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Indigence Issues in Municipal Court, From A-Z
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Indigency Considerations in Revocation Proceedings
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The purpose of this presentation is to focus on the issue of indigence as it relates to enforcement of a municipal court's orders through revocation proceedings. Sentencing of indigent persons will also be addressed. General issues related to the rights of probationers will be examined and alternatives to revocation will be discussed.

I. Court's Ability to Incarcerate or Place on Probation.

A. The court can incarcerate a defendant to the full term without putting someone on probation, even if the person is indigent. *Williams v. Illinois, 399 U.S. 235 (1970); Bearden v. Georgia, 461 U.S. 660 (1983)*.

B. A defendant's poverty in no way immunizes him or her from punishment. *Bearden v. Georgia, 461 U.S. 660 (1983)*.

C. A defendant cannot be subjected to imprisonment solely because of his or her indigency. *Tate v. Short, 401 U.S. 395 (1971)*.

D. An indigent person may not be required to serve more than the maximum sentence because the person is unable to pay the fine. *Williams v. Illinois, 399 U.S. 235 (1970)*.

E. Imprisoning a defendant because of his or her inability to pay a fine is invidious discrimination that violates the Equal Protection Clause of the Fourteenth Amendment. *Williams v. Illinois, 399 U.S. 235 (1970)*

F. Once it is determined that probation is appropriate, there is a determination that the state's interests do not require imprisonment. *Bearden v. Georgia, 461 U.S. 660 (1983)*.

G. Municipal court judges may place a defendant on probation or parole for up to two years and can place such conditions and restrictions as the judge sees fit. *K.S.A. 12-4511*.

II. Court's Ability to Revoke.

A. The municipal court statute does not provide much guidance for revocation hearings. "After notice and hearing, the municipal judge may revoke such parole for violation of conditions by directing the chief of police to execute the sentence and again confine the accused person to jail for the time specified by the court, which shall not exceed the initial jail sentence imposed, less the time served." *K.S.A. 12-4511*.

B. The court can revoke a probationer if he or she willfully refuses to pay or fails to make sufficient bona fide efforts. *Bearden v. Georgia, 461 U.S. 660 (1983); City of Wichita v. Lucero, 255 Kan. 437 (1994)*.

C. Lack of bona fide efforts may include:

1. Failure to make sufficient bona fide efforts to legally acquire the resources to pay. *Bearden v. Georgia, 461 U.S. 660 (1983)*.
2. This may include a requirement to seek employment or borrow money to pay the fines and costs. *Bearden v. Georgia, 461 U.S. 660 (1983)*.
3. Failing to actively seek full-time employment constitutes a wrongful refusal to pay. *State v. Dockery, 2000 Kan. App. Unpub. LEXIS 923*.

D. If the defendant cannot pay despite bona fide efforts, the court must consider alternative measures of punishment. *Bearden v. Georgia, 461 U.S. 660 (1983); City of Wichita v. Lucero, 255 Kan. 437 (1994)*.

E. Alternative measures of punishment are not limited to a specific list. A Bench Card that provides for alternative sanctions was prepared by the National Task Force on Fines, Fees and Bail Practices. It is attached and the following alternatives are recommended:

1. Reduction, waiver or suspension of the fine imposed;
2. Extension of time to pay;
3. Modification of payment plan;
4. Community service;
5. Credit for completion of relevant, court-ordered program; and
6. Waiver or suspension of the amount due.

F. If the court determines that none of the alternatives are adequate to meet the state's interests in punishment and deterrence, the court may then revoke and imprison the probationer. *Bearden v. Georgia, 461 U.S. 660 (1983)*.

III. Right to Counsel.

A. A defendant is entitled to some minimum due process protections, including assistance of counsel. *State v. Miller, 44 Kan. App. 2d 438 (2010); Black v. Romano, 471 U.S. 606 (1985).*

B. The defendant must be informed that if they are financially unable to hire an attorney one will appointed for them. *State v. Miller, 44 Kan. App. 2d 438 (2010).*

C. The defendant must comprehend the nature of the charges and proceedings, range of punishment, and all facts necessary for a broad understanding of the case. *State v. Miller, 44 Kan. App. 2d 438 (2010); State v. Buckland, 245 Kan. 132 (1989); State v. Mixon, 27 Kan. App. 2d (2000).*

D. A waiver of counsel should be signed by the defendant in all cases where the defendant proceeds without counsel. A *Waiver of Counsel - Parole or Probation Revocation Hearing* form is attached with these materials.

E. The defendant must possess the intelligence and capacity to appreciate the consequences of the waiver. *State v. Miller, 44 Kan. App. 2d 438 (2010).*

III. Burden of Proof.

A. Revocation of probation or parole is not a part of a criminal prosecution and thus the full panoply of rights are not due to a defendant for that proceeding. *State v. Miller, 20 Kan.App.2d 378 (1995).*

B. The state has the burden of establishing the violation. *State v. Duke, 10 Kan. App. 2d 392 (1985); K.S.A. 22-3716(b).*

C. A preponderance of the evidence is sufficient. *State v. Rasler, 216 Kan. 292 (1975).*

D. After the prosecution establishes a violation for failure to pay, the burden is on the defendant to raise the defense of poverty and introduce evidence showing poverty and a good-faith effort to meet the terms of probation. *State v. Duke, 10 Kan. App. 2d 392 (1985).* Simply stating that the defendant is injured or disabled is not sufficient. The defendant is required to produce testimony or evidence to show that injury or disability. *State v. Winters, 2001 Kan. App. Unpub. LEXIS 85.*

IV. Use of Affidavits.

A. Affidavits may be introduced if "good cause shown". *State v. Yura, 250 Kan. 198 (1992); State v. Miller, 20 Kan.App.2d 378 (1995).*

B. A two factor test is required. The court must balance the probationer's right to confront an adverse witness against the grounds asserted by the government for not requiring confrontation. *State v. Miller, 20 Kan.App.2d 378 (1995).*

C. The court must make a specific finding regarding what the good cause is. *Morrissey v. Brewer, 408 U.S. 471 (1972); State v. Miller, 20 Kan.App.2d 378 (1995).*

V. Extension of Probation.

A. Probation or parole may be extended by the court for additional periods not to exceed two years. *K.S.A. 12-4511.*

B. A defendant does not have a right to counsel at a hearing on a motion to extend probation. *State v. McDonald, 272 Kan. 222 (2001).* A defendant also does not have the right to counsel when community service is ordered to be extended. *State v. Sanders, 2000 Kan. App. Unpub. LEXIS 165.*

C. Equal protection is not invoked when probation is extended. *State v. Gordon, 275 Kan. 393 (2003).*

D. If restitution is owed, probation may be extended without even giving notice of hearing to the defendant. *State v. Gordon, 275 Kan. 393 (2003).*

VI. Practical Alternatives.

A. Continue the hearing. The hearing may be continued to allow the defendant more time to pay the amounts due. This is a good time to address and possibly modify the payment plan set out for the defendant.

B. Extend Probation. As indicated above, probation may be extended. This is particularly helpful when there is a large amount due and the defendant has been unable to pay (or is still unable to pay) the amount due.

C. Address other violations. Even if non-payment is an issue, a probationer can be revoked for other violations. *State v. Ferguson, 271 Kan. 613 (2001).* (Failure to attend therapy, take drug tests, failure to seek and obtain employment, failure to comply with SRS). Willfulness is not required for violations other than non-payment. *State v. Naughton, 2015 Kan. App. Unpub. LEXIS 799.*

D. Offer community service. If a defendant is physically capable, the defendant should almost always be given a chance to do community service to pay fines and costs.

E. Terminate unsuccessfully and send to collections. There are some cases where the defendant is not going to be able to successfully paying the amounts due. Alternative sanctions may not be able to address the issues. Closing the file may be the best option.

VI. Appeal.

A. There is no right to appeal a revocation order from municipal court. *City of Wichita v. Patterson*, 22 Kan. App. 2d 557 (1996).

B. The defendant may file a habeas corpus action in district court pursuant to K.S.A. 60-1501. *In re Koenig*, 708 P.2d 986, 1985 Kan. LEXIS 479 (1985).

IN THE MUNICIPAL COURT OF _____, KANSAS

CITY OF _____, Plaintiff,)
)
vs.)
)
_____, Defendant.)

Case No. _____

WAIVER OF COUNSEL -- PAROLE OR PROBATION REVOCATION HEARING

The undersigned hereby acknowledges being advised of the following by the Municipal Court of _____, Kansas:

1. Notice of the claimed violations of parole or probation;
2. Disclosure of evidence against me;
3. That the City has the burden of establishing the violations charged and that I have the right to be present at a hearing on the charges against me;
4. My right at a hearing to present evidence, subpoena witnesses, and cross-examine witnesses brought by the City to testify against me; and
5. My right to deny or admit the claimed violations of my parole or probation.

I understand that I may be sentenced to a maximum of ____ days in jail if my probation or parole is revoked in this matter.

STIPULATION

___ I admit that I have violated the conditions of my parole or probation.

___ I deny committing the violations alleged and agree to proceed to hearing without counsel.

The undersigned further acknowledges that the Court has advised me of my right to counsel; that I can hire an attorney of my choosing and, if I cannot afford an attorney and I might be deprived of my liberty if revoked, the Court will appoint an attorney to represent me in this case. Notwithstanding my right to counsel, either retained or appointed, I hereby waive this right and agree to proceed as indicated above. I waive an attorney and enter my stipulation above without any promises being made to me by anyone and without any force or coercion being used against me.

DATE _____

Defendant

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 20__.

Judge of the Municipal Court

I hereby certify that the above-named person has been fully informed of the alleged violations of his or her probation or parole and of the defendant's right to have counsel, either retained or appointed, to represent the defendant at the proceedings before this Court and that the accused has executed the above waiver in my presence, after its meaning and effect have been fully explained to the defendant, this ____ day of _____, 20__.

Judge of the Municipal Court



NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES

LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

A BENCH CARD FOR JUDGES

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent but to lack of financial resources, the court should consider alternative measures of punishment other than incarceration. *Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983). Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. *Id.* at 671.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel*¹; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

- a. Whether the amount charged as due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness¹

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG);²

For 2016, 125% of FPG is:

\$14,850 for an individual;	\$30,375 for a family of 4;
\$20,025 for a family of 2;	\$35,550 for a family of 5;
\$25,200 for a family of 3;	\$40,725 for a family of 6.

- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

¹ See *Bearden v. Georgia*, 461 U.S. 660 (1983)

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, <https://aspe.hhs.gov/poverty-guidelines>

- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the person is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;
- g. Other LFOs owed to the court or other courts;
- h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and
- i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record, that the person was provided prior adequate notice of:

- a. Hearing date/time;
- b. Failure to pay an LFO is at issue;
- c. The right to counsel*;
- d. The defense of inability to pay;
- e. The opportunity to bring any documents or other evidence of inability to pay; and
- f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

1. The financial resources relied upon to conclude that nonpayment was willful; or
2. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

Alternative Sanctions to Imprisonment That Courts Should Consider When There Is an Inability to Pay

- a. Reduction of the amount due;
- b. Extension of time to pay;
- c. A reasonable payment plan or modification of an existing payment plan;
- d. Credit for community service (*Caution:* Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);
- e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or
- f. Waiver or suspension of the amount due.

*Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees. See *Best Practices for Determining the Right to Counsel in Legal Financial Obligation Cases*.

This bench card was produced by the National Task Force on Fines, Fees and Bail Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and the Bureau of Justice Assistance, coordinated by the National Center for State Courts.

