

**Topeka Municipal Court Audit**  
**Prepared by**  
**The Thomas & Means Law Firm L.L.P.**

**Purpose and Methodology**

The Topeka City Manager's Office requested the Thomas & Means Law Firm conduct an independent audit of the Topeka Municipal Court. The purpose of the audit was to ensure city departments and contractors responsible for the operation and function of the court were compliant with judicial and legal standards, and professional best practices. The court was observed and interviews were conducted during the week of July 13, 2015 by Thomas & Means representative Police Captain (ret.) Greg Seidel, who has worked with and for the Thomas & Means Law Firm for more than ten years. Follow up telephonic interviews occurred after the initial site observation week. Report delivered electronically November 4, 2015.

The audit methodology included observing the court's various dockets and as many of the city employees and contractors as the week-long schedule would allow. Interviews were conducted with all parties. The audit findings are based almost exclusively on the week of observation and follow-up interviews. The scope of the audit did not include a detailed statistical examination of Municipal Court outcomes.

Administrative Judge Victor W. Miller and Associate Judge Lloyd C. Swartz provided the auditor open access to the court's operation and staff. Throughout the audit both Judges made themselves available. Court Administrator Denise Vaughn provided statistical data and insight into the court's recordkeeping procedures.

Chief of Prosecution Tiana M. McElroy provided open access to the office's attorneys and staff who made themselves available to the auditor.

Chief Probation Officer Cathy Deters Walker explained the varied supporting roles the probation office plays for the court.

Mr. Kevin J. Cook of Cook and Associates is contracted to provide indigent defendants with representation before the Municipal Court. Mr. Cook explained the procedure used by his firm to notify, counsel and defend indigent defendants.

Subsequent interviews were conducted with recently appointed Legal Department members City Attorney Lisa Robertson and Chief of Prosecution Charles Kitt focusing on actions they have taken in the department.

As a benchmark for proper procedure and best practices the audit drew on several references including the following: The Kansas Municipal Court Manual a publication of the Kansas Judicial Council, established under K.S.A. 20-2201 et seq.; the Municipal Court's Local Rules as listed on

the court's webpage; the Rules of Professional Conduct as adopted by the Kansas Supreme Court; publications from the National Center for State Courts on collections methods for fines and fees; and insight from Tom R. Tyler, PhD., a leading researcher in Procedural Justice and Legitimacy, as well as practitioners Judges Kevin Burke and Steve Leben, who assisted in the practical application of the relevant research.

### **The Observer Effect**

All parties were intentionally made aware of the auditor's presence and purpose. To covertly observe the professional behavior of the court's officers would inevitably lead to suspicion and its counterpart, negative assumptions. Once revealed as an auditor the potential loss of candor and trust during subsequent interviews would have undermined the audit.

Knowing one is being observed causes an unavoidable change in one's behavior. So, to some degree this certainly occurred, even if unconsciously, in all parties. Through the interview process any significant departures from the court, its officers and staff's normal behavior were probed during interviews and validation questions.

## **Procedures**

### **Docket Organization**

The court's docket scheme is a mixture of organizational ideas. There are six arraignment dockets a week. Two arraignment dockets are conducted in the county jail to facilitate defendant availability. Each arraignment docket include both traffic and misdemeanor offenses. The number of arraignment dockets allows for flexibility to accommodate the volume of the court case flow. The docket scheme minimizes wait times for defendants to appear before the court.

A "jail docket" is held four times per week for individuals who are released from custody on bond prior to being seen in the jail. When a person signs an appearance bond, he/she is given a court date on one of these four dockets, which are held in Municipal Court.

Among the court's specialized or dedicated dockets are a weekly motions docket, a docket for defendants with court appointed attorneys, a time-to-pay docket, and a docket for DUI/drug cases.

The court sets eleven weekly trial dockets, five pro se dockets and six "represented" dockets for defendants with retained counsel.

Each week there is a general sentencing docket and a specialized alternative sentencing docket for defendants in the mental health program.

During the week of observation the court's docket organization processed the volume of cases within the time allotted. However the auditor was informed by the court and prosecution personnel that it was an unusually light week.

Court is held in three locations: the City Council Chambers, a designated room for trials, and in the county jail.

### **Pre-Arrest Procedures**

A majority of cases before the court are prepayable and are prepaid. The payment modalities are outlined below.

The court operates on a first-come, first-heard basis. Defendants identify themselves to court security who furnishes the names in order of arrival to the court. Prior to the docket defendants are instructed to view an instructional video. The video script is attached.

The use of a video provides defendants with information about the arraignment process. The information includes: the right to representation or the option of acting as your own counsel; the conditions and charges that would make court appointed counsel available to indigent defendants; the presumption of innocence; the right to a trial; the right to confront witnesses and present witnesses and evidence in one's defense; the right against compelled self-incrimination; the right to appeal and the process of appeal; an explanation of expungement; an explanation of the pleas of Guilty, No Contest and Not Guilty; an explanation of sentencing procedures; an expectation that fines, fees and costs are due at the time of sentencing and if necessary payment plans may be established by the court; that fingerprinting may be required depending on the charge, and; a failure to be printed, or appear before the court, will result in a bench warrant for arrest.

The auditor listened attentively to the video as it explained familiar court procedures. For a defendant unfamiliar with court proceedings and the fundamental protections of the U.S. Constitution a meaningful level of comprehension is unassured. The Kansas Municipal Court Manual addresses this concern by advising pre-printed or pre-recorded arraignment information efforts are helpful, but the court should ensure individual defendants understand their rights and options before the bench.<sup>1</sup>

### **General Arraignment Procedure**

Pleas of guilty or no contest are common for defendants in pre-payable traffic offense cases. During the observed arraignments those who appeared for pre-payable cases fell into two distinct groups: those defendants aware some favorable outcomes were only available by appearing in person, and those who did not have the money to prepay.

Arraignments are generally a pro forma exercise. The defendant acknowledges he or she is the person charged, the court informs the defendant of their charge(s), asks the defendant if they

---

<sup>1</sup> Kansas Judicial Council. "Municipal Court Manual." *Kansas Judicial Council*. March 30, 2015. [http://www.ksjudicialcouncil.org/docs/mc\\_manual/toc.php](http://www.ksjudicialcouncil.org/docs/mc_manual/toc.php), 6.03.

wish to be represented by counsel, asks if they are ready to enter a plea, and receiving an affirmative response, asks how the defendant wishes to plead.<sup>2</sup>

After a plea of not guilty or no contest the Judicial Council explains “...the accused person should be given the opportunity to state any facts surrounding the charge which may help to reduce the penalty”....“If the judge believes that the accused person has a valid and plausible defense to the charge, the judge should so advise the accused person and offer the accused the option of changing his or her plea, or the judge may refuse to accept the ‘guilty’ plea if the judge feels it lacks a factual basis.”<sup>3</sup>

In cases that involve the possibility of jail time or might contribute to “enhanced sentencing” in the future the court informs the defendant of the circumstances and requires a signed waiver of the right to counsel before they proceed pro se.<sup>4</sup>

If the plea is guilty or no contest the court may choose to hear evidence from the prosecution and the defense. The judge may then move straight to sentencing or sentencing may be continued until a separate court date if additional information is necessary prior to sentencing.

The Kansas Municipal Court Manual provides this “example of the proper way to conduct an arraignment.”<sup>5</sup>

*Judge: Are you (the accused person)?*

*Accused Person: Yes.*

*Judge: (The complaint is read to the accused person or substance explained.) Do you understand the charge against you and your rights before this court?*

*Accused Person: Yes. (If the accused says no, the judge must then explain.)*

*Judge: Do you understand the nature of the pleas, “guilty,” “not guilty,” and “nolo contendere or no contest”?*

*Accused Person: Yes. (If not, explain.)*

*Judge: You are informed that the maximum penalty for the charge against you is \_\_\_\_\_ . Do you understand this?*

---

<sup>2</sup> Ibid, 6.05.

<sup>3</sup> Ibid, 6.06.

<sup>4</sup> Ibid, 6.05.

<sup>5</sup> Ibid.

*Accused Person: Yes, I do.*

*[Judge: You are charged with misdemeanor domestic battery. If you are convicted, federal law may prohibit you from possessing a firearm. Do you understand this?*

*Accused Person: Yes, I do.]*

*Judge: Do you wish to obtain a lawyer or have additional time to seek counsel?*

*Accused Person: No. (If the accused says no and is charged with a class A or B misdemeanor, the judge should obtain a written waiver of counsel from the accused as described in 13.02.)*

*(If the accused says yes, then a continuance should be granted. If the accused says yes and says he or she is without funds, the judge must make a determination of indigency as provided in 13.02.)*

*Judge: Are you ready to plead?*

*Accused Person: Yes.*

*Judge: How do you plead to the charge?*

*Accused Person: Guilty. (If "not guilty," a time is set for trial.)*

*Judge: Do you wish to make any statement or explanation concerning the charge against you prior to sentencing?*

Calculating from court provided statistics, less than 1% of the court's cases are resolved by a trial where sworn testimony is given. This is not necessarily shocking, but it does highlight the tremendous role arraignment plays in matters before the court. Observation and interviews confirmed the arraignment dockets resolve or begin a pathway to the resolution of nearly all of the cases before the court with a plea of guilty, or no contest.

Prosecutors generally shared a common concern with the arraignment process; specifically, that the court's pre-plea actions tended to limit prosecutorial input. Some prosecutors also believed the court was overly focused on fees and fee collections from past court orders during the arraignment process.

## **Pleas**

Both Judges Miller and Swartz were involved in the arraignment procedure beyond the required pro forma requirements. Some defendants were asked questions pertaining to the charges in question *prior* to entering a plea. An example observed was being asked “Did you have insurance?” on a driving an uninsured vehicle charge. Or, in a counter example, after a defendant pled not guilty the court asked, “Why?” in a strong tone that did not suggest curiosity.

In both of these cited instances the motivation of the court may be viewed as assisting the defendants navigate arraignment to a favorable outcome. Specifically in the first example the court may have been determining if there was an affirmative defense available – i.e. the car was in fact insured at the time. In the second instance the court may have been ensuring the defendant understood the plea’s ramifications. An alternative interpretation is the court is asking the defendant for self-incriminating information in the form of unsworn testimony or the court was displeased with the plea of not guilty.

The overall impression was the court was attempting to save time and get to the point of the matter, which is understandable considering the court’s normal volume. This is acceptable, provided the defendant is not giving up his or her constitutional rights without assuring he or she understands the charges and potential punishments, has decided on the choice of representation, or confirming that he or she is prepared to plead before requiring a plea to be entered.

Fundamental to the adversarial process is the accused person’s defense and the city’s prosecution advocating their respective positions before an impartial court. Several months ago, the City prosecutors expressed some concern about the court’s active involvement during arraignment. In the majority of cases observed by the auditor the court’s arraignment involvement either improved the defendant’s outcome or created a pathway for a better outcome. A recurring example involved individuals charged with driving while suspended. Frequently the cause of the suspension was a failure to appear on a charge or a failure to pay a previous fine. (Suspension of the license in such circumstances is done by the Department of Vehicles after mandatory notification by the court. K.S.A. 8-2110(b).)

The court and prosecutors have a standing agreement that, if the defendant wishes, the case will be continued to enable the defendant to pay costs, fines and fees and to obtain a valid license. If the defendant has a valid license by the end of the continuance the driving while suspended charge is amended to driving while not having a license in possession.

During the observation week in July the auditor observed the several roles the court played during arraignments. In a fluid and comfortable manner the court would guide the defendant through the arraignment either prior to or after a plea. The behavior observed by the auditor was not roughshod in substance or tone but was akin to an experienced and knowledgeable brokering of the best path forward for the defendant in the opinion of the court.

## **Trials**

Only one trial with sworn testimony was observed by the auditor. Judge Swartz presided over the lengthy trial. The court maintained a professional and patient demeanor with defense counsel, the city prosecutor, and witnesses even under circumstances that would likely test ones judicial temperament. In this single observation the court's knowledgeable and consistent use of procedural rigor was evident.

## **Sentencing**

### **Schedule of Misdemeanor Fines**

Kansas statutes fix a maximum punishment for classified and unclassified misdemeanors. A Class A misdemeanor is punishable by up to one year in a county jail and a \$2,500 fine. A Class B misdemeanor is punishable by up to 6 months in a county jail and a \$1,000 fine. A Class C misdemeanor is punishable by up to one month in jail and a \$500 fine. Unclassified misdemeanors are punishable as a Class C misdemeanor. The court has established a fine structure for misdemeanor offenses. The normal fines for the misdemeanors are: Class A- \$250; Class B- \$200, Class C- \$150.

The Municipal Court Manual cautions sentencing must fall within the proscribed limits set by legislation but also that "While general guidelines can be set out, there are no hard and fast rules to follow. Each person before the bench is an individual, so each case must be handled on a case-by-case basis."<sup>6</sup>

Prosecutors' experience is the presumptive fine system is closely adhered to in sentencing even if the prosecutor requests a departure due to mitigating or aggravating case facts.

### **Jail Time**

The use of active jail time as a non-mandatory sentence is uncommon according to current and former prosecutors. Some interviewees felt strongly that incarceration was under-utilized and would be appropriate in criminal cases involving significant misdemeanors especially where an accompanying criminal history supported the recommendation.

During a discussion with Judge Miller he expressed the belief that in some instances little was gained by long sentences. He thought a more effective approach was to sentence an individual to 10 or 30 days and, after some number of days bring the prisoner back into court and suspend the remaining time - the unserved time re-imposed if the prisoner failed to meet his obligations and conditions of release. This perspective predicts suspended time has a greater deterrent effect on behavior than active time from a conviction.

---

<sup>6</sup> Ibid, 10.01.

## **Restitution**

The Municipal Court Manual states “District courts have the power to order restitution (payment to an injured party, or repair to the extent possible, for damage done by a criminal act) in some cases. Municipal courts may use this as an alternative when coupled with parole, probation, or suspension of sentence.” Since the municipal court has no civil authority, it lacks the full civil reach available in the district court - although some victims of criminal acts could seek restitution to fully redress their loss by a municipal court order of restitution.<sup>7</sup>

Prosecutors have requested restitution when applicable in criminal convictions. This prevents the victims from having to file a civil suit and seek a civil judgement. In addition, satisfying the court ordered restitution can be a condition of other court-ordered sanctions. Prosecutors related that the court’s position was that a separate legal action by the victim was generally preferable.

The Legal Department developed a restitution policy subsequent to the initial audit week. A copy of which is attached with the reference materials. This policy addresses issues raised by the court and the prosecutor’s office concerning the best practice of seeking appropriate restitution for victim(s). The policy places an affirmative duty on the prosecutor’s office to contact victims in all cases where restitution is possible. The prosecutor’s office is to gather all information and documentation regarding the restitution and explain to the victim the alternatives to the municipal court including the Kansas Attorney General’s Crime Victim’s Compensation Board, Shawnee County District Court and the Small Claims/Limited Action dockets, and through them, garnishment and aid in execution dockets at the Expocentre.

The prosecutor’s office will advise the court of any cases with the potential for a request for restitution so the court can avoid a plea and sentencing until the victim has made a determination on restitution. In instances where a case is ready for a plea prior to communicating with the victim the prosecution shall request the matter be set for sentencing at a specially set docket.

Prosecutors shall enter a Motion for Restitution including documentation supporting the request in all appropriate cases. When restitution is ordered it shall have priority of payment except in cases where fees and fines impede the issue of a driver’s license. Restitution collection efforts shall be included in all collection or agency setoff program.

The policy clearly addresses and clarifies the Legal Department’s approach to restitution. It creates a victim-first point of view providing information and choice. It is also crafted so that the victim, the court and the prosecutor’s office are fully informed of the underlying circumstances, documentation and choices prior to a sentencing docket.

---

<sup>7</sup> Ibid, 10.09K.

### **House Arrest**

House arrest is an option that allows part of a sentence to occur at home with conditions set by the court. The monitoring equipment cost is borne by the defendant. Common factors when considering the house arrest alternative are: dependent care, maintaining employment or a medical condition. In 2014, house arrest was ordered by the court three times. All home incarcerations were in connection with mandatory DUI jail time and sentenced by Judge Swartz. The same is true for the four times it was ordered in 2015. Although specific hour requirements are set out in reference to DUI cases, the house arrest alternative is applicable to sentencing in other cases.

### **Restricted Driver's License**

Kansas law allows the issuance of a restricted license through the Department of Vehicles. Generally this option is available to drivers who are suspended due to in-state traffic violations and who have not received a restricted license for driving while suspended in the past. The restricted license permits driving to work or school, medical appointments, parole/probation meetings, drug/alcohol counseling and during medical emergency. Restricted licenses are the responsibility of the Department of Vehicles not the court. That said, awareness of the availability of a restricted license for those actively seeking to comply with the court's orders and the laws of Kansas are a potential win-win.

Restricted license information is provided in the pre-arraignment video, but was not observed being relayed to suspended offenders who may apply. Awareness of restricted license opportunities may motivate and encourage suspended defendants to seek workable options for compliance with the court's orders.

### **Diversion Programs**

Diversion is a formal agreement entered into by the prosecutor's office and the defendant. Diversion is a privilege and the burden of persuasion rests with the applicant. Defendants seeking a diversion agreement are required to make an application of acceptance. If accepted by the prosecutor's office diversion may apply to offenses including: DUI, Drug Offenses, Social Hosting, Class A, B, C and unclassified misdemeanors. Typically the resulting additional total cost of a diversion agreement is significantly more than a conviction without diversion.

### **Alternative Sentencing Program**

The Alternative Sentencing initiative is a federal grant-supported effort by the municipal court, prosecutor's office, Valero Behavioral services, other service providers and law enforcement. Participants interviewed about the initiative all seemed deeply committed to assisting the participants to succeed. Judge Miller and Swartz split the alternative docket every other week.

The program is a high-intensity near-daily contact service endeavor. All defendants in the program have mental and/or substance abuse problems that have brought them into contact with law enforcement and the courts on multiple occasions. Several were homeless or lacked sufficient care or support prior to the program.

In observing the weekly docket, the degree of interest and involvement by all is undeniable. One by one the defendants appeared before the court and their week's progress was reviewed often in very moving and emotional terms.

Several were celebrated for successfully completing a multi-month phase of supervision and graduating to an advanced level - a moment of pride for all involved. Others had fallen off. With a mixture of carrot and stick, mostly carrot, the defendants reaffirmed their commitment to seeing the program through.

Two of the week's negative outcomes were alcohol abusers who had become intoxicated and were contacted by law-enforcement. This was unusual for the program. Court professionals questioned confided the program's success rate was much higher than they could have anticipated. These results clearly benefit the defendants and the long line of agencies and departments no longer in frequent negative contact with the high recidivist. The program appears to successfully support and assist, while requiring commitment from the defendants and eliminating the multiple weekly contacts many had with the police and the court.

### **Expungement**

K.S.A. 12-4516(i) requires that defendants diverted, convicted of or pleading guilty to an ordinance violation be advised of the ability to have the conviction, the arrest records or the diversion expunged. The pre-arraignment video directs defendants to the Clerk's office for more information, but the court's website did not contain this information for those pleading guilty and pre-paying the court. This information has since been added to the court's website.

### **Traffic Citation Amendment Program**

The Traffic Citation Amendment Program is an agreement with the prosecutor for traffic citations (with some exceptions and conditions) that with a plea of guilty the defendant is convicted of a non-moving violation. A \$150 amendment fee applies in addition to the fees and costs associated with the original citation.

## **Fines, Fees and Cost**

### **Focus on Fines and Collection Efforts**

The most common penalty in any municipal court is a fine, costs and fees. The National Center for State Courts provides guidance on appropriate collection practices through its research and publications. It cautions that all court orders should be equally complied with whether that involves incarceration, fees or other sanctions. Moreover, the practice of consistent and predictable application of the law to similar controversies is critical to the sense of procedural justice and legitimacy the community perceives of the court. This applies to collection efforts and to any other aspect of the court-ordered sanctions.<sup>8</sup>

---

<sup>8</sup> Matthias, J. T., & Klaversma, L. (2009). *Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions, Second Edition*. Retrieved from <https://csgjusticecenter.org/wp-content/uploads/2013/07/2009-NCSC-Current-Practices-in-Collecting-Fines-and-Fees.pdf>, 14-18.

During the observation week it was apparent the court is deeply involved in and attentive to the collection of costs, fines and fees. Individuals appearing on prepayable charges and motivated primarily by insurance implications increased their total cost, but most were prepared and able to pay. The other prepayable defendants were there because they were not able to prepay. A substantial proportion of this group also had active but delinquent accounts with the court.

### **Approach to Collections**

After calculating the total due in the case before the court, the two judges had slight but important differences in approaching payments. Judge Swartz would ask with little variation “How much a month do you think you can pay and when can you begin?” Most defendants offered to pay \$20 or \$25 a month starting within thirty days.

Judge Miller would ask, “Are you able to pay that today?” If the defendant replied they were not, he would rephrase the question in a manner similar to Judge Swartz. After the defendant’s response an interest free payment plan account was created by the clerk. In no observed case was there an attempted inquiry into the defendant’s ability to pay in full or to pay more per month.

The court’s physical configuration and operational procedures allow all parties in the court to hear the payment terms of all defendants that preceded them. In negotiating terms, this allows any defendant to confidently offer the low monthly amount of \$20-\$25.

A defendant’s total fines, costs and fees can easily reach \$600 or \$900. At \$25 a month the account will take 24 or 36 on-time payments, respectively, to pay in full. The Center for State Courts research demonstrates asserting the expectation that payment is due at the time of sentencing is critical to successful collection efforts.<sup>9</sup>

Creating payment expectation is enhanced by consistent court practices, sharing information at the time of citation or arrest, information posted in the court complex and distributed on the court’s website. Aside from increased collections, a ‘more, sooner’ collection effort may increase the defendant’s chance of satisfying payment requirements and avoiding the likelihood of having the account moved to collections and increasing by 30%.

It also reduces the risk of the defendant getting trapped in the repeatedly-observed cycle of account default, license suspension, subsequent charges of driving while suspended with additional cost and restrictions.<sup>10</sup> The National Center for State Court’s research demonstrates the first 60 days after sentencing is when the most fines are collected and after that period a significant percentage fall behind or go dormant.<sup>11</sup> Defendants with outstanding/delinquent

---

<sup>9</sup> Ibid, 3-5.

<sup>10</sup> Ibid, 15-18; 20; 24.

<sup>11</sup> Ibid, 25.

accounts were handled slightly differently depending on whether the account was with the court or had been referred to the private collection agency.

The court instantly verified the current accounts' payment status for all defendants; if the account was behind or delinquent the court would question the defendant about their payment intentions on the outstanding and the new account. If payment behavior was poor the court was resolute in admonishing the defendant that non-payment would not forgive the debt and where it was a condition of a plea or agreement it could result in further sanctions or sending the account to collections. The court would also admonish defendants with delinquent accounts that their disregard of the court-ordered financial obligation may or would disincline the court in the future to rely on that sanction and would leave incarceration as the only available sentence. The exact phrasing was less nuanced and could be heard as, "Come back again and you're going to jail."

For defendants with accounts already sent to collections the court would advise them of the amount and provide the defendant with the contact information of the collection agency.

The judges handle defendants' payment plans and advise defendants to make contact with the court if they are unable to make a scheduled payment or are requesting to adjust the payment schedule. Ms. Vaughan included that, in the absence of a judge, she is able to authorize a \$50 a month payment plan.

### **Categorization of Debt**

Some debt will never be collected despite all efforts of the court and collection agency. Maintaining all accounts as equally likely to be paid gives an inaccurate forecast of the actual amount the court can reasonably expect to collect. Forgiveness of debt is not necessary to accomplish increased accuracy in anticipated debt collection. The collection mechanisms of the court can reclassify the account as inactive. Thus the inactive debts are still payable and if payments do occur the account can be reclassified as active.<sup>12</sup>

Although the court should expect all defendants to comply with any and all sanctions or penalties imposed, there is in the law and within the principles of fairness a distinction between defendants truly unable to pay without significant personal or dependent hardship and defendants unwilling to pay. The court should seek to distinguish between the two. For those who are unable to pay, practical alternative sentencing methods for dealing with indigence should be sought. Community service hours exchange is in place to serve as that vehicle.

### **Community Service**

Community service is a common alternative enforcement option, but such programs require administrative coordination and resources. The court's probation unit administers community service for the court. They maintain a standing list of religious organizations, other non-profits and some city and county departments willing to accept community service workers.

---

<sup>12</sup> Ibid, 28-29.

Individuals may also seek approval from the probation unit for community service opportunities they develop. The community service participants “earn” \$5 per hour worked as is stipulated in Kansas law covering community service in DUI-related cases. The court’s voluntary practice is to use \$5 for all defendants. Community service may be used to pay fines but not court costs.<sup>13</sup>

Adding 15 hours of community service a month to the common \$25 monthly payment plan would resolve a \$450 fine and \$150 cost obligation in 6 months, not 24. This community service enforcement option could provide a path to compliance for those criminal defendants who are unemployed and searching for a means to satisfy their obligations. In addition, successful programs ensure participants comply with program requirements in a manner consistent with any other type of employment. The practice and habit of reporting on time, prepared to perform, and taking direction from supervision may also help the unemployed secure steady employment. Successful programs have a short orientation explaining the work rules and adhere to a “two strike” policy of dismissal from the program.<sup>14</sup>

## **Court Officers**

### **Court Clerk’s Office**

The Clerk’s office has a staffing shortage and retention problem. Judge Miller explained that interest in entry-level clerk positions is high. The court receives many high quality applications to fill vacant positions and they are able to select and fill the openings with very capable people. He believes after new hires receive training and experience in customer service techniques, and learn the importance of work product accuracy, they become highly attractive to the private sector seeking those same skills and abilities. The audit did not include interviews with any past clerks. Since the shortfall is creating operational difficulties for the court, human resources may consider making an inquiry of recently-separated court clerks or reviewing their exit interviews.

Judge Miller explained the police division began issuing etickets, a program the court strongly supports. Etickets provide drivers with a court date at the time of issue. The citation information is downloaded into the court’s case management system without significant delay or input effort.

Ms. Vaughan explained traditional paper tickets first have to get to the clerks’ office. Once received it takes four steps to input the ticket into the management system. First, all the information written on a paper ticket is typed into the case management system. A second staff member reviews the data entry for quality assurance. Next, the citation is scanned and placed into the management system where a second staff member reviews the scanning process for quality assurance.

---

<sup>13</sup> Ibid, 42-43.

<sup>14</sup> Ibid.

Etickets not only greatly reduced the data input and review hours spent by the clerk's few staff, but also allows the ticket to be prepaid on-line. In addition, the information is available to the staff much sooner to answer customer service questions.

Judge Miller's monthly eticket spread sheet revealed a significant number of etickets during the program's 2014 rollout. In the last several months the number has noticeably dropped. The expectation was the number would increase as more officers began using the technology.

The eticket program has measurable advantages to both the clerk's office and the cited drivers. Implementation concerns should be forwarded to the police department and sufficiently addressed.

### **Payment Modalities**

The court accepts payment in a number of convenient ways including personal checks and credit cards.

#### In Person to the Clerk's Office

Fines may be paid with cash, check, credit card (only VISA / MasterCard / Discover), cashier's check, or money order at the Municipal Court Clerk's Office.

#### Mail-in Payments

Payments may be mailed to the clerk's office including cash, check, cashier's check or money order.

#### Online Credit Card Payments

The court accepts credit card payments for fines, fees and costs. There is a service charge.

### **Probation Services**

Active probation is used extensively for cases involving drug or impaired driving charges. The city probation officers are licensed addiction counselors certified by the Behavioral Science Regulatory Board and the office space is in compliance with state-mandated requirements for assessments, referrals and to conduct alcohol and drug evaluations and education programs. Each of the current probation officers has 20 or more years of clinical experience.

Ms. Walker is the supervising probation officer. The office is staffed with two probation officers and an office assistant. The office currently manages just over 300 probationers, primarily in cases where drug/alcohol/mental health treatment has been ordered; although the office has the potential to handle other types of offenders if instructed by the court.

Probation officers create a pre-sentencing report on all new supervised active probationers. This is an extensive background investigation involving places of residence, work history, alcohol and drug history (for the probationer and their extended family), criminal history and medical and mental health history. The pre-sentencing report is distributed to the city attorney, court, prosecution and defense counsel.

Once on probation, the office assigns the probationer to one of five different levels of supervised probation. The graduated level of assignment is based on the probationer's successful progress while on probation.

Ms. Walker and her staff have the operational capacity to increase the current case load to the level of the recent past. The swing in case load is attributable in some degree to the police department's enforcement efforts. Concentration on certain crimes increases the number of cases that require supervised probation. The remainder of the volume is the very, very few non-mandatory defendants placed on supervised probation.

The office also believes some frequent offenders whose crimes do not require supervised probation would benefit from the assessment, education and monitoring components and thus be less likely to re-offend. A likely profile is a drug or alcohol abuser who, while not charged with alcohol or drug offenses, support their addictions or have increased behavioral problems as a result of them.

The prosecutor's office regularly asks for supervised probation for defendants when they believe it is in the best interest of the defendant and the community for close monitoring and testing to occur. The court in the past routinely rejected the requests.

### **Prosecutor's Office**

At the time of the audit, all of the prosecutors, including the then-Chief of Prosecution, had less than a year of service in the Legal Department; although several had relevant prosecutorial or trial experience prior to joining the prosecutor's office. The office support staff has remained stable for some time.

In light of the relative short amount of time the Chief and his assistant prosecutors have been in their positions, and to aid in overall office management, a review and/or creation of detailed written directives establishing clear office practices, procedures and individual responsibilities consistent with their positions should be undertaken. Although all prosecutors need some discretion in case-by-case decision-making and strategy, clear directives increase the consistency of office practices and assure all other officers of the municipal court can expect and receive equal treatment.

The need for additional or restructured support staff is a managerial issue voiced by the court and others outside the prosecutor's office. The collective concern was that prosecuting attorneys were spending significant time on work that would be best handled by support staff. The belief is that under-servicing of the support role was contributing to delays or office backlogs. The court also expressed concern that the office as a whole was overly accommodating to the defense bar in accepting plea deals that included reduced or dismissed charges.

### **Court-Appointed Counsel**

The court contracts with the Cook and Associates law firm for court-appointed representation. Court-appointed representation is only assigned in the most serious of cases heard by the court – those criminal charges that mandate the defendant go to jail or place them at risk of going to jail.

Kevin Cook explained that the traditional past practice of notifying defendants by mail and/or telephone of their attorney's contact information resulted in routinely-missed appointments and the non-appearance of defendants for court-process he described as inefficient and which did not produce reliable attorney-client contact.

The current system notifies defendants of their appearance date, but will not identify the attorney handling the case. Case assignment occurs near the appearance date so any potential conflicts with past or known future cases are properly assigned. The result, Mr. Cook explains, is a higher appearance rate on arraignment day without the inefficiencies of the past multiple attempts to contact.

Rule 226 of the Kansas Rules of Professional Conduct, 1.1 Competence states -- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In explanation Subsection [5] Thoroughness and Preparation advises, "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence."<sup>15</sup>

Rule 226 of the Kansas Rules of Professional Conduct, 1.3 Client-Lawyer Relationship: Diligence states -- "A lawyer shall act with reasonable diligence and promptness in representing a client." The explanatory comments [2] to this rule states "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions.... Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."<sup>16</sup>

Rule 226 of the Kansas Rules of Professional Conduct, 1.4 (b) Communication states -- "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>17</sup>

---

<sup>15</sup> Rules Adopted by the Kansas Supreme Court. (n.d.). Professional Conduct. Retrieved from Kansas Judicial Branch: <http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys>, 1.1.

<sup>16</sup> Ibid, 1.3.

<sup>17</sup> Ibid, 1.4.

The current practice potentially undermines the assistance of counsel that necessarily involves the defendant, such as: meaningful consultation, the elements of the charged offense and the evidence necessary for conviction, a review of known evidence and potential witnesses, discussion of pleas and counter-offers with the prosecutor and their decision to plead or stand trial with risk of incarceration.

The auditor observed these brief, first-time attorney-client consultations taking place in court while in session, without privacy. As judged by observation with little defendant input, defendant's depth of understanding was unable to be determined.

It is not unusual for defendants to avoid or not fully participate in the preparation of their defense. That is their prerogative and they may do so voluntarily; but it is critical to remember the proper role and relationship between the defendant and counsel. Specifically, the defendant makes or at least must understand and agree to all significant decisions regarding their defense.

The current practice also forces the defendant actively seeking to be involved in their defense to meet their counsel for the first time in the moments prior to the case being called.

The system may add a particular efficiency in contact success and concentration of effort by appointed counsel, but by design it intentionally prevents defendants from even knowing the identity of counsel until they walk into the courtroom and hear their name.

Stepping back, this engineered set of facts would routinely be determined by a court as good cause for a continuance, and thus is highly questionable as an intentional operational procedure the apparent benefit of which is only to appointed counsel.

## **Conclusions**

Each court component must play its proper role in order for court function and outcomes to be perceived by the parties and larger community as balanced, fundamentally fair and therefore legitimate. The municipal court's case load is a repeated pattern of like cases. Only the presiding judge is in a position to ensure all witnesses, defendants, defendants' counsel and prosecutors receive the proper opportunity to fulfill their equally important roles in helping to adjudicate criminal cases and violations. All regular participants must guard against any slippage in procedural rigor.

The relationship between the court and the prosecutor's office was poor during the on-site audit. Interviews confirmed that a long-standing lack of professional respect existed between them. Much progress has been made regarding this critical concern with the appointment of the new Chief of Prosecution, with the assistance and support of the City Attorney. In a short period of time, the Legal Department's leaders have established a greater mutual understanding and resolution of issues that were previously problematic. The improved working relationship has led to, or is in the process of leading to, the adoption of integrated

procedures and the resolution of past assumptions or misunderstandings. One such recent example involves ensuring all court officers understand the proper use of Party History and Docket Sheets; and their intended purpose of communicating to, and document the proceedings before, the court.

Prosecutorial concerns that the court was overly invested in revenue generation and collection were brought forward during the audit. Some believed the court was acting as though revenue generation was its primary function and concluded that this was a significant reason behind the court's reluctance to give active jail time.

The past schism between the court and prosecution had also diminishes the court's support units' full contributions to the community. The high turnover rate in the clerk's and prosecutor's offices may have been a symptom of a persistently dissatisfying work environment. Department leader's now believe a more pleasant environment is evolving.

The Municipal Court is the legal venue for the average citizen of Topeka—those persons who in their lifetime have (typically infrequent) contact with law enforcement for traffic infractions, nuisance complaints and general petty crimes. More citizens will draw their first-hand perception of the quality of the Topeka legal system from this court than any other. Research cautions that traffic or municipal style courts account for a greater sense of dissatisfaction than higher courts.<sup>18</sup>

## **Recommendations**

The request for an independent audit indicates the City Manager's and then acting City Attorney's proactive commitment to providing oversight and leadership to the municipal court. Within weeks of the preliminary assessment, steps were taken to address key areas of concern. Those efforts are ongoing and are improving understanding and coordination in the Legal Department.

The following recommendations approach the idea of doing justice well in two complementary ways: first, to ensure the rights of all parties under the law are rigorously protected; and, second, to ensure all professional conduct associated with the Municipal Court is perceived internally and by the community as fair, impartial and legitimate.

### **Procedural Justice**

The counterintuitive finding reached through extensive laboratory and field research is that most people's perception of the court is determined by how they are treated in court as opposed to whether they win or lose. So, even though most defendants before the municipal court are found guilty, the use of procedural justice principles can improve the public's

---

<sup>18</sup> Tyler, T. R. (2007). Procedural Justice and the Courts. *Court Review: The Journal of the American Judges Association*, Vol 44 1/2, p29.

perception of the court's fairness, competency, honesty and increase the likelihood of accepting and abiding by the court's decisions.<sup>19</sup>

The degree to which any party before the court perceives they received a full, fair and respectful hearing before a neutral and trustworthy judge whose explained decision was based on law and the rules of the court is their measure of procedural fairness. Without emphasized attentions to the following core elements the court's decision is likely to be perceived as unfair even if a judge is correct on the law and ensures the person's rights are protected.<sup>20</sup>

### **Expectations**

Professor Tom Tyler describes these core principles expected by persons evaluating the judicial process as follows:

**Voice.** People want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem. Having an opportunity to voice their perspective has a positive effect upon people's experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decision.

**Neutrality.** People bring their disputes to the court because they view judges as neutral, principled decision makers who make decisions based upon rules and not personal opinions, and who apply legal rules consistently across people and over cases. To emphasize this aspect of the court experience, judges should be transparent and open about how the rules are being applied and how decisions are being made. Explanations emphasizing how the relevant rules are being applied are helpful.

**Respect.** Legal authorities, whether police officers, court clerks, or judges, represent the state and communicate important messages to people about their status in society. Respect for people and their rights affirm to people that they are viewed as important and valuable, and are included within the rights and protections that form one aspect of the connection that people have to government and law. People want to feel that when they have concerns and problems both they and their problems will be taken seriously by the legal system. Respect matters at all stages, and involves police officers and court clerks as well as judges. It includes both treating people well, that is, with courtesy and politeness, and showing respect for people's rights. For example, when people come to court they are often confused about how cases are handled.

---

<sup>19</sup> Burke, K., & Leben, S. (2007). Procedural Fairness: A Key Ingredient in Public Satisfaction. *Court Review: The Journal of the American Judges Association*, Vol 44 1/2, 5.

<sup>20</sup> Ibid, 6.

**Trust.** Studies of legal and political authorities consistently show that the central attribute that influences public evaluations of legal authorities is an assessment of the character of the decision maker. The key elements in this evaluation involve issues of sincerity and caring. People infer whether they feel that court personnel, such as judges, are listening to and considering their views; are being honest and open about the basis for their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices.<sup>21</sup>

### **Procedural Rigor**

The Court Manual's recommended arraignment procedure should be followed in each case before the court. It assures that the arraignment accomplishes the purpose of the procedure by touching each of the necessary elements resulting in an informed plea. As importantly, it also provides the court and all court officers with an opportunity to demonstrate the core elements of procedural justice (voice, neutrality, respect, and trust) to each person before the bench and to all who are present to witness it.

This dedication to procedure takes more time. Typically the first defendants to go through the process will likely ask questions. Others will appear unsure and their responses should cause the court to explain the issues clearly. Naturally, subsequent defendants will recognize the pattern of the arraignment process and have thought about their own responses to each of the yes/no questions they will answer.

Other frequent explanations concerning representation, mandatory sentencing, diversion, restricted license, citation amendment, supervised probation, alternative sentencing programs expungement, payment plans and past due accounts would be explained and be heard by awaiting defendants. The attentiveness to those present in the courtroom is essential.

Following the arraignment procedure described in the Court Manual and using the above-mentioned research's recommendations may be less expedient early-on during a docket but may save time as understanding is generalized. A significant win-win is achievable if application of these guiding principles reduces recidivism and court volume, as has been the case in other jurisdictions studied.<sup>22</sup>

### **Intra-Court Relations**

The intra-court working relationships appeared to be the root of dissatisfaction between department work groups and with courtroom outcomes. The research into procedural justice principles has also shown "They also apply to people who work within the court system."<sup>23</sup> The Legal Department's current success in incorporating these core elements inside and outside of

---

<sup>21</sup> Tyler, T. R. (2007), 30-31.

<sup>22</sup> Ibid, 27.

<sup>23</sup> Ibid.

court will not only improve the community's perception of the court, but internal court relations as well.

Arraignment. After a plea of guilty, the defense is asked if they wish to add anything to be considered prior to sentencing. Following the defense, the prosecutor would then make any additional recommendations on sentencing.

The defense and/or the prosecution having been heard, the court's decision to accept or reject the recommendation would include respectful acknowledgement, consideration and a brief explanation from the bench for the benefit of the defendant, victim, court officers and others present.

Sentencing. The work all parties do in making the Alternative Sentencing Program a successful initiative should serve as an example for all. During this particular docket, the core procedural justice elements are liberally applied creating a positive collaborative effort.

### **Prosecution**

The City Attorney, Lisa Robertson, informed the auditor that Chief of Prosecution, Charles Kitt, is in the process of reviewing office practices to ensure office procedures and case management are understood and consistent among office members. His initial review indicates many of the perceived issues related to professionalism and consistency. The audit was conducted during a time when three of the four prosecutors for the City, including the former Chief of Prosecution, were in their initial six-month probationary period with the City. With very few policies or procedures in writing, there was little guidance in place for "newer" attorneys to follow, resulting in inconsistency.

Since joining the office, Kitt's primary focus has been to establish consistent guidelines for prosecutors for purposes of making charging decisions, plea negotiations, sentencing recommendations, presentation of evidence during hearings and interactions with the Court, counsel and members of the public. Mr. Kitt has also worked with the court to establish a Code Enforcement Docket for the purpose of improving the consistency with which code enforcement cases are handled (and, thus, ensuring that more consistent results are obtained). Since beginning his duties as the Chief of Prosecution, Mr. Kitt has found the relationship between his office and the court to be very professional – with the majority of the perceived problems set forth in this audit having already been remedied.

### **Fines, Fees and Cost**

The Municipal Court has in place many of the collections procedures recommended by the National Center for State Courts. By process and structure the court is less aggressive in its collection practices than is recommended. Improvement in collections also aids defendants with accounts to stay current and return to lawful driving. Creating the expectation that monetary sanctions are due in full or soon after sentencing is key to the "more sooner" model.

There are several successful models explained in the literature. Choosing the right approach for Topeka will depend largely on the extent city resources are used in collection efforts and how aggressive the collection techniques used are.

Community service should be available to those unable to pay to satisfy their debt in criminal matters. Mandatory community service should also be considered for those individuals the court believes community service would be an appropriate sanction.

### **Court Appointed Counsel**

Viewing the process of notification and consultation used by appointed counsel for indigent defendants through the prism of procedural justice strengthens the recommendation that defendants are given an opportunity to meet with their lawyer sooner than the moments before making decisions in cases that may result in incarceration.

The single appointed counsel docket observed was uncharacteristically small. Still, the attorneys were pushed to consult with the client as they became available. At times there was no case before the court because all of the attorneys were introducing themselves to their next client.

### **City Attorney's Office**

The City Attorney's Office has taken the lead in making positive changes. The primary obstacle was the past actual or perceived disagreement, misunderstanding or indifference between work groups. Recently resolved issues such as the restitution policy and others are a good example of positive initiatives in these areas.

Each work group has an indispensable role in doing justice well and each also expressed and displayed interest in doing more, not less; a positive starting point.

Ensuring the appropriate balance between the court officers and the appropriate influence of support staff is key. Best practices call for the skillful use of options available to the department. Several of these standard sentencing options are under-utilized.

As already quoted from the Court Manual concerning appropriate sentencing "[T]here are no hard and fast rules to follow. Each person before the bench is an individual so each case must be handled on a case-by-case basis."<sup>24</sup> Best practices then ensure all of the court's options are used to craft the best outcome.

---

<sup>24</sup> Kansas Judicial Council. (2015), 10.01.

## I. Bibliography

- American Bar Association. "American Bar Association Standards, Criminal Defense Function." 1993.
- Burke, Kevine, and Steve Leben. "Procedural Fairness: A Key Ingredient in Public Satisfaction." *Court Review: The Journal of the American Judges Association*, Vol 44 1/2, 207: 4-25.
- Kansas Judicial Council. "Municipal Court Manual." *Kansas Judicial Council*. March 30, 2015. [http://www.ksjudicialcouncil.org/docs/mc\\_manual/toc.php](http://www.ksjudicialcouncil.org/docs/mc_manual/toc.php).
- Matthias, John T, and Laura Klaversma. "Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions, Second Edition." 2009. <https://csgjusticecenter.org/wp-content/uploads/2013/07/2009-NCSC-Current-Practices-in-Collecting-Fines-and-Fees.pdf>.
- Rules Adopted by the Kansas Supreme Court. "Professional Conduct." *Kansas Judicial Branch*. n.d. <http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys>.
- Topeka Municipal Court. "Topeka Municipal Court Local Rules." 2015. [http://www.topeka.org/MunicipalCourt/court\\_rules.shtml](http://www.topeka.org/MunicipalCourt/court_rules.shtml).
- Tyler, Tom R. "Procedural Justice and the Courts." *Court Review: The Journal of the American Judges Association*, Vol 44 1/2, 2007: 26-31.