

VII. - PRETRIAL PROCEEDINGS

Judge Ronald J. Brockmeyer

Section	Page Number
7.1 Scope of Chapter	3
7.2 Court Docket: Separation of Traffic and Non-Traffic Cases (Docket Control).....	3
7.3 Arraignment.....	3
7.4 Violation Bureau and Violations Clerk	4
7.5 Continuances	5
7.6 Disqualification of Judge.....	5
7.7 Pretrial Motions	7
7.8 Discovery.....	7
7.9 Severance.....	8
7.10 Witness – Subpoena	8
7.11 Service	8
7.12 Return of Service	8
7.13 Failure to Appear	9

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The format used herein is based on the original version of this chapter prepared by Judge J. Lloyd Wion, who served as municipal judge in the 21st Judicial Circuit, Overland, Missouri, since 1972 until his retirement in October, 1991.

CHAPTER VII

PRETRIAL PROCEEDINGS

7.1 SCOPE OF CHAPTER

This chapter describes the pretrial activities as they occur in a typical municipal case. Arraignments, Violation Bureaus, pretrial motions and process for witnesses are among the topics covered.

7.2 COURT DOCKET: SEPARATION OF TRAFFIC AND NON-TRAFFIC CASES. (DOCKET CONTROL)

Rule 37.61 (b)

If practical, traffic cases shall be heard and tried separately from other types of cases. Where a particular session of court has been designated a traffic case session, only traffic cases shall be tried except for good cause shown.

NOTE: This may mean separate dates or separate times on your docket; i.e., 7:00 p.m. to 8:00 p.m. traffic and an 8:00 p.m. start on the balance of your docket.

7.3 ARRAIGNMENT

Rule 37.47(b)

The judge shall inform the defendant of the ordinance violation charged; his right to retain counsel, his right if indigent and there is a likelihood of a jail sentence to request the appointment of counsel, his right to remain silent and that any statement made by him may be used against him.

Rule 37.48

- (a) Upon request, a defendant shall be furnished a copy of a summons or information filed and shall not be required to plead until he has been afforded reasonable time to examine the charges against him and consult with counsel or others.
- (b) Arraignment shall be conducted in open court and shall consist of reading the information to the defendant or stating to him the substance of the charge and calling on him to plead thereto.

NOTES

There are several ways to accomplish advising the defendants of their rights. One commonly used way is for the judge to address all those present in the courtroom with a detailed statement of their rights. If done verbally, the judge must then ask the defendant in each case if he/she was present at the opening of court.

Another way to advise defendants of their rights is to give each of them a written statement to read and review and bring with them to the bench when their case is called. The judge should be sure that each defendant has signed this statement of rights, and after he/she is arraigned, same should be filed with the court and kept in that individual's file.

Since the judge should not know the facts of the charge, inquiry must be made of the prosecutor to determine if he/she is going to request jail time and to determine if the judge will accept that recommendation.

If it is likely that a defendant will receive a jail sentence and he/she has no attorney, the judge must review with that defendant the written "Waiver of Counsel" form and have him/her sign same. Form 37J or Form CR210. The judge him/her-self should then sign this "Waiver of Counsel" form before proceeding any further in a case where jail time is a likelihood. Since defendants are entitled to a circuit court review at to whether or not their guilty plea was voluntary and understood, the court record needs to be complete. (See form CR 210 following this chapter.)

NOTE: Even if a jail sentence is not likely, it is recommended that a "waiver of counsel" form be utilized. 302.060(9) requires a written waiver of counsel as a precedent to using the conviction for purposes of withholding license after a second conviction.

Having the arresting officers present at arraignment depends on whether or not trials are held on the first appearance of defendants; if such is the case, officers should be present and witnesses should be summoned. When trials are held at a later setting, each defendant should be advised at arraignment of his/her right to have and subpoena witnesses, his/her right of not being required to testify, his/her right to consult an attorney, and his/her rights during trial (e.g., cross examination of any and all witnesses who might appear against him/her, including police officers).

If the court has a separate trial docket, there is no need to have police officers in court on arraignments. In fact, it probably presents a bad appearance to the public to do so. It might appear that trials at the time of arraignment may have some built-in unfairness to the defendants as they have little time to reflect on their rights and trial procedures. Thus, some courts simply set the case for trial on the next docket after arraignment. (See Chapter IX, "Trials").

7.4 VIOLATION BUREAU AND VIOLATIONS CLERK

Rule 37.49

- (a) Any judge having original jurisdiction of any animal control violation, housing violation, or traffic violation may establish by court order a violation bureau, which shall be subject to the supervision of the circuit court.

A clerk shall be designated by the judge as the violations clerk. The clerk shall perform the duties designated by the court including accepting appearance, waiver of trial, plea of guilty, and payment of fine and costs for the designated violations, entering the plea on the record, and transmitting the violation record as required by law.

NOTE: The violation bureau clerk can also perform other functions within the municipal court office.

- (b) The violations within the authority of the bureau shall be designated by order of the judge, and such designated violations may be amended from time to time. However, Subparagraphs (1), (2), (3) and (4) provide that in no event shall the following be handled by a bureau: violations resulting in personal injury or property damage; operating a motor vehicle while intoxicated or under the influence of intoxicants or drugs; operating a vehicle with a counterfeited, altered, suspended or revoked license; fleeing or attempting to elude an officer.
- (c) The judge, by order prominently posted at the place where the fines are to be paid, shall specify by schedule the amount of fines and costs to be imposed for each violation.

NOTE: St. Louis County Circuit Court en banc has set the upper limits on certain fines in traffic violations bureaus in an effort to establish uniformity among the municipalities.

- (d) Within the time fixed by the judge and subject to the judge's order, any person charged with an animal control, housing, or traffic violation, except those requiring court appearance, may deliver by mail, automatic teller machine, or as otherwise directed, the specified amount of the fine and costs to the bureau. Said delivery constitutes a guilty plea and waiver of trial.

NOTE: Fines not covered by the Violations Bureau may also be standardized and paid, at the discretion of the court.

7.5 CONTINUANCES

The prosecution and the defense in each case shall have the right to a speedy trial. Continuances may be granted for good cause shown.

7.6 DISQUALIFICATION OF JUDGE

RSMo 479.220

[Section 479.220, RSMo](#), provides that a municipal judge shall be disqualified to hear any case in which he is in any wise interested, or, if before the trial is commenced, the defendant or the prosecutor files an affidavit that the defendant or the municipality, as the case may be, cannot have a fair and impartial trial by reason of the interest or prejudice of the judge. Neither the defendant nor the municipality shall be entitled to file more than one affidavit or disqualification in the same case.

37.53. Ordinance Violation Cases Not Heard on the Record – Disqualification and Change of Judge

- (a) This Rule 37.53 governs the procedure for disqualification of a judge in all ordinance

violation cases, except those heard de novo or those in which there is a timely exercise of a right to a jury trial. (See Rule 37.53 following this chapter.)

- (b) Without Application. If the judge is related to any defendant or has an interest in or has been counsel in the case, the judge shall recuse.
- (c) With Application – Procedure. A change of judge shall be ordered upon the filing of a written application therefor by any party. The applicant need not allege or prove any reason for such change.

The application need not be verified and may be signed by any party or an attorney for any party.

The application must be filed not later than ten days after the initial plea is entered.

If the designation of the trial judge occurs less than ten days before trial, the application may be filed any time prior to trial. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to the commencement of any proceeding on the record, whichever is earlier.

No party shall be allowed more than one change of judge pursuant to this Rule 37.53(c) . However, no party shall be precluded from requesting any change of judge for cause at any time.

- (d) When a timely application for a change of judge is filed or a judge recuses, the judge shall:
 - 1. Comply with any circuit court rule that provides for the assignment of a judge; or
 - 2. Notify the presiding judge of the circuit who shall designate a judge to hear the case or request this court to transfer a judge to hear the case.
- (e) If an associate circuit judge or a circuit judge is designated to try the case, the designated judge shall determine the location of the trial at a place within the county.

(Adopted May 14, 1985, eff. Jan. 1, 1986. Amended December 23, 2003, eff. July 1, 2004.)

NOTE: 479.220 requires that an affidavit be filed by the parties, whereas Rule 37.53 requires a change of judge solely upon application of one of the parties. It should be emphasized that Rule 37.53 must be followed in any case initially before the municipal court, and that a change of judge be ordered without any supporting affidavit or cause. A judge should always disqualify himself, even when he feels that he can properly decide a case, if his being the judge could give the appearance of impropriety in any way.

7.7 PRETRIAL MOTIONS

RULE 37.51(B) AND RULE 37.52

Rule 37.51(b) – Motions Raising Defenses And Objections

(1) Defenses and Objections That May Be Raised. Any defense or objection that is capable of determination without trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must be Raised. Defenses and objections based on defects in the institution of the prosecution or in the information other than that it fails to show jurisdiction in the court or to charge an ordinance violation may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the judge for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the information to charge an ordinance violation shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the judge may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. The motion shall be heard and determined before trial on application of the prosecutor or the defendant, unless the judge orders that the hearing and determination be deferred until the trial.

(5) Effect of Determination. If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand. If the judge grants a motion based on a defect in the institution of the prosecution or in the information, the judge may also order that the defendant be held in custody or that the conditions of his release be continued for a specified time pending the filing of a new information.

Rule 37.52 - Motions to Suppress

Requests that evidence be suppressed shall be raised by motion before trial; however, the judge in the exercise of discretion may entertain a motion to suppress evidence at any time during trial.

NOTE: A motion to suppress a confession as not being voluntary must be heard separate and apart from the principal trial. State v. Garrett, 595 S.W.2d 422. (Mo.App. S.D. 1980).

7.8 DISCOVERY

Rule 37.54

Discovery shall be permitted solely in the judge's discretion as justice requires.

Rule 37.61(e)

All jury trials shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure.

NOTE: Criminal Procedure Rules 25.03 and 25.05 list the discovery to which a defendant and the state are entitled without a court order, and Rules 25.04 and 25.06 list the discovery which may be obtained by court order on the showing of good cause. Rule 25.10 lists matters not subject to discovery (e.g., legal work product, informant's identity, and items which involve a substantial prejudice to national security). While discovery is permitted solely in the judge's discretion, the defendant is always entitled to a copy of the information or summons that has been filed pursuant to Rule 37.48. Release of the original information or summons is not considered discovery and is not discretionary.

7.9 SEVERANCE

Rule 37.60

When two or more persons are jointly charged with an ordinance violation they shall be tried jointly unless the judge finds that a probability for prejudice exists. When a person is charged with more than one ordinance violation in the same information, the violations shall be tried jointly unless the judge finds such trial would result in substantial prejudice.

7.10 WITNESS – SUBPOENA

RSMo, 479.160 and Rule 37.55

Form 37J or MU95 “SUBPOENA – ORDER TO APPEAR/PRODUCE DOCUMENTS” is the form to be used.

7.11 SERVICE

Rule 37.55

(a) A subpoena may be served by any peace officer or by any other person who is not a party and who is not less than eighteen (18) years of age. A subpoena may be served any place within the state. Fees and mileage need not be tendered to the witness upon service of a subpoena.

(b) The service of a subpoena shall be by reading same or delivering a copy thereof to the person to be summoned; provided, that in all cases where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read same or to deliver a copy thereof and such refusal shall be sufficient service of such subpoena.

7.12 RETURN OF SERVICE

Rule 37.55(e)

Every officer to whom a subpoena is delivered for service shall make return thereof in writing as to the time, place and manner of service of the subpoena and shall sign the return. If service of the subpoena is made by a person other than an officer, the person shall make affidavit as to the

time, place and manner of service thereof. (See form MU 95 following this chapter.)

7.13 FAILURE TO APPEAR

Rule 37.55(f)

Whenever a witness in a proceeding has been once subpoenaed or required to give bail to appear before the court, he/she shall attend from time to time until the case is disposed of or he/she is finally discharged by the judge.

The witness shall be liable to attachment and bail may be forfeited for failure to appear if the witness has received notice of the time and place to appear.

If the trial is continued and he is requested to do so, the judge shall orally notify such witnesses present, as either party may require, to attend on the new date set for hearing to give testimony. The oral notice shall be valid as a summons. The names of the witnesses so notified shall be entered on the docket. It shall be the sole responsibility of the respective parties or their attorneys to notify any witnesses not orally notified by the judge of the new date set for hearing, and court process shall be provided for such purpose when requested.

NOTE: Rule 37.55(g) further provides that any person who, without good cause, does not obey a subpoena shall be subject to contempt of court proceedings.