admissible. For instance, a declarant states *to* the police officer that he bought marijuana at a specific house. This statement can be admitted to explain why the officer subsequently went to the house.

## **11.8 EXCEPTION TO THE HEARSAY RULE**

For every rule there is an exception and there are plenty of exceptions to the Hearsay Rule. In an effort not to be too technical, a certain number of well-recognized exceptions are listed. This list is by no means exhaustive.

### **A. ADMISSIONS OF THE DEFENDANT**

A statement of a defendant which is adverse to his or her interest is admissible as substantive evidence of the fact admitted. A statement need not be against the defendant's particular interest at the time it is stated, State v. Jones, 779 S.W.2D 668 (Mo.App. E.D. 1989). Should a defendant

make a statement that “I am willing to pay you for the damage done,” such a statement would be admission of guilt and would be admissible as an exception to the hearsay rule, State v. Alexander, 499 S.W.2D 439 (Mo. 1973).

Declarations of a co-conspirator can be introduced against the defendant to show the participation in a conspiracy, State v. Jennings, 815 S.W.2d 434 (Mo.App. E.D. 1991).

## **B. SPONTANEOUS DECLARATIONS**

A declaration made concerning an event is admissible when made contemporaneously with the event described. Thus, a declaration of a mental state, which manifests a present state of mind, knowledge or intent is admissible. It is proper to allow a city’s evidence of prior declarations and actions manifesting a victim’s fear of the defendant when defendant injected issues of self defense in his actions of attacking the victim, State v. Luster, 750 S.W.2d 474 (Mo.App. W.D. 1988); State v. Singh, 586 S.W.2d 410 (Mo.App. S.D. 1979). Statements may also be introduced to show the intent of a defendant, such as he was driving a car when he made a statement that he was going to “pick up Mike now,” thus showing that he had a design or plan to drive a car, State Farm v. Foley, 624 S.W.2d 853 (Mo.App. W.D. 1981).

Spontaneous declarations are admissible when made contemporaneously with the event described. An officer’s testimony that the incident leading police attention to defendant was hearing a lady’s scream “help, he’s going to kill me,” was properly received, State v. Franklin, 755 S.W.2D 667 (Mo.App. E.D. 1988). Statements made of a victim of an assault within one hour of the event at the hospital describing her assailant were admissible, State v. White, 621 S.W. 2d 287 (Mo. 1981). Statements made by a defendant when being questioned prior to an arrest for driving under the influence are not admissible, since a statement would lose its spontaneity when made in response to an interrogation by an investigating police officer, State v. Stevens, 757 S.W.2d 229 (Mo.App. E.D. 1988). Declarations of an unidentified person in a citizen band radio transmission reporting a “car traveling southbound in northbound lanes,” described as excited by law enforcement officers who heard the transmission held admissible to prove the act of driving by a DUI defendant, State v. Dunn, 821 S.W.2D 512 (Mo.App. W.D. 1991).

## **C. PAST RECOLLECTION RECORDED**

There are two different situations which arise when a witness cannot immediately recall the facts, but is able to do so through the aid of a writing. The rules applying to them in trial are different. The first of these is known as present recollection refreshed and requires that the witness be able to testify independently without the writing, after refreshing his memory. However, when a witness is unable to testify from memory, the document may be admitted into evidence if the witness testifies as to its accuracy, Ferguson v. Overhead Door, 549 S.W.2d 356 (Mo.App. 1977). The witness must be able to testify either that he made the writing or that at some point in the past he knew it to be correct. This particular exception has little practical use because the writing itself would generally be admissible as a business record, or under some other hearsay exception. The observations made by a police officer in a police report, can be admissible if the officer is required to make the report such as an alcohol report which is sent to the Director of Revenue in DUI cases. Certain statements contained in the police report captured

by the investigating officer from witnesses at the scene, would still fall within the objection of hearsay.

#### **D. BUSINESS RECORDS**

Under §490.680, any portion of the books or records of a corporation or business may be used in evidence if the custodian of the records or other qualified witness testifies as to their identity and the mode of preparation and if it was made in the regular course of business, at or near the time of the act, and the source of information was clear to the preparer. Missouri rules also allow an affidavit to be prepared by the custodian, so the custodian would not have to appear personally, and the records that are produced ten days prior to the actual trial to the opponent. Likewise, hospital records are admissible as business records and generally fall within §490.680 RSMo. The courts have increasingly dealt with business records with great latitude. For examples see Director of Revenue cases beginning with Peace v. Director of Revenue, 765 S.W.2d 382 (Mo.App. W.D. 1989) and continuing, wherein essentially any witness who is familiar with the records or can testify as to the general preparation of the documents can provide the requisite affidavit for admission, see State v. Graham, 641 S.W.2D 102 (Mo. Banc 1982).

Business records are admissible for the city as well as the defense if the offering party provides an affidavit consistent with VAMS 490.692 providing notice and copies of the records to the other side at least seven (7) days prior to the date of trial.

#### **11.9 DEMONSTRATIVE AND REAL EVIDENCE**

Proof which is addressed directly to the senses of the court without interposing the testimony of witnesses is generally characterized as demonstrative evidence. Evidence of this character includes objects or articles brought into court and exhibited such as photographs, X-rays, diagrams, drawings or tests conducted either in or out of court. Such evidence is admissible if they supplement a witness's testimony, or clarify some issue in the case. The court has wide latitude in admitting this evidence. Officers are allowed to state that a knife "looked like" the one he removed from defendant's person or "would have been very similar" as ample identification for an admission for a particular weapon, State v. Hubbard, 659 S.W. 2d 551 (Mo.App. W.D. 1983).

Real evidence may consist of the actual object associated with a crime. When real evidence is purported to be the actual object, proof of accuracy has two elements: the city must establish (1) that the evidence is identical to that involved in the crime, and (2) that the evidence has not been tampered with. In chain of custody matters involving drugs and other matters before the courts, the chain of custody has been loosely construed. Where a police officer initials a bag of a substance taken from the accused, barring a showing as to the breaking of the chain, that evidence would be admitted, State v. Hurtt, 807 S.W.2D 185 (Mo.App. S.D. 1991); State v. Bishop, 781 S.W.2D 195 (Mo.App. S.D. 1989).

An article which relates to the crime in such a way as to be illustrative of the crime is also admissible. Thus, open beer cans found in the back seat of a car are admissible in a DUI prosecution.

## 11.10 RELEVANCY AND MATERIALITY

Evidence offered by either party in the trial, to be admissible must be relevant to the issues of the case and tend to establish or disprove them; matters that are wholly irrelevant and that are incapable of affording any legitimate proof, presumption, or inference regarding the fact or facts in issue must be excluded. Merely because a fact is remote in point of time or of significant value does not of itself, preclude its admissibility. Admissibility depends, to a large extent, on the nature and the circumstances of the case and rests largely in the discretion of the trial court. The real dangers of relevancy lie in the level of unfair prejudice, confusion, delay or needless presentation of cumulative evidence.

A brief checklist of relevant issues and supporting cases is stated below.

Relevant issues:

- A. Identification of accused: State v. Taylor, 770 S.W.2d 531 (Mo.App. E.D. 1989), allowing the statement “I’m going to beat the hell out of someone,” as identification factor of assailant;
- B. Intent: State v. Brown, 624 S.W.2d 543 (Mo.App. 1981), allows pre-arrest conduct of screaming and cursing of police to show agitation and conscious disruption in a possession of marijuana case;
- C. Conduct manifesting consciousness of guilt allows admission of evidence of flight to show consciousness of guilt: State v. Cone, 744 S.W.2d 860 (Mo.App. W.D. 1988).

Matters offered in evidence in a case must not only be relevant to the issues and tend to establish or disprove them, but they must also be “material” in that they must relate to the issues in the case. Evidence should be excluded if it is offered to prove or disprove a fact or proposition that is not at issue. The evidence must have some probative force over and above logical relevancy. Objections based on “immateriality” or “irrelevant” are used interchangeably.

## 11.11 IMPEACHMENT

Credibility of any witness who has given testimony on a material issue may be attacked by impeachment. Its purpose is to destroy credibility, not to prove the facts stated in the impeaching statement. Remember that impeachment comes from the opposing party and is generally not allowed by the party offering the particular witness unless the witness gives answers contrary to what the proponent believes the testimony to be. Thus, the oft cited cliché “you cannot impeach your own witness.” The most common form of impeachment occurs when a witness testifies to facts material to the case and the opponent would have available proof that the witness has made previous statements that are inconsistent with his present testimony. The most obvious of these that are presented to us as municipal judges are police reports written by law enforcement officers at the time of a particular incident that are different from the testimony of the police officer in trial. In an impeachment scenario, hearsay statements are allowed and are admissible for the limited purpose of impeaching a witness. Thus, a conflicting statement from a witness

contained in a police report can be used to impeach the witness if he or she testifies in court. The reasoning is that the statement is not being offered for substantive evidence or for proof of the matter in the statement, but simply to show an inconsistency of a witness' statement at the time of trial. You, as the court, have a great deal of latitude in determining what is and what is not actually a contradiction or inconsistent statement.

The generally accepted view is that any material variance between the testimony and the previous statement will suffice to allow the impeachment to be presented, and then you as the fact finder will determine what significance to place on the inconsistency.

There are essentially five stages of impeachment or attacks that are made upon witnesses you observe in your court. The first, and probably the most effective, is that the witness, on a previous occasion, has made statements inconsistent or different from his present testimony. The second line of inquiry is to produce evidence that the witness is biased towards one party to the case or has an interest in the outcome of the matter. The third would be an attack on the character of the witness. The fourth is showing a defect in the capacity of the witness to remember or observe or to be able to recount the matters that were observed previously in the testimony before you. The final area of impeachment is that other witnesses have testified to material facts contrary to the testimony of this particular witness.

The character of the witness is most commonly impeached through the use of past convictions. A witness may only be impeached with felony or misdemeanor cases that have resulted in either a conviction, an SES or an SIS. Section 491.050, RSMo (1994). Municipal ordinance convictions may not be used to impeach pursuant to Commerford v. Kreidler, 462 S.W.2d 726, 733 (Mo. 1971). It is improper impeachment to examine a witness through use of prior arrests. Convictions of prior crimes can be introduced for the limited purpose either by the introduction of the record or by cross examination. If the witness fails to acknowledge the convictions, a certified copy of the arrest and conviction should be produced and may be admitted as evidence. Pursuant to §491.050, RSMo (1994), a plea of guilty or nolo contendere or a finding of guilty are admissible. It would be admissible even if they are "not final" because they are under appeal or if he had a suspended imposition of sentence, State v. Blaylock, 705 S.W.2d 30 (Mo.App. W.D. 1985). Under Missouri law, a conviction during the lifetime of a witness is admissible and the fact that the conviction is remote does not limit its use, State v. Askew, 822 S.W.2D 497 (Mo.App. 1991). When examining as to prior convictions, the testimony should be limited to "the nature of the crime, the date, the place of occurrence." A complete recitation of the facts and circumstances of the prior conviction are not admissible and is not allowed, State v. Hill, 823 S.W.2D 98 (Mo.App. 1991).

A witness can be impeached by proof of his or her general reputation, but the inquiry is usually confined to the reputation in the locality he or she resides. However, a defendant's character cannot be used as the basis for interring guilt. State v. Dudley, 912 S.W.2d 525 (Mo.App. W.D. 1996). To prove the bad character a proper foundation must be laid. The witness to the reputation must first know the reputation and explain how the witness came to this knowledge. Character or reputation cannot be proved by showing a witness has committed "bad acts." Thus a witness can testify about someone's reputation for honesty but cannot state he is a thief because he stole and give an example. The only bad acts that can be shown are convictions.

Once a witness has been impeached with a prior inconsistent statement, that witness may be rehabilitated through a prior consistent statement. You should exercise restraint to avoid the introduction of numerous consistent statements simply to counteract the inconsistency. The actual introduction of the evidence is within your discretion. State v. Mueller, 872 S.W.2d 559 (Mo.App. 1994.)

### **11.12 JUDICIAL NOTICE**

Judicial notice is a substitute for formal proof of a matter by evidence. The phrase judicial notice refers to the method by which a court informs itself of a particular fact during the course of trial. This procedure dispenses with production of evidence and concedes that the proposition is true. There are three prerequisites (1) the matter must be one of common knowledge; (2) the matter must be settled beyond a reasonable doubt; and (3) the knowledge must exist within the jurisdiction of the court. If there is any uncertainty about a matter then evidence should be taken. Judicial notice should be used cautiously and only when the facts cannot reasonably be disputed. Francis v. Richardson, 978 S.W.2d 70 (Mo.App. 1998.)

Notice can be taken of a court's own files, Missouri statutes, matters of common knowledge, encyclopedias, textbooks, dictionaries, historical facts, geography, political subdivisions, common meaning of language or phrases, seasons, and scientific and mechanical facts. This is a partial list and far from exhaustive. The common knowledge element is difficult to apply. If, for instance, a fact is commonly accepted by scientist in a specific field, judicial notice can be taken of the fact. Remember, if there is some question about the fact, require the formal proof.

### **11.13 CONCLUSION**

The purpose of this chapter is not to provide an exhaustive source book for all issues that will be presented to you in the court. Remember, the admissibility of evidence only becomes an issue if one of the parties objects. In considering the objection you will seldom be wrong if you review it from the standpoint of the witness. If a witness saw it, made it, smelt it or acted upon it, it will generally be admissible.

Studies show that the only contact most people have with the judicial system is through municipal courts. Treat the parties and their witnesses with respect.

## XII. JUDGMENT AND SENTENCING

**John Maxwell**

<b>Section</b>		<b>Page Number</b>
12.1	Scope of Chapter.....	3
<b>SENTENCING CONSIDERATIONS.....</b>		<b>3</b>
12.2	Penalty Limits .....	3
12.3	Other Considerations .....	4
12.4	Fines/Partial Payment/Failure to Pay.....	4
12.5	Presentence Investigations.....	4
12.6	Consecutive or Concurrent Sentences .....	5
<b>ALTERNATIVE SENTENCES.....</b>		<b>5</b>
12.7	General Considerations.....	5
12.8	Probation.....	5
12.9	Parole .....	8
12.10	Traffic Offender Programs.....	8
12.11	Alcohol and Drug Programs .....	8
<b>RESTITUTION/COMMUNITY SERVICE .....</b>		<b>9</b>
12.12	Restitution.....	9
12.13	Community Service Programs .....	10

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## CHAPTER XII

### JUDGMENT AND SENTENCING

#### 12.1 SCOPE OF CHAPTER

This chapter explores sentencing considerations such as statutory penalty limits, the defendant's background, and the availability of alternative sentences, including probation, parole, traffic offender programs, mandatory and optional alcohol and drug rehabilitation programs, and restitution. The chapter also explains the judge's options when a defendant is unable to pay or refuses to pay a fine.

### SENTENCING CONSIDERATIONS

#### 12.2 PENALTY LIMITS

In response to the Supreme Court's decision in *Turner v. State*, 245, S.W.3d 826 (Mo.2008), the legislature amended yet again the definition of and penalty provisions for "prior," "persistent," "chronic," or "aggravated" alcohol-related offenders to include municipal or county ordinance violations in determining the number of prior alcohol-related convictions.

[§577.023, RSMo 2008](#), effective July 1, 2009, now provides that municipal court judges may no longer suspend the imposition of sentence or fine or place on probation or parole a prior offender unless he/she has served a minimum of five days imprisonment or 30 days of community service, a persistent offender until he/she has served a minimum of 10 days imprisonment or 60 days community service, an aggravated offender until he/she has served a minimum of 60 days imprisonment or a chronic offender until he/she has served a minimum of two years imprisonment. §577.023.6, RSMo 2008. The community service option for prior offenders requires the municipality to "have a recongnized program for community service." There is no such requirement for persistent offenders, only that the minimal 60 days community service be performed "under the supervision of the court." Chronic or aggravated offenders are required to serve the statutory minimum sentences set forth above without possibility of community service in lieu thereof.

The county or municipal court is required to find the offender prior, persistent, chronic, or aggravated if the information pleads all facts necessary to support such a finding. §577.023.6, RSMo 2008. In the author's experience, it is unlikely that law enforcement officers would file such charges in a county or municipal court rather than seeking warrants in state court. If warrants were refused at the state level, a municipal prosecutor could theoretically prosecute such offenders at the county or municipal level, but in order to invoke the mandatory minimums set forth above, the prosecutor must plead and prove th prior alcohol related contacts. Absent such allegations, the municipal judge is not bound by the mandatory incarceration language of §577.023.6. Furthermore, the three month jail limitation imposed on third and fourth class cities for municipal ordinance violations would preclude a municipal judge from assessing the statutory minimum required of aggravated offenders. §§77.590 and 79.470.

## **Driving While Suspended/Revoked**

A common question for municipal judges is whether or not an individual convicted of a municipal offense of driving while suspended or revoked may be placed on probation or parole. State law provides that any “person convicted of driving while revoked is guilty of a class A misdemeanor,” and that “no court shall suspend the imposition of sentence as to such a person nor sentence such person to pay a fine in lieu of a term of imprisonment, nor shall such person be eligible for parole or probation until such person has served a minimum of 48 consecutive hours of imprisonment, unless as a condition of such parole or probation, such person performs at least 10 days involving at least 40 hours of community service under the supervision of the court in those jurisdictions which have a recognized program for community service.” [§302.321, RSMo 2005](#). Unlike the statute related to driving while intoxicated, §577.023, which imposes mandatory sentences for those charged in municipal or county courts, the state law pertaining to driving while suspended or revoked makes no similar directive to municipal courts.

It is the author’s position that the mandatory sentencing language contained in §302.321 only applies to those charged with a violation of state law as opposed to a municipal offense.

### **12.3 OTHER CONSIDERATIONS**

In December 2003, the Supreme Court amended Rule 37.67 by adding sub-section (c), which provides that “clerical mistakes in the record and errors in the record arising from oversight or omission may be corrected by the court any time on the motion of any party and after such notice, if any, as the court orders. Previously, the court lost jurisdiction 10 days after rendition of judgment to vacate its judgement. Rule 37.67(c). Effective July 1, 2004.

### **12.4 FINES/PARTIAL PAYMENT/FAILURE TO PAY**

Effective July 1, 2004, Rule 37.65 was amended to permit payment of fines on an installment basis, “under such terms and conditions as the judge may deem appropriate.” Rule 37.65(a). Many of the municipal courts in the St. Louis metropolitan area now use “payment dockets” to enable defendants to make regular monthly payments towards their assessed fines and costs in order to avoid. Alternatively, the judge may order a stay of execution on the fine “and grant the defendant a specified period of time within which to satisfy the same.” Rule 37.65(b). “If a defendant defaults in the payment of the fine, the judge may order the defendant to show cause why the defendant should not be held in contempt of court.” Rule 37.65(c).

### **12.5 PRESENTENCE INVESTIGATIONS**

Supreme Court of Missouri Rule 37.64(a) recognizes the value of a presentence investigation for a judge who has a probation or parole officer available, and it is logical that such use would be made where necessary because of the severity of the offense. Such an investigation may be ordered and submitted for examination only after a plea of guilty or a finding of guilty by the judge. A judge can further limit the presentence investigation to specific information as

requested, but must, in all circumstances, allow the defendant or his or her attorney access to the report.

Most municipal judges who do not have a presentence investigation available to them still have tools that give valuable information to aid in sentencing. At a minimum, the judge should be able to obtain the defendant's criminal record from the police department or the defendant's driving record from the State of Missouri. The judge should also ask the defendant about prior offenses. Similar questions should be posed to the defendant's attorney if there is one. Where there is a victim in court, the judge should find out about the effect of the crime on the victim — injury, financial loss, insurance, and so forth.

Section 559.607 RSMo (1994) permits municipal divisions of any circuit court acting through the presiding judge to contract with a private entity for probation or rehabilitation services for individuals placed on probation for violation of city ordinances. This is a tremendous tool for municipal divisions to have probation services available to it. The city is not required to pay for the probation services cost. That burden is born by the defendant pleading guilty or found guilty per the court order. The court ordered entity then acts as the city's probation office. The court is required to notify the state board of probation and parole of the existence of this entity by forwarding the contract to it. There are certain requirements provided by subsequent sections to Chapter 559 of the Missouri Revised Statutes with respect to implementing this process. Section 559.609, RSMo (1994) lists the factors to consider in choosing the private entity. Section 559.612, RSMo (1994) requires solicitation of bids and that the contract be for a period of at least three years. Finally, Section 559.615, RSMo (1997 Supp.) puts restrictions on the relationship of the entity to the judge to prevent nepotism and conflicts of interest.

## **12.6 CONSECUTIVE OR CONCURRENT SENTENCES**

If the defendant is found guilty or pleads guilty to multipleailable offenses, the judge may have the sentences run consecutively or concurrently. Supreme Court Rule 37.64 provides that the judge shall so state, and if the judge fails to do so, the charges will be held to run concurrently.

## **ALTERNATIVE SENTENCES**

### **12.7 GENERAL CONSIDERATIONS**

Chapter 557 of the Missouri Revised Statutes deals generally with sentencing provisions. This section will deal specifically with different types of alternative sentences, particularly with application to the municipal divisions.

### **12.8 PROBATION**

Chapter 559 of the Missouri Revised Statutes deals generally with probation and allows the judge to impose probation and attach conditions to it as well as enlarge or modify the terms of probation if certain due process requirements are met. An SIS also tolls the deadline for a defendant to apply for a trial de novo, since the case has not been reduced to final judgment. State ex rel. Streeter v. Mauer, 985 S.W.2d 954 (Mo.App. W.D. 1999). See section 14.14 (new

section) for further discussion of this case.

Rule 37.64(e) allows the judge to suspend execution of sentence and place the defendant on probation or parole as authorized by law up to two years. The statutory basis for the rule is Section 479.190, RSMo (1994).

A court generally can impose conditions of probation as seen fit by the court so long as the conditions are not illegal, immoral or impossible. State v. Brantley, 353 S.W.2d 793, 796 (Mo. 1962). Thus, the court has broad discretion in the area of probation.

### **A. SUSPENDED IMPOSITION OF SENTENCE**

The suspended imposition of sentence (S.I.S.) is a suspension of active proceedings in the case. Not being a final judgment, it is not appealable nor, absent statutory provisions to the contrary, is it a conviction. State ex rel. Peach v. Tillman, 615 S.W.2d 514, 517 (Mo. App. E.D. 1981). In contrast to a suspended execution of sentence where the sentence is imposed but payment or jail is not executed, there is no sentence imposed at all with an SIS.

There is no direct state statutory authority for a municipal judge to suspend imposition of sentence. As a result, the city must have an ordinance allowing the judge to do so. State v. Motley, 546 S.W.2d 435, 437 (Mo. App. 1976). By contrast, associate and circuit divisions, by virtue of Section 557.011, RSMo (1994) may suspend imposition of sentence and criminal prosecutions unless otherwise prohibited by law.

The S.I.S. is a matter of grace for the judge and is generally used where the judge feels the circumstances do not warrant the "stigma" of a conviction.

Certain mandatory requirements relating to alcohol and drug offenses where suspended imposition of sentence is imposed are now required by state statute. These will be discussed in more detail in Section 12.11.

### **B. SUSPENDED EXECUTION OF SENTENCE**

Missouri Supreme Court Rule 37.64(e) allows the judge to suspend execution of sentence (S.E.S.) and place the defendant on probation or parole for a term not to exceed two years. In contrast to an SIS where sentence is not imposed at all, with an SES, sentence is imposed (resulting in a conviction), but payment of fine or service of jail sentence (execution) is suspended.

### **C. TERMS AND CONDITIONS**

Probation and parole are not matters of right. The terms and conditions of probation or parole are within the discretion of the judge. State v. Keller, 685 S.W.2d 605, 606 (Mo. App. S.D. 1985). The actions of the court in granting or denying parole and in setting terms or conditions are not reviewable in the absence of extreme abuse of discretion. State v. Austin, 620 S.W.2d 42, 43 (Mo. App. E.D. 1981). The court retains continuing jurisdiction over the defendant during the

entire probationary period.

Thus, the court can impose terms and conditions on the defendant that, in its discretion, would be reasonably necessary to insure the defendant will not again violate the law (alcohol treatment programs, drug education school, restitution, community service work, and so forth).

#### **D. MODIFICATION**

The judge may enlarge or modify conditions of probation and parole before completion of the term. However, if the modification enlarges or expands the terms of probation or parole or their conditions, the defendant is entitled to appropriate due process requirements of notice and hearing.

Section 558.046, RSMo (1994) permits reduction of sentence upon petition if the crime did not involve violence and threats of violence, involve alcohol or illegal drugs, the defendant has successfully completed a detox or rehabilitation program and is not a prior or persistent offender under Sections 558.016, 558.018, or 558.019 (1994 and Supp. 1997). In addition, Section 577.054 (1994) also allows the originating court to expunge a DWI or DUI record after 10 years only on the condition it was a first offense and there were no subsequent or prior alcohol-related offenses.

Section 302.304.14 and Section 302.540.1 permit an associate circuit court or circuit court upon Motion of Hearing to waive or modify an assignment or recommendation for a SATOP Program based on the determination the program is unwarranted. Factors for the reviewing court include the needs assessment, driving record, circumstances of the offense and likelihood of future offenses. However, a court cannot waive but only modify the conditions if the defendant, in an alcohol-related offense, is a prior or persistent offender or had a BAC test of .15 or more.

#### **E. REVOCATION**

Supreme Court of Missouri Rule 37.70 governs revocation of probation or parole and requires compliance with Section 559.036, RSMo (Supp. 1997). This Section lists specific procedural requirements that must be met as a condition of revocation. The statute requires notice and an opportunity to be heard on the issues of violating probation or parole conditions. Unlike Section 559.036, Rule 37.70 permits such notice to be mailed rather than personally served. The notice must apprise the defendant of the specific conditions of probation or parole he or she has allegedly violated or any other basis for the action.

To make a finding of revocation, the judge need only be "reasonably satisfied" that the terms of the probation or parole have been violated. State v. Wilhite, 492 S.W.2d 397, 399 (Mo. App. S.D. 1974).

The case of Moore v. Stamps, 507 S.W.2d 939, 949 (Mo. App. E.D. 1970), consistent with Section 559.036, states that the defendant is entitled to notice of the claimed violation, disclosure of the evidence against him or her, the opportunity to be heard and present witnesses and evidence, the right to confront adverse witnesses, and a written statement of the grounds for

revocation of probation or parole.

In Abel v. Wyrick, 574 S.W.2d 411, 418 (Mo. 1978), the Supreme Court of Missouri held that the court must consider alternative responses to revoking the probation and that probation revocation must not be "automatic." Section 559.036(3), RSMo (Supp. 1997) specifies that the judge has the option of continuing the defendant on the existing conditions, "with or without modifying or enlarging the conditions or extending the term...."

## **12.9 PAROLE**

Supreme Court of Missouri Rule 37.64 and Section 479.190, RSMo (1994) govern parole as well as probation. The conditions governing revocation or granting of parole are the same as those discussed in Section 12.8, A-E as dealing with probation. The distinction between probation and parole is that parole includes: (1) a release from confinement if the parolee meets certain conditions required by the judge; and (2) suspension of the execution of the balance of the sentence so long as the conditions are met.

## **12.10 TRAFFIC OFFENDER PROGRAMS**

In certain traffic cases, Section 302.302.4, RSMo (Supp.1997) permits a court to order the completion of a driver improvement program in lieu of assessment of points. If the offender satisfactorily completes the program within 60 days of the court order, points are not assessed. The stay provisions are restricted to an individual who has not had a similar stay within the previous three years. The stay applies to all one-, two-, three-, and four-point violations except that of permitting an unlicensed operator to drive an automobile. The school completed must be one on the state-approved list of traffic offenders' schools. (See approved format following this chapter.)

A court is not limited to stay provisions to order traffic school. Such programs can be ordered at the discretion of the court and as a condition of probation in any traffic offense case in which the court deems the program necessary.

## **12.11 ALCOHOL AND DRUG PROGRAMS**

Section 577.049, RSMo (Supp. 1997) mandates that upon a plea or finding of guilty to any alcohol- or drug-related traffic offense, a court must order participation in SATOP (Substance Abuse Traffic Offender Program). The same is also true per Section 577.525, RSMo (Supp. 1997) for offenders convicted of possession or use of alcohol while under the age of 21. The definition of SATOP is included in Section 302.010(21), RSMo (Supp. 1997) and Section 577.001, RSMo (Supp. 1997).

The "Abuse and Lose Law" also puts greater constraints on the courts in dealing with alcohol and drug offenders. Offenders under the age of 21 convicted of violating state statutes relating to drug offenses or alcohol offenses could lose their driver's licenses for up to one year. Section 577.500, RSMo (1994). The law further requires that any person under the age of 21 who violates a state, county, or municipal law involving possession or use of alcohol complete an

alcohol-related education program that meets or exceeds requirements promulgated by the Department of Mental Health. Section 577.525, RSMo (Supp. 1997). In addition, the court is required to enter an order revoking the driving privilege of any person who violates state, county, or municipal law involving possession or use of a controlled substance (as defined in Chapter 195, RSMo (Supp. 1997)) while operating a motor vehicle, and who at the time of the offense was 21 years of age or older. Section 577.505, RSMo (1994).

There are additional mandatory requirements, besides those relating to SATOP as listed in the first paragraph, that are now imposed on courts when dealing with drug and alcohol offenders. Section 577.023(3).4, RSMo (1994) provides that a court cannot give a suspended imposition of sentence to any individual who is a prior or persistent offender nor can such person be eligible for probation or parole unless he or she serves 48 hours in jail or performs 10 hours of community service. The definition of prior and persistent offender is included in Section 577.023(2) and (3), RSMo (1994). A persistent offender is an individual with two or more intoxicated related traffic offenses within 10 years. A prior offender is an individual with one prior intoxicated related traffic offense within 5 years. Furthermore, Section 577.600, RSMo (Supp. 1997), has been added requiring that on a first offense, a court may, but on a second offense of an intoxicated related traffic offense a court shall, as a condition of granting probation, require an individual convicted to equip his or her vehicle with a certified ignition interlock device. Before doing so, the court must make findings of no hardship and that there is an available installation service within 50 miles of the county seat wherein the court lies. The court may reduce the individual's fine because of the additional cost associated with the interlock device. The Department of Revenue has forms for an order requiring the device as a condition of probation and these can be requested from it.

Section 577.600 now mandates that on a second or subsequent offender of an intoxicated related traffic offense that for a period of not less than one month from the date of reinstatement of license the offender shall not operate any vehicle unless it is equipped with an ignition interlock device.

The court must keep abreast of mandatory requirements that are imposed upon it. More of these requirements may be added in the future. It is likely the court will be kept aware of these through educational programs through various state agencies.

## **RESTITUTION/COMMUNITY SERVICE**

### **12.12 RESTITUTION**

Ordering restitution is clearly within the authority of a judge in ordering probation or parole. However, a judge must always consider the practical problems of restitution such as the defendant's ability to pay, the monitoring of payment, and the method of payment. In addition, if a complaining party wishes no contact with the defendant, the court must decide whether to order the restitution paid through the court.

In dealing with state charges, the situation is easier because state probation and parole officers can monitor and conduct the restitution process. By contrast, on the municipal level, few courts

have the time or ability to insure that restitution is made.

Restitution raises a number of difficult questions. For example, should restitution be restricted to intentional violations such as assault and disorderly conduct, or should the court enter the civil arena by ordering restitution in automobile accident cases where there is no insurance?

There are no clear-cut answers. However, the court should proceed carefully into the area of restitution, particularly when there is a civil remedy available for the injured party.

### **12.13 COMMUNITY SERVICE PROGRAMS**

Section 479.190, RSMo (1994) which permits a judge hearing municipal cases to grant probation or parole, was revised in 1990 to specifically allow for restitution and community service as terms of probation. A provision in the law relating to community service gives immunity from suit to "Any county, city, person, organization, or agency, or employee of a county, city organization, or agency charged with the supervision of such free work or who benefits from its performance . . . except for intentional torts or gross negligence."

Liability used to be a concern when working with community service programs. However, Section 217.437, RSMo (Supp. 1997) now provides that any city or agency charged with supervision of free work per court order are immune from suit for supervision of the performance of those individuals except for intentional torts or gross negligence. As a result, this is a far greater tool for courts to use and can be used in conjunction with a court contracted probation program as outlined in Section 12.8.



MISSOURI DEPARTMENT OF REVENUE  
 RECORD OF PARTICIPATION AND COMPLETION  
 OF DRIVER IMPROVEMENT PROGRAM/  
 MOTORCYCLE RIDER TRAINING COURSE

FORM  
**4444**  
 (REV. 8-95)

OFFENDER INFORMATION		
DRIVERS LICENSE NUMBER	DATE OF BIRTH	SEX <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE
NAME (LAST, FIRST, MIDDLE INITIAL)		
STREET ADDRESS		TELEPHONE NUMBER (      )
CITY	STATE	ZIP CODE
ACCIDENT <input type="checkbox"/> YES <input type="checkbox"/> NO	CHARGE	
COURT INFORMATION		
COURT ORIGINATOR (ORI) NUMBER	COURT NAME	
COURT CASE NUMBER	CONVICTION DATE	
PROGRAM INFORMATION		
NAME OF AGENCY		
STREET ADDRESS		TELEPHONE NUMBER (      )
CITY	STATE	ZIP CODE
DRIVER IMPROVEMENT PROGRAM <input type="checkbox"/> COMPLETED <input type="checkbox"/> FAILED TO COMPLETE	MOTORCYCLE RIDER TRAINING COURSE <input type="checkbox"/> COMPLETED <input type="checkbox"/> FAILED TO COMPLETE	
DATE PROGRAM WAS COMPLETED OR FAILED TO COMPLETE		
PROGRAM COORDINATOR SIGNATURE / I.D. NUMBER		DATE
FOR COURT USE ONLY		
COURT CLERK		DATE
REMARKS		

MO 860-2614 (8-95) WHITE - SEND TO DRIVERS LICENSE BUREAU, P.O. BOX 200, JEFFERSON CITY, MO 65105-0200  
 CANARY - SEND TO APPROPRIATE COURT REQUESTING COMPLIANCE  
 PINK - KEEP FOR YOUR FILES  
 GREEN - DEFENDANT COPY

# CHAPTER XIII. - ENFORCEMENT OF FINES AND COSTS

Judge Todd Thornhill

Section	Page Number
13.1 Introduction.....	3
<b>VOLUNTARY PAYMENT.....</b>	<b>3</b>
13.2 Payment In Full.....	3
13.3 Partial Payments .....	3
13.4 Bond on Stay of Execution .....	4
13.5 Applying Bond to Fine and Costs.....	4
<b>COMPELLING PAYMENT.....</b>	<b>4</b>
13.6 General Considerations.....	4
13.7 Order to Show Cause/Motion for Contempt.....	5
13.8 Right to and Notice of Hearing/Right to Counsel.....	5
13.9 Written Payment Agreements .....	6
13.10 Suspension of Drivers' License for Non Compliance .....	6
<b>COMMITMENT.....</b>	<b>7</b>
13.11 For Nonpayment's .....	7
13.12 For Contempt .....	7
13.13 Voluntary Commitments.....	8
13.14 Execution and Garnishments .....	8

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Judge Todd Thornhill assumes authorship of this chapter from Judge Keith Sutherland who is former chair of the Municipal Judge Education Committee and now circuit judge for the 12th Judicial Circuit in Warren County. Judge Thornhill received his B.A. from Southwest Missouri State University and his J.D. from the University of Missouri-Columbia. He has served as a judge of the Springfield Municipal Court since his appointment in 1993 and was president of the Missouri Municipal and Associate Circuit Judges Association in 1999-2000.

## CHAPTER XIII

### ENFORCEMENT OF FINES AND COSTS

#### 13.1 INTRODUCTION

The purpose of this chapter is to outline the various means, both voluntary and compulsory, of collecting fines and costs from ordinance violators following either a plea of guilty by the defendants or a finding of guilty by the court at trial, and the steps to take if the violators will not pay.

#### VOLUNTARY PAYMENT

#### 13.2 PAYMENT IN FULL

For obvious reasons, it is preferable that defendants pay the total fine(s) and costs at one time. If for some reason a defendant cannot pay at the time the fine and costs are assessed, under Rule 37.64(f) the court may grant a stay of execution not to exceed six months. If a stay is granted, the defendant should be given a definite date on which to pay, and the stay should be entered in writing. A stay raises the possibility that the defendant's intervening bankruptcy filing may suspend or alter the court's ability to enforce the judgement. Although 11 U.S.C. section 1328 (a) (3) makes nondischargeable "restitution or a criminal fine included in a sentence on the [Chapter 13] debtor's conviction of a crime, "such items are most likely discharged if rendered for violation of a municipal ordinance because such infractions are not crimes. Furthermore, restitution orders most frequently occur in orders of suspended imposition of sentence, not a sentence of conviction.

There is a substantial body of case law addressing the dischargeability of fines and costs in a bankruptcy proceeding. There is some authority that fines and costs are not dischargeable. See, for example, In Re Stevens, 184 B.R. 584 (Bankr. W.D. Wash. 1995) (unpaid traffic fines "are nondischargeable whether they are denominated as civil or criminal under local law." Id.) For an extensive discussion including numerous case citations, see "Debts Arising from Penalties as Exceptions to Bankruptcy Discharge under Section 523(A)(7), (13) and 1328(A) of Bankruptcy Code of 1978," 150 A.L.R. Fed. 159 (1998).

#### 13.3 PARTIAL PAYMENTS

The court may accept partial payments of fines and costs if it wishes to do so. Mo. Sup. Ct. Rule 37.64(f), 37.65(a), Section 479.240, RSMo, and Section 560.026, RSMo. There is no statute or rule that requires a court to accept partial payments. However, many courts do accept partial payments as a convenience to defendants. Allowing a defendant to make partial payments is a stay of execution and should be set forth in writing.

### **13.4 BOND ON STAY OF EXECUTION**

Under Rule 37.64(f), the court has the right to require a defendant to enter into a bond on any stay of execution. This is not mandatory and is rarely done when the stay of execution involves only the payment of a fine and costs rather than a jail sentence, but it can be a useful tool for repeat violators who have demonstrated an unwillingness to pay fines and costs in the past. If a bond is entered into and the defendant fails to appear on the return date, the city prosecutor can then file an information against the defendant charging failure to appear on bond — if there is an ordinance covering this offense. [See Chapter VI, "Bail and Sureties," for discussion of bonds.]

### **13.5 APPLYING BOND TO FINE AND COSTS**

If a defendant has entered into an appearance bond and deposited cash bail, the defendant may want to pay the fine and costs from the cash bail. The fines and costs can be paid from the bail, but only with the permission of the defendant. If the bail money is to be used to pay the defendant's fine and costs, the judge should obtain the written consent of the defendant (or of the person who posted the cash bail for defendant if so indicated on the bond form, see State v. Echols, 850 S.W.2d 344, 347, (Mo. banc 1993) or obtain the defendant's oral consent in open court and make a docket entry reflecting the defendant's consent. See form 13-01 following this chapter for suggested consent. Otherwise, there are only two things the court can properly do with cash bail money:

1. Return it to the defendant (or to the person who posted the cash bail) after the case is completed; or
2. Forfeit the bond if the defendant fails to appear. See the Chapter on Bail and Sureties for forfeiture procedures.

State v. Echols, 850 S.W.2d 344 (Mo. banc 1993) discusses from a historical perspective the theory of cash bail and rights thereto at different stages in criminal proceeding.

## **COMPELLING PAYMENT**

### **13.6 GENERAL CONSIDERATIONS**

Defendants who fail or refuse to pay their fines and costs can be extremely difficult to deal with, but if there is a credible threat of incarceration if they do not pay, the job of collection becomes much easier. An intervening bankruptcy may prohibit this possibility, however, because the threat of incarceration may be viewed as an attempt to collect a debt in violation of the automatic stay of 11 U.S.C. section 362. In Re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990).

### **13.7 ORDER TO SHOW CAUSE/MOTION FOR CONTEMPT**

No court can summarily put a defendant in jail for failing to pay a fine and costs. Williams v. State of Illinois, 399 U.S. 235 (1970). To do so is a violation of the right to equal protection of law under section one of the U.S. Constitution's 14th Amendment. The rationale is that "there can be no equal justice where [the kind of punishment] a man gets depends on the amount of money he has." Williams at 241, citing Griffin v. Illinois, 351 U.S. 12 (1956).

The Supreme Court of Missouri has followed the Williams line of decisions. Hendrix v. Lark, 482 S.W.2d 427 (Mo.banc 1972). Additionally, the procedure for addressing fine-defaulting defendants found at Section 560.031 addresses the equal protection issues raised in Williams. "The very purpose of the Section 560.031 enactment was to avoid the constitutional peril of the unequal protection of the laws that peremptory confinement in lieu of nonpayment of a fine works against an indigent." State ex. rel Stracener v. Jackson, 610 S.W.2d 420, 424 (Mo.App. W.D. 1980).

The U.S. Supreme Court has tempered somewhat the Williams line of cases by holding that if a defendant refuses to pay when able or refuses to make bona fide efforts to obtain money to pay, then incarceration as a sanction may be used. Bearden v. Georgia, 461 U.S. 660, 672-73 (1983). Bearden goes further by stating that even if a defendant is faultlessly unable to pay, then incarceration may be used, but only if "alternative measures are not adequate to meet the state's interests in punishment and deterrence." Id. at 672-73.

The defendant first must be given the opportunity to show whether there is any good reason for failing to pay. The first step in this process is notifying the defendant. Mo. Supreme Ct. Rule 37.65(b); Section 560.031.1, RSMo. This notification may be given either by an order to show cause (see form 13-03 following this chapter) or by a motion for contempt. The order or motion may be served on the defendant by mail or by personal service. [See Chapter XV, "Contempt of Court."]

### **13.8 RIGHT TO AND NOTICE OF HEARING/RIGHT TO COUNSEL**

The order to show cause or motion for contempt, once mailed to or personally served on the defendant, constitutes adequate notice of hearing. Defendants who have failed to pay are entitled to an opportunity for a hearing to give them a chance to explain why they failed to pay. If a defendant fails to appear in court on the return date of the order to show cause or motion for contempt, a warrant should be issued to get the defendant before the court for the hearing. The defendant may also be held in contempt for failing to appear for the contempt hearing if there is no good cause for the failure. Section 560.031(1)-(5), RSMo specifies the procedure required. Utilization of state statute by municipal courts is authorized through Missouri Rules of Court 37.08 and 19.04.

A defendant who does appear on the return date has the absolute right to a hearing and to be represented by a lawyer if the defendant is likely to be jailed or cannot show good cause for failing to pay. Since the threat of jail is the only viable means of coercing payment, a lawyer should always be appointed for the indigent defendant. [See Section 5.8.] Not to be overlooked is

the argument that if a defendant is found to be truly “indigent,” by definition he has not acted “intentionally” in not paying fines. State v. Jackson, 610 S.W.2d at 424-25.

The defendant may waive the right to counsel in writing [See Sections 5.6, 5.9 and 5.10], but the defendant should be informed unequivocally that he or she will be given a jail sentence or is most likely to be given a jail sentence if the defendant cannot show good cause for the failure to pay.

### **13.9 WRITTEN PAYMENT AGREEMENTS**

Many courts have had success with written payment agreements. One form of such an agreement is the “Agreement to Pay and Order to Show Cause in Event of Non-Compliance” (see form MBB 13-02 following this chapter) promulgated by the Office of State Courts Administrator. Use of such a form eliminates the necessity of following the steps outlined in Sections 13.7 and 13.8, above, as the form puts the burden on the defendant to either pay as agreed or to appear to show cause why he or she has not paid without the court having to take any additional steps to notify the defendant of a hearing. If such a form is used, the defendant should be provided with a copy.

### **13.10 SUSPENSION OF DRIVERS’ LICENSE FOR NON COMPLIANCE**

Defendants who fail to pay their fines and costs can have their drivers’ licenses suspended whether they are residents of Missouri or most other states. There are two different procedures which need to be followed depending on whether the defendant has a Missouri license or an out-of-state license:

1. Out-of-state drivers’ licenses come under what is commonly called the Non-Resident Violator’s Compact (NRVC). The official title in Missouri is the Driver License Compact (Section 302.600 - .605, RSMo). Any state which is a member of the compact has agreed to suspend the license of any driver who has failed to take case of a traffic violation in another compact state. Not all states are members of the compact, but Arkansas, Illinois, Iowa, Kansas, Nebraska, and Oklahoma are. There are two major qualifications under the compact, namely:

- a. Notification to the defendant’s home state must be made within six months of the date of the violation; and
- b. Serious traffic offenses are not covered by the compact. For purposes of the municipal divisions, the main offense not covered is DWI.

#### **MEMBERS OF THE NONRESIDENT VIOLATOR’S COMPACT (NRVC)**

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

See also Section 8.12.

2. Drivers licensed in Missouri are covered by Section 302.341, RSMo, which allows any municipal court in a municipality to order the Director of Revenue to suspend the driver's license of any defendant who fails to appear or dispose of their violation. This procedure is referred to as FACT (for Failure to Appear in Court for Traffic Violations). The multi-part forms necessary to have a license suspended are available from the Department of Revenue (see approved FACT forms following this chapter). This procedure applies only to violations occurring after June 30, 1996.

## COMMITMENT

### 13.11 FOR NONPAYMENT'S

A defendant who willfully fails to pay a fine and costs can be committed to jail for contempt. Missouri has enacted legislation to address the incarceration of non-paying defendants. Section 560.031, RSMo allows a court to order a defendant to show cause why fines have not been paid, and if the defendant has either "intentionally" refused to pay or failed to "make a good faith effort to obtain the necessary funds," he may be imprisoned. The imprisonment is in the nature of "punishment for contempt of court." State v. Jackson, 610 S.W.2d 420, 423 (Mo.App. 1980). Of course, if a defendant is truly indigent, he by definition has not acted "intentionally." Id. at 424-25. The procedures for an indirect contempt hearing, found at Missouri Rules of Court 36.01 and 37.75, must be followed prior to incarceration. These procedures include notice (see also rule 37.65(b), a hearing on indigence, and a judgment "reciting the essential facts constituting the criminal contempt." If the failure to pay is "excusable," the court may allow additional time, reduce the fine, or revoke any part of the fine. Section 560.031(3), RSMo. However, this practice is not recommended because of the possibility of incarcerating someone who is, in fact, indigent and therefore cannot constitutionally be incarcerated for debt. Incarceration of an indigent strictly for contempt for failure to pay leaves the judge and the municipality open to liability for damages for violation of the defendant's civil rights. See Davis v. City of Charleston, 635 F. Supp. 197 (E.D. Mo. 1986). The harshness of Davis and other similar cases was diluted by passage of the Federal Courts Improvement Act in 1996, found at 42 U.S.C. Sections 1983 and 1988(b), which greatly enhances judicial immunity. Instead, the procedure for commitment for contempt for failure to appear should be used.

### 13.12 FOR CONTEMPT

By committing a defendant for contempt of court for failing to appear to show good cause for failure to pay, the court does not have to worry about whether the defendant is indigent. When a defendant fails to appear on the return date of an order to show cause or a motion for contempt, that defendant is in contempt of court for failure to appear regardless of indigency. In this situation, the action of the defendant that constitutes contempt is the failure to appear, not the failure to pay. Consequently, the constitutional prohibition against imprisonment for debt is not applicable. [See Chapter XV, "Contempt of Court."] Where the defendant has wholly failed to appear, a warrant should be issued to get the defendant before the court. When the defendant is brought before the court on the warrant and cannot show good cause for failing to appear, he or

she may be found in contempt of court and an order issued. (See form 13-04 following this chapter.)

### **13.13 VOLUNTARY COMMITMENTS**

A few defendants will ask to be committed to jail rather than have to pay a fine and costs. This should be distinguished from a court improperly assessing a sentence such as "\$100.00 or 10 days in jail." This sort of alternative sentence is not proper and should never be imposed, but if a fine and costs have been assessed and the defendant voluntarily requests that the fine and costs be commuted to a jail sentence, the court may do so if the municipality has an ordinance permitting it. An ordinance similar to Section 543.270.1, RSMo (1986) would be sufficient. (See form 13-04 following this chapter.) Any request by a defendant for commitment in lieu of a fine should be put in writing and signed by the defendant. A statement such as the following will suffice: "John Doe, defendant, requests that the fine and costs totaling \$100.00 be commuted to a jail sentence to be served at the rate of \$10.00 per day." Hendrix v. Lark, 482 S.W.2d 427, 431 (Mo.banc 1972.)

### **13.14 EXECUTION AND GARNISHMENTS**

Orders to show cause or motions for contempt are not the only means available to enforce the collection of fines and costs. Under the provisions of Rule 37.65(c), the court may use "means for the enforcement of money judgments." This means, among other things, that an execution can be issued to garnish a defendant's wages, bank account, or other assets. This procedure is not used as often as it could be to collect fines and costs. The major problem with garnishing wages or bank accounts is knowing where the defendant works or banks. However, if the court uses a form for stays of execution and partial payments, this information could be requested on the form.





IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:
	Court ORI Number:

City of \_\_\_\_\_ vs. \_\_\_\_\_

(Date File Stamp)

Defendant's Name/Address:

SSN:

### Agreement to Pay

I, \_\_\_\_\_ hereby acknowledge that I am liable and indebted to the Court in the amount of \$ \_\_\_\_\_. I have told the Court that I am ready, willing and able to pay said sum to the Court in equal weekly/monthly installments in the following manner:

Payment Date	Payment Amount	Payment Dates	Payment Amount
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

I understand that the payments are due on the above date(s) specified, or on the last business day before, until the sum owed is paid in full. Further, I understand the following payment conditions:

1. I understand there is **no grace period** on payments.
2. The Court does not have to give me installment payments, they are being offered as a courtesy.
3. All payments must be paid by 4:00 p.m. of the date stated.
4. I am obligated to immediately advise the court of any change in address, telephone number, or employment.
5. The Judge or Clerk will **not** grant an extension by telephone.
6. Failure to comply with the payment schedule will result in the entire balance being due to the court.

I hereby state to the Court that I will pay my fine and costs in full by \_\_\_\_\_(date). In the event I do not fully comply with the court order regarding installment payments, then I will notify the court in advance to make a court appearance on the day the payment was due, to show cause, if any, why I did not comply with the court order, and why I should not be held in contempt of Court.

Further, I understand that payments may be made by mail; however, the risk of loss of payment in the mail is upon me and **not** the Court. All payments must be sent to: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_.

**Response to Nonpayment RSMo 560.31**

1. When an offender sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon motion of the prosecuting attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.
2. Following an order to show cause under subsection 1, unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned for a term not to exceed one hundred eighty days if the fine was imposed for conviction of a felony or thirty days if the fine was imposed for the conviction of a misdemeanor or infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the offender to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

I understand and agree that should I fail to make the above payments according to the schedule set forth, legal action will be taken against me by the court for the entire balance. I further understand that should I fail to make payments as set forth above, the Court may access my credit report from any credit reporting agency as necessary, and may also report this agreement as delinquent to all credit reporting agencies.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. \_\_\_\_\_

\_\_\_\_\_  
Signature Phone Number

\_\_\_\_\_  
Street City State Zip

\_\_\_\_\_  
Date of Birth Social Security Number Driver's License Number

\_\_\_\_\_  
Employer Name Employer Address

\_\_\_\_\_  
Job Title Phone Number Pay Days

**Order to Show Cause in Event of Non-Compliance**

In the event you do not fully comply with the court order regarding installment payments, then you will notify the court in advance to make a court appearance on the date the payment was due, to show cause, if any, why you did not comply with the court order and why you should not be held in contempt of court.

ATTEST:

\_\_\_\_\_  
Clerk/Deputy Clerk Judge

\_\_\_\_\_  
Date Date





IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

Judge or Division:	Case Number:
	Court ORI Number:

(Date File Stamp)

City of \_\_\_\_\_

vs.

Defendant's Name/Address:

**Judgment Finding Defendant in Contempt of Court**

On the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, the defendant was ordered to pay fine(s), costs and fees totaling \$ \_\_\_\_\_, defendant agreed to pay said amount, but has failed to pay \$ \_\_\_\_\_ of said amount when he agreed to do so, and

On the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, the court issued its Show Cause Order For Failure to Pay Fine(s) Costs and Fees which was delivered to defendant by regular mail, postage prepaid and which was returnable on \_\_\_\_\_, that defendant failed to appear on the return date of said Order and has failed to show good cause why he/she failed, refused or neglected to appear on the return date of the Show Cause Order.

**Therefore, it is Ordered** that the defendant be committed to the custody of \_\_\_\_\_ to be confined in the \_\_\_\_\_ Jail for a period of \_\_\_\_\_ days for his contempt and that a Commitment be issued therefore.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge



### FAILURE TO APPEAR OR PAY TRAFFIC VIOLATION

DRIVER LICENSE NUMBER		STATE
CMV <input type="checkbox"/>		HAZMAT <input type="checkbox"/>
CITATION NUMBER		
CASE NUMBER		COURT ORI NUMBER
SEX <input type="checkbox"/> M <input type="checkbox"/> F		DATE OF BIRTH
DESCRIPTION OF VIOLATION		
POSTED SPEED (MPH)		ACTUAL SPEED (MPH)
SECTION VIOLATED <input type="checkbox"/> RSMo: _____ <input type="checkbox"/> ORD: _____		
APPEARANCE DATE		FINE AND COSTS

IN THE COURT OF \_\_\_\_\_, MISSOURI  
NAME OF COURT

DIVISION  
 CIRCUIT/NO. \_\_\_\_\_  ASSOCIATE/NO. \_\_\_\_\_  MUNICIPALITY/NO. \_\_\_\_\_

VIOLATION DATE

TO: (NAME AND FULL ADDRESS OF DEFENDANT)

RETURNED TO COURT UNDELIVERABLE

### NOTICE AND DRIVER LICENSE SUSPENSION WARNING

You have failed to respond to the traffic violation described above by not appearing in court and paying fines and court costs, if applicable, within the time allowed. You must dispose of and fully pay the fine and court costs to this court within 30 days of this date: \_\_\_\_\_ DATE COURT MAILED THIS NOTICE

**FAILURE TO RESPOND WITHIN THIRTY DAYS WILL RESULT IN THE IMMEDIATE SUSPENSION OF YOUR DRIVER LICENSE AND DRIVING PRIVILEGE.** If you do not comply by the deadline, this is the final notice you will receive before your license is suspended. If suspended, your license can be reinstated only by satisfying the reinstatement requirements outlined below. If suspended, you may NOT drive until you receive a notice from the Driver License Bureau that your privilege has been reinstated.

**Questions about payment of any fines and/or court costs must be made directly to the court.**

NAME OF COURT	ADDRESS	CITY	STATE	ZIP CODE	TELEPHONE NUMBER (    )
---------------	---------	------	-------	----------	----------------------------

**DRIVING PRIVILEGE REINSTATEMENT REQUIREMENTS:**

- \$20.00 reinstatement fee **and**
- Notice of Compliance from the Court

**Note:** When sending your reinstatement requirements, please include your full name, address, date of birth and driver license number.

**OPTIONS FOR REINSTATING YOUR DRIVING PRIVILEGE:**

- Take the reinstatement requirements** to your local motor vehicle and driver licensing contract office. A reinstatement notice and Temporary Driving Permit, if you previously surrendered your driver license, will be given to you. If you previously surrendered your driver license, it will be mailed to you at the address indicated on the Notice of Compliance you received from the court unless you instruct the office clerk to have it sent to a different address.

**or**

- Mail reinstatement requirements** to the Driver License Bureau, P.O. Box 3950, Jefferson City, MO 65105-3950. A reinstatement notice and your driver license, if you previously surrendered it to the bureau, will be mailed to you.

**or**

- Bring the reinstatement requirements** to the Driver License Bureau, Harry S Truman State Office Building, Room 470, 301 W. High Street, Jefferson City, MO. A reinstatement notice and your driver license, if you previously surrendered it to the bureau, will be given to you.

### VISIT OUR WEB SITE AT WWW.DOR.MO.GOV



**SUSPENSION NOTICE**

DRIVER LICENSE NUMBER	STATE
-----------------------	-------

CMV <input type="checkbox"/>	HAZMAT <input type="checkbox"/>
------------------------------	---------------------------------

IN THE COURT OF \_\_\_\_\_, MISSOURI  
NAME OF COURT

CITATION NUMBER

DIVISION  
 CIRCUIT/NO. \_\_\_\_\_  ASSOCIATE/NO. \_\_\_\_\_  MUNICIPALITY/NO. \_\_\_\_\_

VIOLATION DATE

CASE NUMBER

COURT ORI NUMBER

TO: (NAME AND FULL ADDRESS OF DEFENDANT)

SEX  
 M  F

DATE OF BIRTH

DESCRIPTION OF VIOLATION

POSTED SPEED (MPH)

ACTUAL SPEED (MPH)

SECTION VIOLATED  
 RSMo: \_\_\_\_\_  ORD: \_\_\_\_\_

APPEARANCE DATE

FINE AND COSTS

TO: DRIVER LICENSE BUREAU, PO BOX 3950, JEFFERSON CITY, MO 65105-3950

I certify that the above named defendant failed to satisfactorily respond to the traffic violation described above by not appearing in court and/or paying the fines and court costs within the time allowed. I certify further that the above-named defendant was sent a Notice of Failure to Appear or Pay Traffic Violation and has failed to respond within the time allowed. Pursuant to Missouri Revised Statute, Section 302.341, this court orders that the Director of Revenue immediately suspend the driving privilege of the above-named defendant.

JUDGE/CLERK

TELEPHONE NUMBER  
 (     )

DATE



# COMPLIANCE NOTICE (CITIZEN)

DRIVER LICENSE NUMBER		STATE
CMV <input type="checkbox"/>	HAZMAT <input type="checkbox"/>	
CITATION NUMBER		
CASE NUMBER		COURT ORI NUMBER
SEX <input type="checkbox"/> M <input type="checkbox"/> F	DATE OF BIRTH	
DESCRIPTION OF VIOLATION		
POSTED SPEED (MPH)	ACTUAL SPEED (MPH)	
SECTION VIOLATED <input type="checkbox"/> RSMo: _____ <input type="checkbox"/> ORD: _____		
APPEARANCE DATE	FINE AND COSTS	

IN THE COURT OF \_\_\_\_\_, MISSOURI  
NAME OF COURT

DIVISION  
 CIRCUIT/NO. \_\_\_\_\_  ASSOCIATE/NO. \_\_\_\_\_  MUNICIPALITY/NO. \_\_\_\_\_

TO: (NAME AND FULL ADDRESS OF DEFENDANT)

TO: DRIVER LICENSE BUREAU, PO BOX 3950, JEFFERSON CITY, MO 65105-3950

**NOTICE TO CLERK**  
The defendant is responsible for providing the original form to the Missouri Department of Revenue for driving privilege reinstatement.

**NOTICE OF COMPLIANCE:** I certify that the above-named defendant has disposed of this traffic violation to the satisfaction of the court.

CLERK

DATE CITIZEN PAID

**DRIVING PRIVILEGE REINSTATEMENT REQUIREMENTS:**

- a. \$20.00 reinstatement fee **and**
- b. Notice of Compliance from the Court

**Note:** When sending your reinstatement requirements, please include your full name, address, date of birth and driver license number.

**OPTIONS FOR REINSTATING YOUR DRIVING PRIVILEGE:**

- a. **Take the reinstatement requirements** to your local motor vehicle and driver licensing contract office. A reinstatement notice and Temporary Driving Permit, if you previously surrendered your driver license, will be given to you. If you previously surrendered your driver license, it will be mailed to you at the address indicated on the Notice of Compliance you received from the court unless you instruct the office clerk to have it sent to a different address.

**or**

- b. **Mail reinstatement requirements** to the Driver License Bureau, P.O. Box 3950, Jefferson City, MO 65105-3950. A reinstatement notice and your driver license, if you previously surrendered it to the bureau, will be mailed to you.

**or**

- c. **Bring the reinstatement requirements** to the Driver License Bureau, Harry S Truman State Office Building, Room 470, 301 W. High Street, Jefferson City, MO. A reinstatement notice and your driver license, if you previously surrendered it to the bureau, will be given to you.

**VISIT OUR WEB SITE AT [WWW.DOR.MO.GOV](http://WWW.DOR.MO.GOV)**



# COMPLIANCE NOTICE (COURT)

DRIVER LICENSE NUMBER		STATE
CMV <input type="checkbox"/>	HAZMAT <input type="checkbox"/>	
CITATION NUMBER		
CASE NUMBER		COURT ORI NUMBER
SEX <input type="checkbox"/> M <input type="checkbox"/> F	DATE OF BIRTH	
DESCRIPTION OF VIOLATION		
POSTED SPEED (MPH)	ACTUAL SPEED (MPH)	
SECTION VIOLATED <input type="checkbox"/> RSMo: _____ <input type="checkbox"/> ORD: _____		
APPEARANCE DATE	FINE AND COSTS	

IN THE COURT OF \_\_\_\_\_, MISSOURI  
NAME OF COURT

DIVISION  
 CIRCUIT/NO. \_\_\_\_\_  ASSOCIATE/NO. \_\_\_\_\_  MUNICIPALITY/NO. \_\_\_\_\_

TO: (NAME AND FULL ADDRESS OF DEFENDANT)

TO: DRIVER LICENSE BUREAU, PO BOX 3950, JEFFERSON CITY, MO 65105-3950

**NOTICE TO CLERK**  
The defendant is responsible for providing the original form to the Missouri Department of Revenue for driving privilege reinstatement.

**NOTICE OF COMPLIANCE:** I certify that the above-named defendant has disposed of this traffic violation to the satisfaction of the court.

CLERK

DATE CITIZEN PAID

## CHAPTER XIV - TRIAL DE NOVO

Judge Charles Curry

Section	Page Number
14.1 Scope Of Chapter .....	3
14.2 Statutory Authority For Trial De Novo .....	3
14.3 Definition .....	4
14.4 Duty To Advise Defendant .....	4
<b>Procedure For Application For Trial De Novo .....</b>	<b>5</b>
14.5 Application Form .....	5
14.6 Ten-Day Filing Period .....	5
14.7 Computing The Ten-Day Period.....	6
14.8 Rule Against Extending Ten-Day Period .....	7
14.9 Rule 37.09 Time - Computation Of - Enlargement .....	7
14.10 Costs Of Filing.....	7
<b>Procedure After Filing Of Application For Trial De Novo.....</b>	<b>8</b>
14.11 Stay Of Execution .....	8
14.12 Bond Pending Trial De Novo .....	8
14.13 Transmittal Of Record .....	8
14.14 Disposition Of Trial De Novo .....	9

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Judge Charles C. Curry received his B.A. from the University of Kansas in 1968 and his J.D. from the University of Missouri at Kansas City in 1975. He has been a Municipal Judge in the City of Belton since 1982. Judge Curry wishes to acknowledge with gratitude the very considerable contribution of Judge Earl W. Drennan who wrote the original text for the 1990 edition of the bench book. Judge Drennan has been the Municipal Judge for the City of O'Fallon for more than 20 years.

## **CHAPTER XIV**

## TRIAL DE NOVO

### 14.1 SCOPE OF CHAPTER

This chapter discusses the statutory authority for trial de novo, the judge's obligation to advise the defendant of any right to a trial de novo, outlines the application procedure for a trial de novo, and explains why the outcome of a trial de novo may differ from that of the municipal court trial.

### 14.2 STATUTORY AUTHORITY FOR TRIAL DE NOVO

The Court Reform and Revision Act which went into effect on January 2, 1979, added a new tier to the due process structure for defendant — the trial de novo. Formerly cases from the municipal courts were taken on direct appeal when defendants believed they had not received a fair hearing. Authority for the trial de novo is found in Section 479.200, RSMo (1986) as follows:

' 479.200 Appeals, trial de novo.

1. In any case tried before a municipal judge who is not licensed to practice law in this state, the defendant shall have a right to trial de novo, even from a plea of guilty, before a circuit judge or an associate circuit judge.
2. In any case tried before a municipal judge who is licensed to practice law in this state or before an associate circuit judge, except where there has been a plea of guilty or the case has been tried with a jury, the defendant shall have a right of trial de novo before a circuit judge or upon assignment before an associate circuit judge. An application for a trial de novo shall be filed within ten days after judgment and shall be filed in such form and perfected in such manner as provided by Supreme Court rule.
3. In any case tried with a jury before an associate circuit judge a record shall be made and appeals may be had upon that record to the appropriate appellate court.
4. The Supreme Court may provide by rule what record shall be kept and may provide that it be a stenographic record or one made by the utilization of electronic, magnetic, or mechanical sound or video recording devices.

Cases interpreting Section 479.200 have resulted in some interesting rulings. In the case of State of Missouri, ex rel Brian D. Wilson v. Hon. Thomas Sims, 654 S.W.2d 325 (Mo. app. 1983) the defendant had entered a guilty plea to the charge of stealing before Judge Sims, a lawyer judge. Wilson applied for a trial de novo and Judge Sims refused to accept the application relying on the language in ' 479.200.2 supra, which appears to say that a defendant who pleads guilty

before a lawyer judge does not have a right to a trial de novo. Held: The question of whether a defendant has a right to a trial de novo after a plea of guilty is to be decided by the circuit court. Furthermore, the municipal judge is without jurisdiction to refuse to process a defendant's application for trial de novo and must forward the file to the circuit court.

In this same case the court further ruled in dicta that a defendant may appeal, after a guilty plea before a lawyer judge, for the limited purpose of determining the validity of his waiver of counsel and plea of guilty. See State ex rel. Kansas City v. Meyers, 513 S.W.2d 414 (Mo. banc 1974).

In summary, if a defendant timely files an application for trial de novo in a municipal division, regardless of the manner in which the case was disposed of, the municipal judge must forward the file to the circuit court for disposition.

More recently in City of Kansas City, Missouri v. Terry Dudley, 244 S.W.3d 763 (Mo.App. 2008) addressed the issue of what constitutes a "trial" for the purpose of satisfying the requirement stated in paragraph 2 of ' 479.200. In the Dudley case, the defendant had pled not guilty to the charge but had stipulated to the city's records for the case. The court imposed a fine and jail sentence and Dudley timely filed an application for trial de novo. The circuit court judge, to which the case was assigned, decided it did not have subject matter jurisdiction for a trial de novo because in its opinion since the defendant entered a technical not guilty the case was not "tried" in the municipal court as required by the statute, and dismissed the trial de novo. The court of appeals held that: a) defendant's stipulation to the city's case file satisfied the requirement in Rule 37.62 that evidence be offered by the prosecutor; b) in both criminal and civil cases, stipulations of fact are considered evidence; c) trial by stipulation is not a guilty plea because the defendant has not conceded his guilt and reserves his right to challenge the sufficiency of the evidence to convict; and d) since the court pronounced judgment based on the record presented the proceeding was the functions equivalent of a municipal court trial under Rule 37.62.

### **14.3 DEFINITION**

Trial de novo simply means a new trial before a different judge, as though the case had never been heard before.

### **14.4 DUTY TO ADVISE DEFENDANT**

At the time of sentencing (after sentence is pronounced), the municipal judge is required to advise the defendant of any right to a trial de novo, and of the right to proceed as an indigent if the defendant cannot pay the cost for a trial de novo. (See [Rule 37.64\(c\)](#).)

Rule 37.64 Sentence and Judgment

(ee) Notification of Right to Trial De Novo. After imposing sentence the judge

shall advise the defendant of any right to trial de novo and the right of a defendant who is unable to pay the cost to proceed as an indigent.

In cases heard by a non-lawyer judge, the defendant has a right to trial do novo even when a plea of guilty has been entered in the municipal court.

A defendant is not entitled to a trial de novo until after there has been a sentence imposed after a finding of guilt after trial in the municipal division. A municipal judge has no authority to transfer a case to the circuit court for any proceedings unless there is a judgment in the municipal division. City of Webster Groves, Missouri v. Kurt, 797 S.W.2d 494 (Mo. App. 1990).

## **PROCEDURE FOR APPLICATION FOR TRIAL DE NOVO**

### **14.5 APPLICATION FORM**

A sample form for an application for trial de novo (see form 14-01) together with a sample form for the bond for trial de novo (see form 14-02) are provided at the end of this chapter. Also provided is a Trial De Novo Information Sheet (see form 14-03), which has been found to be very useful and helpful in providing information to defendants about the procedure used to file for trial de novo. It is recommended that the defendant sign one of the forms for inclusion in the court's file. The inclusion of a signed copy of the information sheet has been extremely useful in resolving disputes between defendants and the court where claims that the defendant was not provided the correct or sufficient information to perfect his/her right to trial de novo have been made.

It has been held that even an unsigned application for trial de novo is sufficient to perfect a defendant's request for trial de novo. It is not necessary that suggested forms be used so long as the application clearly indicates the defendant's intent to seek a trial de novo in the circuit court. City of Lake Winnebago v. Sharp, 652 S.W. 2d 118 (Mo. 1983). The application for the trial de novo must be filed with the municipal court clerk.

### **14.6 TEN-DAY FILING PERIOD**

#### **Rule 37.71 Trial de Novo - Right - Time**

(a) An application for trial de novo shall be filed as provided by law. No judge may order an extension of time for filing or perfection of an application for trial de novo.

(b) An application for trial de novo shall not be granted after the satisfaction by the defendant of any part of the penalty and costs of the judgment. (Amended December 18, 1998, effective January 1, 2000.)

The defendant must file an application for trial de novo with the municipal court clerk within 10 days from the time judgment is entered, and no extension of time can be granted, regardless of the reason. The specific requirement that the application for trial de novo be filed within 10 days was deleted in the 1998 amendment to Rule 37.71(a). The 10-day time limitation for filing the application for trial de novo remains in ' 479.200, RSMo. In the event the defendant pays any part of the fines or court costs assessed by the municipal court, or otherwise satisfies any part of the penalty, the defendant is barred from a trial de novo.

**14.7 COMPUTING THE TEN-DAY PERIOD**

The 10-day period of time for filing the application for trial de novo is computed in accordance with Rule 37.09(a).

**Rule 37.09 Time - Computation Of - Enlargement**

(a) Computation. In computing any period of time prescribed or allowed by this Rule 37, by order of court, or by an applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Examples: The judge finds the defendant guilty and sentences him or her on Tuesday, September 6, as shown on the calendar below.

SEPTEMBER						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

The 10-day period for filing the application for trial de novo begins on Wednesday, September 7. The last day on which the application can be filed is Friday, September 16. Assume though, that the judge sentences the defendant on Wednesday, September 7. The 10-day period then begins on Thursday, September 8. However, since the tenth day would fall on a Saturday, the period of time for filing the application for trial de novo is extended through Monday, September 19.

## 14.8 RULE AGAINST EXTENDING TEN-DAY PERIOD

Although Rule 37.09(b) allows the court to enlarge (extend) certain time limits for good cause, the same rule specifically states that the period of time for filing a application for trial de novo cannot be enlarged under any circumstances. (See [Rule 37.71\(a\).](#))

The filing of a motion to vacate a guilty plea entered in the municipal division does not toll the running of the ten day period for filing an application for trial de novo. Thus the 10-day period runs from the date of the conviction in the municipal division not from the date of the court's ruling on the motion. City of Slater, Missouri v. Burks, 714 S.W. 2d 534 (Mo. App. 1986).

## 14.9 RULE 37.09 TIME - COMPUTATION OF - ENLARGEMENT

(b) Enlargement. When by this Rule 37 or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown, may at any time in its discretion (1) with or without motion or notice, order the period enlarged if the request, therefore, is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon notice and motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but the court may not enlarge the period for filing an application for trial de novo.

## 14.10 COSTS OF FILING

Section 479.260.5, RSMo (1996) requires that an application for trial de novo be accompanied by payment of a \$30 fee.

479.260 Court Costs, Filing Fees.

5. In municipal ordinance violation cases, when there is an application for a trial de novo, there shall be an additional fee in an amount to be set pursuant to sections 488.010 to 488.020, RSMo, which shall be assessed in the same manner as provided in subsection 2 of this section.

488.012 Collections, clerk of court--amount of court costs

6. Twelve dollars for municipal court costs, fifteen dollars for municipal ordinance violations filed before an associate circuit judge and thirty dollars for applications for a trial de novo of a municipal ordinance violation, pursuant to section 479,260, RSMo.

However, the exact amount of the filing fee may vary in some circuits under local circuit court rules, so it is advisable to check with the local circuit clerk if there is any doubt.

If the defendant has been determined to be indigent, in which case the filing fee is waived, then the application for trial de novo must be accompanied by an affidavit of indigency.

## **PROCEDURE AFTER FILING OF APPLICATION FOR TRIAL DE NOVO**

### **14.11 STAY OF EXECUTION**

If there is any indication that the defendant might file an application for trial de novo, the judge should stay execution of the sentence for ten days to allow time for filing. Once the application is filed, execution of the sentence is automatically suspended until the case is actually heard again at the trial de novo. (See [Rule 37.72](#).)

#### **Rule 37.72 Trial De Novo - Stay of Execution**

The filing of an application for trial de novo or review shall suspend the execution of the judgment of the municipal division. If the applicant for trial de novo withdraws the application or, if before commencement of trial, the court enters a finding that the applicant has abandoned the trial de novo, the case shall be remanded to the municipal division for execution of judgment (Amended December 18, 1998, effective January 1, 2000)

### **14.12 BOND PENDING TRIAL DE NOVO**

Although a municipal judge has no specific authority by statute or Supreme Court rule, some municipal courts take the position that it is within the court's inherent authority to require the defendant to post an appearance bond to assure the defendant's appearance for the trial de novo, especially if no bond has been previously required. Such bond is only to assure the defendant's appearance in the circuit court and is not to be punitive in nature; thus, the bond cannot properly be set so high as to deprive defendants of their basic right to a trial de novo under due process.

Any bond previously posted, or imposed by the court pending trial de novo, is to be forwarded to the circuit clerk together with the filing fee, application for trial de novo, and other records as described in Section 14.12 of this chapter.

### **14.13 TRANSMITTAL OF RECORD**

Upon receipt of the application for trial de novo, the clerk of the municipal court should stamp

the application to show the actual date filed and collect the appropriate application fee (or affidavit of indigency, when applicable).

A duplicate copy of the municipal court records, including the trial de novo application, should be made and kept in the municipal court file. The clerk then certifies the original record as being true and complete. (See [Rule 37.73](#).)

#### Rule 37.73 Trial de Novo - Transmittal of Record

When an application for trial de novo is filed, the clerk shall transmit the duly certified record to the clerk of the division designated to hear ordinance violations de novo. The failure of the clerk to transmit the record shall not affect the defendant's trial de novo. (Adopted May 14, 1985, effective January 1, 1986.)

The municipal court should forward to the circuit clerk, or to the associate circuit division if designated by local court rule, the following:

1. The application for trial de novo:
2. The certified record and all related documents, including the original signed information;
3. The appropriate trial de novo fee (or affidavit of indigency); and
4. Any bond given as security in the case.

Local circuit court rules or policies may vary as to how the trial de novo fee or bond monies or both should be transmitted. Again, the municipal court should check with the local circuit court clerk if there is any question in this regard.

#### **14.14 DISPOSITION OF TRIAL DE NOVO**

Trial de novo proceedings in the associate circuit court, are the same as for a trial of a misdemeanor by the rules of criminal procedure. (See [Rule 37.74](#).)

#### Rule 37.74 Trial de Novo — Procedure

All trials de novo shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure. (Adopted May 14, 1985, effective January 1, 1986)

Once the trial de novo application and associated records and monies are transmitted to the circuit clerk or associate division, the municipal judge has no further jurisdiction, and his/her

involvement in the case ends at that point. The municipal court docket and related municipal court records should be closed with an appropriate notation as to the application for trial de novo having been received and the file having been transmitted to the circuit clerk or associate circuit division, as applicable. Collection of any fines or costs subsequently imposed, if the defendant is found guilty on trial de novo, and transmittal of such fines or costs back to the original municipality, as required, becomes the responsibility of the circuit division hearing the trial de novo.

It has often been strongly suggested that a municipal judge not be concerned about how many of his or her decisions are changed after a trial de novo lest such knowledge cloud the judge's judgment on future cases. The municipal judge should remember that the testimony and evidence presented on trial de novo may differ greatly from that presented at the original hearing; thus acquittal or a reduced sentence on trial de novo does not necessarily mean that the municipal judge who originally heard the case erred in the original decision or sentencing.



IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:
	Court ORI Number:
City of _____, _____ vs. _____ (Date File Stamp)	
Defendant's Name/Address:	Judgment Date:
	Applicant's Telephone Number:

### Application for Trial De Novo/Review

Judgment having been rendered against me before the Municipal Division of the Circuit Court, I the above named defendant, make application for  Trial De Novo  Review. (Check one.)

\_\_\_\_\_ Date

\_\_\_\_\_ Applicant Signature

\_\_\_\_\_ Date Filed

\_\_\_\_\_ Clerk

# CHAPTER XV. - CONTEMPT OF COURT

Judge Mark S. Levitt

Section	Page Number
15.1 Introduction.....	3
15.2 Authority of Municipal Courts .....	3
<b>DIRECT CRIMINAL CONTEMPT.....</b>	<b>4</b>
15.3 Defined and Contrasted with Civil Contempt.....	4
15.4 Intent Requirement .....	5
15.5 Procedure for Imposing Punishment.....	6
15.6 Conduct Protected by First Amendment.....	6
<b>INDIRECT CRIMINAL CONTEMPT .....</b>	<b>6</b>
15.7 Defined and Contrasted with Direct Contempt.....	6
15.8 Summary Punishment Prohibited .....	7
15.9 Burden of Proof.....	7
15.10 Good Faith as Mitigating Factor.....	8
15.11 Disqualification of Judge .....	8
<b>JUDGMENT.....</b>	<b>8</b>
15.12 Orders to be in Writing .....	8
<b>AFFILIATED FORMS .....</b>	<b>9</b>
15.13 Procedure for Review .....	9
15.14 Punishment.....	10

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## **CHAPTER XV CONTEMPT OF COURT**

### **15.1 INTRODUCTION**

This chapter is not intended to be a complete treatise on the subject of contempt of court. Its purpose is to give a general understanding and background of the court's contempt powers. The reader should not let this chapter be a substitute for independent legal research, but rather should consider it a starting point for further study and research on this topic. In this spirit, the author suggests that a thorough reading of the case of McMillian v. Rennau, 619 S.W.2d 848 (Mo.App. W.D. 1981), which contains an excellent discussion of the law of contempt, is an appropriate starting place for research in the area of contempt.

Contempt of court is defined in Black's Law Dictionary, 4<sup>th</sup> Revised Edition, (1968), page 390 as "Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or dignity. Ex parte Holbrook, 133 Me. 276, 177 A. 418, 420. Committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to proceeding therein, willfully disobeys or fails to comply with an undertaking which he has given. Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621, 623, 23 A.L.R. 183."

The author believes that because of the nature of the court's contempt power, the court should, at all times, take extreme care in imposing and using the power of contempt of court, and that this power should be used extremely rarely and with great restraint.

See affiliated forms following this chapter:

MBB 15-02 Motion for Contempt

MBB 15-01 Show Cause Order

MBB 15-03 Judgment of Contempt

MBB 15-04 Warrant of Commitment for Contempt of Court

### **15.2 AUTHORITY OF MUNICIPAL COURTS**

The authority for the judge of a municipal division of a circuit court in the state of Missouri to punish for criminal contempt of court is found in Rule 37.75 that was amended on December 23, 2003, eff. July 1, 2004. Rule 37.75 reads as follows:

#### **Criminal Contempt**

- (a) A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the judge's presence. The judgment of contempt and the order of commitment shall recite the facts and shall be signed by the judge and entered of record.

- (b) All other instances of contempt shall be prosecuted on notice. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt, the judge shall recite, in the judgment of contempt and in the order of commitment, the essential facts constituting the criminal contempt and fixing the punishment.

Courts of common law general jurisdiction have the inherent power to punish for contempt. However, since a municipal division of the circuit court is not a common law court of general jurisdiction, it is this author's opinion that the contempt power of a municipal judge of a municipal division is limited to the criminal contempt power expressly provided for in Rule 37.75, quoted above.

A municipal division does not have civil contempt powers. McMillian v. Rennau, 619 S.W.2d 848 (Mo.App. W.D. 1981); White v. Held, 269 S.W.2d 125 (Mo.App. E.D. 1954).

## **DIRECT CRIMINAL CONTEMPT**

### **15.3 DEFINED AND CONTRASTED WITH CIVIL CONTEMPT**

Direct criminal contempt deals with conduct or actions that are committed in the actual presence of the court while court is in session and that were actually seen or heard by the judge presiding. Generally speaking, "criminal contempt" results from actions directed against the dignity of the court that brings the court into disrepute by ignoring its judgments, by challenging its authority, or by affronting its majesty as an agent of government. Such contempt consequently affects all the people of the municipality and state.

Identifying the underlying concepts and purposes of civil and criminal contempt powers helps to understand how they differ. Civil contempt is generally intended to protect a party to the litigation, the party for whose benefit the judgment or decree was entered. Civil contempt provides a means to compel one party to the civil litigation to comply with the judgment entered in favor of the other party.

Criminal contempt, on the other hand, does not serve the function of aiding a litigant in achieving the relief granted, but instead protects the dignity of the court and the authority of the court's orders and decrees. The basis of criminal contempt is the intentional interference with the judicial process and the refusal to be bound by judicial orders. Criminal contempt springs not from the need to protect the litigant, but from the necessary power of the court to protect the judicial system established by the people. It has been said that without this power the courts are no more than advisory bodies to be heeded or not at the whim of the individual.

The following cases involve discussions regarding the criminal contempt. Teefey v. Teefey, 533 S.W.2d 563 (Mo. 1976); Saab v. Saab, 637 S.W.2d 790 (Mo.App. E.D. 1982); State, on Inf. of McKittrick v. Koon, 201 S.W.2d 446 (Mo. 1947); International Motor Company, Inc. v. Boghasian Motor Company, Inc., 870 S.W.2d. 843(Mo.App.E.D.1993); State ex rel. Tennenbaum v. Clark, 838 S.W.2d 26 (Mo.App.W.D.1992); Happy v. Happy, 941 S.W.2d 539

(Mo.App.W.D.1997); State ex rel. Picerno v. Mauer, 920 S.W.2d 904 (Mo.App. W.D.1996); State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994).

Direct criminal contempt must consist of conduct that the judge certifies that he or she saw or heard and that was committed in his or her presence during a session of court. Conduct occurring at the clerk's office or in the hallway that does not actually disrupt the judicial proceeding or that occurs during a recess of the court is not an instance of direct criminal contempt. Rule 37.75(a).

Direct criminal contempt may be punished summarily; that is, the judge may hold the contemnor in contempt immediately and without the notice and hearing required for indirect criminal contempt, as will be discussed later in this chapter. Rule 37.75(a).

Direct criminal contempt generally consists of acts done in the presence of the court that tend to obstruct or interfere with the peaceful and orderly functioning of the court. A judge should not summarily punish for contempt a trivial act that does not actually tend to interfere with the peaceful and orderly functioning of the court or impede or embarrass the administration of justice. McMillian v. Rennau, *supra*.

But, false statements made by a witness, under oath, are not subject to summary punishment as indirect criminal contempt, although they may lead to a conviction on a criminal charge of perjury. State, ex.rel. Shepherd v. Steeb, 734 S.W.2d. 610 (Mo.App.W.D.1987).

The refusal of a defendant to give permission to the judge to use the defendant's name is not direct criminal contempt. The refusal of defendant was inconsequential. The court exceeded its jurisdiction by holding defendant in criminal contempt. In re Lomax v. Merritt, S.W.3d (Mo.App.S.D. 2005). This case also gives a lengthy discussion of the types of contempt and the requirements for a proper finding of contempt.

#### **15.4 INTENT REQUIREMENT**

The conduct of the contemnor must be intentional or at least demonstrate that the contemnor should reasonably be aware that the conduct is wrongful. Obviously, conduct such as cursing the judge constitutes direct criminal contempt and may be punished summarily and without giving the individual involved any advance warning because people should know that such conduct is wrong. However, it is generally a good practice, where possible, to warn an individual that his or her conduct is contemptuous, and that if the conduct continues, he or she will be held in contempt of court and punished for that contempt. If the conduct continues after warning, the judge is justified in summarily holding the individual in contempt and punishing immediately for that contemptuous behavior, as intentional contempt of the court's authority is then evident. McMullin v. Sulgrove, 459 S.W.2d 383, 388 (Mo. 1970); State ex rel. Wendt v. Journey, 492 S.W.2d 861, 864 (Mo.App. E.D. 1973); In Re Blankenship, 553 S.W.2d 307, 309 (Mo.App. W.D. 1977); U.S. v. Dowdy, 960 F.2d 78 (8th Circuit 1992).

## **15.5 PROCEDURE FOR IMPOSING PUNISHMENT**

After determining that summary contempt is necessary, the court should advise the contemnor as to exactly what act or conduct is contemptuous, and the court should ask the contemnor whether he or she knows the act is contemptuous and if there is any reason or excuse for the act or conduct. If the court is satisfied that the act or conduct is contemptuous and that there is no reasonable excuse for the conduct, and once the order of contempt and order of commitment have been prepared, the court should read the account of the facts and circumstances constituting the contempt to the contemnor, afford the contemnor allocution if he or she is to be imprisoned, find him or her in contempt, and pronounce and impose the punishment. State ex rel. Burrell-El v. Autrey, 752 S.W.2d 895, 899 (Mo.App. E.D. 1988).

It is the opinion of this author, that the right to appointment of counsel in indigency situations, right to trial by jury, right to change of judge and right to change of venue, that generally apply in the indirect criminal contempt cases, do not apply in the context of direct criminal contempt. Because direct criminal contempt occurs in the immediate presence and hearing of the court, the court must take immediate action to protect the dignity and functioning of the court.

## **15.6 CONDUCT PROTECTED BY FIRST AMENDMENT**

Where conduct occurs that is alleged to be contemptuous and a claim is made that the conduct is protected under the First Amendment to the United States Constitution, Freedom of Religion Clause, a balance must be struck between the court's power to preserve its dignity and the orderly functioning of the court and the individual's protection of First Amendment Freedom of Religion Rights. In such a case, a person claiming an infringement of the right to free exercise of religion has the burden initially, to show that there is a "religion" within the constitutional meaning of religion and that the conduct infringed is truly "religious" in nature. Although it is inappropriate to question the verity of a religious belief, the sincerity of the religious belief may be examined.

To demonstrate that there is a religion in the constitutional sense, that the conduct in question is truly religious, and that the religious belief is sincere, a person claiming the free exercise of religion is entitled to a "Threshold Hearing" to offer testimony and evidence. If a person claiming free exercise of religion develops and proves (or if judicial notice may be taken) that the religion is truly a religion within the meaning of constitutional principles, and the act or conduct in the courtroom is an essential tenet or an essential part of that religion, then the state or city bears a heavy burden to establish that the state's interest in maintaining dignity and decorum would override the interest of the free exercise of religion that might threaten public peace, order and safety. State ex rel. Burrell-El v. Autrey, 752 S.W.2d 895, 900-901 (Mo.App. E.D. 1988).

## **INDIRECT CRIMINAL CONTEMPT**

### **15.7 DEFINED AND CONTRASTED WITH DIRECT CONTEMPT**

As stated previously in this chapter, direct criminal contempt generally consists of acts done in the presence of the court that obstruct or interfere with the peaceful and orderly function of the

tribunal or constitute an open insult to the presiding judge's person in the court's presence. Indirect criminal contempt generally takes place outside of the actual presence and hearing of the court. It is an act, done at a distance that tends to degrade, obstruct, interfere, belittle, prevent, or embarrass the administration of justice. As with direct criminal contempt, a judge dealing with indirect criminal contempt must be mindful of the purpose of the court's contempt power, and not attempt to punish for contempt matters of a trivial nature or acts that merely irritate a judge but do not pose any threat to the functioning of the judiciary in general or to the particular court involved. Ryan v. Moreland, 653 S.W.2d 244 (Mo.App. E.D. 1983).

Contempt power should be used only when the judicial function is integrally threatened. The power to punish for contempt should be used sparingly, wisely, and with judicial restraint, and only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. In Re Estate of Dothage, 727 S.W.2d 925, 927 (Mo.App. W.D. 1987); Fulton v. Fulton, 528 S.W.2d 146, 157 (Mo.App. S.D. 1975); McMillian v. Rennau, *supra*.

See In Re: Frank A. Conard, Respondent, 944 S.W.2d 191 (Mo. 1997). Although this is an original disciplinary proceeding before the Supreme Court of Missouri, there is a lengthy discussion of criminal contempt and the problems which might result if the judge exceeds his jurisdiction and becomes personally involved in the dispute. This case deals with civil vs. criminal contempt, disqualification of judge, and direct vs. indirect contempt. This judge was found guilty of misconduct in his official duties and was suspended without pay for thirty days.

## **15.8 SUMMARY PUNISHMENT PROHIBITED**

Unlike direct contempt, indirect criminal contempt may not be punished summarily. The alleged contemnor is entitled to a hearing at which he or she can present evidence, be represented by counsel, and cross-examine witnesses. If there is a reasonable likelihood of jail time being imposed, the contemnor who is indigent and consequently unable to retain counsel should be provided with appointed counsel. Hunt v. Moreland, 697 S.W.2d 326, 329-330 (Mo.App. E.D. 1985). "Notice must be given to the alleged contemnor specifying the alleged acts of contempt that were supposed to be committed." See City of Pagedale v. Taylor, 831 S.W.2d 723 (Mo.App. E.D. 1992) and In Re Conard, *Supra*.

## **15.9 BURDEN OF PROOF**

The burden of proof in an indirect criminal contempt proceeding is on the municipality. The alleged contemnor must be found guilty of the alleged contemptuous conduct beyond a reasonable doubt. The contemnor cannot be required to testify against himself or herself. Chemical Fireproofing v. Bronska, 553 S.W.2d 710, 714 (Mo.App. E.D. 1977); State ex rel. Pini v. Moreland, 686 S.W.2d 499, 501 (Mo.App. E.D. 1984); Osborne v. Purdome, 244 S.W.2d 1005 (Mo. 1952); State, ex.rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.1994); Ramsey v. Grayland, 567 S.W.2d 682, 686 (Mo.App. E.D. 1978). There is no constitutional right to a jury trial so long as the jail sentence handed down by the judge does not exceed six months. Ryan v. Moreland, 653 S.W.2d 244, 248 (Mo.App. E.D. 1983).

## 15.10 GOOD FAITH AS MITIGATING FACTOR

In determining whether a person is guilty of contempt, the court can and should consider that person's good faith or lack of it. Although it is not a defense that the contemnor acted on the advice of counsel, or acted in good faith and on the advice of counsel, the court should consider such facts in mitigation of both the offense and the punishment. State on Inf. of McKittrick v. Koon, supra; Hoffmeister v. Tod, 349 S.W.2d 5, 18 (Mo. 1961).

## 15.11 DISQUALIFICATION OF JUDGE

If the indirect criminal contempt charged involves disrespect or criticism of the judge, the judge is disqualified to hear the matter except with the defendant's consent. Rule 37.75(b); State ex rel. Wendt v. Journey, supra. However, the mere fact that the judge is the instigator of the proceedings does not disqualify him or her to sit; also, a change of venue generally does not lie. The rules of criminal law generally do not apply because a proceeding for criminal contempt is sui generis and is controlled by its own rules. State ex rel. Wendt v. Journey, supra; Mechanic v. Gruensfelder, 461 S.W.2d 298, 309 (Mo.App. E.D. 1970). It has also been held that although the judge who issues an order might be expected to have some interest in insuring compliance with it and would have more knowledge of the circumstances that form the basis of the contempt, this interest does not in and of itself disqualify the judge from hearing the contempt proceeding. Ramsey v. Grayland, supra.

## JUDGMENT

### 15.12 ORDERS TO BE IN WRITING

The order of contempt, as well as the order of commitment for contempt, should be in writing and should recite the actual facts constituting the contempt. Although, there is some authority for the proposition that a Warrant of Commitment that does not contain the specific facts constituting the contempt can be validated by specifically incorporating by reference the Order of Contempt (containing the proper recitation of facts) in the Order or Warrant of Commitment, this author believes the more prudent approach is to recite, in full, the facts constituting the contempt in BOTH orders as per the specific language of Supreme Court Rule 37.75. Bewig v. Bewig, 784 S.W.2d 823 (Mo. App.E.D.1990). In any event, a commitment is invalid where not supported by a valid Judgment of Contempt, since it is the judgment, not the commitment order, that provides the legal basis to detain an individual. Nesser v. Pennoyer, 887 S.W.2d 394 (Mo.1994). A judge should take care to recite, in detail, the facts and circumstances constituting the offense. Mere legal conclusions are not sufficient and would result in an invalid order that could be successfully attacked. Rule 37.75; Ex parte Brown, 530 S.W.2d 228, 231 (Mo. 1975), State ex.rel. Barth v. Corrigan, 870 S.W.2d 458 (Mo.App.E.D.1994); Burton v. Everett, 845 S.W.2d 710 (Mo.App.W.D.1993).

In Re: Steven W. Brown, Petitioner, 12 S.W.3d 398 (Mo.App. 2000). In this Eastern District case, petitioner was held in contempt and incarcerated for failing to obey a court order for paying child support. He petitioned the court of appeals for a writ of habeas corpus arguing that the judgment of contempt and order of commitment are invalid because the trial court failed to

specifically find that he had the present ability to purge himself of contempt by paying the amounts due per the order in the dissolution. He further alleged that the judgment and order of contempt are invalid because they did not set forth the facts and circumstances that constitute the contempt on his part. The court of appeals granted the habeas corpus and ordered petitioner discharged from custody. It found that the failure of the trial court to set forth the facts and circumstances of his conduct which constitute contempt renders the court's findings mere conclusions insufficient to support the order of commitment. It further found that to require him to make a lump sum payment of over \$13,000.00 without finding specific facts to support the conclusion that he had the present ability to do so was legally insufficient.

## **AFFILIATED FORMS**

See MBB 15-03 Judgment of Contempt and MBB 15-04 Warrant of Commitment for Contempt of Court following this chapter.

### **15.13 PROCEDURE FOR REVIEW**

A finding of criminal contempt, whether direct or indirect, is not reviewable by a trial de novo or on a direct appeal, but may be tested for its legality only by a writ of habeas corpus, or if a fine is imposed, then by a writ of prohibition. Ramsey v. Grayland, supra; State ex rel. Burrell-El v. Autrey, supra; International Motor Company, Inc. v. Boghasian, Inc., 870 S.W.2d 843 (Mo.App.E.D.1993).

The initial determination of whether a writ should be granted is based on the contents of the order of contempt and the order of commitment. Therefore, a judge should take care to fully recite the facts and conversation as nearly verbatim as possible in both orders. Recitation of the proper facts in one order does not cure the defect of the other order not containing the proper recitals. Ex Parte Ryan, 607 S.W.2d 888, 891 (Mo.App. S.D. 1980); Rule 37.75. A judge should also make certain that the orders recite the facts needed to show that all essential elements of Rule 37.75 have been satisfied. This is true whether direct or indirect contempt is involved.

State of Missouri ex rel., Euclid Plaza Associates, L.L.C., Relator v. Honorable David C. Mason, ED80801, May 14, 2002. In this action, relator filed a petition for a writ of prohibition seeking to prohibit the enforcement of a contempt order entered by respondent. The Eastern District found that since Judge Mason's order did not specifically prohibit relator's actions, no action for contempt could lie. The judge exceeded his authority by finding relator in contempt. The preliminary order in prohibition was made absolute.

State of Missouri, ex rel., Rebecca Lepper, Relator v. Hon. Byron L. Kinder and Thomas J. Brown, III, Respondents, 14 S.W.3d 674 (Mo.App. 2000). In this Western District case, the wife claimed that she did not receive dissolution papers including parenting plan prior to signing the custody stipulation agreement. Following a hearing on the enforcement issue, her husband filed a motion for contempt. Trial court held a hearing and found her guilty of perjury and issued an order for contempt, fining her \$5,000.00. Relator sought a writ of prohibition. The court of appeals found that the trial court did not have authority to hold relator in contempt for perjury.

An untruthful witness may be charged with perjury, but not contempt. The trial court's judgment of contempt and fine exceeded its jurisdiction.

#### **15.14 PUNISHMENT**

The punishment entered by the judge for contempt should reflect the nature of the conduct involved. Criminal contempt may be punished by a fixed jail term or by the imposition of a set fine. The court may grant probation and thereby suspend execution of sentence entered by the court on such conditions as the judge deems appropriate under the circumstances of the case.





IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, MISSOURI

MUNICIPAL DIVISION, CITY OF \_\_\_\_\_

Judge or Division:	Case Number:	(Date File Stamp)
	Court ORI Number:	
City of _____		
vs.		
Defendant's Name/Address:		

### Motion for Contempt

Comes now the undersigned and states that the defendant \_\_\_\_\_  
has committed an act constituting  
 Direct Criminal Contempt of Court       Indirect Criminal Contempt of Court on the \_\_\_\_\_  
day of \_\_\_\_\_, \_\_\_\_\_ by:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

**Wherefore**, the undersigned prays the court to issue its order directed to the defendant to show cause why he/she should not be held in criminal contempt of court and punished therefore.

\_\_\_\_\_  
Prosecuting Attorney

I certify that a copy of this motion has been mailed to the above named defendant and defendant's attorney, if applicable, by regular mail on: \_\_\_\_\_ (date).

\_\_\_\_\_  
City Prosecutor





**Officer's Return**

I certify that I have served the warrant in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of Missouri on the \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Peace Officer

## CHAPTER XVI. - JUDICIAL ETHICS

### Judge William G. Buchholz II

<b>Section</b>		<b>Page Number</b>
16.1	Introduction.....	4
16.2	Code of Judicial Conduct.....	4
16.3	Advisory Opinions .....	4
16.4	Methods of Study.....	5
16.5	Applicability of the Code to Part Time Judges.....	5
<b>THE CODE OF JUDICIAL CONDUCT AND RELATED ADVISORY OPINIONS .....</b>		<b>5</b>
16.6	Canon 1 – A Judge Shall Uphold the Integrity and Independence of the Judiciary .....	5
16.6(A)	Definitions Pertaining to Canon 1: .....	5
16.6(B)	Advisory Opinions Regarding Canon 1:.....	5
16.7	Canon 2 A Judge Shall Avoid IMPROPRIETY and the Appearance of Impropriety in all of the Judge’s Activities .....	6
16.7(A)	Definitions Pertaining to Canon .....	6
16.7(B)(1)	Advisory Opinions Regarding Canon 2A.....	6
16.7(B)(2)	Advisory Opinions Regarding Canon 2B: .....	7
16.8	Canon 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently .....	8
16.8(A)	Definitions Pertaining to Canon 3 .....	11
16.8(B)(1)	Advisory Opinions Regarding Canon 3B .....	12
16.8(B)(2)	Advisory Opinions REGARDING Canon 3C .....	14
16.8(B)(3)	Advisory Opinions Regarding Canon 3E .....	14
16.9	Canon 4 – A Judge Shall so Conduct the Judge’s Extrajudicial Activities as to Minimize the Risk of Conflict with Judicial Obligations .....	16
16.9(A)	Definitions Pertaining to Canon 4 .....	19

16.9(B)(1)	Advisory Opinions Regarding Canon 4A.....	20
16.9(B)(2)	Advisory Opinions Regarding Canon 4B .....	21
16.9(B)(3)	Advisory Opinions Regarding Canon 4C .....	21
16.9(B)(4)	Advisory Opinions Regarding Canon 4C(2 & 3)16.9(B)(4) - ADVISORY OPINIONS REGARDING CANON 4C(2 & 3).....	21
16.9(B)(5)	Advisory Opinions Pertaining to Canon 4G.....	24
16.9(B)	Advisory Opinions Regarding Canon 4H.....	24
16.10	Canon 5 – A Judge and Certain of the Judge’s Employees Shall Refrain from Inappropriate Political Activity .....	25
16.10(A)	Definitions Pertaining to Canon 5 .....	26
16.10(B)(1)	Advisory Opinions Pertaining to Canon 5A(1) and 5A(2):.....	26
16.10(B)(2)	Advisory Opinions Pertaining to 5A(3):.....	27
16.10(B)(3)	Advisory Opinions Pertaining to Canon 5A(4): .....	27
16.10(B)(4)	Advisory Opinions Pertaining to Canon 5A(5): .....	27
16.10(B)(5)	Advisory Opinions Pertaining to Canon 5B(2): .....	28
<b>FUNCTIONING OF THE COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE OF JUDGES.....</b>		<b>29</b>
16.11	Discipline of Judges.....	29
16.12	Complaint Process .....	29
16.13	What to do When Faced with an Ethical DILEMMA .....	29

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Judge William G. Buchholz II received his B.A. from Columbia University and his J.D. from St. Louis University. He is presently a Municipal Judge for the city of Country Club Hills. He also serves as Provisional Judge in the cities of Jennings, Chesterfield, St. Ann, and Riverview. All courts in which he serves are located in the 21st Judicial Circuit, St. Louis County.

# **CHAPTER XVI**

## **JUDICIAL ETHICS**

### **16.1 INTRODUCTION**

The purpose of this chapter is to review the Code of Judicial Conduct, the functioning of the Commission on the Retirement, Removal and Discipline of Judges and advisory opinions which have been rendered regarding particular Canons. The final section will deal with the steps a judge should take when faced with an ethical dilemma.

### **16.2 CODE OF JUDICIAL CONDUCT**

The Code of Judicial Conduct is found under Rule 2 of the Missouri Rules of Court. There are five basic Canons of Ethics. Each Canon is followed by subparts that further explain the Canon and its application. Following the subparts is a commentary explaining the reasoning behind the rule and supplying further clarification.

### **16.3 ADVISORY OPINIONS**

Advisory opinions are available from the Commissioner on Retirement, Removal and Discipline of Judges. Any judge may request an opinion from the commission as to the propriety of contemplated judicial or non-judicial conduct. The Commission has issued 180 opinions to date.

The commission's internal rules dictate that the opinion shall be advisory only and shall not be binding on the commission. However, compliance with an opinion of the commission shall be considered to be a good faith effort to comply with the Code of Judicial Conduct. No opinion of the commission shall be authority for the conduct or evidence of good faith of another judge unless the underlying facts are identical. The commission may withdraw any opinion. In order to request an opinion, a judge shall submit the request in writing, stating the facts in detail, and the question to be answered. The request should also state any legal authority or theory known to the requesting judge which would aid the commission in answering the question. Requests for advisory opinions should be sent to the following address:

Commission on Retirement, Removal & Discipline  
James M. Smith, Administrator and Council  
2190 S. Mason, Suite 201  
St. Louis, MO 63131

The commission shall issue its opinion in writing. Copies of each opinion are kept by the commission in its file. The commission's opinions may be released to the public, but all references to the name of the requesting judge must be deleted.

## **16.4 METHODS OF STUDY**

When studying a particular Canon, a judge should read the Canon, all subparts and the Commentary. This chapter provides an index and summary of advisory opinions and selected court decisions issued regarding each Canon. Two things must be noted. First, the Canons have been revised and new language may affect a particular opinion. Second, the following are summaries of advisory opinions. The full text of the opinion should be secured from the commission if a judge intends to rely upon the same. Many opinions cite several Canons in response to an inquiry. The listing of opinions below are grouped according to the primary Canon upon which the opinion was rendered.

## **16.5 APPLICABILITY OF THE CODE TO PART TIME JUDGES**

The code provides that only Canons 1, 2, and 3 are applicable to part-time judges. A part-time judge is defined as "a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other occupation and whose compensation for that reason is less than that of a full-time judge." A part-time judge who is serving as a senior judge must comply with all Canons except Canon 4H(2).

## **THE CODE OF JUDICIAL CONDUCT AND RELATED ADVISORY OPINIONS**

### **16.6 CANON 1 – A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY**

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Rule 2 are to be construed and applied to further that objective.

#### **16.6(A) DEFINITIONS PERTAINING TO CANON 1:**

2.02(p) - "*shall*" or "*shall not*" intends to impose binding obligations the violation of which can result in disciplinary action.

#### **16.6(B) ADVISORY OPINIONS REGARDING CANON 1:**

Opinion 141 - A judge should not hold a dual role of municipal judge and building commissioner. This was true even though the change of the issuance of a misdemeanor charge based upon a building code violation was remote.

Opinion 164 - A municipal judge may not serve on a Regional Advisory Counsel for the state Department of Alcohol and Drug Abuse. The commission reasoned that a judge who established public and procedures for alcohol and drug rehabilitation and thereafter required defendants to participate in such programs created a potential conflict of interest and had an appearance of impropriety.

**16.7 CANON 2 A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES**

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

**16.7(A) DEFINITIONS PERTAINING TO CANON**

*"shall"* - See subsection 16.6(A).

The *"law"* is defined in 2.02(h) as follows: "Law" denotes court rules as well as applicable constitutional provisions, statutes, ordinances and decisional and other law. See Canons 2A, 3A, 3B(2), 3B(7), 4B, 4C, 4E, 4F and 4I.

**16.7(B)(1) ADVISORY OPINIONS REGARDING CANON 2A**

Opinion 17 - A judge may not accept fees, gifts or gratuities for performing marriages. To do so violates the Constitution of the state of Missouri and the Code of Judicial Conduct. Any unsolicited fees, gifts or gratuities should be returned to the donor. If return is not possible, the same should be forwarded to the state of Missouri Escheat Fund.

Opinion 38 - A judge may not appoint his son as Guardian Ad Litem, appraiser, referee, trustee or attorney for an indigent as this could be considered an exercise of nepotism or favoritism. This is true for remunerative and non-remunerative assignments.

Opinion 39 - The commission indicated that the use of court stationary by the judge for private business is not absolutely prohibited but will be considered on a case by case basis. The standard will be whether or not the use will lend the prestige of office to private affairs and the appearance of impropriety.

Opinion 63 - A municipal judge asked whether he could be appointed to represent an indigent in a criminal case. The commission issued an opinion stating that a municipal judge should not be appointed to represent criminal indigents because the judge could conceivably be a judge in one trial and the defense in another trial involving the same facts.

Opinion 73 - A judge should not allow his picture to appear in a newspaper advertisement warning drivers of drinking and driving and "stiff penalties." Such an advertisement may create the impression of a preconceived sentencing policy and would not promote public confidence in the integrity and impartiality of the judiciary.

Opinion 81 - The commission further clarified what a municipal judge could and could not do in

his practice of law. A municipal judge should not practice law within his municipality and should withdraw from any criminal case occurring within his municipality for which he had been retained prior to swearing in as municipal judge.

Opinion 84A and 97 - Both of these opinions deal with a municipal judge accepting compensation from public service work. The issue arose because of the prohibition found in Article V, Section 20, of the Constitution of the State of Missouri, which reads: "No judge shall receive any other or additional compensation for any public service."

Initially, the commission found that this provision dealt with both part-time and full-time judges. The commission ruled that "all state and municipal judges shall not accept compensation for a public service from the State of Missouri, other than their judicial salary." The commission stated that a part-time judge could serve on organizations such as the Board of Directors of a Missouri college as long as he did not accept compensation and there was no appearance of impropriety. Full-time judges are strictly forbidden from serving on such commissions.

Finally, the commission ruled that a part-time judge could accept compensation for counseling students for a state college if he was paid by a private organization.

Opinion 85 - A full-time municipal judge may not participate in political activities. However, a part-time judge may be a member of a congressman's re-election committee and attend a fundraiser. NOTE: Opinion 129, found at 16.10(B)(1) withdraws certain aspects of Opinion 85.

Opinion 126 - A judge had inquired whether his clerk could hold a part-time job with one of the court services companies currently servicing his court. The commission ruled that the clerk's acceptance of such a position might create the appearance of impropriety and the potential for allegations of preferential treatment of the court service in the judge's own court.

Opinion 141 - See Subsection 16.6(B)

Opinion 164 - See Subsection 16.6(B)

Opinions 172, 173 – See Subsection 16.9(B)(4)

#### **16.7(B)(2) ADVISORY OPINIONS REGARDING CANON 2B:**

Opinion 133 - A judge may give a recommendation and use his judicial stationery for that purpose. However, special circumstances may exist which would make such a recommendation inappropriate. Each case must be examined to determine if the same constitutes a misuse or abuse of the prestige of his office.

Opinion 137 - A judge may not recommend a disbarred attorney reinstatement to The Missouri Bar and the Supreme Court without a subpoena or a specific request from The Missouri Bar or the Supreme Court.

Opinion 157 - Canon 4 and 2B do not prohibit a judge from publicly recognizing and issuing a plaque to those individuals who have provided pro bono exemplary services to the juvenile court system.

Opinion 179 – A judge should not be involved in a continuing legal education program sponsored by a law firm where the program will be advertised to the Bar of the general public interest using the judge’s name and title.

The use of the judge’s name and title in promotion of continuing legal education programs sponsored by bar associations, law school or other organizations that are not likely to appear before the judge as a party or an attorney for a party is allowed to a limited extent under the guidelines as set forth in the opinion.

## **16.8 CANON 3 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY**

A. Judicial Duties in General. The judicial duties of a judge take precedent over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers and of staff, court officials and other subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability or age against parties, witnesses, counsel or others. This Canon 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability or age or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence for the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allow an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) A judge shall abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the Court.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Rule 2 should take appropriate action. A judge having knowledge that another judge has committed a violation for this Rule 2 that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of Rule 4 should take appropriate action. A judge having knowledge that a lawyer has committed a violation of Rule 4 that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in the respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Canon 3D(1) or Canon 3D(2) are part of a judge's judicial duties and shall be absolutely privileged and no civil action predicated thereon may be instituted against the judge.

E. Recusal

(1) A judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest, that could be substantially affected by the proceeding;

(d) The judge or the judge's spouse, or a person with the third degree of relationship to either of them, or the spouse of such person:

- (i) Is a party to the proceeding or an officer, director or trustee of a party;
- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Canon 3E may disclose on the record the basis of disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

## **16.8(A) DEFINITIONS PERTAINING TO CANON 3**

*2.02(h) - "Law"* - See subsection 16.7(A).

*2.02(a) - "Appropriate authority"* denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Canons 3D(1) and 3D(2).

*2.02(p) - "Shall"* - See subsection 16.6(A).

*2.02(s) - "Third degree of relationship"* - The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Canon 3E(1)(d) and 4E(1).

*2.02(o) - "Require"* - The rules prescribing that a judge "require" certain conduct of others are, like all provisions of this Rule 2, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Canon 3.

*2.02(c) - "Court personnel"* are reporters, clerks, bailiffs and office personnel performing duties in a proceeding before a judge but are not lawyers representing litigants. See Canons 3B(7)(c)

and 3B(9).

2.02(l) - "*Nonpublic information*" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statutes or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports. See Canon 3B(11).

2.02(g) - "*Knowingly*", *knowledge*", "*known*" or "*knows*" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Canons 3D and 3E(1).

2.02(j) - "*Member of the judge's family residing in the judge's household*" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Canons 3E(1) and 4D(3).

2.02(e) - "*Economic interest*" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

- (1) Ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest.
- (2) Service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization.
- (3) A deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest.
- (4) Ownership of government securities is not an economic interest in the issue unless a proceeding pending or impending before the judge could substantially affect the value of the securities.
- (5) Ownership of small amounts of publicly traded corporations is not an economic interest unless a proceeding pending or impending before the judge could substantially affect the value of the shares.

2.02(d) - "*De minimis*" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Canons 3E(1)(c) and 3E(1)(d).

2.02(f) - "*Fiduciary*" includes such relationships as personal representative, executor, administrator, trustee, attorney-in-fact under power of attorney, and guardian. See Canons 3E(2) and 4E.

#### **16.8(B)(1) ADVISORY OPINIONS REGARDING CANON 3B**

Opinion 48 - The business of the court shall be conducted in the courtroom except in emergency

circumstances. If the judicial act in question is authorized to be performed in camera, then there is no ethical restriction as to when and where the judge performs the act.

Opinion 108 - The commission opined that there is nothing in Canon 3A(7) (now deleted by new Canon 3) which would prohibit a judge in his discretion to permit the use of tape recording devices in court by private attorneys.

Opinion 148 - A judge may not ethically grant limited driving privileges when to do so would violate the clear provisions of a state statute and case authority. Such an action would violate old Canon 3A, new 3B(2).

Opinion 149 – A judge could respond to a questionnaire regarding his experience, education, background and other qualifications for his office sent by an environmental group. The judge should not relate his position on environmental matters as the same would be prohibited under old Canon 3A©, now 3B(9).

Opinion 33 – It would be improper for a judge or court personnel to advise people concerning applications for Refusal of Letters or assist in the preparation of Refusal Letters. Clerk and court officials may, however, identify the instance of such letters and recommend that a lawyer's consulted. This matter was determined pursuant Canon 3B(1) and (2), now 3C(1) and (2).

Opinion 175 – A judge may not ethically grant a suspended imposition of sentence to a defendant charged with driving while intoxicated as a persistent and prior offender or to a defendant charged with driving while license or driving privilege is cancelled, suspended or revoked. Canon 3B(2) requires a judge to follow the clear language of V.A.M.S 577.023(4) and 302.321 which prohibit suspended impositions of sentence in such cases. A judge may grant a suspended imposition of sentence even though the original charge, prior to reduction or amendment by the prosecutor, would prohibit such a sentence.

### **16.8(B)(2) ADVISORY OPINIONS REGARDING CANON 3C**

Opinion 38 - See subsection 16.7(B)(1), note Canon 3B(4) prohibiting "nepotism and favoritism in new Canon 3C(4).

Opinion 55 - There is nothing to prohibit a circuit judge to allow his daughter to be hired as a clerk by an associate circuit judge due to the fact that it was the associate circuit judge who was making the appointment. Decided pursuant to Canon 3B(4), now 3C(4).

Opinion 96A - A judge may appoint a retired judge as a commissioner, guardian, appraiser, referee, trustee or attorney for indigents so long as such appointments are spread equally over members of the Bar who are qualified. Appointment of legislators to similar positions should be carefully considered in light of Article III, Section 12 of the Constitution of the state of Missouri and V.A.M.S. 105.456(1).

Opinion 126 - See 16.7(B)(1). Decided pursuant to Canon 3B(2), now 3C(2).

Opinion 157 - See 16.7(B)(2). Decided pursuant to 3B, now 3B(2).

### **16.8(B)(3) ADVISORY OPINIONS REGARDING CANON 3E**

Opinion 5 - The commission gave a detailed analysis of probate judge's questions as to disqualification in an involuntary hospitalization hearing when his spouse was employed as a social worker at the state mental institution where a patient was being treated. The question depended upon the level of participation of the spouse in the patient's care and the likelihood of her input on diagnosis or as a witness. Decided pursuant to Canon 3C(1), now 3E(1).

Opinion 14A - An associate circuit judge was only allowed to preside over cases which were pending in the prosecutor's office when the judge served as a prosecutor so long as the judge neither handled nor has any knowledge of the case. In those cases, the judge was to disclose to the parties as to his level of participation and must recuse himself at the request of either party. Decided pursuant to Canon 3D(1)(b), now 3E(1)(b).

Opinion 22 - A judge must disqualify himself in matters, no matter how routine, where he or a former law partner had been involved as a private practitioner. Decided pursuant to Canon 3C(1)(b), now 3E(1)(b).

Opinion 24A - A probate judge who witnessed but did not draft a Will need not disqualify himself unless a dispute arises as to Will construction or evidentiary fact. However, a probate judge who drafted a Will about to be admitted to probate should write the legatees and heirs advising them he prepared the Will and will disqualify himself upon complaint of any heir or legatee. Decided pursuant to Canon 3C(1), now 3C(1)(a & b).

Opinion 37 - Decided under the old Canons, this opinion states that a judge need disclose but not automatically disqualify himself in a proceeding where his son is acting as an attorney. This practice is now strictly prohibited pursuant to Canon 3E(1)(d)(ii).

Opinion 46 - A judge should disqualify himself in any proceeding which would involve his father-in-law who is a deputy sheriff. This disqualification should occur at any point in the legal process when the judge receives information that his father-in-law has an interest which could substantially be affected by the outcome of the proceeding or is likely to be a material witness. The judge should inform both his father-in-law and the prosecuting attorney of this restriction. Decided pursuant to Canon 3C(1), now 3E(1)(d).

Opinion 62 - A new judge may recover a portion of a contingency fee case so long as that fee corresponds to the percent of work he has completed on the case. The judge should disqualify himself on any case he has previously referred to another attorney pursuant to Canon 3C(b), now 3E(1).

Opinion 66 - Decided under the old Canons, an appellate judge did not automatically have to recuse himself in any case which his daughter represents the Attorney General's office. This practice is now strictly prohibited under Canon 3E(1)(d)(ii). The judge need not recuse himself in all matters involving the state of Missouri and its attorney general unless his "impartiality might be reasonably questioned," now Canon 3E(1).

Opinion 71 - A judge must disqualify himself in any proceeding in which his ex father-in-law deputy sheriff is likely to be a material witness. The ex father-in-law was also the grandfather of the judge's children. The judge need not disqualify himself in matters where the deputy sheriff involvement would be de minimis. Decided pursuant to Canon 3C(1)(d), now 3E(1)(d).

Opinion 84A - See 16.7(B)(1). Decided pursuant to Canon 3C, now 3E.

Opinion 87 - A judge was not to serve as a fiduciary for a close friend. This now is especially true since old language which would allow acting as a fiduciary for a "person with whom the judge maintains a close familial relationship" has been eliminated from new rule 3E(1).

Opinion 92 - A judge who previously served as a part-time prosecuting attorney should disqualify himself in any criminal case in which he was previously involved or in which his impartiality may reasonably be questioned. A part-time prosecutor is one who is hired by the prosecuting attorney to handle a select number of cases. Decided pursuant to Canon 3C(1)(b), now 3E(1)(b).

Opinion 101 - An appellate judge must disqualify himself in all cases involving any law firm which he maintains a continuing attorney-client relationship. Decided pursuant to Canon 3C(1), now 3E(1).

Opinion 124 - See section 16.6(B).

Opinion 125 - The commission reviewed the rules regarding disqualifications. The commission found that the judge was not required to disqualify himself when his law partner's spouse or a member of the spouse's law firm appeared before him unless the judge's impartiality might reasonably be questioned. Decided pursuant to Canon 3C(1), now 3E(1).

Opinion 143 - A judge must disclose his business relationship to all parties in all cases involving

a former associate to whom he sold his law practice and to whom he leases an office building at fixed monthly rental. Decided pursuant to Canon 3C(1), now 3E(1).

Opinion 156 - A judge need not disqualify himself or notify the parties of potential grounds for disqualification where the only business relationship between the judge and his former law firm is collecting back due attorney's fees on behalf of the judge. Decided pursuant to Canon 3C(1)(d)(ii), now 3E(1).

Opinion 161 - A municipal judge asked if he could rent office space from or to attorneys who appear before the judge. The commission answered that such rental arrangements are not prohibited by the Code of Judicial Conduct so long as the rent received is at fair market value. A more "involved business relationship" may require disqualification. Decided pursuant to Canon 3C(1)(d), now 3E(1).

Opinion 163 - The commission found that a municipal judge may not serve in the same city as that which his law partner serves as city attorney. The same law office drafting and interpreting ordinances creates an appearance of impropriety. Decided pursuant to Canon 3C, now 3E.

## **16.9 CANON 4 – A JUDGE SHALL SO CONDUCT THE JUDGE’S EXTRAJUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS**

### **A. Extrajudicial Activities in General**

A judge shall conduct all of the judge's extrajudicial activities so that they do not:

- (1) Cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) Demean the judicial office; or
- (3) Interfere with the proper performance of judicial duties.

### **B. Avocational Activities.**

A judge may speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice and nonlegal subjects, subject to the requirements of this Rule 2.

### **C. Governmental, Civil or Charitable Activities**

- (1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.
- (2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Rule 2.

(a) A judge shall not serve as an officer, director, trustee or nonlegal advisor if it is likely that the organization:

(i) Will be engaged in proceedings that would ordinarily come before the judge, or

(ii) Will be engaged frequently in adversary proceedings in the court of which the judge is a member of in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or nonlegal advisor, or as a member or otherwise:

(i) May assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other funds raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority.

(ii) May make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) Shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) Shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

#### D. Financial Activities

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest investments and other financial interests that might require frequent disqualification.

(3) Neither a judge nor a member of the judge's family residing in the household shall accept a gift, bequest, favor or loan from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to the judge; books supplied by publishers on a complimentary basis for office use; or an invitation to the judge and the judge's spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) A judge or a member of a judge's family residing in the household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) A judge or a member of the judge's family residing in the household may accept any other gift, bequest, favor or loan only if the donor is not a part or other person whose interests have come or are likely to come before the judge, and, if its value exceeds \$100.00, the judge reports it in the same manner as compensation is reported in Canon 4H.

(4) A judge is not required by this Rule 2 to disclose income, debts or investments, except as provided in this Canon, Canon 3 and Canon 4H.

(5) Information acquired by a judge in a judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

#### E. Fiduciary Activities

(1) A judge shall not serve as executor, administrator, other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, providing such person is the judge's spouse or within the third degree of relationship to the judge or the judge's spouse, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

#### F. Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of Law

A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Compensation, Reimbursement and Reporting

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Rule 2, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The report shall be made at least annually and shall be filed as a public document in the office of the clerk of this court.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon 4, in Canon 3E, and in Canon 3F, or as otherwise required by law.

**16.9(A) DEFINITIONS PERTAINING TO CANON 4**

2.02(h) - "*Law*" denotes court rules as well as applicable constitutional provisions, statutes, ordinances and decisional and other law. See Canons 2A, 3A, 3B(2), 3B(7), 4B, 4C, 4E, 4F and 4I.

2.02(f) - "*Fiduciary*" includes such relationships as personal representative, executor, administrator, trustee, attorney-in-fact under power of attorney, and guardian. See Canons 3E(2) and 4E.

2.02(s) - "*Third Degree of Relationship*" - The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Canons 3E(1)(d) and 4E(1).

2.02(k) - "*Member of the judge's family residing in the judge's household*" denotes any relative of a judge by blood or marriage, or a person treated by a just as a member of the judge's family, who resides in the judge's household. See Canons 3E(1) and 4D(3).

## **16.9(B)(1) – ADVISORY OPINIONS REGARDING CANON 4A**

Opinion 58 - A judge may be a member of a dinner committee honoring the judge's friend with a humanitarian award. The same would not adversely reflect upon his impartiality which was prohibited under Canon 5B, now Canon 4A.

Opinion 75 - A judge should not be involved in the activities of a county task force on drunk driving where activities included advocating more stringent legislative penalties for drunk driving. Decided under Canon 5B, now Canon 4A and 4C.

Opinion 10 - A judge who is retiring to return to the practice of law must clearly state his status when advertising for association or office sharing arrangements.

Opinion 20 - An associate circuit judge may not prepare state and federal income tax returns after hours at his personal residence for compensation. The same would be prohibited pursuant to Canon 5C(1), now Canon 4A(1-3).

Opinion 25 - A judge may not purchase real estate and sell rock from that real estate to the state and county highway departments if these departments appear frequently as parties in litigation before the judge.

Opinion 60 - A judge should divest himself from inherited real estate jointly owned with a bondsman who has frequent transactions with is court. If the co-tenant bondsman uses the real estate as collateral for party bonds, the judge must disqualify himself in any case involving such a bond.

Opinion 81 - The commission further clarified what a municipal judge could and could not do in his practice of law. A municipal judge should not practice criminal law within his municipality and should withdraw from any criminal cases occurring within his municipality for which he had been retained prior to swearing-in as municipal judge. A municipal judge can accept a civil case that arises in the municipality where he presides when there is no pending issue of a violation of a city ordinance.

Opinion 110 - A judge may lease real property which he owns or has an interest in to the county in which he is an elected official so long as the business dealing does not reflect an unfair or non-competitive business dealing.

Opinion 118 - A judge should not be involved in a general or limited partnership holding real estate with attorneys who frequently appear before him. If such appearances are rare, the judge need not automatically disqualify himself, rather analyze the facts of each case and make full disclosure to the parties.

Opinion 127 - A judge should not be engaged in a private venture regarding the sale of educational audio materials regarding the Common Law of the state of Missouri. The activity would involve a considerable amount of his time as prohibited under Canon 4A(3) and the material sold may be used by lawyers appearing before the judge in arguing cases as prohibited by Canon 4A(1).

### **16.9(B)(2) – ADVISORY OPINIONS REGARDING CANON 4B**

Opinion 67 - An associate circuit judge should not serve as a member of the selective service local draft board since such activity would not improve the law, legal system or the administration of justice.

Opinion 75 - A judge may participate in an interview or an educational program regarding consumer affairs. However, the judge should not comment on any pending case or express a preconceived opinion which would cast doubt on his impartiality. Current Canon 4B.

Opinion 79 - A judge may give a radio interview regarding his experience in Vietnam if it is not for the purpose of soliciting funds. The judge's name may appear on the letterhead of an organization local committee so long as he is not designated as a judge or an attorney. Finally, he may invite a friend who is a U.S. Senator to town for the purpose of raising interest in a memorial fund. This matter was decided under old Canon 5A, now Canon 4B.

Opinion 116 - A judge should not serve on a committee which would set guidelines for workplace solicitation of government employees by various characters. This activity would not "improve the law, the legal system or the administration of justice".

Opinion 128 - A judge may participate in a media campaign to recruit foster families, as well as appear in television, radio and newspaper advertisements. The judge indicated he would not solicit funds for the foster parent program.

Opinion 157 - See section 16.7(B)(2).

Opinion 158 - A senior judge may testify before the Missouri legislature regarding proposed legislation to create a new judicial circuit. This would be a matter which concerns the "law, the legal system and the administration of justice".

### **16.9(B)(3) – ADVISORY OPINIONS REGARDING CANON 4C**

Opinion 61 - A circuit judge may not comment publicly in favor of a proposed sales tax. Such comments would be personally participating in public fund raising activities in violation of Canon 4C(3).

Opinion 122 - The Canons in effect at the time of this opinion did not prevent a judge from representing himself in a lawsuit. New Canon 4C(1) specifically allows the judge to function in this capacity. The judge may also assist his council in preparation of his case.

### **16.9(B)(4) – ADVISORY OPINIONS REGARDING CANON 4C(2 & 3) 16.9(B)(4) - ADVISORY OPINIONS REGARDING CANON 4C(2 & 3)**

Opinion 9 - The Canons do not prohibit an associate circuit judge from serving as a trustee for a hospital where there is no compensation and meetings are on a once a month basis. He may not do so if the hospital is likely to appear before him and he may not solicit funds or give investment advice to that hospital. Decided under Canon 5B(1&2), now Canon 4C(3)(a).

Opinion 44 - An associate circuit judge may serve on a steering committee of the attorney general's council on crime prevention. The judge was warned to be careful not to become involved in soliciting funds or become involved in political activity that is not on behalf of measure to "improve the law, legal system or administration of justice." Citing what is now Canon 4(C)(2).

Opinion 61 - A circuit judge may not comment publicly in favor of a proposed sales tax. Such comments would be personally participating in public fund raising activities in violation of Canon 4C(3).

Opinion 64 - A judge may not serve on the Missouri Mental Health Commission since the judge's service would not concern issues of "improvement of the law, the legal system and the administration of justice".

Opinion 67 - An associate circuit judge should not serve as a member of the selective service local draft board since such activity would not improve the law, legal system or the administration of justice.

Opinion 70 - A judge may serve as the master of ceremonies at a Jaycees junior miss contest in that it is not a money making venture and is intended to be a community service. Decided pursuant to Canon 5B, now Canon 4A and 4C.

Opinion 80 - An associate circuit judge may not serve as a member of the city zoning commission as it did not fall within the parameters of what is now 4C(2). The commission also noted that the judge would be subject to disqualification in adversary proceedings concerning zoning issues if he became a member of the committee.

Opinion 83 - A judge may not serve as a director of the Industrial Development Corporation, without compensation, since the purpose of the corporation is to promote development of a city or municipality. These purposes do not fall within parameters of allowable activities what is now Canon 4C(2 & 3).

Opinion 84A - See section 16.7(B)(1).

Opinion 91 - A judge may not serve on an advisory board of a hospital which is likely to be engaged in proceedings that would come before the judge. Decided under Canon 5B(1), now Canon 4C(3)(a)(ii).

Opinion 104 - A judge may serve as a member of the board of directors for an alternative dispute resolution center. The judge would not be engaged in the day to day activities of the center. It was unlikely the center itself would ever appear before the judge. Decided under Canon 5B(1&2), now Canon 4C(3)(a)(i & ii).

Opinion 113 - A judge may serve on a committee appointed by the governor to engage in activities regarding the *USS Missouri*, without pay. The judge must be careful not to be engaged

directly or indirectly in fund raising activities. He may appear on letterhead so long as he is not identified as a lawyer or judge. Decided under Canon 5B(1-3), now Canon 4C(3)(a)(i & ii).

Opinion 115 - A judge may not serve as the Government Division Chairman for the United Way campaign. This would create the appearance he was soliciting funds for a charitable organization which is prohibited under Canon 5B, now Canon 4C(3)(b)(i).

Opinion 124 - A judge may serve as trustee of an educational trust so long as the trust is not likely to be engaged in proceedings before the judge. He shall not solicit funds or give investment advice. The judge may not receive a fee. Decided under Canon 5D, now Canon 4E and Canon 5B, now Canon 4C(3).

Opinion 134 - An associate circuit judge may not serve as a member of a citizen's steering committee designed to improve the city's economy, resources, cultural and recreational activities, and building environment. The goals do not fall in those permitted under what is now Canon 4C(2).

Opinion 135 - A circuit judge could not be on a governmental task force charged with future planning of a county library. In addition to the services falling outside permissible activities as set forth in the Canon, the commission also noted that said services may involve the judge in extrajudicial matters which would interfere with his effectiveness and independence.

Opinion 146 - A judge may serve on a board of directors of a city public library so long as such service did not involve him in controversial matters which might interfere with the judge's independence. The judge should abstain from voting on any issues.

Opinion 150 - An associate circuit judge could not serve as a member of the Missouri Advisory Council on Alcohol and Drug Abuse. The commission determined that the committee is concerned with issues of fact or policy on matters other than the "improvement of law, the legal system or the administration of justice".

Opinion 154 - A judge may serve on the board of director for a not-for-profit corporation, which is primarily funded by the state of Missouri. The state funding does not change the characterization of the judge's activities as civil and charitable. Decided under Canon 5B, now Canon 4C(3) and Canon 5G, now Canon 4B(2).

Opinion 159 - An associate circuit judge may serve as an advisory director of a not-for-profit corporation which provides education and information to school aged children about drugs and alcohol. The judge will receive no pay and not be engaged in day to day activities. Decided under Canon 5B, now Canon 4C(3).

Opinion 172 – A judge should not impose, as a condition of probation, payments to the county treasury, a crime reduction fund, or specified charity, absent a state statute or constitutional provision authorizing such payment.

Opinion 173 – Opinion 172 applies to full- and part-time municipal judges. It does not prohibit an order of restitution to the victim, or an order requiring the performance of free work for a public or charitable purpose. It (Opinion 172) applies to a suspended imposition of sentence.

Opinion 174 – A judge has an obligation to review a plea agreement and exercise discretion if the prosecutor has required any type of payment to any special fund in order to receive a recommendation, even if it is not part of the formal sentence or condition of probation. The judge should not approve such an arrangement absent an ordinance, statute or constitutional provision authorizing such a payment.

Opinion 177 – The commission continued its practice of evaluating a judge’s service on governmental committees as a case by case basis in determining that service on the St. Louis County Domestic and Family Violence Council did not violate Canons 4(C)(2) and 4(A.)

Opinion 180 – The commission further clarifies opinions 172, 173 and 176 dealing with questions pertaining to the imposition of conditions of probation requiring donations in lieu of fines. The commission found that even though the payment was to be made to the county school fund, the fund designated in the Constitution to receive fine money, it nevertheless had the appearance of a “payoff and would create the appearance of impropriety.” Such conditions of probation and plea agreement are not allowed unless specifically authorized by municipal ordinance (in the case of municipal charges) or by state statute or Constitution in state charges.

#### **16.9(B)(5) – ADVISORY OPINIONS PERTAINING TO CANON 4G**

Opinion 26 - It is improper for a probate judge to advise people with respect to applications for refusal of letters in that the same constitutes the practice of law. The judge may identify the existence of such letters and recommend a lawyer. See Opinion 51 below.

Opinion 33 - See section 16.8(B)(1).

Opinion 51 - Because of new legislation V.A.M.S. 473.091 it was now permissible for a probate court to advise people with respect to application for refusal of letters. Legislation concerning the practice of law will be valid unless it unreasonably encroaches upon the power of the courts.

Opinion 62 - See section 16.8(B)(3).

Opinion 97 - See section 16.7(B)(1).

Opinion 117 - An associate circuit judge may attend as a spectator an arbitration proceeding involving his spouse who is a real estate broker. He may not directly or indirectly lend advice or assistance during the hearing. He may discuss the case with his wife and attorney.

Opinion 122 - See section 16.9(B)(3).

#### **16.9(B) – ADVISORY OPINIONS REGARDING CANON 4H**

Opinion 65 - The commission found that a judge may accept employment and receive

compensation for writing a Treatise on Probate Law. The compensation may be based upon the number of volumes sold. Current Canon 4H.

## **16.10 CANON 5 – A JUDGE AND CERTAIN OF THE JUDGE’S EMPLOYEES SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY**

### **A. Political Conduct in General**

- (1) No judge appointed to or retained in office in the manner prescribed in section 25(a)-(g) of article V of the state constitution shall directly or indirectly make any contribution to or hold any office in a political party or organization or take part in any political campaign.
- (2) Where it is necessary that a judge be nominated and elected as a candidate of a political party, an incumbent judge or candidate for election to judicial office may attend or speak on the judge or candidate's own behalf at political gatherings and may make contributions to the campaign funds of the party of choice. However, neither the judge nor the candidate shall accept or retain a place on any party committee or act as party leader or solicit contributions to party funds.
- (3) A judge shall resign judicial office when the judge becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law to do so.
- (4) A judge shall not engage in any other political activity except on behalf of measure to improve the law, the legal system or the administration of justice.
- (5) Persons appointed as a circuit or associate circuit judge selected pursuant to section 25(a)-(g) of article V of the state constitution and their employees shall not directly or indirectly make any contributions to or hold an office in a political party or organization or take part in any political campaign.

### **B. Campaign Conduct**

- (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of the non-partisan court plan:
  - (a) Shall maintain the dignity appropriate to judicial office and shall encourage members of the candidate's family to adhere to the same standards of political conduct that apply to the candidate;
  - (b) Shall prohibit public officials or employees subject to the candidate's direction or control from doing for the candidate what the candidate is prohibited from doing under this Canon 5; and except to the extent authorized under Canon 5B(2) or Canon 5B(3), such candidate shall now allow any other person to do for

the candidate what the candidate is prohibited from doing under this Canon 5;

(c) Shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce views on disputed legal issues; or misrepresent the candidate's identity, qualifications, present position or other fact.

In consideration of Republican Party of Minnesota, et al v. White et al, 536 U.S. 2002, the Supreme Court of Missouri, on July 18, 2002, issued an order to the commission directing that the language “announce views on disputed legal issues” shall not be enforced.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not solicit or accept campaign funds or solicit publicly stated support but he candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

(3) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate and whose candidacy has drawn active opposition may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in Canon 5B(2).

#### **16.10(A) – DEFINITIONS PERTAINING TO CANON 5**

*2.02(n) - "Political organization"* denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Canon 5.

*2.02(b) - "Candidate"* is a person seeking election for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions of support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office. See Rule 2.01 and Canon 5.

#### **16.10(B)(1) – ADVISORY OPINIONS PERTAINING TO CANON 5A(1) AND 5A(2):**

Opinion 31 - A judge who must run for election may attend political gatherings on his own behalf. He may make contributions to the campaign funds of his party so long as the same is not to a specific individual's campaign fund. He may speak on his own behalf at meetings and gatherings. He should not solicit funds, act as a party leader, or advocate the election of anyone other than himself.

Opinion 50 - A judge who must be nominated and elected as a candidate of a political party may attend political gatherings and speak on his own behalf and make contributions to the campaign fund of the party of his choice regardless whether he is running for re-election.

Opinion 68 - A judge may attend a convention of the Missouri Federation of Women's Democratic Club. However, she may not act as Parliamentarian at the convention as the same would be serving as a "party leader" which is prohibited under the Canon.

Opinion 129 - Withdraws certain aspects of Opinion 85. "Political gatherings" includes fundraisers, victory and defeat parties for specific candidates who are not the judge. However, the judge's activities at such meetings, dinners and fundraisers should be confined to speaking on his own behalf. He cannot solicit funds, act as party leader, or advocate the election of anyone other than himself. He cannot contribute to any specific candidate, nor can he purchase a ticket to a dinner or fundraiser where the purchase price goes to a specific candidate's fund.

**16.10(B)(2) – ADVISORY OPINIONS PERTAINING TO 5A(3):**

Opinion 35 - An associate circuit judge need not resign from his office in order to run as a circuit judge. Canon 7A(3), now Canon 5A(3) only applies to candidates for non-judicial offices.

**16.10(B)(3) – ADVISORY OPINIONS PERTAINING TO CANON 5A(4):**

Opinion 160 - A judge may publicly endorse or criticize the non-partisan court plan but he may not publicly endorse or recommend against the retention of any specific judge as such conduct would be engaging in "other political activity".

Opinion 44 - See section 16.9(B)(3).

Opinion 72 - A judge may not participate in educational, social and fund raising activities which have the purpose of promoting or discouraging the proposed Equal Rights Amendment or the proposed Human Life Amendment. The same would constitute "political activity" in violation of the Canon.

Opinion 158 - A senior judge may publicly express his views and appear before the Legislature on proposed legislation to create a new judicial circuit. The same would be allowed "political activity" under the Canon.

**16.10(B)(4) – ADVISORY OPINIONS PERTAINING TO CANON 5A(5):**

Opinion 114 - There is nothing to prohibit a member of the judge's family from holding the position of city councilman or mayor. The judge should not allow his name to be used in conjunction with any campaign.

An associate judge under the non-partisan court plan, responsible for hiring and firing clerks, would prevent his clerk from serving as a councilman or mayor. If the associate circuit judge is elected, there would be no prohibition against his clerk serving as councilman or mayor.

Opinion 162 - The commission found that Canon 7B(2) which prohibits "publicly stated support" would not foreclose an associate circuit judge from going door to door, handing out campaign literature, handshaking and "vote for me" statements. Television or radio advertisements as well as speaking at "public gatherings" are also not prohibited by the commission. The commission

noted that the same should be done with an eye toward maintaining the honor, integrity and dignity of judicial office.

**16.10(B)(4) - ADVISORY OPINIONS PERTAINING TO CANON 5B(1):**

Opinion 86 - A judge's court employees, subject to his direction and control, may speak on his behalf and hand out campaign literature. However, the judge and court employees may not engage in such activities in the courthouse or during work hours.

Opinion 23 - Employees of an associate circuit judge who was part of the non-partisan court plan are prohibited from engaging in political activity. The judge, who was responsible for hiring and discharging court employees, is responsible for preventing his employees from engaging in political activity.

Opinion 149 - See section 16.8(B)(1).

Opinion 155 - A judicial candidate should not publicly criticize a sitting judge's absence from his county or circuit while performing his duty in serving under assignment of the Chief Justice. To suggest conduct of the sitting judge is inappropriate would be misrepresenting a fact which is prohibited under current Canon 5B(1)(c).

**16.10(B)(5) – ADVISORY OPINIONS PERTAINING TO CANON 5B(2):**

Opinion 18 - A judge may not retain leftover campaign funds or use them for any other purpose other than to pay for expenses incurred during the campaign. Any unused funds should be returned to the contributors on a pro rata basis. Expenses incurred in returning the funds may be paid by the fund. Withdrawn, See Opinion 178 below.

Opinion 44 - A judge may serve on a council for crime prevention. The judge should be careful not to be involved in fund solicitation or become involved in political activities prohibited under Canon 5B(2).

Opinion 93 - A judge's election committee may continue to make direct solicitations for campaign funds and hold fundraising events after the election until the campaign debt is repaid.

Opinion 174 – Because of changes in the language of Canon 5B(2) (formerly Canon 7B(2) effective July 1, 1999, judges and judicial candidates may seek publicly stated support including permission to erect yard signs.

Opinion 178 – Opinion 18 is withdrawn by the commission in ruling that a judge may retain leftover campaign funds from one judicial election to the next. When it is clear that a judge will not seek further judicial office, leftover campaign funds are to be dispersed of as per the methods as set forth in the opinion.

## **FUNCTIONING OF THE COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE OF JUDGES**

### **16.11 DISCIPLINE OF JUDGES**

In Re Fullwood, 518 S.W.2d 22, 23 (Mo. 1975) held that municipal judges are subject to the jurisdiction of the Commission on Retirement, Removal and Discipline of Judges. The commission began operating on January 1, 1972, and is governed by Supreme Court Rule 12. The commission is composed of six members, who serve six-year terms. Two non-lawyers are appointed by the governor, two lawyers are appointed by The Missouri Bar's governing body, one court of appeals judge is appointed by the other court of appeals judges, and one circuit judge is selected by the state's circuit judges.

### **16.12 COMPLAINT PROCESS**

The commission is responsible for receiving and investigating all requests and suggestions for the retirement of judges because of disability and all complaints concerning alleged misconduct of judges and members of judicial commissions.

Upon receiving a complaint which is not "obviously" unfounded or frivolous against a judge or judicial officer, the commission conducts an investigation. Rule 12.05(a), 12.07(a). If at least four members of the commission find there is probable cause to believe the judge or judicial officer is disabled due to permanent physical sickness or mental infirmity under Rule 12.05(a) or is guilty of misconduct, incompetency or other actions constituting grounds for discipline as listed in Rule 12.07(a), a hearing will be conducted.

If at least four members find the person investigated should be retired or disciplined, a report containing findings of fact and conclusions of law and a recommendation is made to the Supreme Court. Rule 12.07(c). The report will also contain a recommendation for discipline, which can range from removal from office to suspension or other discipline. Rule 12.07(c). The court then makes a ruling based upon a de novo review of the transcript and commission records. Rule 12.07(c). The person being investigated may, however, file objections to the commission's findings and request oral argument before the court before a final decree is entered. A similar procedure is followed in the case of retirement due to disability.

### **16.13 WHAT TO DO WHEN FACED WITH AN ETHICAL DILEMMA**

When faced with an ethical dilemma, frequently a judge cannot find the answer by simply examining the code of ethics. Every judge should keep in mind the broad base Canon 2 prohibiting "the appearance of impropriety". The most basic advice is to refrain from the contemplated conduct if there is any question as to impropriety. Oftentimes, it helps to seek the advice of a fellow judge or the presiding judge in the circuit. However, if the judge feels that the problem will reoccur or that the action in question is in the best interests of the court, he should request an advisory opinion from the Commission on Retirement, Removal & Discipline, following the procedures as outlined in 16.3 of this chapter.

**CHAPTER XVII. - DEPARTMENT OF REVENUE ADMINISTRATIVE  
LICENSE ACTIONS**

**Charles L. Gooch**

<b>Section</b>	<b>Page Number</b>
<b>DEPARTMENT OF REVENUE ADMINISTRATIVE LICENSE ACTIONS .....</b>	<b>4</b>
17.1 Scope of Chapter.....	4
<b>NON-ALCOHOL-RELATED ACTIONS .....</b>	<b>2</b>
17.2 Assessment of Points .....	2
17.3 Review of Point Suspension / Revocation .....	5
17.4 Point Assessment for Speeding.....	6
17.5 Driving While Suspended / Revoked and License Reinstatement .....	6
17.6 Failure to Appear .....	7
17.7 Nonresident Violator Suspensions.....	7
17.8 Motor Vehicle Financial Responsibility .....	8
17.9 Citation for Examination .....	11
17.10 Child Support Enforcement Suspension .....	12
<b>ALCOHOL-RELATED ACTIONS .....</b>	<b>12</b>
17.11 Abuse and Lose.....	12
17.12 Ignition Interlock Devices (including new provisions effective 07-01-09).....	14
17.13 License Denial/Ineligibility Periods .....	16
17.14 Implied Consent/Chemical Refusal Provisions .....	17
17.15 Administrative Alcohol Suspension and Revocation Actions .....	20
17.16 Limited Driving Privileges .....	23
17.17 Reinstatement Requirements .....	24

**SUSPENSION/REVOCAION REINSTATEMENT REQUIREMENTS..... 25**  
17.18 Driver’s Privacy Requirements..... 27  
17.19 Department of Revenue Records ..... 28  
17.20 Conclusion ..... 28

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# DEPARTMENT OF REVENUE ADMINISTRATIVE LICENSE ACTIONS

## 17.1 SCOPE OF CHAPTER

This chapter will cover various types of driver's license suspension, revocation and denial actions that may be imposed by the Department of Revenue. The different actions resulting in a loss of driver's license consist of two main types: alcohol- and non-alcohol-related actions. The non-alcohol-related driver's license loss may be the result of the accumulation of points for moving violations; nonappearance or unpaid tickets in this or another state; failure to maintain insurance; failure of pay child support; or incompetency to continue to drive. The alcohol-related loss of driver's license may result from driving with a blood alcohol content in excess of the legal limit; for refusal to submit to alcohol testing; from the court ordering a loss under the abuse and lose provisions; and from multiple convictions relating to driving while intoxicated. This chapter will also discuss the reinstatement requirements for getting relicensed after a loss, the availability of limited driving privileges, when ignition interlock is applicable and what information is available relating to driving records under the privacy provisions. It will also cover the provisions of new legislation effective July 1, 2009, requiring the filing of proof of installation of approved Ignition Interlock device as a condition for reinstatement of licensure and for issuance of limited and restricted driving privileges for certain repeat alcohol offenders.

## NON-ALCOHOL-RELATED ACTIONS

### 17.2 ASSESSMENT OF POINTS

The assessment of points on a driver's license is governed by Sections 302.302 and 302.304, RSMo. Points are assessed only on convictions for moving violations. A moving violation is defined as one where, at the time of the violation, the motor vehicle involved is in motion. The term does not include the driving of a motor vehicle without a valid motor vehicle registration or violations of Section 304.170 to 304.240, RSMo inclusive, relating to the sizes and weights of vehicles. Section 302.302, RSMo also excludes from moving violations equipment violations such as driving without headlights, brake lights or having defective equipment. A conviction for failure to produce an insurance card on demand, state law (§ 303.024, RSMo), or municipal violation, however, is considered a moving violation, resulting in the assessment of four points upon receipt of the conviction record.

Section 302.020, RSMo provides that a state charge of driving without a valid driver's license for a third or subsequent offense will be a Class D felony. However, only convictions under state law may be counted toward the three convictions. In addition, enhanced point assessment is mandated for repeat state law convictions for driving without a driver's license. The first conviction will be assessed two points, the second four points, and the third six points. Municipal ordinance violations for driving without a driver's license were *not* included in the enhanced point provisions and will still result in a two-point assessment.

Under section 302.321, RSMo the crime of driving while suspended or revoked includes persons whose privilege to drive has been canceled, suspended or revoked under the laws of this state or *any other state*. Municipal ordinance violations may also count toward enhancing the criminal

penalty to a felony for repeat violations if it is shown that the defendant was represented or waived the right to counsel. A fourth conviction of driving while suspended or revoked may be a felony if the prior three convictions for driving while suspended or revoked occurred within ten years of the present offense and the person received and served a sentence of ten days or more on such previous offenses. A third conviction of driving while suspended or revoked may be a felony if there is a prior alcohol-related enforcement contact and the prior two offenses occurred within ten years of the occurrence of the present offense and the person received and served a sentence of ten days or more on such previous offenses.

**Conviction:** Points are only assessed based on a conviction. A conviction is the final outcome at the time of sentencing or a forfeiture of bail or collateral deposited to secure a defendant's appearance in court. The forfeiture of bail is considered a conviction whether entered in Missouri or out-of-state. See Section 302.010(3), RSMo and Pryor v. David, 436 S.W. 2d 3 (Mo. 1969). A suspended imposition of sentence (SIS) is *not* a conviction for point assessment purposes since sentence is not imposed. A suspended execution of sentence (SES) *is* considered a conviction for point assessment purposes since sentence is entered but the execution is delayed.

**Point Assessment Mandated:** All convictions of moving violations are subject to point assessment. Once a conviction is received the director is mandated to assess points and has no discretion to disregard the conviction based on delay in receipt or age. Jennings v. Director of Revenue, 986 S.W.2d 513 (Mo.App. 1999); Rudd v. David, 444 S.W.2d 457 (Mo. 1969).

**Point Accumulation:** Pursuant to Section 302.304.2, RSMo points are *accumulated* based on date of conviction. Section 302.304.2, RSMo. Points, however, cannot be assessed until receipt of the conviction from the court, at which time the appropriate number of points are assessed as required in Section 302.302, RSMo. Total point accumulation is calculated using conviction date, allowing for credit for any safe driving reduction, if any. If sufficient points are accumulated, a suspension or revocation notice is then issued. The notice of suspension or revocation notifies the driver thirty days in advance that the suspension or revocation will take place. The suspension or revocation does not begin from the date of conviction. Any suspension or revocation action commences or is effective only after the Director of Revenue receives the record of conviction and mails notice thereof to the driver. Harper v. Director of Revenue, 118 S.W.3d 195 (Mo. App. 2003). Only the Director of Revenue, not the court, can assess points and suspend or revoke the driver's license for point accumulation. Jennings, 986 S.W.2d at 515.

**Safe Driving Reduction:** Section 302.306, RSMo provides for a safe driving point reduction for each full year of operation without conviction for a moving violation. The total point accumulation is reduced by one-third for the first full year, one-half for the second full year and all remaining points are removed the third full year of safe driving. However, no safe driving reduction is given during a period of suspension or revocation, even if the suspension or revocation is non-point related. Senn v. Director of Revenue, 674 S.W.2D 43 (Mo.App. 1984); Creech v. Director of Revenue, 886 S.W.2d 111 (Mo.App. 1994). There is also *no* point reduction during periods of limited driving privileges. (See the Missouri Department of Revenue Drivers License Bureau Point System Violation Description Table following this chapter.)

### 17.3 REVIEW OF POINT SUSPENSION / REVOCATION

**Jurisdiction:** Section 302.311, RSMo provides that a petition for review of any action

suspending, revoking, denying or withholding a license may be filed in the circuit court of the county of petitioner's residence, within thirty days after notice of the action. The 30-day period is jurisdictional and no three-day mail rule applies to review of administrative decisions. Howard v. Director of Revenue, 202 S.W.3d 612 (Mo. App. 2006); Smith v. Director of Revenue, 179 S.W.3d 310 (Mo. App. 2005). Welch v. Director of Revenue, 859 S.W. 2d, 230 (Mo.App. 1993). A driver must file a petition to review in the circuit court within thirty (30) days of the date of mailing of the notice of suspension or revocation by the Director of Revenue. McInerney v. Director of Revenue, 12 S.W.3d 403 (Mo. App. 2000); Gilbert v. Director of Revenue, 974 S.W.2d 655 (Mo. App. 1998). Section 302.311 is the exclusive method of review of an action of the director in suspending or revoking a driver's license and no extraordinary remedies are available. Nash v. Director of Revenue, 856 S.W. 2d 112 (Mo.App. 1993).

**No collateral attack:** The issue on review of the suspension or revocation action is whether the director correctly assessed points based on the conviction record(s) received. The petition cannot be used to collaterally attack the validity of the underlying convictions. If a conviction is to be attacked, it must be appealed or attacked directly in the rendering court. Stokes v. Director of Revenue, 796 S.W.2d 887 (Mo.App. 1990); James v. Director of Revenue, 893 S.W.2d 406 (Mo.App. 1995).

#### **17.4 POINT ASSESSMENT FOR SPEEDING**

**Criteria:** Section 304.009, RSMo provides that any state charge of speeding five miles per hour or less over the posted speed limit is an infraction. Section 304.009.2, RSMo additionally provides that no points shall be assessed to a driver's record for such a conviction. The same five-mile per hour criterion is used for municipal and state court convictions.

#### **17.5 DRIVING WHILE SUSPENDED / REVOKED AND LICENSE REINSTATEMENT**

**License Reinstatement is Not Automatic:** A person who resumes driving after a point suspension or revocation without reinstatement may be convicted of driving while suspended or revoked. The suspension or revocation will continue beyond its original period for a two-year period unless the person reinstates driving privileges. State v. Counts, 783 S.W. 2d 181 (Mo.App. 1990). An out-of-state driver whose privileges are suspended or revoked in Missouri can likewise be charged with driving while suspended or revoked in Missouri, even if the person possesses an otherwise valid, unrevoked license from another state. State v. Bray, 774 S.W. 2d 555 (Mo.App. 1989); State v. Hulse, 774 S.W. 2d 556 (Mo.App. 1989).

The penalty under state law for driving while one's license is suspended or revoked was enhanced so that a fourth conviction will be a class D felony and if there are prior alcohol contacts, the second or third conviction may be charged as a felony. Municipal alcohol-related convictions may be considered in making the decision to enhance the penalty for driving while one's license is suspended or revoked, and prior municipal convictions for driving while one's license is suspended or revoked may be used for enhancement if the judge was an attorney and the defendant was represented or waived the right to counsel. To be used for enhancement prior offenses must have occurred within 10 years of the present offense and the defendant must have received and served a sentence of 10 days or more.

**Point Reduction on Reinstatement:** Upon reinstatement of a suspension/revocation for points, accumulated points will be reduced to four. Subsequent point accumulation is calculated from the date of reinstatement using the four points assessed on that date. A new suspension or revocation may be generated prior to reinstatement when additional points are accumulated during an existing period of suspension or revocation. Creech v. Director of Revenue, 886 S.W. 2d 111 (Mo.App. 1994); Wright v. Director of Revenue, 849 S.W. 2d 148 (Mo.App. 1993).

If a person has been revoked for a one-year period for excessive point accumulation, he or she must, in addition to completing all reinstatement requirements, take and pass the complete Missouri driver's examination in order to have his or her license restored.

## **17.6 FAILURE TO APPEAR**

All municipalities and all state courts may forward license suspension information to the Department of Revenue for persons who have committed moving violations and fail to appear or pay the fines or court costs assessed. The failure to appear provisions may be used even if the offender originally appeared and entered an installment plan to pay the fine and costs. If the offender defaults on payment, the court may begin the failure to appear process.

**Criteria:** Section 302.341, RSMo provides that the offender must be a Missouri resident and must be charged with a moving violation. Therefore, if the original charge is amended to be a non-moving violation prior to the offender failing to appear or to pay the court costs and fines, the charge no longer qualifies for the failure to appear sanctions.

**Notice:** The court is charged with providing notice to the defendant by ordinary mail at the last address shown on the court records that the court will order the Director of Revenue to suspend the defendant's driving privileges if the charges are not disposed of and fully paid within 30 days from the date of mailing. If the defendant fails to timely dispose of the charges after notice, the court shall then notify the director of the failure and of the pending charges against the defendant. The suspension remains in effect until the court requests the withdrawal of the suspension *or* the offender disposes of the charges with the court and/or pays the applicable court costs and fines and receives documentation from the court that the matter is resolved. Unlike other license suspension or revocation actions, the notice from the director that the license is being suspended will **postdate** the suspension or revocation action.

**Reinstatement:** The offender may take the court documentation and a \$20 reinstatement fee to have the failure to appear suspension reinstated at any local license office. No proof of insurance is required to reinstate a failure to appear suspension.

Forms the court may use to provide notice to the citizen and to the Department of Revenue are available from the Driver's License Bureau. Any court requiring information or forms should contact the Missouri Department of Revenue, Driver's License Bureau, P.O. Box 200, Jefferson City, Missouri 65105 or by referring to its Web site at [www.dor.mo.gov](http://www.dor.mo.gov).

## **17.7 NONRESIDENT VIOLATOR SUSPENSIONS (NRVC)**

**Statutory reference:** Section 544.046, RSMo provides that the state of Missouri will suspend

the driving privileges of any Missouri licensee who fails to comply with a traffic citation issued in another state. Likewise, Missouri courts — both municipal and state — may complete notification forms for out-of-state license holders charged with traffic citations in Missouri.

**Indefinite suspension:** Like the in-state failure to appear suspension, the nonresident violator suspension is an *indefinite* suspension that continues until proof of compliance is submitted to the department and the \$20 reinstatement fee is paid. Once the driver has proof from the court that the citation is satisfied this can be taken to the local license office with the reinstatement fee and the suspension reinstated.

**Notice:** When a nonresident violator notice is received from another state the Department of Revenue sends notice to the Missouri driver. The driver is notified that he or she must submit proof that he or she has complied with the other state’s traffic citation within 30 days or his or her driver’s license will be suspended. If compliance is not received within the 30-day period, the suspension becomes effective, and continues indefinitely until compliance is shown.

The compact has been determined not to violate the supremacy clause found in Article I, Section 10 of the United States Constitution, in that it does not tend to increase the political power of the state or infringe on the supremacy of the United States. State v. Kurt, 802 S.W. 2d 954 (Mo banc 1991).

## **17.8 MOTOR VEHICLE FINANCIAL RESPONSIBILITY (§§ 303.010 – 303.370, RSMO)**

**Applicability:** All owners of motor vehicles are strictly liable for maintaining financial responsibility on their vehicles. Koehr v. Director of Revenue, 863 S.W. 2d 663 (Mo.App. 1993). The definition of owner includes the title holder as well as the possessor pursuant to a conditional sale agreement or lease with an option to purchase. See Section 303.020(9), RSMo. All vehicles which are registered **or required to be registered** are subject to the mandatory insurance provisions. Section 303.025, RSMo.

Owners of motor vehicles in the state of Missouri are required to maintain liability coverage for at least the statutory minimum (§ 303.020(1), RSMo). Current requirements are \$25,000 bodily injury or death, one person/one accident; \$50,000 bodily injury or death total/one accident; and \$10,000 property damage/one accident. “Financial Responsibility” may be demonstrated by filing with or producing for the Director of Revenue the following:

1. An insurance identification card (303.024) – card issued by insurance company;
2. A surety bond (303.230) –evidenced by card issued by Department of Revenue;
3. Cash or securities deposited in the amount of \$60,000 with state treasurer (303.240) – evidenced by card issued by Department of Revenue;
4. Certificate of self insurance with agreement to pay for damages caused in an accident (303.220) – evidenced by card issued by Department of Revenue.

**Noncompliance:** The Department of Revenue may become aware of noncompliance with the mandatory insurance requirements through accident reports, sampling or citations issued pursuant to Section 303.024, RSMo for failure to exhibit an insurance identification card.

**Suspension Periods and Reinstatement Requirements:** The following is a summary of the mandatory insurance enforcement process from the stop of a driver by a law enforcement officer, to conviction or disposition by the court, under the provisions of § 303.025, RSMo:

**§ 303.025**

Owners of motor vehicles registered *or required to be registered* in Missouri are required to maintain financial responsibility. This is a strict liability — no mens rea required. Non-owner operators, *with knowledge* that the owner has no insurance, are also liable. A motor vehicle which is inoperable or being stored (and is *not registered*) is exempt.

When an officer stops an individual, the officer encounters one of two situations:

1. The driver *has* coverage, but doesn't have proof in his possession OR
2. The driver doesn't have proof/doesn't have coverage.

In either situation, the officer **should issue** a citation. It is a Class C misdemeanor. Where this occurs, the driver has to go to court. Once at court, the following may:

**§ 303.025.3**

1. If driver can show proof he or she had insurance coverage **ON THE DATE CITED** for the offense, he or she cannot be found guilty. The case should be dismissed.
2. If, however, the driver is *convicted* of the offense (remember, strict liability for the owner), the court *shall*, in addition to any other punishment, notify the Director of Revenue of such conviction AND do **one** of the following:
  1. **Enter an Order of Suspension** as of the date of the court order. Court takes or requires surrender of license at time the order entered. Court sends order and license to the Director of Revenue. The director records on the individual's driver record a suspension effective the date of court order.

Length of suspension:

**First Offense:** Indefinite (as little as 0 days). The license suspension continues *until* the reinstatement requirements met (i.e., proof of insurance/insurance identification card produced to the director\* and payment of a \$20 reinstatement fee). The driver must thereafter maintain proof of insurance, as applicable, for three (3) years from date of suspension.

**Second Offense:** 90-day license suspension, \$200 reinstatement fee; proof of insurance/insurance identification card produced to the director (3 years)\*.

**Third Offense:** One-year revocation; \$400 reinstatement fee; proof of insurance/insurance identification card produced to the director (3 years)\*.

\* SR-22/other proof of insurance filing required *only* in circumstances where an accident is involved; an accident report is filed with the director; and one of the vehicles involved in the accident was uninsured.

Where required, failure *to maintain* a required proof of insurance filing with the director will result in re-suspension or revocation of license until proof is filed *or* the three-year filing period has expired. Usually this is triggered by notification to the director by an insurance company of a lapse in the policy.

**AND/OR**

2. The court forwards a record of conviction (if convicted of §303.025, RSMo offense) to the Director of Revenue. The director will assess 4 points to individual's Missouri Driver Record. See § 302.302.1(13), RSMo.

**OR**

3. **Enter an Order of Supervision as per § 302.303, in lieu of an assessment of points** [see § 302.303 for definition of “court ordered supervision”— requires finding or plea of guilty on offense, with deferred sentence/order for supervision of defendant [Department of Revenue form used].

Both a conviction and an Order of Supervision can be entered. Only *state* courts can enter Orders of Suspension or Orders of Supervision. One advantage of an Order for Supervision is that no points are assessed, and the record is not to be released to any “outside source.” See § 302.303, which refers specifically to “violations of section 303.025.”

**Notice:** Once the director receives and processes an accident report indicating a lack of insurance, the director will issue notice by certified mail requiring proof of insurance be provided within 33 days or the driver's license will be suspended. If no proof that the motor vehicle was insured on the date of the accident is furnished to the director *or* an administrative hearing requested within that period, then the director will enter a suspension of driving privileges and registration plates.

**Accident Report Requirement:** Section 303.040, RSMo requires motorists involved in accidents, with (or as) an uninsured motorist where there is personal injury *or* \$500 or more in property damage, to file an accident report with the Director of Revenue. Report forms are available from the Driver's License Bureau, as well as most police departments and insurance companies. Failure to file a report results in a suspension pursuant to Section 303.370, RSMo. The suspension will continue until the required report is filed or a period of one year elapses.

**Hearings:** Administrative hearings to review suspension for not having insurance are conducted in accordance with Chapter 536. In person hearings are held in Jefferson City, Missouri, but hearings will be conducted by telephone unless an in person hearing is requested. Evidence may be submitted by affidavit in lieu of making a personal appearance. 12 CSR 10-23.030(8)(C). Requests for hearing must be postmarked by the compliance date on the notice or hearing or the request will be denied and judicial review precluded. Renfro v. Director of Revenue, 810 S.W.

2d 723 (Mo.App. 1994).

**Review:** Final decisions are issued within 90 days of the date of the hearing request. These decisions are issued by certified mail and are considered to be notices of suspension pursuant to Section 303.041, RSMo if suspension action is ordered. Further appeal is to the circuit court of the county of residence.

**Judgment Suspensions:** Pursuant to Sections 303.090 and 303.100, RSMo a motorist who fails to satisfy a judgment resulting from a motor vehicle accident within 60 days is subject to suspension of his or her driver's license. This suspension remains in effect for the lifetime of the judgment, which is normally ten years, unless the judgment is revived. The licensee is not eligible for limited driving privileges. Section 302.309.3(5)(c), RSMo. The judgment can be satisfied by full payment or by entering an installment agreement.

**Reinstatement:** To be reinstated the driver must pay a \$20.00 reinstatement fee and maintain proof of insurance for two years, after showing satisfaction of the judgment.

## **17.9 CITATION FOR EXAMINATION (UNQUALIFIED/INCOMPETENT DRIVER)**

**Retesting Requirements:** The director may request that a driver be retested or submit to medical examination pursuant to reports received from law enforcement, courts, medical personnel, certain family members, or field office personnel. Section 302.291, RSMo provides that the director may require retesting when there is good cause to believe the person is unqualified or incompetent to operate a vehicle, even prior to any license renewal date. The report must contain factual information based on personal observation of the person or their medical condition rather than just opinion in order for the director to act. Nagel v. Director of Revenue, 180 S.W.3d 90 (Mo. App. 2005); Singer v. Director of Revenue, 771 S.W. 2D 375 (Mo.App. 1989); Bopp v. Director of Revenue, 617 S.W. 2d 100 (Mo.App. 1981).

The director may also require retesting at the time of license renewal if the information provided in the application, record of convictions or other records maintained by the director for the applicant show that there is good cause to request retesting. If the director has reasonable grounds to believe that an applicant is suffering from some known physical or mental ailment which would interfere with the applicant's fitness to operate a motor vehicle safely, the director may require that the examinations include a mental or physical examination. See Section 302.173.1, RSMo. Requests to submit to examination are mailed by the director to the last address of record. The licensee is given 30 days to complete the required testing.

**Reporting:** Department of Revenue Form 4319 can be used to complete a report of an unfit or unqualified driver. This report form is available through the Driver's License Bureau in Jefferson City, Missouri, local license offices, or online at [www.dor.mo.gov](http://www.dor.mo.gov). Municipal courts may use this form to report offenders who appear in court and by their actions or the facts presented to the court may require retesting.

**Failure of testing or refusal to test:** If the driver does not complete the required tests or fails to demonstrate competence on any tests administered, the director may then suspend or revoke the driver's license. The suspension or revocation action is then reviewable in the circuit court in the

county of residence. See Section 302.311, RSMo.

## **17.10 CHILD SUPPORT ENFORCEMENT SUSPENSION**

**Statutory reference:** Section 454.1008, RSMo provides that the director must suspend the driver's license of a licensee whom the circuit court or the Director of the Division of Child Support Enforcement has ordered be suspended for a child support arrearage. Hearings regarding these types of suspensions are handled by the court or Division of Child Support Enforcement prior to the director being forwarded the order to suspend the license.

**Not eligible for limited privileges:** No limited driving privileges may be granted pursuant to Section 302.309, RSMo by the director or the court for a child support arrearage suspension. See Section 454.1010.9, RSMo. The only relief available from the suspension is through the circuit court or by the Director of the Division of Child Support Enforcement, who may issue a stay of the suspension in cases where "significant hardship" is shown.

**Driving while suspended:** If the licensee continues to drive and is charged with driving while suspended while under this suspension the appropriate section to charge the violation would be Sections 302.321, RSMo or 454.1008.5, RSMo or corresponding municipal ordinance.

**Reinstatement:** Requires a showing of compliance by the licensee from the circuit court or the Division of Child Support Enforcement, and payment of a \$20 reinstatement fee.

## **ALCOHOL-RELATED ACTIONS**

### **17.11 ABUSE AND LOSE**

**Provisions for those under age 21:** Courts, including municipal courts where the defendant is represented by or waives the right to counsel, are required to enter an abuse and lose order on pleas of guilty or convictions for certain alcohol- or drug-related offenses. If the court orders that a driver is subject to the abuse and lose provisions of Section 577.500, RSMo the action will be shown on the driving record as an "Abuse and Lose" suspension or revocation. The Director of Revenue will enter the suspension or revocation *effective on the date of the court order*. Because the department is using the court order date, the effective date of the suspension or revocation will always predate the entry of the order on the driving record.

The court shall require the surrender of and forward to the director any driver license, intermediate license or permit held by the person against whom an order has been entered. For offenders less than 16 years of age, a juvenile court is required to hold the order until 30 days before the person's 16th birthday, and then forward the order to the department. The length of the suspension or revocation is determined by Section 577.500.

#### **Application:**

#### **577.500.1**

90-day suspension, 1<sup>st</sup> offense; 1-year revocation, 2<sup>nd</sup> or subsequent

Offenses involving a minor *and* motor vehicle operation:

- (1) Alcohol-related traffic offenses — DWI, BAC (state law *and* municipal ordinance if represented by an attorney or waived in writing)
- (2) Possession or use of alcohol while operating a motor vehicle (state law *and* municipal ordinance if represented by attorney or waived in writing).

Offenses involving a minor with *no* vehicle operation:

- (3) Possession or use of a controlled substance (Chap. 195 def.), (state law; *and* municipal if represented by attorney or waived in writing).
- (4) Altercation, modification or misrepresentation of a driver license (§ 311.328).
- (5) Possession or use of alcohol for a second time where a determination of guilt was made on the 1st offense; both offenses occurred while person under 18 years of age.

**577.500.2** (§ 311.325 “Minor in Possession” offenses—*no* vehicle operation)

**1st Offense:** 30-day suspension, **2nd:** 90-day suspension, **3<sup>rd</sup>/subsequent:** one-year revocation

Applies to a person under the age of twenty-one years who:

- Purchases any “intoxicating liquor” as defined in 311.020;
- Attempts to purchase any intoxicating liquor;
- Has in his or her possession any intoxicating liquor;
- Is “visibly intoxicated” as defined by 577.001; or
- Has a BAC of more than .02% (“possession by consumption”).

**Provisions for those age 21 and over:** The court is also required to order a revocation of the driver’s license for licensees over the age of 21 at the time of offense, who plead guilty or are convicted of any offense involving the possession or use of a controlled substance, as defined in chapter 195, RSMo, while operating a motor vehicle. The period of revocation for a first offense is one year. See Section 577.505, RSMo.

**Notice and Appeal rights:** The suspension or revocation orders are forwarded to the Director of Revenue for immediate entry on the driving record. Once the order is received by the director, the suspension or revocation is entered as of the date of the court order without further notification or hearing. There are *no* Section 302.311, RSMo appeal rights are available for these suspension or revocation actions. Cross v. Director of Revenue, 861 S.W.2d 214 (Mo.App. 1993). Any appeal of the court order must be by direct appeal.

**Court order required:** The director enters an abuse and lose suspension or revocation *only* pursuant to and upon receipt of a court order. There is no credit of time for time served on an Abuse and Lose action to any other license suspension or revocation action.

**Required information for abuse and lose to apply:** The age of the driver is not required to be stated in the information charging the underlying alcohol- or drug-related offense and the failure to charge abuse and lose as part of the underlying offense does not violate due process. State v. Rehm, 821 S.W. 2d 127 (Mo.App. 1992); State v. Stokes, 814 S.W. 2d 702 (Mo.App. 1991). It is likewise not necessary to advise the defendant of the intent to seek abuse and lose as part of the plea negotiations. State ex rel. Lee v. Bailey, 817 S.W.2d 287 (Mo.App. 1991).

**No double jeopardy:** Since the suspension or revocation of a driver's license for abuse and lose is a civil penalty, it does not constitute double jeopardy. State v. Rehm, 821 S.W. 2d 127 (Mo.App. 1992).

## 17.12 IGNITION INTERLOCK DEVICES

**Statutory requirements:** Pursuant to Section 577.600, RSMo a court *may* require offenders who plead guilty or are found guilty of a first offense (includes SIS disposition) of driving while intoxicated, driving with excessive blood alcohol content or driving under the influence of alcohol or drugs, to not operate a motor vehicle during a period of probation unless the vehicle is equipped with a functioning ignition interlock device. The court is *required* to order the use of and ignition interlock device during a period of probation granted to any person found guilty of a second or subsequent offense.

For offenders who are found guilty of or who plead guilty to a second or subsequent intoxication-related traffic offense, Section 577.600, RSMo currently mandates that a court shall require that such offenders shall not operate a motor vehicle unless the vehicle is equipped with a functioning ignition interlock device for a period of not less than one month from the date of reinstatement of their license. **NOTE:** Effective July 1, 2009, courts must order installation of the device for a period of not less than **six months** from the date of reinstatement. Further, a court granting limited driving privileges to an applicant with a second or subsequent intoxication-related offense *must* require the use of an ignition interlock device on all vehicles operated by the person during the term of the limited privilege.

**Department of Revenue action:** Currently, the Department of Revenue does not monitor whether courts are ordering installation when required, or whether the device is actually being installed. Under Section 577.606, RSMo, the department merely enters on the offender's driver record the interlock requirement and the duration, as indicated within the court order. Where an interlock device should have — but was not — ordered as a condition of a limited driving privilege, the department will file a motion to amend the order to include the interlock requirement.

**Sanctions for violating the requirement:** The director will enter a one-year revocation for any first time plea of guilty or finding of guilty entered for not using the ignition interlock device, where required. A plea or finding of guilt regarding a second violation will result in a five-year revocation of license.

**\*\*New Provisions Effective July 1, 2009:** Pursuant to SB 930/947, effective July 1, 2009, the Director of Revenue will now have the authority to require the filing of proof of installation of

an ignition interlock device upon conviction for certain alcohol-related offenses as a condition of reinstatement of license or for the issuance of restricted or limited driving privileges. These provisions are in addition to the current court-ordered requirements found in Section 577.600, RSMo, which will remain in effect. As noted above, effective July 1, 2009, courts will now be required to order installation for a minimum six-month period from the date of reinstatement.

**Application:** The new law requires a licensee to file proof of installation of an ignition interlock device with the Director of Revenue as follows for:

**License Reinstatement on:**

Section 302.060 (9), RSMo—Ten-Year minimum denial

Section 302.060(10), RSMo—Five-Year denial

Section 302.304.17, RSMo—Point revocation (triggered by a second or subsequent alcohol or drug –related traffic offense);

Section 302.525.5, RSMo—Administrative Alcohol (.08% and .02%) revocation;

Section 302.525.5, RSMo--Administrative Alcohol suspension, where licensee has a prior “alcohol related enforcement contact,” as defined by Section 302.525.3, RSMo of record.

Section 577.041.10, RSMo—Second or subsequent Missouri Chemical Refusal revocation;

**Limited Driving Privilege issuance**\* (Section 302.309, RSMo):

One-year Point revocation, where the revocation is the result of a second or subsequent alcohol or drug related traffic conviction;

Five Year Denial;

Ten-Year Minimum Denial.

(\*Where otherwise eligible under Section 302.309, RSMo)

**Restricted Driving Privilege issuance:**

Point Suspension, Section 302.304, RSMo (*only* where prior “alcohol-related enforcement contact” of record)

Administrative Alcohol Suspension, Section 302.525, RSMo (*only* where prior “alcohol related enforcement contact” of record)

**“Alcohol-Related Enforcement contact”** is defined by Section 302.525.2(3) to include:

- A DWI, BAC or DUI conviction (in or out of state)
- A Chemical Refusal action (in or out of state)
- A Missouri Administrative Alcohol suspension or revocation
- Driving while under the influence of drugs or alcohol conviction

**Interlock requirement for reinstatement:** For reinstatement of a license following certain alcohol-related license suspension, revocation or denial actions, the new law requires the licensee to file proof of installation of a functioning, approved ignition interlock device with the director. This process is expected to be similar to how the current proof of financial responsibility/SR-22 filing requirement is administered. This filing must additionally be maintained for a period of six (6) months following *the date of reinstatement* (not the date the licensee *is eligible* for reinstatement). The filing is to be done electronically by the approved ignition interlock provider or installer, on behalf of the licensee.

**Failure to maintain proof of interlock installation:** Once proof of installation is filed with the director for license reinstatement, if the licensee fails to maintain proof of installation, the motorist's license will be re-suspended for the balance of the six-month period. If the licensee fails to maintain proof as required for a restricted or limited privilege, the privilege will be terminated. Notice by the director and an opportunity to cure the lapse will be given prior.

### 17.13 LICENSE DENIALS

**Statutory requirements:** Section 302.060(9), RSMo provides for a 10-year minimum license denial period and Section 302.060(10), RSMo requires a five-year minimum license denial period for repeat alcohol-related offenders.

#### A. FIVE-YEAR LICENSE DENIAL:

**Statutory requirements:** Section 302.060(10), RSMo provides that two convictions of driving while intoxicated *within five years of each other* will trigger a five year license denial period. The five-year period begins on the date of the second conviction of driving while intoxicated. This provision specifically requires that out-of-state driving while intoxicated convictions be combined with qualifying municipal or Missouri state court convictions to trigger the ineligibility period. Municipal convictions for driving while intoxicated *prior to July 1, 1992*, are *not* used to trigger a five-year ineligibility period. A licensee who has been convicted for the crime of involuntary manslaughter while operating a motor vehicle in an intoxicated condition may also be denied licensure for a five-year period under section 302.060(10), RSMo.

**Reinstatement:** Currently, the driver is reinstated on the five-year anniversary date from the date of the last DWI conviction, if otherwise eligible. Effective July 1, 2009, however, the driver will now be required to file with the Director of Revenue proof of installation of an ignition interlock device for reinstatement, which must be also be maintained for a period of six (6) months following the date of reinstatement.

#### B. TEN-YEAR LICENSE DENIAL

**Statutory requirements:** Section 302.060(9), RSMo provides that three or more convictions, in any combination, of driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter involving driving while intoxicated or vehicular assault involving driving while intoxicated will trigger a ten year minimum license denial period. The driving while intoxicated or driving with excessive blood alcohol content convictions may be municipal

convictions if it is shown that the defendant was represented or waived the right to counsel. A record of conviction that had the “yes” box checked for representation by counsel held to be sufficient to establish attorney representation for purposes of the ten-year license denial action. Bowers v. Director of Revenue, 193 S.W.3d 887 (Mo. App. 2006). *Municipal convictions* for driving while intoxicated or driving with excessive blood alcohol content *entered prior to July 1, 1992* are not used to trigger a ten-year license ineligibility period, nor are state law BAC convictions had prior to that date.

**Application for Reinstatement:** At the expiration of 10 years from the date of conviction of the last offense of the alcohol-related offense, the person may petition the circuit court *of the county in which such last conviction was rendered* for an order of reinstatement. The court is required to review the person’s habits and conduct since the last alcohol-related conviction. If the court finds that the petitioner has not been convicted of any offense related to alcohol, controlled substances or drugs during the preceding ten years and that his habits and conduct show him to no longer pose a threat in the public safety, the court may order the director to issue a license to the petitioner if he is otherwise eligible under the provisions of Sections 302.010 to 302.540, RSMo. No person may obtain a license under the provisions of Section 302.060(9), RSMo more than once. Effective July 1, 2009, a driver will be required to file with the Director of Revenue proof of installation of an ignition interlock device for reinstatement, which must also be maintained for a period of six month following the date of reinstatement.

#### **17.14 IMPLIED CONSENT—CHEMICAL REFUSAL PROVISIONS**

**Presumption of consent:** Section 577.020 states that any person who operates a motor vehicle upon the public highways of this state is deemed to have given his/her consent to a chemical test or tests of his/her breath, blood, urine or saliva for the purpose of determining the alcohol or drug content of his/her blood. It has been specifically held that the implied consent provision of Section 577.020 is not limited solely to operation on highways; an arrest made on a parking lot will support a revocation. Betram v. Director of Revenue, 930 S.W. 2d 7 (Mo.App. 1996); Peeler v. Director of Revenue, 934 S.W. 2d 329 (Mo.App. 1996).

**Number of tests:** No more than two tests may be required from any one incident. However, the two tests do not include a test done on a portable breath-testing device. Justice v. Director of Revenue, 890 S.W. 2d 728 (Mo.App. 1995). If there is an insufficient sample to suffice for the test a motorist may still be subject to revocation for refusing a blood test after three unsuccessful attempts at a breath test. Snow v. Director of Revenue, 935 S.W.2d 383 (Mo.App. 1996); Freeman v. Director of Revenue, 113 S.W.3d 307 (Mo. App. 2003). It must be shown, however, that the subject failed to blow as instructed. Bogart v. Director of Revenue, 185 S.W.3d 286 (Mo. App. 2006); Yasulik v. Director of Revenue, 118 S.W.3d 279 (Mo. App. 2003). A subject may be deemed to have refused a blood test even after submitting to a breath test. Smock v. Director of Revenue, 128 S.W.3d 643 (Mo. App. S.D. 2004).

**Implied Consent Warning:** The arresting officer must inform the licensee of the request, that the evidence of refusal may be used against him/her in a criminal prosecution and that the his/her license shall or shall immediately be revoked if he/she refuses. A warning substantially in the language of the statute will suffice if it conveys to the driver that his/her license will be revoked upon refusal. Teson v. Director of Revenue, 937 S.W.2d 195 (Mo. 1996).

**Chemical Refusal action is separate from criminal charge:** Driving while intoxicated and refusal to submit to chemical testing are separate violations, even when arising out of the same incident, and can, therefore, result in separate periods of revocation/suspension. There is no credit of time given between any suspension or revocation triggered due to an accumulation of points from the criminal conviction and the revocation triggered due to the refusal to submit to testing. Greenwood v. Director of Revenue, 5 S.W.3d 604 (Mo. App. 1999); Brown v. Director of Revenue, 772 S.W. 2d 398 (Mo.App. 1989). A driver may still be revoked for refusal even though s/he is acquitted of driving while intoxicated. Tolen v. Missouri Department of Revenue, 564 S.W.2d 601 (Mo. 1978). A finding of no probable cause in the criminal case of driving while intoxicated is not res judicata in the separate refusal case. Borchelt v. Director of Revenue, 806 S.W.2d 95 (Mo.App. 1991).

**Evidence of refusal:** Evidence that the driver refused to submit to a chemical test can be admitted in a criminal trial and used as evidence of guilt for driving while intoxicated. State v. McCarty, 875 S.W. 2d 622 (Mo.App. 1994). This is true for municipal driving while intoxicated trials as well as state charges. However, failure to warn the driver that his/her refusal may be used against him/her in a criminal proceeding will prevent the use of the evidence at the criminal trial. The refusal evidence may be used in the refusal revocation review even without the warning. Barnhart v. McNeill, 775 S.W. 2d 259 (Mo.App. 1989). Section 577.041, RSMo has also been amended to permit evidence of a refusal to test to be admissible in manslaughter and assault with a motor vehicle driving while intoxicated cases.

**Notice:** If the person, after receiving the warning, refuses to submit to the requested test(s), the officer shall on behalf of the Director of Revenue, serve the notice of license revocation personally upon the arrested person and take possession of any license to operate issued by this state held by the person. The arresting officer will then issue a 15 day driving permit and give the person arrested a notice of his right to file a petition for review to contest his license revocation. The arresting officer will then file a sworn report with the Director of Revenue, stating that s/he has reasonable grounds to believe that the person was driving while intoxicated and that the person refused to take the test.

**Review:** The person seeking review of the directors action must file a petition for review as provided by section 302.311, RSMo in the county of arrest within 30 days of the date the notice of revocation was served or mailed by the director. Romans v. Director of Revenue, 783 S.W.2d 894 (Mo. banc 1990); Turpin v. Director of Revenue, 876 S.W. 2d 54 (Mo.App. 1994). If the petition is filed in the wrong county, the court cannot transfer it to the proper court once the thirty-day filing period has elapsed. Woolbright v. Director of Revenue, 891 S.W. 2D 860 (Mo.App. 1995).

**Exclusionary rule:** The court may not use the exclusionary rule to find that an illegal arrest (municipal officer outside of the city limits) prevents the evidence of the refusal from being admitted because the exclusionary rule does not apply to civil proceedings, which include the review of a driver's license suspension or revocation. Sullins v. Director of Revenue, 893 S.W. 2d 848 (Mo.App. 1995).

**No automatic stay without order:** If the driver does not obtain a stay order from the trial court,

the revocation will not be stayed by the Department of Revenue. The driver will not have his driver's license returned even after a stay order is issued but must use the stay order as his authority to drive.

**Issues on review:** At the hearing the court may determine whether the person was arrested, whether or not the arresting officer had reasonable grounds to believe that the person was driving while intoxicated, and whether or not the person refused to submit to testing.

Reasonable grounds is synonymous with probable cause and may be observed by the officer after the stop of the vehicle. Gelsheimer v. Director of Revenue, 845 S.W. 2d 107 (Mo.App. 1993). Proof that the person was driving may be direct or may be established by circumstantial evidence. Stenzel v. Director of Revenue, 536 S.W. 2d 163 (Mo.App. 1976); Delaney v. Director of Revenue, 657 S.W. 2d 354 (Mo.App. 1983).

**What constitutes refusal:** A volitional failure to do what is necessary for the test to be performed is a refusal. Spradling v. Deimeke, 528 S.W.2d 759 (Mo. 1975). A refusal can be verbal or may occur in nonverbal ways such as an insufficient blow and blowing around the mouthpiece. White v. Director of Revenue, 784 S.W. 2d 861 (Mo App. 1990); Benson v. Director of Revenue, 937 S.W.2d 768 (Mo.App. 1997). Failing to blow properly into a breath testing instrument is a refusal. Tarlton v. Director of Revenue, 201 S.W.3d 564 (Mo. App. 2006); Sutton v. Director of Revenue, 20 S.W.3d 918 (Mo. App. 2000). Failure to provide a complete breath sample may constitute a refusal, even when the digital readout on the instrument reflects a BAC over the legal limit. Freeman v. Director of Revenue, 113 S.W.3d 307 (Mo. App. 2003); Bogart v. Director of Revenue, 185 S.W.3d 286 (Mo. App. 2000). However, evidence merely showing that the subject stopped blowing before giving a complete sample is insufficient to establish a refusal, absent a showing that the subject failed to blow as instructed. Yarsulik v. Director of Revenue, 118 S.W.3d 279 (Mo. App. 2003).

Consent to take the test cannot be conditioned on certain events such as having attorney present, arresting officer not being present, choosing the test to be given, or using the bathroom first. Spradling v. Deimeke, 528 S.W. 2d 759 (Mo. 1975); Rains v. King, 695 S.W. 2d 523 (Mo.App. 1985); Borgen v. Director of Revenue, 877 S.W. 2d 172 (Mo.App. 1994); Rogers v. Director of Revenue, 184 S.W.3d 137 (Mo. App. 2006). A qualified or conditional consent constitutes a refusal, unless the condition is to talk to counsel, as required under the "20-minute" rule. However, asking to contact a lawyer but then refusing to contact one constitutes a refusal. Roberts v. Wilson, 97 S.W.3d 487 (Mo. App. 2002).

**Right to counsel:** Driver has no *constitutional* right to counsel prior to the test, however, Section 577.041, RSMo provides a limited, statutory right to consult with an attorney prior to the test. This is commonly known as the "20-minute rule." If a driver, when requested to submit to a chemical test, requests to speak to an attorney, he or she shall be granted 20 minutes in which to attempt to contact an attorney. The subject must specifically request to talk to an attorney to trigger the 20 minute rule. Akers v. Director of Revenue, 193 S.W.3d 325 (Mo. App. 2006); Moody v. Director of Revenue, 14 S.W.3d 729 (Mo. App. 2000). If after the expiration of 20 minutes the driver continues to refuse to submit to a chemical, it shall be deemed a refusal. If the subject abandons attempts to contact counsel before the 20 minutes are up, the officer may proceed with the test or refusal. Schmidt v. Director of Revenue, 48 S.W.3d 688 (Mo. App.

2001); Wall v. Lohman, 902 S.W.2d 329 (Mo.App. 1995). However, the evidence must clearly show that the subject abandoned attempts to contact counsel. Krakover v. Director of Revenue, 128 S.W.3d 589 (Mo. App. 2004). It is not necessary to wait out the balance of the 20 minute period if the subject completes a phone call, then unequivocally refuses the test. Hunter v. Director of Revenue, 75 S.W.3d 299 (Mo. App. 2002). Nor must an officer wait out the balance of the 20 minutes if the subject agrees to take the test. Crabtree v. Director of Revenue, 65 S.W.3d 557 (Mo. App. 2002); Dotzauer v. Director of Revenue, 131 S.W.3d 371 (Mo. App. 2004). If the evidence does not reflect that either the subject affirmatively abandoned his attempts to contact an attorney *or* that 20 minutes had elapsed since the request, the refusal will be deemed invalid. Bacandreas v. Director of Revenue, 99 S.W.3d 497 (Mo. App. 2003); Keim v. Director of Revenue, 86 S.W.3d 177 (Mo. App. 2002); Foster v. Director of Revenue, 186 S.W.3d 928 (Mo. App. 2006).

## 17.15 ADMINISTRATIVE ALCOHOL SUSPENSION AND REVOCATION ACTIONS

**When action applies:** For those **over the age of 21**, the administrative alcohol suspension or revocation process is triggered when there is a *alcohol-related arrest* where the driver is operating a motor vehicle with a blood alcohol content of .08% or more. For drivers **under the age of 21**, the process is triggered when there is a *stop for a traffic violation* and upon testing the driver has a blood alcohol content of .02% or more. The director is not required to show that the initial stop is lawful, only that there was probable cause to believe the driver committed an alcohol-related traffic offense such as driving while intoxicated or driving with excessive blood alcohol content. Gordon v. Director of Revenue, 896 S.W.2d 737 (Mo.App. 1995); Lambert v. Director of Revenue, 897 S.W.2d 204 (Mo.App. 1995).

**Notice of Suspension or Revocation:** Notice of suspension or revocation is to be served on the motorist by the arresting officer at the time of arrest (where a test result is available). If the officer does not obtain the test results immediately (such as in a blood test case), the director will serve notice by mail. This notice from the Department of Revenue is deemed received three days after mailing. Griffit v. Director of Revenue, 786 S.W. 2d 183 (Mo.App. 1990). The fact that the arresting officer mistakenly gave the motorist a refusal notice instead of an administrative alcohol notice did not affect the validity of the suspension, where the motorist was not prejudiced and there was no affirmative misconduct on the part of the officer. Oliphant v. Director of Revenue, 938 S.W. 2d 345 (Mo.App. 1997). Extended delay in serving notice does not affect the validity of the Administrative alcohol case where there is no prejudice to the motorist. Whitworth v. Director of Revenue, 953 S.W. 2d 142 (Mo.App. 1997); Olivo v. Director of Revenue, 950 S.W. 2d 327 (Mo.App. 1997). Any error in the implied consent warning made by the officer does not affect the admissibility of the BAC result as the officer does not have to inform the driver of the consequences of refusing *if* the motorist consents to the test. Mullen v. Director of Revenue, 891 S.W. 2d 562 (Mo.App. 1995). The rationale here is that the driver is not subject to the civil sanction for refusing to take the test.

**Hearing:** All administrative hearings are conducted by the Department of Revenue, General Counsel's Office, utilizing licensed attorney hearing officers. A hearing request must be postmarked or received by the Department of Revenue within 15 days of the date of notice. The request for hearing must indicate whether an in-person or telephone hearing is desired. If an in-person hearing is not requested, a telephone hearing will be scheduled and no request to change to an in person hearing will be permitted. There is no longer the requirement that the driver's

license be surrendered as a prerequisite for hearing. See, Sections 302.525 and 302.530, RSMo; 12 CSR 10-24.030. The driver has full driving privileges pending the outcome of any hearing (unless otherwise suspended or revoked), as the department issues a temporary driving privilege (TDP) upon receipt of a hearing request. The temporary privilege is valid throughout the hearing process and serves as the driver's license in lieu of the original. A driver must completely exhaust all administrative remedies by completing the hearing process before proceeding to circuit court for any trial de novo appeal of the hearing decision. Marquart v. Director of Revenue, 896 S.W.2d 716 (Mo.App. 1995).

**Certification of officer:** All arrests for violating **county or municipal ordinance** relating to driving while intoxicated require that the officer be certified as a peace officer in the state under Chapter 590, RSMo. The officer may testify to his own qualifications and a permit is not required to be offered in evidence to prove the certification. Cooley v. Director of Revenue, 896 S.W.2d 468 (Mo. banc 1995); Roach v. Director of Revenue, 941 S.W.2d 27 (Mo.App. 1997). This showing is *not* required for any state law violations.

**Exclusionary rule:** Because the administrative alcohol hearing and trial de novo are civil in nature, the exclusionary rule does not apply, and an illegal stop or arrest does not operate to exclude evidence relating to the arrest/intoxication. Riche v. Director of Revenue, 987 S.W.2d 331 (Mo. banc 1999); Kimber v. Director of Revenue, 817 S.W. 2d 627 (Mo.App. 1991).

**Trial de novo:** A petition for trial de novo to review the administrative action must be filed in the circuit court of the county of arrest *within fifteen days of the date of mailing* of the administrative hearing decision by the Director of Revenue. See, Section 302.530.7, RSMo. The petition must be filed in the county of arrest to invoke the jurisdiction of the court. Pool v. Director of Revenue, 824 S.W. 2d 515 (Mo.App. 1992). The trial de novo is governed by the Missouri rules of civil procedure and *not* as an appeal of an administrative decision under Chapter 536, RSMo.

**No Stay or Limited Privileges:** There is no stay, restricted or limited driving privileges available during the first 30 days of the suspension — commonly referred to as the “30-day hard walk.” See, 12 CSR 10-24.020. The filing of the petition for trial de novo *does not stay* the suspension or revocation action, either. See, Section 302.535.2, RSMo. Courts cannot grant limited privileges to those ineligible under statute, and a writ of prohibition is authorized for those that do. Conrad v. Director of Revenue, 20 S.W.3d 607 (Mo. App. 2000); State ex rel. Director of Revenue v. Mobley, 49 S.W.3d 178 (Mo. banc 2001); State ex rel. Director of Revenue v. Ash, 173 S.W.3d 388 (Mo. App. 2005). In the case of a suspension, a restricted driving privilege will be issued at the end of the 30-day suspension period. No restricted or limited driving privilege will be issued during the entire period of a one-year administrative revocation. See, Sections 302.525 and 302.535, RSMo 12 CSR 10-24.020.

**Burden of Proof:** The director bears the burden of establishing by a preponderance of the evidence that the driver was arrested for an alcohol-related traffic offense and that the driver was tested in accordance with Department of Health regulations which produced a test result either .08% or more for those age 21 years or more, or .02% for those under the age of 21, stopped for a traffic violation, by a preponderance of the evidence. McDaniel v. Director of Revenue, 989 S.W.2d 688 (Mo. App. 1999).

**Breath Test Foundation:** The Director of Revenue must lay a foundation for admission of the breath result. This includes proof that the test was performed following the Department of Health and Senior Services approved techniques and methods; by an operator holding a valid permit to operate the test device; and that the test was administered on a device approved by the department. Coyle v. Director of Revenue, 181 S.W.3d 62 (Mo. banc 2005); 19 CSR 25-30.011-.060. Once the director establishes a *prima facie* case for admission of the test result, the burden of production shifts to the motorist to present evidence which raises a “genuine issue of fact” which challenges the presumption that the test result is valid, or that his or her blood alcohol concentration did not exceed the legal limit. Walker v. Director of Revenue, 137 S.W.3d 444 (Mo. banc 2004); Verdoorn v. Director of Revenue, 119 S.W.3d 543 (Mo. banc 2003); Singleton v. Director of Revenue, 120 S.W.3d 218 (Mo. App. 2003). Where a proper and timely objection is made to the admission of a breath test result, the maintenance of the breath testing device becomes an issue, and the director is required to prove that the device used was maintained 35 days or less prior to the date of arrest. This showing is predicated, however, only upon a motorist’s timely and proper objection to admission of the test result, either at administrative hearing or trial de novo. Sellenreik v. Director of Revenue, 826 S.W.2d 338 (Mo. banc 1992); Kern v. Director of Revenue, 936 S. 2d 860 (Mo.App. 1997); Bollinger v. Director of Revenue, 936 S.W. 2d 870 (Mo.App. 1997). The appropriate maintenance report may be offered as a department business record under Section 302.312, RSMo as such proof. The qualifications of the person who conducted the maintenance check may be proven by his or her Type II permit number and expiration date, reflected on the maintenance report. Smith v. Director of Revenue, 948 S.W. 2d 219 (Mo.App. 1997).

**Fifteen Minute Observation Period (breath tests):** Immediately prior to the administration of an evidentiary breath test, the test administrator is required to observe the subject for a period of at least 15 minutes to insure the dissipation of any residual mouth alcohol that may possibly affect the validity of the test result. 19 CSR 25-060. However, where a subject objects to the admission of a breath test result on this basis, he is required to either show that he or she did something proscribed by the regulations (i.e., smoked, vomited, oral intake) during the 15 minute period *or* that something otherwise affected the accuracy of the test. Merely asserting that the officer did not properly conduct the observation period is not sufficient. Coyle v. Director of Revenue, 181 S.W.3d 62 (Mo. banc 2005); Bhakta v. Director of Revenue, 182 S.W.3d 662 (Mo. App. 2005); Gholson v. Director of Revenue, 215 S.W.3d 229 (Mo. App. W.D. 2007); Vanderpool v. Director of Revenue, 226 S.W.3d 108 (Mo. banc 2007).

**Blood test foundation:** Where the blood alcohol concentration is to be proven by the result of a test performed on a sample of blood, absolute and literal compliance with the requirements of Section 577.029, RSMo must be shown by the state. Nesbitt v. Director of Revenue, 982 S.W.2d 783 (Mo. App. 1998); State v. Setter, 763 S.W.2d 228 (Mo. App. W.D. 1988). This includes a showing that the blood was drawn by either a licensed physician, registered nurse, or “trained medical technician,” at the place of their employment, and at the request of a law enforcement officer. Section 577.029, RSMo. A paramedic who drew blood at an accident scene was deemed to be “at the place of his employment,” as required by Section 577.029, RSMo. Smith v. Director of Revenue, 77 S.W.3d 120 (Mo. App. 2002). A blood drawer’s statement on the Alcohol Influence Report was held to be sufficient to prove the qualifications of the blood drawer and compliance with Section 577.029, RSMo requirements. Francis v. Director of Revenue, 85 S.W.3d 56 (Mo. App. 2002). A blood sample cannot be drawn after a refusal under the “exigent

circumstances” exception. Murphy v. Director of Revenue, 170 S.W.3d 507 (Mo. App. 2005). However, a blood sample can be drawn pursuant to a warrant, even though the subject has refused to submit to testing. State v. Smith, 134 S.W.3d 35 (Mo. App. 2004).

**Proof of driving:** The director may use circumstantial evidence to prove the “driving” element. Rogers v. Director of Revenue, 947 S.W. 2d 475 (Mo.App. 1997); Kleffner v. Director of Revenue, 956 S.W.2d 446 (Mo.App. 1996).

**Periods of loss:** Driving privileges are suspended for 30 days followed by a 60 day restricted driving period *if* the driver’s record shows no alcohol-related enforcement contacts within the previous five years if the driver is otherwise eligible. If there is no petition for trial de novo filed the petitioner must file proof of financial responsibility (SR-22 or similar) with the director prior to being issued a 60-day restricted privilege. Driving privileges are revoked for one year if the driver’s record shows one or more “alcohol-related enforcement contacts” as defined in Section 302.525.3, RSMo within the previous five years. An alcohol-related enforcement contact is defined to include convictions for driving while intoxicated, driving with excessive blood alcohol content, or driving under the influence of drugs; prior Missouri administrative alcohol suspension or revocation actions; and both Missouri and out-of-state chemical refusals to submit to testing.

## 17.16 LIMITED DRIVING PRIVILEGES

**Jurisdiction:** The granting or denial of limited driving privileges during a period of license suspension, revocation or denial is governed by Section 302.309, RSMo. Application for such privileges may be made either with the circuit court in the county of residence or employment or to the Director of Revenue. For applicants who choose to apply to the director, application forms are available at all local Department of Revenue offices as well as the main offices in Jefferson City, Missouri, and on the Department’s Web site at [www.dor.mo.gov](http://www.dor.mo.gov). All denials of limited driving privileges by the director may be appealed within 30 days of the denial notice to the circuit court in the county of the applicant’s residence or employment. The sole issue for the court on appeal is whether the director correctly denied the limited driving privileges in accordance with Section 302.309, RSMo.

**Applications procedures:** The applicant for limited driving privileges must be a resident of Missouri or be employed in Missouri. Additionally, the applicant must have had a valid Missouri license prior to the suspension, revocation or denial action for which the limited privileges apply. An out-of-state resident cannot move to Missouri and apply for limited driving privileges from this state to cover the period of the out-of-state suspension or revocation. The applicant must submit a completed application form and have proof of insurance on file with the director. The applicant is not required to submit a driving record since that information is already available to the director. It takes approximately seven to 10 working days for the director to process the application and issue an order either granting or denying limited driving privileges. The orders are mailed to the applicant by ordinary mail.

**Ineligibility:** Section 302.309.3(5), RSMo provides the statutory grounds for ineligibility for limited driving privileges. There are approximately 20 different grounds for denying limited privileges set out in this section. The most common grounds for denial of such privileges are set forth in the chart “Mandatory Denial of Limited Driving Privileges.” As you will note, many of

the ineligibility reasons relate to alcohol offenses or repeat alcohol offenses or offenses of a serious nature such as felony convictions involving the use of a motor vehicle or unpaid judgments. The director screens applications for limited driving privileges in accordance with the statutory grounds for ineligibility.

### **17.17 REINSTATEMENT REQUIREMENTS**

The chart below lists the different types of license suspension and revocation actions and the various requirements that apply to each type of action for reinstatement. In examining the chart you will note that the actions which are based on chapters 302 or 303, RSMo require proof of financial responsibility prior to reinstatement and for a two or three year period following reinstatement. If the suspension action is not based on chapter 302 or 303, RSMo financial responsibility is not normally required for reinstatement. Also, some suspension actions based on chapter 302, RSMo such as instate failure to appear and zero tolerance first offense, specifically provide that such proof is not required for reinstatement. Normally, all reinstatement requirements must be delivered to the Driver's License Bureau in Jefferson City, Missouri, rather than a local office. The exception to this is instate failure to appear and nonresident violator compact suspensions which can be reinstated at any local license office if the driver first obtains proof of compliance from the court.

## SUSPENSION/REVOCAION REINSTATEMENT REQUIREMENTS

NON-ALCOHOL-RELATED POINTS 302.304, RSMo	ALCOHOL-RELATED POINTS 302.304 AND 302.541, RSMo
\$20.00 Reinstatement Fee	\$45.00 Reinstatement Fee
Proof of Financial Responsibility (SR-22) for 2 years	Proof of Financial Responsibility (SR-22) for 2 years;  SATOP (Substance Abuse Traffic Offender Program)  ( <b>Effective July 1, 2009</b> — Proof of Ignition Interlock installation for 6 months from reinstatement on suspension or revocation resulting from conviction for a 2nd or subsequent alcohol- or drug-related traffic offense. Section 302.304.17, RSMo)

ZERO TOLERANCE (.02% or more/minors) & ADMINISTRATIVE ALCOHOL (.08% or more) 302.304, 302.540 and 302.541 RSMo.	JUDGMENT 302.281 and 302.304 RSMo.
\$45.00 Reinstatement Fee	Pay judgment in full or enter into court approved installment agreement
*An SR-22 is not required on a <u>first</u> offense zero tolerance, but is required on any subsequent offense.  Proof of Financial Responsibility (SR-22) for 2 years	\$20.00 Reinstatement Fee
SATOP (Substance Abuse Traffic Offender Program)  ( <b>Effective July 1, 2009</b> — Proof of Ignition Interlock installation for 6 months from reinstatement for all revocations; and for any suspension, where prior alcohol-related enforcement contact at any time on driver record. Section 302.525.5, RSMo).	Proof of Financial Responsibility (SR-22) for 2 years

<b>ABUSE &amp; LOSE</b> <b>577.520 and 302.541</b> <b>RSMo.</b>	<b>NON-RESIDENT VIOLATOR</b> <b>302.304 and 544.046 RSMo.</b>	<b>REFUSAL</b> <b>577.041 AND 302.541</b> <b>RSMo.</b>
\$45.00 Reinstatement Fee	Proof of Compliance (Paid receipt from Court)	\$45.00 Reinstatement Fee
SATOP (Substance Abuse Traffic Offender Program)	\$20.00 Reinstatement Fee	SATOP (Substance Abuse Traffic Offender Program)  <b>(Effective July 1, 2009—</b> Proof of Financial Responsibility (SR-22) for 2 years, <b>and</b> proof of Ignition Interlock installation for 6 months from reinstatement on 2nd or subsequent Chemical Refusal only)

IN-STATE FAILURE TO APPEAR SUSPENSION (FACT) * 302.341 RSMo.	MANDATORY INSURANCE 303.043, 303.041 AND 303.044 RSMo.	CHILD SUPPORT ARREAGE SUSPENSION 454.1000 RSMo.
Proof of Compliance (payment or satisfy violation with court)	1st Offense - \$20.00 Reinstatement Fee and Proof of Financial Responsibility	\$20.00 Reinstatement Fee
\$20.00 Reinstatement Fee	2nd Offense - \$200.00 Reinstatement Fee and Proof of Financial Responsibility	Proof of Compliance
*These suspensions <u>only</u> can be reinstated through the local Department of Revenue branch or fee offices	3rd Offense - \$400.00 Reinstatement Fee and Proof of Financial Responsibility	
	If license and license plates are not timely surrendered, late surrender fees (\$25 - \$300 max.)	
	Proof of financial responsibility (SR-22) for 3 years	

### 17.18 DRIVER'S PRIVACY REQUIREMENTS

**Applicable statutes:** The federal Driver's Privacy Protection Act, 18 USC 2721, and Sections 32.091 and 32.092, RSMo provide that personal information contained on motor vehicle records, including driver's license records, are confidential with limited exceptions for disclosure. Missouri adopted the federal provisions and the exceptions. Personal information is defined in both federal and state law to include information which identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the five digit zip code), telephone number and medical and disability information, but does not include information on vehicular accidents, driving violations, and driver's status. The Department of Revenue takes this obligation of privacy very seriously.

**Exceptions allowing disclosure:** There are exceptions contained in both federal and state law allowing a requestor who qualifies within an exception to obtain personal information from driving and motor vehicle records. The requestor falling within an exemption must apply in advance for an approved access number ("Security Access Code," DOR Form 5091) to use in obtaining such records or must establish that the requestor is within an appropriate exemption each time a request for information is made. Forms to complete for individual record requests or for an approved number can be obtained from the Driver's License or Motor Vehicle Bureaus in Jefferson City, Missouri, or on its Web site at [www.dor.mo.gov](http://www.dor.mo.gov). Municipal courts or prosecutors desiring such information qualify within the exemption for use in connection with any civil or

criminal proceeding in local court or agency, however, must have an approve security access code in the name of the individual requesting records containing personal information.

**Considerations:** It is important to remember that the only information that is protected pursuant to the privacy provisions is the personal information concerning the driver. The status of the driver's license and all conviction and suspension/revocation information will still appear on the record. Driving records which block the personal information ("redacted" records) will still be available if the inquirer is only trying to establish the validity of the license or the actions contained on the driving record.

## **17.19 DEPARTMENT OF REVENUE RECORDS**

**Statutory provisions:** Section 302.312, RSMo provides for the admission of Department of Revenue records properly certified by a custodian of record in all courts in the state or administrative proceedings without any further foundation being required. There is no seven-day advance notice requirement, and the records are deemed to be self-proving. Neer v. Director of Revenue, 204 S.W.3d 315 (Mo. App. 2006); McFall v. Director of Revenue, 162 S.W.3d 526 (Mo. App. 2005). Police reports submitted to the Department of Revenue have been determined to be business records of the department. Helton v. Director of Revenue, 944 S.W. 2d 306 (Mo.App. 1997), as well as out-of-state records of convictions filed with the department by another state. Friedrich v. Director of Revenue, 124 S.W.3d 30 (Mo. App. 2004).

## **17.20 CONCLUSION**

This chapter is intended as a general outline or guide for understanding Department of Revenue driver's license suspension and revocation actions. It is not all encompassing but will hopefully provide some assistance is dealing with these cases. As always, the best source of information concerning an issue you need to have clarified may be direct contact with the Department of Revenue, or by visiting its Web site at [www.dor.mo.gov](http://www.dor.mo.gov).



**POINT SYSTEM VIOLATION DESCRIPTION TABLE**

Violations are listed separately by violation description as they would appear on the Missouri driver record. The points assessed for the violations vary, based on conviction under state law or county or municipal ordinance.

All violations marked with an asterisk (\*) that were committed while operating a Commercial Motor Vehicle (CMV) or all violations marked with two asterisks (\*\*) that were committed by a Commercial Driver License (CDL) holder while operating a CMV or non-CMV will be used toward CDL disqualification under 302.700 – 302.780, RSMo, and points are assessed against the base driving privilege under 302.302, RSMo.

	Points Assessed		Points Assessed
<b>CARELESS &amp; IMPRUDENT **</b>		<b>LEAVING SCENE OF ACCIDENT **</b>	
State Law or County or Municipal Ordinance		State Law Violation . . . . .	12
Violation . . . . .	2	County or Municipal Ordinance Violation . . . . .	6
State Law, Section 304.016.4, RSMo . . . . .	4	<b>MURDER 2ND DEGREE VEHICULAR INTOXICATED</b>	
<b>CMV / CDL HOLDER FATAL **</b>		State Law or County Ordinance Violation . . . . .	12
State Law Violation Only . . . . .	0	<b>NO MOTORCYCLE QUALIFICATION (State Law Violation Only)</b>	
<b>DRIVE UNDER INFLUENCE DRUGS (1st Offense) **</b>		1st Offense . . . . .	2
1st Violation of State Law or County or Municipal Ordinance . . . . .	8	2nd Offense . . . . .	4
Subsequent offenses, or first offense following previous alcohol/drug-related offense . . . . .	12	3rd Offense/Subsequent Offense . . . . .	6
<b>DRIVING WHILE INTOXICATED (1st Offense) **</b>		<b>NO DRIVER LICENSE (State Law Violation Only) *</b>	
1st Violation of State Law or County or Municipal Ordinance . . . . .	8	1st Offense . . . . .	2
Subsequent offenses, or first offense following previous alcohol/drug-related offense . . . . .	12	2nd Offense . . . . .	4
<b>DRIVING WHILE UNDER SUSPENSION OR REVOCATION OR DENIAL — “DRIVE WHILE SUS/REV/DEN” *</b>		3rd Offense/Subsequent Offense . . . . .	6
State Law or County or Municipal Ordinance Violation . . . . .	12	<b>ASSIST/OBTAIN LIC BY MISREP **</b>	
<b>DRIV UNDER INFLUENCE BAC .04 *</b>		State Law or County or Municipal Ordinance Violation . . . . .	12
State Law or County or Municipal Ordinance Violation . . . . .	2	<b>PERMIT UNLICEN DRVR TO DRIVE</b>	
<b>EXCESS BLOOD ALCOHOL CONTENT **</b>		State Law or County or Municipal Ordinance Violation . . . . .	4
1st Violation of State Law or County or Municipal Ordinance . . . . .	8	<b>SPEEDING</b>	
Subsequent offenses, or first offense following previous alcohol/drug-related offense . . . . .	12	State Law Violation . . . . .	3
<b>EXCESSIVE SPEEDING **</b>		County or Municipal Ordinance Violation . . . . .	2
State Law Violation . . . . .	3	<b>STOP SIGN</b>	
County or Municipal Ordinance Violation . . . . .	2	State Law or County Ordinance Violation . . . . .	2
<b>FAIL TO PRODUCE INSURANCE ID . . . . .</b>	4	Municipal Ordinance Violation when an accident was involved . . . . .	2
<b>FELONY-DRUG TRANSPORT/MFG **</b>		Municipal Ordinance Violation when no accident was involved . . . . .	1
State Law or County Ordinance Violation . . . . .	0	<b>ASSAULT VEHICULAR INJURY *</b>	
<b>FELONY INVOLVING MOTOR VEH **</b>		State Law or County Ordinance Violation . . . . .	12
State Law or County Ordinance Violation . . . . .	12	<b>VEHICULAR MANSLAUGHTER *</b>	
		State Law or County Ordinance Violation . . . . .	12
		<b>ENDANGER HIGHWAY WORKER **</b>	
		State Law Violation Only . . . . .	4
		<b>AGGRAV ENDANGER HIGHWAY WORKER **</b>	
		State Law Violation Only . . . . .	12
		<b>UNLAWFUL TOW TRUCK STOP</b>	
		Municipal Ordinance Violation . . . . .	4

- NOTE:**
- Any other moving violation not listed on this form would be assessed as two points.
  - Suspended Imposition of Sentence (SIS) convictions received under 302.725, RSMo, shall be processed accordingly if the driver was a CDL holder or operating a CMV at the time he/she was stopped.

**CONTINUED...**

The following violation descriptions (as they will appear on the Missouri driver record) are assessed TWO POINTS, whether a state, county, or municipal violation. These violations will only have points assessed if the person was operating a motor vehicle at the time of the traffic offense.

All violations marked with an asterisk (\*) that were committed while operating a Commercial Motor Vehicle (CMV) or all violations marked with two asterisks (\*\*) that were committed by a Commercial Driver License (CDL) holder while operating a CMV or non-CMV will be used toward CDL disqualification under 302.700 – 302.780, RSMo, and points are assessed against the base driving privilege under 302.302, RSMo.

<p>15 1/2 OPERATE AT NIGHT ORD (Municipal Only)</p> <p>ACTIVAT RED LT NON-EMERGENCY</p> <p>AGGRESSIVE DRIVING (Municipal Only)</p> <p>ALT/COUNTERFEIT INS ID CARD</p> <p>ALTER DRIVER LICENSE</p> <p>ASSAULT-3RD DEGRE INVOLVE MV</p> <p>ATTEMPTED DWI</p> <p>ATTEMPTED LEAV SCENE OF ACC</p> <p>COAST WITH GEARS DISENGAGED</p> <p>COLLIDE W/VEHICLE/PROPERTY</p> <p>CRUISING</p> <p>DISOBEY EMERGENCY VEH ORD (Municipal Only)</p> <p>DISOBEY FUNERAL PROC ORDINA</p> <p>DISOBEY TRAF DEVICE RAILROAD</p> <p>DISOBEY TRAFFIC CONT DEVICE</p> <p>DISOBEYED TRAFFIC OFFICER</p> <p>DR W/CHILD ON LAP/MC TANK</p> <p>DRIV OUT OF SERV-15 PASS/HAZ *</p> <p>DRIV UNDER MIN SPEED LIMIT</p> <p>DRIVE CMV W/O OBTAINING CDL *</p> <p>DRIVE MTRCYCLE BETWEEN VEH'S</p> <p>DRIVE MV W/O OWNERS CONSENT</p> <p>DRIVE TOO FAST FOR CONDITION</p> <p>DRIVE WHILE DISQUALIFIED *</p> <p>DRIVE WHILE OUT OF SERVICE *</p> <p>DRIVERS VIEW OBSTRUCTED</p> <p>DRIVING ACROSS FIRE HOSE</p> <p>DRIVING ON SHOULDER (Municipal Only)</p> <p>DRIVING OVER CURB</p> <p>DRIVING OVER SIDEWALK</p> <p>DRIVING THROUGH BARRICADE (Municipal Only)</p> <p>DRIVING WHILE IMPAIRED</p> <p>DRIVING WRONG SIDE OF ROAD</p> <p>ELUDING POLICE OFFICER</p> <p>ENDANGER WELFARE OF CHILD</p> <p>ENGAGE IN SPEED COMPETITION</p> <p>ERRATIC SPEED</p> <p>EXCESS VEH NOISE-SQUEAL TIRE</p>	<p>EXCESSIVE PASSENGER VIOL</p> <p>FAIL TO OBEY RR DEVICE/OFCCR *</p> <p>FAIL TO REMAIN IN MOVING VEH</p> <p>FAIL TO REPORT AN ACCIDENT</p> <p>FAIL TO SLOW AT RR CROSSING *</p> <p>FAIL TO STOP AT RR CROSSING *</p> <p>FAIL TO STOP FOR SCHOOL BUS</p> <p>FAIL TO STP BEFORE RR CROSS *</p> <p>FAIL TO YIELD RIGHT OF WAY</p> <p>FAIL TO YIELD/COLLIDE W/PED</p> <p>FAILED TO REDUCE SPEED</p> <p>FAILURE TO DIM LIGHTS</p> <p>FAILURE TO KEEP RIGHT</p> <p>FAILURE TO OBEY RR RESTR</p> <p>FAILURE TO SOUND HORN</p> <p>FAILURE TO STAY ON PAVEMENT (Municipal Only)</p> <p>FAILURE/IMPROPER SIGNAL</p> <p>FICTITIO/CAN/SUS/REV/ALT LIC</p> <p>FISHTAILING</p> <p>FOLLOWING TOO CLOSE **</p> <p>GAVE FALSE INFO TO OFFICER</p> <p>HOT-RODDING (Municipal Only)</p> <p>IMP CLASS/END/VIOL RESTR *</p> <p>IMP START FROM PRKD POSITION</p> <p>IMPEDING TRAFFIC MOVEMENT</p> <p>IMPROPER BACKING</p> <p>IMPROPER EMERGING FROM DRIVE</p> <p>IMPROPER LANE **</p> <p>IMPROPER PASSING</p> <p>IMPROPER TURN</p> <p>INATTENT/NEGL/CARELESS DR</p> <p>INCREASED SPEED WHEN PASSED</p> <p>INSUFFCNT SPAC TO DR THRU RR *</p> <p>INSUFFCNT CLEARANCE RR CRSS *</p> <p>INTERFERE WITH OFCCR/TRFC SYS</p> <p>LEAV MAIN PORTION OF ROADWAY (Municipal Only)</p> <p>MINOR IN POSSESSION (State Only)</p> <p>MISC-CONVERT FROM PRIOR SYS (Miscellaneous Conviction)</p> <p>MOTOR FUEL THEFT (State Only)</p> <p>NO LIC-POSSESS OR ON DEMAND *</p>	<p>NO OPERATOR'S LICENSE (County/ Municipal Only) *</p> <p>NO MOTORCYCLE QUALIFICATION (County/Municipal Only)</p> <p>OBSTRUCTING TRAFFIC</p> <p>OP ATV UNDER INFLU ALC/DRUG</p> <p>OP W/O DOUBLE/TRIPLE ENDORSE</p> <p>OP W/O HAZARDOUS MAT ENDORSE</p> <p>OP W/O PASSENGER ENDORSE</p> <p>OP W/O TANK VEHICLE ENDORSE</p> <p>OP WITHOUT SCHOOL BUS PERMIT</p> <p>OPEN CAR DOOR INTO TRAFFIC</p> <p>OPERATE MTRCYCLE 3 PASSENGERS</p> <p>OPERATED ATV WITH PASSENGER</p> <p>OPERATED ATV-UNDER AGE OF 16</p> <p>OPERATING ATV ON HIGHWAY</p> <p>OPERATING MV W/O HEADLIGHTS</p> <p>OPERATING WHERE PROHIBITED</p> <p>OVERTAKE/STRIKE REAR OF VEH</p> <p>PRESENT ANOTHER'S LIC AS OWN</p> <p>PROHIBITED U TURN</p> <p>RIDING SIDESADDLE-MOTORCYCLE (Municipal Only)</p> <p>SB DR NOT PERMIT VEH TO PASS</p> <p>STRIKE A LEGALLY STOPPED CAR</p> <p>TAMPER W/IGN INTERLOCK DEV</p> <p>TAMPERING WITH MOTOR VEHICLE</p> <p>TEXTING WHILE DRIVING (State Only)</p> <p>TRAFFIC TURN/SIGNAL VIOL</p> <p>UNAUTHORIZED LANE USE</p> <p>USE TSPS TO CONTROL TRAFFIC (State Only)</p> <p>VIOL OF IGNITION INTERLOCK</p> <p>VIOL OF INSTRUCTION PERMIT</p> <p>VIOL OF RESTRICTED LICENSE</p> <p>VIOLATED OPEN CONTAINER LAW (Municipal Only)</p> <p>WARNING OF RADAR</p> <p>WEAVING</p> <p>WRONG DIRECTION-DIVIDED ST</p> <p>WRONG DIRECTION-ONE WAY ST</p>
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## **A**

Abuse and Lose Law, 5.14, 12.11, 17.11  
Accounting Guidelines  
    in general, 2.16  
    judicial education fund, 2.17  
    appointed counsel fund, 2.18  
    domestic violence shelter fund, 2.19  
    inmate security surcharge, 2.20  
    law enforcement training surcharge, 2.21  
    municipal division costs, 2.22  
Acquittal, 9.8, 9.12, 9.15  
Administrative Alcohol Suspension/Revocation, 17.15  
Advisory Opinions, 16.3, 16.6, 16.7, 16.8, 16.9, 16.10  
Affidavit, Sureties, 6.15  
Alcohol/Drug Programs, 12.11  
Alcohol/Drug-Related Offenses, 5.14  
Alternative Sentences, 12.7 - 12.11  
Amendment of Information, 4.9  
Appearance of Defendant  
    compelled, 4.13  
    voluntary, 4.12  
Application  
    for change of judge, 3.10, 7.6  
    for trial de novo, 14.5 – 14.9  
Arraignment, 7.3, Chapter 8  
Article V, 1.2, 2.2  
Attorney  
    appointment for indigent defendant, 5.11 – 5.14  
    for defendant, 5.2 – 5.4  
    refusal to hire, 5.7, Form 5.01  
    right to, 5.5  
    waiver of, 5.6  
    when required, 5.3

## **B**

Bail,  
    purpose 6.2  
    condition of release and setting, 6.4  
    setting, 8.14  
Bail/Bonds, Generally, Chapter 6  
Bankruptcy, 13.2  
Body Attachment, 7.13

## **B** continued

### Bond

- application to fine and costs, 13.5
- “box theory”, 1.9
- fidelity, 2.51
- forfeiture, 6.8 – 6.12
- modification, 6.6 – 6.7
- purpose of, 6.2
- trial de novo, 14.11
- schedule, 6.4
- stay of execution, 13.4
- sureties, 6.12 – 6.15

### Budget

- municipal division, 2.5

## **C**

Careless & Imprudent Driving, 10.5

Case Index, 2.10

Case Number, 2.9

Certificate of Mailing, 4.13

Change of Judge, 3.10, 7.6

Child Support Enforcement Suspensions, 17.10

Citation for Examination, 17.9

Circuit Court Divisions, 1.2

Clerk

- of municipal court, 2.4

- of supreme court, 1.2

Closed Records, 2.11, 2.13

Closing Arguments, 9.13

Code of Judicial Conduct, 16.2, 16.6, 16.7, 16.8, 16.9, 16.10

Commission on Retirement, Removal and Discipline of Judges, 16.11 – 16.13

Commitment, 13.11 – 13.14

Community Service, 12.13

Compact, Non Resident Violators, 13.10

Competency of Witnesses, 11.3

Complaint

- contents, 4.2

- form for traffic, 4.3

Concealed Weapon, 10.12

Conditions of Release, 6.4

Confidential Records, 2.13

Conflict Between Statute and Rule, 1.4

Consecutive/Concurrent Sentences, 12.6

Contempt of Court, 5.8, 12.4, 13.7, 13.12, Form 13.04, Chapter 15

## **C** continued

Continuances, 7.5  
Controlled Substance – Revocation of Drivers’ License, 12.11  
Conviction, 12.8  
Counsel, 13.8, Chapter 5  
Counts, Multiple, 4.4, 4.6  
Court Always Open, 3.17  
Court Costs, Chapter 13  
Court Facilities, 2.15.1 – 2.15.5  
Court of Appeals, 1.2  
Court Operating Rules  
    Rule 8, 2.14, Appendix C  
    Rule 13, 2.5, Appendix H  
Credibility, 11.11  
Crime Victims Compensation Fund, 2.12  
Culpable Mental States, Generally, 10.8

## **D**

Defendant  
    commitment for contempt, 5.8  
    compelling the appearance, 4.13  
    indigency of, 5.11, 5.12  
    incorrect name on information, 3.8  
    informing of right to counsel, 5.5  
    presence not required, 5.4  
    pro se representation, 9.4  
    refusal to hire counsel, 5.7, Form 5.01  
    voluntary appearance, 4.12  
Defendants, Multiple, 4.7  
Defenses, 7.7  
Defenses and Objections to Pleadings, Pretrial, 4.5  
Department of Revenue  
    generally, Chapter 17  
    notice of license suspension, 13.10  
    reporting to, 2.12  
    records, 17.19  
Directed Judgment, 9.8  
Discovery, 7.8  
Disqualification of Judge, 3.10, 7.6, 15.11  
Docket, 2.8, 7.2  
Driver Improvement Program, 12.10  
Drivers’ License as Bond, 6.3  
Drivers’ Privacy Requirements, 17.18  
Driving While Intoxicated, 10.7

## **D** continued

Driving While Revoked/Suspended, 10.8, 17.5  
Drug and Alcohol-Related Offenses, 5.14  
Drugged Condition, 10.7  
Due Process/Probation Revocation 12.8

## **E**

Equivocal Pleas, 8.6  
Ethics, Judicial, Chapter 16  
Evidence  
    definition, 11.2  
    demonstrative, 11.9  
    generally, Chapter 11  
    presentation, 9.4 – 9.13, 11.5  
    relevancy and materiality, 11.10  
Excessiveness, 6.4, 6.6, 6.7, 6.12  
Exclusion of Witness, 9.5  
Execution of Judgment, 13.14  
Expert Witnesses, 11.16  
Expungement, 12.8

## **F**

Failure  
    of accused to testify, 9.10  
    of accused spouse to testify, 9.10  
    to appear, 17.6  
    to appear/corporation, 8.12  
    to appear/defendant, 8.12  
    to appear/suspension of driving privileges, 8.12  
    to appear/witness, 7.13  
    to pay fines and costs, 6.8  
Fee, Trial De Novo, 14.9  
Fines  
    generally, 12.4, 13.1  
    payment, 13.2 – 13.5, 13.9  
    schedule, 7.4  
Forfeiture of Bond, 6.8 – 6.11  
Form of Question, 11.5

## **G**

Garnishment, 12.4, 13.14  
Guilt, Finding of, 9.16

## **G** continued

### Guilty Plea,

- voluntary, 8.4 – 8.10
- withdrawal, 8.10, 9.20

## **H**

Habeas Corpus, Writ of, 15.12

Hearings, 6.5 – 6.9, 13.8

Hearing Impaired Defendant, 8.3

Hearsay Rule and Exception

- admissions, 11.8
- business Records, 11.8
- generally, 11.7, 11.8
- past recollection recorded, 11.8

Highway Patrol, Reporting to, 2.12

## **I**

Ignition Interlock Device, 12.11, 17.12

Impeachment, 11.11

Implied Consent Refusal to Test, 17.14

Indigent Defendant, 5.12, 5.13

Information

- amendment, 4.9
- defects in, 3.8, 4.11
- form and contents, 4.4
- nonprejudicial defects, 4.11
- sufficiency, 4.4
- unavailability of original, 4.10

Installment Payments, 12.4

Intoxication, 10.7

## **J**

Jail Sentence

- failure to pay, 13.11
- right to attorney, 5.5 – 5.8
- sentencing limits, 12.2

Joinder

- of defendants, 4.6
- of violations, 4.6

## **J** continued

### Judge

- municipal, 2.3
- opening statement, 1.10
- personal characteristics, 1.11
- presiding, 2.2
- role, 1.7

### Judgment

- generally, 9.14-9.20, Chapter 12
- of acquittal, 9.8, 9.12, 9.15
- on bond forfeiture, 6.8 – 6.11
- suspended execution of sentence, 12.8
- suspended imposition of sentence, 12.8

Judicial Notice, 11.12

Judicial Power, 3.2

### Jurisdiction

- definition, 3.3
- municipal courts, 3.3 – 3.7
- missouri's judicial branch, 1.2
- over the case, 3.6
- over the person, 3.7
- principles, 3.4
- special problems, 3.8 – 3.11
- subject matter, 3.5

Jury Trials, 8.20, 8.21

## **K**

## **L**

Larceny, 10.9

Leaving the Scene of an Accident, 10.6

License Denial/Ineligibility Periods, 17.13

License Reinstatement, 17.5, 17.17

License Suspension/Notice to Department of Revenue, 12.4

Limited Driving Privileges, 17.16

Local Court Rules, 1.5

## **M**

Marriages, 2.3.1

Materiality, 11.10

### Modifications

- by division, 6.6
- by higher court, 6.7

## **M** continued

Monetary Bond, 6.4, 6.8

### Motions

- continuance, 7.5
- for contempt, 13.7, Form 15-02
- judgment of acquittal, 9.8, 9.12
- jury trial, 8.20
- pretrial, 7.7
- pretrial defenses and objections to pleadings, 4.5
- set aside judgment, 9.19
- withdrawal plea of guilty, 9.20

Motor Vehicle Financial Responsibility, 17.8

Municipal Division Court, 1.2

Municipal Judge, Responsibilities, 2.3

Municipal Finance Commission, 2.5

Municipality, Report to, 2.12

## **N**

Name, Incorrect on Information, 4.8

No Contest/Nolo Contendere Pleas, 8.13

### Nonprejudicial Defects

- information, 4.11

Nonresident Violator Compact, 8.12, 13.10

Nonresident Violator Suspensions, 17.7

Not Guilty Pleas, 8.11

Noxious Odors, Peace Disturbance, 10.10

## **O**

Objections, 4.5, 7.7, 11.4, 11.7, 11.10

Offensive Language, Peace Disturbance, 10.10

Office, Judicial Defined, 1.8

### Opening Statement

- by the defendant, 9.9
- by the judge, 1.10
- generally, 9.6

Operation of Motor Vehicle, defined for DWI, 10.7

Opinions, 11.6, 16.3, 16.6-16.10

Order to Show Cause, 13.7, Form 13-03, Form 15-01

### Ordinances

- generally, 1.6
- penalty limits, 1.6, 12.2
- traffic, 10.3 – 10.7

## **P**

Parole, 12.9  
Payment, Partial, 13.3  
Payment of Fine, 12.4, Chapter 13  
Peace Disturbance, 10.10  
Penalty Limits, 8.7, 9.17, 12.2  
Plea Agreements/Negotiations, 8.15-8.21  
Pleas, 8.4 – 8.14  
Points on Drivers License  
    assessment for speeding, 17.4  
    generally, 17.2  
    suspension/revocation, 17.13.  
Police Officer, Hindering and Interfering, 10.11  
Presence of Defendant, 9.2  
Presentence Investigation, 12.5  
Presiding Judge, 2.2  
Pretrial Motions  
    defenses and objections to pleadings, 4.5  
    generally, 7.7  
Private Probation Provider Services, 12.5  
Probation, 3.11, 9.17, 12.8  
Procedural Rules, 1.4  
Prohibition, Writ of, 15.13  
Promise to Appear, 6.4  
Pro Se Litigants, 9.4

## **Q**

## **R**

“Reasonable Doubt”, 9.4, 9.8, 9.10, 9.14, 11.12  
Rebuttal Evidence, 9.11  
Record Keeping, Generally, 2.7 – 2.14  
Records Transfer/Destruction, 2.14  
Reduction of Sentence, 12.8  
Reimbursement to Law Enforcement, 12.4  
Reinstatement Requirements, 17.17  
Release on Own Recognizance, 6.3, 6.5  
Release, Conditions for, 6.8  
Relevancy, 11.10  
Reporting, Required, 2.12  
Resisting Arrest, 10.11  
Restitution, 12.12  
Restrictions on Court, 5.2  
Return, On Service of Summons, 7.12

## **R** continued

Revocation of Probation/Parole, 3.11, 12.8

Right to Trial De Novo, 9.18

## **S**

SATOP, 12.11

Security, Court, 2.15

Sentence

concurrent and consecutive, 9.17, 12.6

generally, 9.17, Chapter 12

Service

by mail, 3.7, 3.11

personal, 7.11 – 7.12

pretrial, 7.10

return of, 7.12

Setting Aside Judgment, 8.10, 9.19

Severance, 4.7, 7.9

Scienter, mens rea for Driving while Revoked, 10.8, 17.5

Show Cause, Failure to Pay, 12.4, 13.7, Form 13-03, Form 15-01

State Court Administrator, 1.2, 1.4

Statement of Rights, In Court, 8.2 – 8.3

Statutes, 1.3

Statutes of Limitations, 3.9

Stay of Execution, 13.4, 14.10

Stealing, 10.9

Subpoena, Witness, 7.10, Form MU95

Sufficiency of Information, 4.4

Summons, 4.3, 4.13

Suppress, Motions to, 7.7

Supreme Court, Generally, 1.2

Supreme Court Rules, 1.4

Sureties

compensated, 6.13

uncompensated, 6.12

Surrender of the Accused, 6.10

Suspended Execution of Sentence, 12.8

Suspended Imposition of Sentence, 12.8

Suspension of License/Notice to Department of Revenue, 13.10

## **T**

Third Class City, 12.2

Time Computation, 3.14 – 3.17, 14.7

## **T** continued

### Traffic

- careless & imprudent driving, 10.5
  - driver's license as bond, 6.3
  - driving while intoxicated, 10.7
  - driving while revoked/suspended, 10.8
  - failure to yield, 10.4
  - form of complaint, 4.3
  - form and contents of information, 4.4
  - leaving the scene of accident, 10.6
  - offender's school, 12.10
  - speeding, 10.3
  - violations bureau, 7.4
- Trial De Novo, 9.18, Chapter 14
- Trial, Continuance, 7.5
- Trials, Generally, Chapter 9
- Twenty Hour Rule, 6.6

## **U**

- Uniform Complaint and Summons, 4.3 – 4.4

## **V**

- Venue, 3.12 – 3.13
- Victims, 12.5
- Violations Bureau, Establishment, 2.6, 7.4
- Village, 12.2

## **W**

- Waiver of Counsel, 5.6, Form CR210
- requirements to be valid, 5.10
- Warrants, 4.13, 6.4, 6.6
- Weapons
- concealed, 10.12
  - unlawful discharge, 10.12
- Withdrawal of Guilty Plea, 8.10, 9.20
- Witnesses
- exclusion from trial, 9.5
  - generally, 7.10
  - presence for trial, 9.3
  - subpoena, 7.10
- Writ of Habeas Corpus, 15.13
- Writ of Prohibition, 15.13

**X**

**Y**

**Z**