



The Third Branch: Municipal Courts in Kansas

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“Fairness is the basic premise of our system of justice. The goal is a fair process that produces a fair result, a system that treats similarly situated people similarly, and does not distinguish among persons because of irrelevant factors. Those of us in the system believe that we accomplish this. But the reality of the justice system in action in the community depends not only on what the system thinks it is doing, but on what the public perceives it to be doing. If any significant portion of the public perceives the system to be unfair in process or outcome, if it perceives it as treating people differently because of race or ethnicity, if it thinks that the system’s claim to fairness is illegitimate, then the efficacy of the system is compromised. The practical working of the law in the community depends in large part on voluntary compliance. And voluntary compliance depends, in turn, on how the public perceives the system.”

Michael D. Zimmerman, Former Chief Justice, Utah Supreme Court

Our system of government in the United States is based on the separation of powers, with the three branches of government providing checks and balances against the abuse of power of any one branch. Mayors and city council members are very familiar with the executive (mayor or city manager, city staff, police) and the legislative branches (governing body), but not quite as familiar with the third and separate branch, the judicial branch (municipal court). There are 388 municipal courts in Kansas and 260 people serving as municipal judges, the majority of those judges being lawyers. Municipal courts are generally considered high volume courts and as a whole handle many more cases annually than the state system, even though many of those cases are “fine-only” cases. Because of this, if a person is going to interact with the court system in your area in his or her lifetime, it is probably going to be with a municipal court. Therefore, we must be ever vigilant to make sure that the impression is a good one; one that it is, above all else, fair. So how does a city ensure that its citizens respect its court and therefore comply with its orders and adhere to the laws adopted by the governing body?

I. The Court Organizational Chart

K.S.A. §12-4105 states that the municipal court shall be presided over by a judge and the judge shall be selected

as “provided by statute.” The judge must be a citizen of the United States and a high school graduate. If the judge is presiding in a city of the first class, the judge must be a lawyer. If the judge is not a lawyer, he or she has 18 months from the date of taking office to pass a comprehensive exam given by the Kansas Supreme Court.

A city can decide “by statute” how it wants to select and retain its judge. Currently however, all municipal judges in Kansas are appointed. That is where the similarities end. In some cities, the mayor appoints the judge. In some, the city council appoints. In others, the city manager appoints the judge. And, believe it or not, in a few, the chief of police actually makes the selection. In smaller cities, the judge also serves as the clerk and handles all the necessary court paperwork. In others, there is a court staff. In some cities the court staff reports to the judge, in others it reports to the city manager or the chief of police. So here is the first and most visible opportunity for a city to show it believes in the rationale for three branches of government, to show its citizenry that the court is a fair and unbiased place to resolve cases, be they speeding tickets, DUI, domestic battery, shoplifting, dog-at-large, or property maintenance code violations.

Can anyone dispute the perception that the public is left with when the person deciding his or her case can be

hired, fired or given a raise (or no raise) by the chief of police? Or the city attorney who prosecutes the cases? Or the city manager who hires the city attorney? To avoid the appearance of impropriety and bias, if appointed, the municipal judge should be appointed by the governing body of the city. The legislative branch is not in a position to have day-to-day interaction with the court and therefore attempts to influence court outcomes are minimized by having the judge report to the legislative branch.

Likewise, a court staff that reports to anyone other than the judge, is a recipe for trouble.

Granted, in some cities there is no full-time court staff. For example, a full-time city employee may be assigned both to the police department and the court to fill out full-time duties. In this situation, although the day-to-day supervision of the staff member may be the city manager or chief of police or finance director, when it comes to directing court operations the staff person should take direction from the judge and the other executive branch supervisor needs to recognize and appreciate this distinction. The judge adopts court policy and needs to be able to direct staff to implement and enforce said policies. In addition, a judge is ethically bound by the actions of those under his or her direction. Therefore, the judge needs to have administrative control over the staff, at least as it relates to their court responsibilities.

II. The Contract or Employment Agreement with the Judge

Most appointing authorities put a lot of thought into who is going to be the municipal judge for the city. They want someone whose judgment they trust and who is a solid member of the community. They want a person that will decide a case based on the facts presented and not on who may garner the most influence with the judge, or who the mayor or chief of police want to prevail. Therefore, once this intelligent and trusted judge is selected, it is best not to “meddle” in how he or she does the job. This is at the heart of the “separation of powers” doctrine.

Some cities only contract with the judge for one year. In other words, the city can remove the judge for any reason or no reason every year. It is important to again examine what type of message this is sending to your community. *“If we don’t like the decisions the judge makes, we will remove him.”* A revolving door of judges sends a message that this position is just window-dressing for the governing body, which really controls the decisions made and keeps the judge on a short leash.

A year is not a very long time and anger over a particular case can brew for months at a time. You certainly do not want a judge that bases his or her decisions on the “popular will of the people.” In fact, to decide a case based on anything other than the particular facts before her would be an ethical violation for the judge. Therefore, if you truly want to have a “third branch” of government, cities should consider contracting with their judges for longer terms. Many of the larger cities use four year terms. At the end of four years, the council decides whether to grant another four year term or look for another judge. This insulates the judge, to some extent, from minor skirmishes over cases and allows the governing body to look at the “big picture” when it comes time for reappointment. This does not mean that you cannot get rid of a “bad” judge. Any contract should state that the

judge can be disciplined, suspended or removed from office upon the finding of an ethical violation by the Kansas Commission on Judicial Qualifications, the state judicial disciplinary board.

YOU SHOULD EXPECT THE FOLLOWING FROM YOUR MUNICIPAL JUDGE:

- ✦ Makes prompt decisions based solely on the facts and the law
- ✦ Adheres to the Kansas Code of Judicial Conduct
- ✦ Obtains required annual continuing education and keeps up-to-date on law
- ✦ Treats all involved with the court system with courtesy and respect
- ✦ Performs necessary judicial and administrative duties competently and promptly
- ✦ Conducts himself or herself in a manner that promotes confidence in the system

III. Frustrations

At the last municipal judges conference, a survey was distributed asking judges to list their top five job frustrations. What follows is a compilation of some common themes that were expressed universally by respondents, regardless of the size or location of the court. These issues all affect the public perception of the court and are common pitfalls to establishing a court that receives the proper respect of your residents.

A. Lack of Understanding Regarding the Court Process

Judges are often confronted by city officials or employees upset with the outcome or procedure in a particular case. Often this is simply the result of being unfamiliar with the court process and the statutory and constitutional provisions that govern it. Here are a few examples.

1. The Trial

The City is required to prove each and every element of a crime beyond a reasonable doubt. It is required to file the charge in a form that properly sets out the necessary elements and provides notice of the charges to the alleged offender. Failure to adequately charge the case will require dismissal. Failure to prove each and every element beyond a reasonable doubt will result in a “not guilty” finding. There is generally no right for the city prosecutor to appeal a “not guilty” finding. However, if a defendant is found guilty she does have a remedy. She can appeal and get a brand new trial in district court, in some cases a jury trial. The standard response to a constituent that believes she was unjustly convicted is to point out that an appeal is always an option if done in a timely manner. However, do not expect your prosecutor to be able to appeal a “not guilty” finding or for your judge to be able to “un-do” the result. The case is finished and there are no “do-overs.”

2. Constitutional Right to An Attorney

If there is a possibility that the judge could send a defendant to jail or assess a jail term (even if the person is

granted probation or the jail term is suspended) he has the right to an attorney. If the person cannot afford an attorney, the court must appoint one for the defendant at the city's expense. There is no getting around this. Your court may try to recoup these fees from the defendant, but regardless of whether the defendant pays those fees, the judge must appoint an attorney and your city is ultimately responsible for paying for it.

3. The Role of the City Attorney/Prosecutor

The role of the city prosecutor is a powerful one. A prosecutor can file charges, dismiss charges, and divert charges with very little input from the court. The prosecutor can enter plea agreements in which certain sentences are agreed upon. Even though the judge can reject the plea agreement, it is difficult to justify departing from a reasonable agreement between consenting parties. If you are dissatisfied with the result of a particular case, the first thing to find out is whether it was a negotiated result. As Lenny Bruce once said, "*In the halls of justice, justice is in the halls.*" The vast majority of criminal cases in this country are resolved by some sort of mutually agreed upon disposition and there are some very valid reasons to support such practices. If you do not like such a policy, you need to discuss it with your city attorney.

Prosecutors are so important that a case cannot proceed to trial without a prosecutor. The police officer cannot present the city's case and the judge certainly cannot. K.S.A. §12-4110 states that "*the city attorney, in person or by assistants, shall prosecute all causes in municipal court.*" Therefore, unless a continuance has been granted for good cause, failure of a city prosecutor to appear and present evidence at the time of trial requires that the judge dismiss the charges for lack of prosecution. The judge has no choice.

4. Interpreters

K.S.A. §75-4351 (as it applies to municipal court cases) states that when a person's primary language is not English a qualified interpreter **shall** be appointed for any criminal court proceeding involving such person that may result in jail or fine or any type of sanction. It further states at K.S.A. §75-4352 that any interpreter so appointed must be paid out of court funds and interpreter fees cannot be assessed back against the defendant. This includes interpreters for the deaf and hard of hearing as well as languages other than English. Even if this statute were not in place, some courts around the country have found that a defendant's constitutional right to confront witnesses, present a defense, testify on his own behalf, right to counsel and right to due process of law may be compromised if he or she is not able to understand the proceedings due to a language barrier.

B. Judicial Ethics

Your judge must uphold his or her responsibilities under the Code of Judicial Conduct before and superior to any respon-

sibility to the City or the judge's appointing authority. A violation of the Code can result in loss of judicial position and, if your judge is an attorney, can result in the loss or suspension of his or her license to practice law. It is taken **very seriously** by judges. They receive yearly training in the Code provisions from the Kansas Supreme Court. So, what are some ethical dilemmas faced by your judge?

1. Ex Parte Contacts.

A judge is generally prohibited from initiating, permitting, or considering *ex parte* communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter. *Ex parte* means from or concerning one side in a dispute only, without the other side present. Therefore, if you are an elected official or police officer or city manager the judge cannot discuss the case with you unless all parties to the case are present to hear the conversation. If you send the judge a memo or email about the case, the judge is required to copy all parties with it and give each of them a chance to respond to the communication. If you insist on discussing the case or making your position known to the judge, the judge may be required to disqualify himself from hearing the case. Remember, this includes not only cases that have been filed, but cases that **may** be filed. See, Kansas Code of Judicial Conduct, 601B, Canon 2, Rule 2.9.

2. Disqualification

A judge is required to disqualify (recuse) herself in any proceeding in which the judge's impartiality might reasonably be questioned. One such situation is when the judge has personal knowledge of the facts that are in dispute in a proceeding. Therefore, if you share information about the facts of a case with the judge, she may have to disqualify herself from hearing the case.

Another situation requiring disqualification is when the judge, either while a judge or while a judicial candidate, has made any public statement that commits the judge to reach a particular result or rule in a particular way in a case. So, for example, in selecting your judge, if you made it known that you wanted a judge that would get rid of all the problem dogs in town by finding all their no-good owners guilty, and you asked the candidate if he would do this and the judge responded affirmatively, he would be ethically bound to disqualify himself in all dog cases because he has publicly committed that he will find all dog owners guilty. In other words, be careful what you ask for.

And finally, if your judge is required to recuse herself on a case, your city will have to pay a pro tem (temporary) judge to hear it. The pro tem judge is selected by your judge, not you. See, K.S.A. §12-4107.

3. Public Clamor/Criticism

A judge cannot be swayed by public clamor or fear of

criticism. A judge cannot permit relationships or a defendant's wealth and standing in the community to influence her conduct or judgment. A judge cannot convey or permit others to convey the impression that any person or organization is in a position to influence the judge. *See*, Kansas Code of Judicial Conduct, 601B, Canon 2, Rule 2.4. In fact, the mere attempt to influence a judge is a felony. *See*, K.S.A. §21-3815.

I have to take this opportunity to brag a little about the Overland Park Governing Body (and no, I am not up for re-appointment this year). In the almost 20 years I have served as municipal judge, I have never had an elected official or city employee request special consideration or treatment in a case. Never. While I was preparing this article, one of our council members was sent an email about a pending animal case. His response, reprinted here with his permission, was the perfect way to support the independence of the court.

Mr. Doe,

It is my opinion that it is an improper role for an elected official to interfere with a matter pending in court. This is especially true with Overland Park's Municipal Court and governing body because the municipal judges report directly to the City Council. The risk of corruption of the court's impartiality would certainly exist if the judges felt pressure from City Council members regarding specific decisions. For this reason, I will not become involved in your current case.

If you believe the City Council should enact new ordinances or revise existing ordinances, the proper place to register your request would be with your ward City Council representatives. I did not see your address so I do not know which ward you live in. I expect you are already aware of this information but in case you are not, it can be located at the city's website at www.opkansas.org.

I'm sorry to be of no assistance to you in this matter but hope you respect the importance of allowing our courts to interpret our ordinances without political influence.

C. Code and Animal Cases

This surely makes the "top five" list of city council member frustrations as well, so at least we have something in common! We all know these are highly volatile cases with vocal opposition on both sides. Before a case is even filed in the municipal court, city staff has usually spent weeks, if not months, trying to get voluntary compliance. Once a criminal complaint is filed, everyone wants immediate action and can't understand why the case is taking so long. Once a case is filed, there are many procedural guarantees that must be honored. The defendant has a right to have an arraignment on the charges, to request a trial, to get an attorney, to seek a continuance for a variety of valid reasons; the city may seek a continuance for a variety of valid reasons. Often these cases involve multiple witnesses and neighbors whose schedules must all align for the trial setting.

During the trial, the city must prove each and every element of the crime, including ownership of the dog or property.

This often appears easier than it is. Many a dog or code case has been dismissed because of the inability to prove ownership or a failure to properly serve the owner with notice of the criminal case.

In addition, someone always leaves angry, usually very angry, after these cases. People take what they view as "attacks" on their pets and their homes very seriously. Neighbors take attacks on the peaceful enjoyment of their homes and their property values very seriously. One side wants the offender hung in the city square at high noon (be it a dog or property owner) and one side wants to sue the judge, the prosecutor, the neighbors and the city for violation of his constitutional rights to enjoyment of his property (whether dog or home). In a property maintenance case, often the resident is unable financially or mentally to take care of the problem. This is a great embarrassment to the offender and it is often manifested by angry, uncooperative behavior. When the real goal is to clean up the property, the judge must often participate in a very careful balancing act of fines and suspension of fines to garner compliance. Even though the judge has a responsibility to make sure cases are heard in a timely manner, the final resolution of these cases is seldom speedy.

Just know this: the judge is just as troubled by these cases as you are; there are no easy answers; and there are few quick dispositions.

D. The Court as a "Cash Cow"

The purpose and function of the municipal court is not to make money, it is to administer justice. If it is treated as a "cash cow" and expectations are established that it will collect a certain amount of money, we need to look again at what perception the public is left with concerning the "fairness" of the Court.

The city council adopts criminal statutes in the city and sets the general penalty for violations of same. In some cases the statute sets out a mandatory penalty (for example, a mandatory fine of \$200 for each offense), in others it just sets a range (for example, up to \$500 fine and/or up to 6 months in jail). This is purely a legislative branch decision. However, if there is no mandatory sentence required, the judge decides the sentence within the statutory range. Statutorily, it is the judge that sets the traffic fine schedule. *See*, K.S.A. §8-2118(d). He sets this based on what he determines to be an appropriate penalty for the behavior, not how much of a budget deficit the city has to make up. The goal is to set a fine that not only punishes the behavior, but more importantly encourages compliance with the law in the future.

Assessing fines and collecting fines are two distinct processes. The U.S. Supreme Court and our state supreme court have made it clear that we do not have debtors prison in this country. If a defendant fails to pay a fine, the court must initiate a process to determine if the defendant is willfully refusing to pay or if the defendant is financially unable to pay. The judge is required to conduct a hearing in which she examines the defendant's financial situation. Notice of this "contempt" hearing must be served on the defendant. In addi-

tion, before jailing a defendant for a willful failure to pay, the Court must advise the defendant of his or her right to counsel, and appoint an attorney if he can't afford one. Needless to say, the cost of paying a court-appointed attorney to represent a defendant who has failed to pay a traffic fine can often exceed the amount owing. Likewise, jailing a defendant for failure to pay can result in costs that exceed the value of the fine. Again, the judge is often involved in a delicate balancing act in an attempt to get compliance (to wit: payment) in a meaningful way.

Some courts use community service as an alternative, giving the defendant credit toward the fine for hours worked for the city or for local non-profit organizations. Some use the state set-off program, which takes money owing to cities out of any state financial payments due to the defendant (i.e., tax refunds). Some cities hire collection firms. Some do all of the above. If it is a traffic offense, the court notifies the state motor vehicle division of the failure to comply and the state will suspend the offender's driver's license in her licensing state until she complies. Courts spend considerable time and resources attempting to collect fines, understanding that enforcement of its orders is essential to compliance with its orders. But we must face the fact that some people are simply poor and unable to pay. The impact of a \$150 fine could mean no food for a week for some families. Therefore, recognize that your judge will sometimes be required to simply waive the fine based on indigency when the financial circumstances of the defendant warrant it.

Given this background, you can no doubt understand a judge's frustration when the city finance staff announces to the governing body of the city that \$X remains uncollected in unpaid fines. Elected officials get excited about the possibility of more revenue to pay off that budget deficit. Well, not so fast. It may not be collectible and if it is, it may cost more to collect than is owed. In addition, you should examine the amount owing in comparison to the amount assessed and collected over the same time periods and view it as a "collection rate." You will be surprised that many courts exceed the collection rate of other city and state departments for other types of fees and taxes.

IV. Conclusion

City, state, and federal governments each have three separate, distinct and equal branches of government. Each branch has its role in a representative government. Your municipal court represents the judicial branch of government and should be free from undue influence by the other two branches. If we expect the citizens of our cities to adhere to the laws adopted by the legislative branch, and enforced by the executive branch, there must be both the perception and the reality of a bias-free, fair judicial branch. The organization of your court, the term served by your judge, and an understanding by city officials and the public of the court system and its limits can go a long way toward garnering support for and adherence to the laws of your city.