MISSOURI MUNICIPAL AND ASSOCIATE CIRCUIT JUDGES ASSOCIATION

Regional Seminar Notebook

November 4 , 2022

MMACJA Regional Seminars

November 4, 2022, Noon to 4:00 PM

Lake of the Ozarks - Lodge of Four Seasons
and Virtual Via Zoom Video Conferencing

AGENDA

11:30 light lunch for those attending in person

12:00 - 4:00 - Sessions

Caselaw Update - St. Louis County Associate Circuit Judge John Newsham

Panel Discussion - Muncipal Judges from across the state will discuss warrants, Webex, hybrid courts and other changes in our courts.

Ethics Quiz - What would you do? Municipal Judge in Battlefield, Branson West, Crane, Kimberling City and Reeds Springs, Mark Rundel

Who Should Attend

All municipal court judges[1] and associate circuit judges hearing municipal and/or traffic violations and municipal appeals. Prosecutors are also encouraged to attend.

This seminar qualifies for 4.0 hours judicial CLE including 1.0 hour of ethics. MMACJA is an accredited sponsor under both Supreme Court Rules 15 and 18.

[1]All attorney municipal judges are required to complete 5 hours and non-attorney judges 15 hours of judicially related CLE each reporting year ending July 31, 2023. All municipal judges must complete 2 hours of ethics annually.

JUNE, 2022

STATE v. BILSKEY, SD37241 (June 3, 2022)

Defendant and his friend were in a "borrowed" (stolen) vehicle which was pulled over pursuant to a report of a stolen vehicle. Defendant was the driver and denied that any weapons were in the vehicle. Defendant was arrested on an outstanding warrant and from outside the vehicle, the officer observed the barrel of a gun between the driver's seat and the center console.

The court noted that "[P]ossession of a prohibited object therefore has two distinct elements: (1) 'conscious and intentional possession . . . either actual or constructive'; and (2) 'awareness of the presence and nature' of the item being possessed." State v. Ludemann, 386 S.W.3d 882, 885 (Mo. App. S.D. 2012) (quoting State v. Purlee, 839 S.W.2d 584, 587 (Mo. banc 1992)). The court held there was sufficient evidence for a reasonable factfinder to conclude beyond a reasonable doubt that Defendant had possession of the firearm. The Defendant told Deputy Wilson there was no firearm in the Jeep despite the fact the silver barrel of the gun was sticking up about two inches between the center console and the driver's seat where he was sitting. The firearm was just an inch from his leg. This was sufficient evidence that the Defendant knew about the firearm and that the firearm was within his easy reach and convenient control.

STATE v. BENSON, SD 37023 (June 9, 2022) After a guilty verdict of felony DWI as a persistent offender, Defendant raised a challenge to the finding that she was a persistent offender because the State did not prove she was represented by or waived counsel in the prior proceedings for intoxication-related offenses. The court noted that in 1991, the legislature amended the definition of "intoxication related traffic offenses" to add a limiting, relative clause: "where . . . the defendant was represented by or waived the right to an attorney in writing." 1991 Mo. Laws 702, 714; § 577.023.1(1) (Cum. Supp. 1992). After that revision, it was plain error for a court to enhance a sentence for a Chapter 577 offense when the state did not prove, beyond a reasonable doubt, that the defendant was represented by counsel or waived the right to counsel during the proceedings for the prior convictions submitted as qualifying intoxication-related traffic offenses. However, in 2009, the legislature struck that clause. 2009 Mo. Laws 237, 275-76; § 577.023.1(4) RSMo. (Cum. Supp. 2009).

Defendant was found guilty of DWI on April 30, 2017. The enhancement provisions and pertinent definitions speak only at the time of the enhancement, that is, at the time of the present offense. State v. Shepherd, 643 S.W.3d 346, 349 (Mo. banc 2022). In 2017, the counsel or waiver requirement was no longer required.

STATE v. TEEL, SD37178 (May 31, 2022) Defendant appealed his conviction, arguing that the search of his backpack was inadmissible because an initial search at the scene violated police policy. Defendant was detained on an outstanding arrest warrant, he lied to the officers regarding his identity, and was then

placed under arrest. After the arrest at the scene, the officer searched his backpack, finding needles and baggies of what appeared to be methamphetamine. The officer admitted that he did not complete a required inventory list per police policy. The Court held that assuming the police officer failed to follow policy at the scene, the required custody search during the booking process would have "inevitably discovered" the drugs and the conviction was affirmed.

JULY, 2022

Edward Terry v. State of Missouri, ED110050 (July 5, 2022)
Edward Terry appealed from the denial of a Rule 24.035 post conviction motion to vacate, set aside or correct the judgment or sentence. Terry argued that the lower court erred in denying the motion without an evidentiary hearing because she pled facts, not refuted by the record, establishing she received ineffective assistance of counsel and was thus prejudiced. The court held that since Terry had absconded from parole for nearly a year during the pendency of the post conviction relief case, that this adversely affected the criminal justice system and in an exercise of discretion dismissed Terry's appeal.
Affirmed

Antonio Jackson v. State of Missouri, WD 84387 (July 12, 2022)
Antonio Jackson appealed the judgement of the Circuit court after an evidentiary hearing denying Jackson's amended motion under Rule 29.15. Jackson argued the court erred in such denial because a)Jackson had ineffective assistance of counsel in that he was advised to waive a jury trial due to potential federal charges which rendered Jackson's waiver not knowing, voluntary and intelligent and b) Jackson's trial counsel was ineffective in failing to request Jackson's physician to perform a complete mental evaluation of Jackson and also failing to call such physician as a witness during sentencing to explain how Jackson's intellectual disability influenced his criminality.
The western district held Jackson's trial counsel acted appropriately in that the recommendation made to waive jury did not fall below an objective level of reasonableness. Counsel for Jackson testified in his experience federal prosecutors were less likely to charger federal gun offenses if some sort of agreement was made to dispose of the case. In Jacksons case, the trade off for waiving a jury trial was an agreement that no request for incarceration of over 25 years would be asked on any count if Jackson was convicted. The court also found the actions of Jackson's counsel to be reasonable given such counsels belief that the complex legal theories being used by Jackson would be better received in a bench trial situation than in a jury trial.

The Court also found that not requesting the physician conduct a full mental evaluation or to call the physician as a witness during sentencing was not ineffective assistance of counsel. The court reviewed the

record and found that all parties were aware of Jackson's mental and criminal history at the time of sentencing. The court also determined that Jackson's counsel had submitted a written report of Jacksons mental evaluation at sentencing which contained the essential and necessary information regarding Jackson's intellectual and cognitive abilities to allow for effective and informed sentencing. The Court found the decision not to call the physician was based upon conversations between Jackson's counsel and the physician and a determination by counsel that the physician's testimony might be more harmful than helpful. Admitting the report but not calling the physician saved the possible harm to Jackson by the cross examination of the physician. The court found all of the above to be sound trial strategies.

Affirmed

State of Missouri v. Anthony Levar Sinks, ED109710 (July 5, 2022)

Following a bench trial, Sinks appealed his conviction for first degree murder and armed criminal action for the shooting death of Derwin Simmons. Three points on appeal are raised.

1. Sinks contends the trial court erred when it misapplied RSMo 56.031 and misstated the law when it observed that Sinks was required to wait and see if the victim had a gun before defending himself.
2. Sinks argues the record contained uncontroverted facts showing the victim was the initial aggressor and that a reasonable person in SInk's position would haver believed the use of deadly force was necessary to defend himself against such aggression.
3. Sinks asserts the court erred in wrongfully excluding testimony that Sinks witnessed Simmons seriously injure someone some 15 years earlier because such knowledge was relevant to his knowledge of the threat posed by Simmons.

The Court found no misapplication or misinterpretation of the law by the lower court when it commented on particular facts which it found undermined the defense of justification, therefore denying point 1. The Court next found there was nothing in the record to indicate any undisputed evidence establishing the use of deadly force by Sinks. It further pointed out that as the trier of fact, the court could adduce sufficient evidence to find that Sinks did not shoot Simmons out of self defense. Lastly the court found that Sinks prior knowledge of Simmons was so remote in time and was only speculatively linked to the facts in this matter, that the exclusion of such testimony about Simmons prior behaviors did not prejudice any defense of justification especially in the context of the other relevant evidence. The court found no abuse discretion and denied Point 3.

Affirmed

Christa E. Mueller v. State of Missouri, SD 37128 (July 5, 2022)

Mueller appealed her conviction for first degree assault of her daughter under MRCP 29.15 that her trial counsel was ineffective for not requesting an instruction patterned on the "mere presence instruction", essentially stating that just because someone is near the scene at the time an incident is committed is not

sufficient to make such person responsible for such offense, but may considered with other evidence in the totality for determining guilt or innocence. The court determined the decision not to use the mere presence instruction was strategic and reasonable, even if unsuccessful in convincing a jury. Mueller contends that the mere presence instruction should always be given and the courts failure to do so was clear error. Mueller also argues the failure to request the mere presence instruction relieves the state of the burden to prove an essential element of their case. Lastly Mueller contends the alibi evidence was problematic and even if believed did not provide a complete alibi. The appellate court found the giving of the mere presence instruction was not mandatory and the failure to request it in every case did not constitute ineffective assistance of counsel. Next the appellate court determined that not giving an instruction does not alter the burden of proof required of the State, distinguishing between burden of proof and cautionary instructions, classifying the mere presence instruction as the later. Although one strategy which might have been used by trial counsel could have involved requesting the mere presence instruction, the failure to do so was not deemed to rise to the level of ineffective assistance of counsel. The appellate court found Mueller's counsel made considered, deliberate and strategic choices, which were believed to be the appropriate and proper choices given the strategy being used - such decisions were reasonable trial strategy and not objectively unreasonable.

Affirmed

AUGUST, 2022

Balbirnie v. State, 649 S.W.3d 345 (Mo. App. 2022)

In this case, the Western District dealt with a Brady issue. The Court held that:

- "Under Brady v. Maryland, due process is violated when the prosecutor suppresses evidence that is favorable to the defendant and material to either guilt or punishment." State v. Mosely, 599 S.W.3d 236, 247 (Mo. App. W.D. 2020) Accordingly: to prevail on his Brady claim, Balbirnie must show that: (1) the evidence at issue is favorable to him either because it is exculpatory or impeaching; (2) the evidence was, either willfully or inadvertently, suppressed by the state; and (3) he suffered prejudice as a result of the state's suppression.

The Court found no Brady violation in this case.

Affirmed.

State v. Haden, 648 S.W.3d 148 (Mo. App. 2022)

In this case, the appellate court considered the following issue:

> Defendant asserts the evidence was insufficient to "prove beyond a reasonable doubt that [Corporal] Johnson was making an arrest of [Defendant] for the felony of assault in the first degree" "in that the evidence adduced at trial showed that [Corporal] Johnson was making an arrest of [Defendant] for misdemeanor driving while intoxicated."

The Court determined that **the word "for" in its plain and ordinary meaning** as set out in Webster's New International Dictionary in 2002 was "because of" and "on account of".

The statute which discusses enhancing an arrest from a misdemeanor to a felony mandates the State to present sufficient evidence to support a factual finding beyond a reasonable doubt that the defendant was arrest "because of" or "on account of" an offense to support a felony resisting arrest. The appellate court stated it was the court – not the factfinder – to determine whether offense was a felony or misdemeanor. It is then up to the court, not the factfinder, to determine whether the offense constitutes a felony as a matter of law.

Affirmed

McMullan v. State, **648 S.W.3d 919 (August 9, 2022)**

In this case, the eastern district dealt with an ineffective assistance of counsel case in regard to a plea. The court stated:

1. In a "plea case", the defendant identifies specific acts or omissions of defendant's attorney that given the circumstances, are not encompassed by the scope of professional competent assistance.
2. Once a guilty plea is entered, ineffectiveness is only relevant to the extent it affected "the voluntariness and knowledge with which the plea was made."
3. A guilty plea must be a voluntary expression of the defendant's choice, and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.

The court found the defendant failed to prove any specific act or omission by defendant's attorney showing ineffective representation. The court held that failing to prove specific acts or omissions fails to overcome the presumption defendant's attorney provided competent assistance. The defendant failed to prove by a preponderance of the evidence defendant's attorney representation was unreasonable or prevented him from entering his plea voluntarily and knowingly.

Affirmed.

Va**squez v. Director of Revenue, --- S.W.3d ----2022 WL 3363817 (August 16, 2022).**

The Western District dealt with the Petitioner's argument that the "trial court erred in ruling Vazquez's arrest was supported by probable cause that he committed an alcohol related offense in that there was insufficient evidence Vasquez was intoxicated at the time of the automobile accident." The trial court found Vasquez's arrest for driving while intoxicated was supported by probable cause. The trial court found:

> In the present case, [Vasquez] admitted to driving and crashing his vehicle. The vehicle is owned by [Vasquez] and he was found seated near the vehicle. [Vasquez] exhibited many indicia of intoxication. He could not satisfactorily follow the instructions for the HGN test. The remaining field sobriety tests were not concluded due to safety concerns for [Vasquez] in that he could not stand without assistance. [Vasquez] indicated positive for the presence of alcohol on the PBT. All of this information taken together is sufficient to show that there was probable cause to arrest [Vasquez] for an alcohol related traffic offense."

The driver argued – as stated above – that the there was insufficient evidence to establish probable cause for his arrest. The court set out that:

1. Probable cause, for purposes of section 302.505, will exist when the surrounding facts and circumstances demonstrate to the senses of a reasonably prudent person that a particular offense has been or is being committed.
2. The trial court must assess the facts by viewing the situation as it would have appeared to a prudent, cautious, and trained police officer.

The appellate court then stated:

3. The first step of the probable cause determination involves examining the **historical facts** and the reasonable inferences drawn therefrom.
4. Historical facts are the facts that led to the stop, search, or arrest.
5. Here, the historical facts presented at trial were sufficient to determine that probable cause supported Vasquez's arrest for driving while intoxicated.

The court went on to lay out the driver's argument:

> Vasquez argues the trial court erred because there was insufficient evidence that he was intoxicated at the time of the accident, which was when he was operating the vehicle. Specifically, Vasquez argues the Director did not establish a time or approximate time of the operation or accident and that he had not consumed alcohol after his last operation of the vehicle; therefore, it is unclear whether Vasquez was driving his vehicle in an intoxicated condition.

The court held:

> However, our cases have held that an arrest for an alcohol related offense supported by probable cause can be established even though an officer does not know the exact time of the accident if there are sufficient facts to reasonably infer the driver was in an intoxicated condition at the time of the operation of the vehicle.

In this case, although the exact time of the accident was unknown,

a. Deputy Zubeck inferred from the totality of the circumstances that the accident had occurred close in time to the dispatch call.
b. Deputy Zubeck was dispatched to the scene of a single car crash in a residential neighborhood at 4:35 in the afternoon.

c. There, he observed Vasquez sitting on the grass next to a vehicle that was backed into a deep ditch. The way in which the vehicle was backed into the ditch was consistent with impairment of the driver. The ditch was clearly marked with a tall yellow post next to the driveway, and an unimpaired driver should have been able to easily pull into the wide driveway and back onto the street to turn around without ending up in the ditch.
d. Vasquez admitted he was driving when the vehicle went into the ditch, and Deputy Zubeck observed multiple indicia of severe intoxication from Vasquez, including watery and blood shot eyes, dilated pupils, odor of intoxicants, inability to maintain balance to the point of not being able to stand or walk without significant assistance, and a positive result for the presence of alcohol on the PBT test.
e. Vasquez admitted that he had consumed several beers earlier in the day.
f. Although Deputy Zubeck did not know the exact time of the accident, given the nature of the accident and indicia of significant intoxication exhibited by Vasquez, the arrest for an alcohol related offense was supported by probable cause.
g. And although the trial court did not make a specific finding regarding the time of the accident, "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Rule 73.01(c).
h. Therefore, **we defer to the trial court's credibility determinations and inferences drawn from the contested historical facts** regarding the time of the accident. See Stanton, 616 S.W.3d at 408 ("Since the trial court found in favor of the Director and did not make a specific finding of fact on this issue, the trial court must have found the deputy's report and testimony credible.").

Here, the trial court found sufficient, credible historical facts to establish probable cause

Affirmed.

State v. Hurst, --- S.W.3d ----2022 WL 3754802 (August 30, 2022)

In this case, the Southern District dealt with a jury instruction issue involving a defendant charged with tampering and resisting arrest. The court stated that our courts have construed substantial evidence to mean "any theory of innocence … however improbable that theory may seem, so long as the most favorable construction of the evidence supports it." The court found that the defendant was entitled to an instruction "if substantial evidence and the reasonable inferences drawn therefrom support the

theory propounded in the requested instruction." The appellate court reversed the Circuit Court and remanded the case for a new trial.

Reversed.

SEPTEMBER, 2022

STATE v. JACOB MASTERS, WD84753 (September 6, 2022) Masters was convicted of driving while intoxicated and driving while revoked. He contends the circuit court erred in finding that he knowingly, voluntarily, and intelligently waived his right to counsel. Master was originally represented by an attorney. Two weeks before trial, attorney seeks leave to withdraw due to a "'trust issue' and that it would be difficult to continue representing Masters." The court then asked several questions on the record regarding knowledge of rules of evidence, that it was not in his best interest to represent himself, that the court must enforce the rules, the inability to appeal this decision, and that no one is forcing him to do this. The State raised the issue of mental disease or defect that may affect his competency. The Court further inquired of Masters about mental disease or defect. Masters responded that "I'm not a doctor." The State objected to the attorney's withdraw and asserted that Masters needed to be represented to have his rights protected. The Court agreed but stated that Masters has chosen to represent himself.

After conviction, Masters filed a pro se motion for new trial because before trial, Masters checked himself into a psychiatric unit at the hospital and was diagnosed with bipolar disorder and number of other problems. Court denied the motion for new trial.

Missouri has two requirements to conclude that a defendant has effectively waived the right to counsel.

1) There must be a throughout Faretta evidentiary hearing that establishes that the Defendant actually understood what rights and privileges his is waiving, as well as the dangers associate with waiving constitutional rights

2) The defendant must be given the opportunity to sign the written waiver of counsel.

The waiver of counsel form is set forth in RSMO 600.051 in any criminal case where a defendant may receive a jail sentence. For the Faretta hearing, the court must advise the defendant of the nature of the charges, potential sentences if convicted, potential defenses to the charges, the nature of the trial proceedings, that he will have to proceed pro se if he refuses counsel, and the dangers of proceeding pro se.

The appellate court held that the circuit court erred in finding that Masters knowingly, voluntarily, and intelligently waived his right to counsel. The court failed to conduct the Faretta evidentiary hearing to establish that Masters understood exactly what rights and privileges he was waiving and the dangers associated with waiving those rights, and the court failed to give Masters the opportunity to sign the written waiver of counsel mandated by Section 600.051, RSMo 2016. In a criminal action, a waiver of counsel is possible after an evidentiary hearing and a proffer of the written form for defendant's signature. Neither occurred. A pro se defendant need not preserve a constitutional objection to their own waiver of counsel, and a violation of the statutory procedure for a written waiver presumptively constitutes plain error.

STATE v. CHRISTOPHER FORD, SD37278 (September 6, 2022) Ford was convicted of robbery in the second degree and resisting arrest. Fudge-covered Oreos were found in the front of the Defendant's pants when arrested. Wal-Mart employees alleged that the item was stolen from Wal-Mart. When Ford testified in his own defense at trial, he testified that the stolen Oreos were purchased the previous day from a Dollar General. Prosecutor showed his cell phone to Ford during cross examination with the website for Dollar General displayed on the phone. Prosecutor challenged Ford to find the Oreo cookies on the website. Dollar General, the prosecutor alleged, did not stock the item. Defense counsel objected to the Prosecutor using his cell phone "he can't even enter it into evidence." Ford alleges that the court committed plain error when it permitted the prosecutor to cross-examine Defendant by urging him to look at a Dollar General website to see if the store stocked a particular product.

The trial court stated that he thought it was improper, but the issue was not preserved for appeal because the Defendant volunteered his answers before the court could rule on the Defense counsel's objection. The appellate court reviewed under plain error review. The appellate court held that "[T]he prosecutor's stunt with his phone did not result in a manifest injustice or gross miscarriage of justice."

STATE v. TERRY BERWALDT, WD84329 (September 27, 2022) Berwaldt appealed from his conviction of possession of a controlled substance (methamphetamine) and unlawful possession of drug paraphernalia (syringe). Officer executed a search warrant for controlled substances of Berwaldt's home. Multiple persons were present in the home at the execution of the warrant. Multiple persons lived in the home. From Berwaldt's bedroom, Officer Barker collected a baggie of methamphetamine located in a couch in the bedroom, a camo pouch containing a spoon with residue that field-tested positive for methamphetamine, a small black bag that contained prescription drugs, and a loaded syringe. Berwaldt admitted to Officer Barker that he currently uses 1.75 grams of methamphetamine per week, and Berwaldt admitted that he owned the home and that the bedroom searched on the main floor of the house with the hospital-style bed was his bedroom. Each of the other residents of the home had their own separate bedroom.

Berwaldt challenged the sufficiency of evidence to show that he possessed the controlled substance and drug paraphernalia in that the evidence failed to establish who owned the methamphetamine and syringe found in Berwaldt's bedroom.

A person commits the offense of possession of a controlled substance if he knowingly possesses a controlled substance. "A person who, although not in actual possession, has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it."

The Court held that sufficient evidence was presented to support a reasonable inference of sole possession because the controlled substance and paraphernalia were found in Berwaldt's personal bedroom, which he occupied alone, and which is thus sufficient to give rise to an inference that Berwaldt had exclusive control over the drugs in his own room. When the elements of a charge include possession,

the State must show that defendant knew what the contraband was and intended to control it. Control can be constructive and joint among defendant and others. Evidence that contraband was in a bedroom occupied solely by defendant made a submissible case of possession.

OCTOBER, 2022

State v. Oliver, --- S.W.3d ----2022 WL 483485 (October 4, 2022)

In this case, the Court dealt in part with a speedy trial request. The court stating the following: (t)his Court has recognized "orderly expedition of a case, not mere speed, is the essential requirement behind a speedy trial." To determine whether a defendant's constitutional right to a speedy trial has been violated, we must balance four factors:

(1) the length of delay;
(2) the reason for the delay;
(3) the defendant's assertion of his right; and
(4) prejudice to the defendant."

The Court found in weighing the Four Barker Factors:

- Three of the four Barker factors weigh against Defendant, including the most important factor—prejudice.
- The one factor in Defendant's favor is the length of the delay.
- Although the length of Defendant's delay is presumptively prejudicial, this presumption is overcome by the fact that the delays are largely either attributable to Defendant or circumstances that weigh neutrally.
- Furthermore, because Defendant's assertion of his right was belated and solitary, he was not prejudiced by the delay.
- For these reasons, Defendant's right to a speedy trial was not violated, and we further find that the circuit court did not plainly err in failing to sua sponte dismiss the action for violating Defendant's right to a speedy trial.

Affirmed.

City of St. Peters v. Lienemann, --- S.W.3d ----2022 WL 14156350 (October 25, 2022)

The Eastern District dealt with a case involving municipal citations issued by the City of St. Peters for property violations against the defendant. The court stated that the property at issue in this case was owned by the Family Partnerships, the general partner of each Family Partnership is Harvester Farms, LLC, and the defendant, Lienemann was the registered agent for each Family Partnership and was the sole member of Harvester Farms, LLC. Between December 2020 and June 2021, the City issued 31 citations to the defendant, Lienemann for violations of the City of St. Peters Municipal Code (City Code) relating to property maintenance and weeds. The court found that the parties' sole dispute was whether

the facts were sufficient to cause Lienemann to be cited for violations at the Property of the City's property maintenance and nuisance ordinances. The issues arose from the dismissal of municipal citations issued by the City to Lienemann in connection with property located in St. Peters, Missouri.

In the second point on appeal, the City contended that the trial court erred in granting Lienemann's motion to dismiss because Lienemann was the proper defendant liable for the municipal violations, in that she was the person in control of the corporate entities that owned the Property. The court agreed that the trial court erred in dismissing the citations against Lienemann. There is an extensive discussion about the City of St. Charles property maintenance code and whether Lienemann was the person in control of the property. On this second point, the court stated that "without sufficient facts before us regarding Lienemann's 'control' over the Property, we are unable to determine if she may properly be held liable for the property maintenance violation".

On Point II, the court remanded the case for further proceedings.

On the third point on appeal, the court dealt with the City's claim that the trial court erred in granting Lienemann's motion to dismiss because Lienemann was collaterally estopped from arguing that she was not the proper defendant for the municipal violations at issue. "Specifically, the City asserts that Lienemann is collaterally estopped from raising this argument because she was previously found guilty of violations of the same ordinances involving the Property, she withdrew her application for trial de novo of those convictions, and she paid the fines assessed against her."

The court held that:

> "Collateral estoppel 'means simply that when an issue of ultimate fact has been determined by a valid final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " State v. Dowell, 311 S.W.3d 832, 837 (Mo. App. E.D. 2010) (quoting State v. Coleman, 773 S.W.2d 199, 201 (Mo. App. E.D. 1989)). The principle of collateral estoppel is embodied in the 5th Amendment guarantee against double jeopardy. Id. (citing supporting cases, including Ashe v. Swenson, 397 U.S. 436, 445, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). One fundamental aspect of the doctrine of collateral estoppel is that it is only available for use by a defendant in a criminal proceeding—not the State. See id. at 837–38; State v. Cusumano, 399 S.W.3d 909, 914-15 (Mo. App. E.D. 2013). And although municipal proceedings are civil in nature, courts generally apply fundamental criminal law principles to prosecutions of municipal ordinance violations because of their quasi-criminal aspects. See Tupper, 468 S.W.3d at 372-73. Accordingly, the doctrine of collateral estoppel is not available to the City in its prosecution of the ordinance violations against Lienemann. The trial court did not err in failing to apply collateral estoppel to preclude Lienemann from asserting that she cannot be named as the defendant party for these municipal ordinance violations.

Point III was denied.

State v. Barton, --- S.W.3d ----2022 WL 14374812 (October 25, 2022)

In Barton, the Southern District dealt with the issue of whether a police officer necessarily violates the Fourth Amendment when he makes an arrest that is prohibited by state law?

The court set out the following:

- The court stated that in the absence of statute, municipal police officers have no official power to apprehend offenders beyond the boundaries of their municipality.
- The State does not dispute Defendant's assertion that Lt. Stewart and the Poplar Bluff police officers apprehended Defendant in Campbell, which was outside the boundary of their municipality.
- Defendant claims that his illegal arrest violated his Fourth Amendment rights and requires the exclusion of his confession as the "fruit of the poisonous tree".
- The State disagreed arguing that the officer's arrest in violation of a state statute did not constitute a Fourth Amendment violation, and because Defendant's arrest was supported by probable cause, the evidence at issue should not have been excluded.
- Because the Supreme Court of the United States held in Moore (Virginia v. Moore, 128 S.Ct. 1598 No. 06–1082, Argued Jan. 14, 2008. Decided April 23, 2008.) that an officer who makes an arrest on probable cause does not violate the Fourth Amendment even though the arrest is prohibited by state law, we agree that the unlawful arrest at issue here did not automatically require the circuit court to suppress the evidence that it produced.
- That said, applying the holding of Moore to the facts of the case at bar still leaves the question of whether Lt. Stewart had probable cause to arrest Defendant; i.e. whether Defendant's warrantless arrest met the standard of reasonableness that is required by the Fourth Amendment.

The court then discussed whether the arresting officer had probable cause to arrest the Petitioner:

- Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense.
- There is no precise test for determining whether probable cause existed; rather, it is based on the particular facts and circumstances of the individual case.
- Furthermore, probable cause is determined by the collective knowledge and the facts available to all of the officers participating in the arrest.
- Probable cause [to arrest] does not mean absolute certainty.
- As such, to establish probable cause to arrest much less evidence than is required to establish guilt is necessary.
- In focusing solely upon the issue of the officer's territorial jurisdiction and state-law authority to effect the arrest, the circuit court may not have considered (and did not address) whether Lt. Stewart violated the Fourth Amendment by arresting Defendant without probable cause. Because credibility determinations are critical in making that

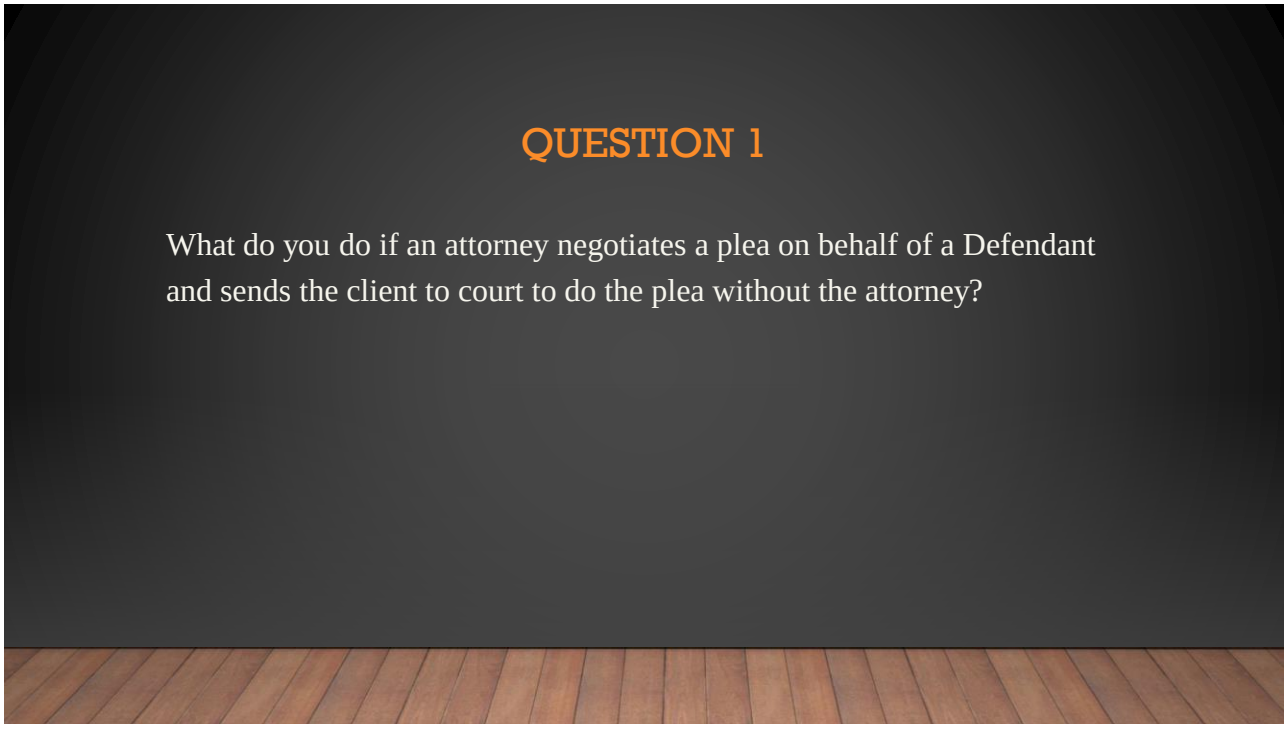
  determination, we reverse the circuit court's suppression order and remand the case for further proceedings consistent with this opinion.

Reversed.

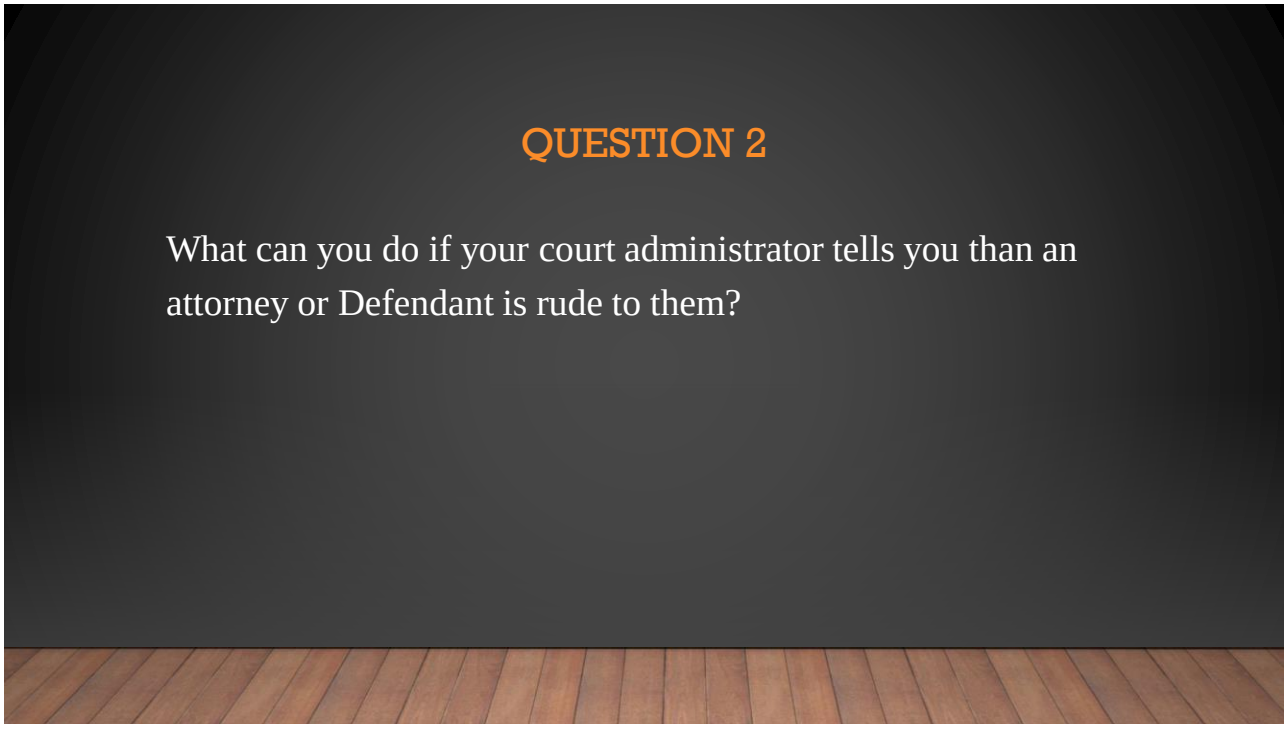
1

THE FED UP JUDGE

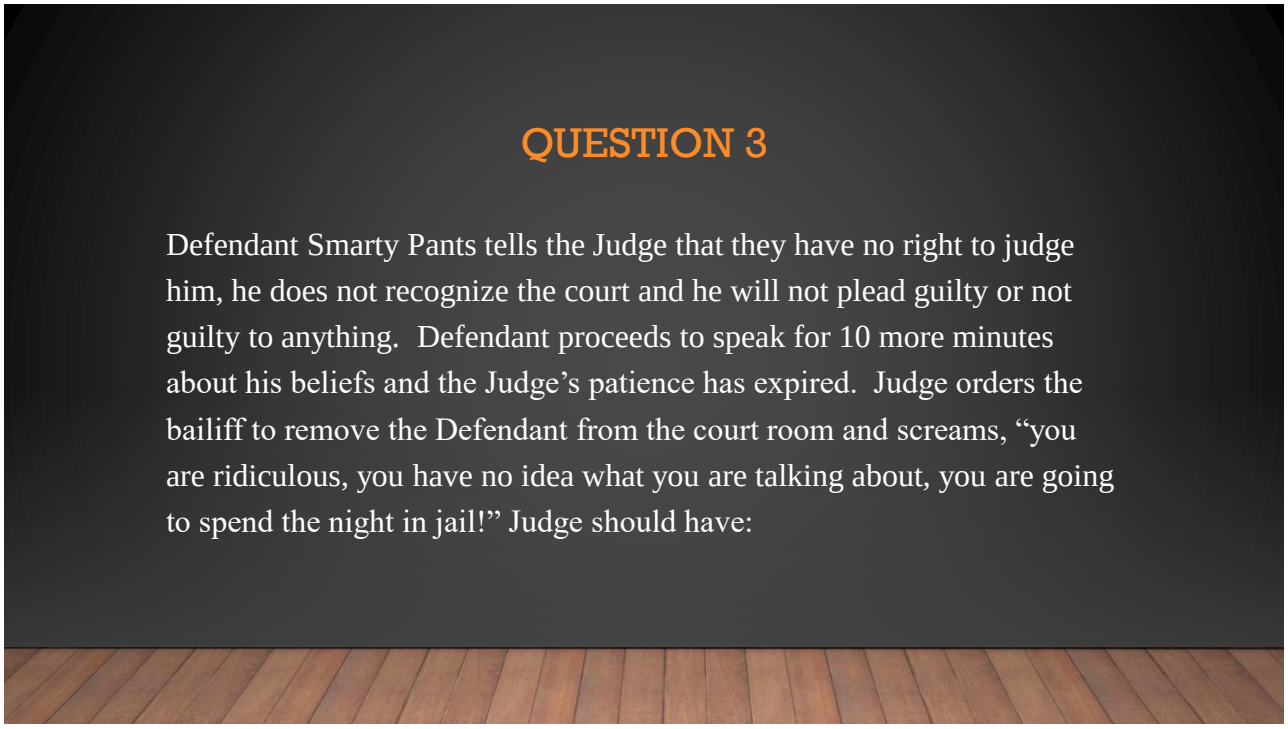
2


QUESTION 1
What do you do if an attorney negotiates a plea on behalf of a Defendant and sends the client to court to do the plea without the attorney?

3


QUESTION 2
What can you do if your court administrator tells you than an attorney or Defendant is rude to them?

4


QUESTION 3
Defendant Smarty Pants tells the Judge that they have no right to judge him, he does not recognize the court and he will not plead guilty or not guilty to anything. Defendant proceeds to speak for 10 more minutes about his beliefs and the Judge's patience has expired. Judge orders the bailiff to remove the Defendant from the court room and screams, "you are ridiculous, you have no idea what you are talking about, you are going to spend the night in jail!" Judge should have:

5

QUESTION 4

Defendant Joe Cool arrives in court in a tailored suit, carrying the latest I Phone, dripping in gold jewelry with a diamond studded pinky ring. He tells you he cannot afford the $200 fine imposed after his guilty plea for indecent exposure.

6

QUESTION 5

Defendant asks you a bunch of questions, hems and haws, and when you ask for his/her plea, they say, I can't afford a lawyer, so I guess I have to plead guilty. The PA is not seeking jail time on the charge.

7

QUESTION 6

Judge Harper starts court and notices that the first person on the docket is his son's travel baseball coach. Coach Obvious has an accident ticket. You must decide how to proceed with arraignment. Judge Harper considers the judicial canons and decides he must:

8

QUESTION 7

A defendant stands before you charged with driving while suspended. The defendant wants to plead guilty and shows you she has got her license reinstated. She has talked to the Prosecuting Attorney and showed him her new license but because of her criminal history, he refuses to amend the ticket. The judge knows that if the defendant pleads to the current charge, her license will be suspended again for points. The Judge should:

9

QUESTION 8

Judge Jones runs into the Mayor at a local Optimist Club dinner and the Mayor takes the opportunity to tell Judge Jones that he is very unhappy with all the speeding that is occurring in front of his new home. He knows the police are cracking down on those speeding because he watches from his front porch as they are stopped and given tickets. The Mayor now wants the Judge to do his part. He tells the Judge, "You can double those fines and it will stop those speedsters and by the way, the city can use the extra revenue to pay for your new courtroom and full-time clerk required by those minimum operating standards". The Judge should:

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THE ETHICAL JUDGE

11

QUESTION 9

Judge Smith works for a very small town with limited funds. The City Council dutifully hired a court administrator to work 30 hours a week when it became mandatory under the Minimum Operating Standards. The Council even hired the Prosecutor a part time clerk. The Court administrator is scheduled to go on her dream vacation and will be out for two weeks. The City Administrator told the Prosecuting Attorney clerk to fill in for the court clerk while she is on vacation. The Prosecuting Attorney clerk will just be answering phones not doing any "real" court work. Judge Smith should:

12

QUESTION 10

Judge Dudd works for a mid-size city and has three court clerks. One of the clerks has a brother-in-law who is running for city council. The clerk asks the judge if she can help her brother-in-law in any way to get elected. He would be great for the city and Judge Dudd agrees. Judge Dudd can ethically tell his clerk that she can:

13

QUESTION 11

While shopping at a local convenience store, Judge gets into a verbal dispute with a customer which results in the store manager calling the local police for assistance. When the police arrive the judge and the customer are still yelling and calling each other everything, but a "good shopper." The police officer cites the judge and the customer for peace disturbance. Could the citation for peace disturbance give rise to the judge being disciplined or sanctioned?

14

QUESTION 12

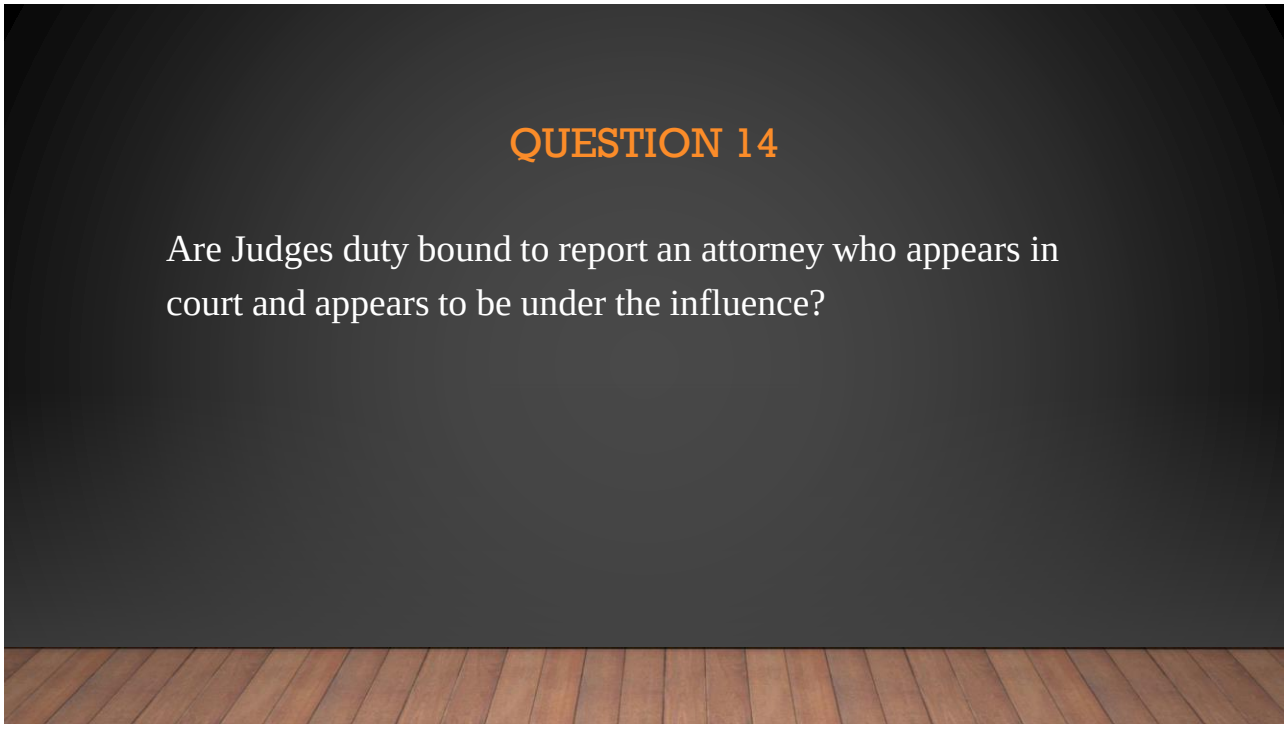
The judge requested that his clerk ask the prosecutor some questions to clear up a matter that wasn't clear from the evidence presented during the trial. Is it appropriate for the clerk to contact the prosecutor in this instance?

15

QUESTION 13

While conducting a call docket, the defense attorney appears before the court on Webex video conferencing wearing a baseball cap and smoking a cigar. Would it be appropriate for the judge to ask defense counsel to step off camera and dress appropriately for court and to extinguish the cigar in this instance?

16


QUESTION 14
Are Judges duty bound to report an attorney who appears in court and appears to be under the influence?

17

QUESTION 15

John, the prosecutor, has a glass of wine with his dinner prior to arriving to court. When speaking with the clerk prior to the start of court, he notices that John is slurring his words and has bloodshot eyes. The clerk advises the judge of his observations. What should the judge do in this instance?

18

QUESTION 16

Recently a DWI caused a death of a young girl in a residential neighborhood and the public has been calling for stronger sentences and jail time for DWI's. At dinner, an old friend of yours stops by the table to say hello. He states that he disagrees with a local article on the subject as a friend's son has just gotten a DWI and "is a good college kid that just made a mistake." At the time of this interaction, you do not know if the case he is talking about is in front of you or not. The Defendant then appears on your next docket.

19

QUESTION 17

Judge is getting married and learns that their fiancée is the Prosecutor's distant cousin. Can the Judge and the Prosecutor continue to work in the same court?

20

QUESTION 18

Judge Fair appears in Court with Prosecuting Attorney Doubledealing once a month. They both have practices outside of Municipal Court. On the June docket, defendant John Smith appears in court on a traffic offense. Defendant Smith wants to set his case for trial. Judge Fair knows that the Prosecutor just bragged to him at the last bar meeting how he had cross examined John Smith in a civil matter recently and made him look like the liar he is. Judge Fair calls the prosecutor to the bench and says "Hey, isn't he on the other side of that civil matter you were talking about?" The Prosecutor says "Yes, but I have no problem continuing on the case." What should the Judge do?

21

QUESTION 19

Tony Soprano appears on your virtual call docket and pleads not guilty. It is your practice to require in person trials, but Tony is in New Jersey and asks for a virtual trial. What do you do?

22

THAT'S ALL FOLKS

23

1. What do you do if an attorney negotiates a plea on behalf of a Defendant and sends the client to court to do the plea without the attorney?

a. Take the plea if the attorney and the Defendant signed the plea agreement.

b. Refuse to accept the plea and tell the client he paid too much for their attorney

c. It depends on the charge

2. What can you do if your court administrator tells you than an attorney or Defendant is rude to them?

a. Teach them a lesson, put them in jail

b. Nothing to the attorney, attorneys are exempt from an ethics complaint for being rude.

c. It depends on the behavior.

3. Defendant Smarty Pants tells the Judge that they have no right to judge him, he does not recognize the court and he will not plead guilty or not guilty to anything. Defendant proceeds to speak for 10 more minutes about his beliefs and the Judge's patience has expired. Judge orders the bailiff to remove the Defendant from the court room and screams, "you are ridiculous, you have no idea what you are talking about, you are going to spend the night in jail!" Judge should have:

a. Held a contempt hearing

b. Entered a not guilty plea and set the case for trial

c. Dismissed the case, the pay is not worth it.

4. Defendant Joe Cool arrives in court in a tailored suit, carrying the latest I Phone, dripping in gold jewelry with a diamond studded pinky ring. He tells you he cannot afford the $200 fine imposed after his guilty plea for indecent exposure.

What should you do?

a. Stop laughing at him, you're a Judge

b. Ask for his tax returns

c. Provide him with the Supreme Court indigency form and hold a hearing

5. Defendant asks you a bunch of questions, hems and haws, and when you ask for his/her plea, they say, I can't afford a lawyer, so I guess I have to plead guilty. The PA is not seeking jail time on the charge.

What do you do?

a. Hurry up, assess a fine and move on to the next case

b. Tell him/her you will not accept the plea and give him/her a new court date

c. Offer a continuance, explain that they have a right to an attorney, and that a plea must be voluntary

6. Judge Harper starts court and notices that the first person on the docket is his son's travel baseball coach. Coach Obvious has an accident ticket. You must decide how to proceed with arraignment. Judge Harper considers the judicial canons and decides he must:

a. Recuse and send the case to the conflicts judge

b. Arraign the coach and takes his plea; Would never let his kid play for him again anyway, he's a horrible coach

c. Stay on the case if he wants to plead guilty and assess the standard fine, but if he wants a trial, Judge Harper will recuse and send it to the conflicts judge

d. Recuse and send it to the conflicts judge with a note in the file to double this guy's fine. Judge Harper's talented son has batted last all season

7. A defendant stands before you charged with driving while suspended. The defendant wants to plead guilty and shows you she has got her license reinstated. She has talked to the Prosecuting Attorney and showed him her new license but because of her criminal history, he refuses to amend the ticket. The judge knows that if the defendant pleads to the current charge, her license will be suspended again for points. The Judge should:

a. Amend the ticket himself and take the defendant's plea to a lesser offense that will allow her to keep her license

b. Take the defendants plea to the Driving While Suspended and explain the collateral consequences of the points

c. Dismiss the ticket, the defendant has a new license and the purposes of justice have been served

d. Tell the Prosecuting Attorney to amend the ticket or you will never rule in his favor again

8. Judge Jones runs into the Mayor at a local Optimist Club dinner and the Mayor takes the opportunity to tell Judge Jones that he is very unhappy with all the speeding that is occurring in front of his new home. He knows the police are cracking down on those speeding because he watches from his front porch as they are stopped and given tickets. The Mayor now wants the Judge to do his part. He tells the Judge, "You can double those fines and it will stop those speedsters and by the way, the city can use the extra revenue to pay for your new courtroom and full-time clerk required by those minimum operating standards". The Judge should:

a. Buy the Mayor a drink and happily double those fines

b. Leave the fines the same and tell the police to stop writing tickets on the Mayor's street

c. Double the fines as along as the judge stays within statutory limits

d. Keep the fines the same as the judge does not want any perception that he is accessing fines for revenue

9. Judge Smith works for a very small town with limited funds. The City Council dutifully hired a court administrator to work 30 hours a week when it became mandatory under the Minimum Operating Standards. The Council even hired the Prosecutor a part time clerk. The Court administrator is scheduled to go on her dream vacation and will be out for two weeks. The City Administrator told the Prosecuting Attorney clerk to fill in for the court clerk while she is on vacation. The Prosecuting Attorney clerk will just be answering phones not doing any "real" court work. Judge Smith should:

a. Agree with the arrangement as long as the PA clerk is just answering the phone

b. Tell the city administrator that this arrangement will not work as there is a conflict of interest and the city will have to provide someone else to answer the phone

c. Tell the city administrator that this creates a conflict for the court and he will just close the court office during that two weeks

d. Go on vacation with the court clerk

10. Judge Dudd works for a mid-size city and has three court clerks. One of the clerks has a brother-in-law who is running for city council. The clerk asks the judge if she can help her brother-in-law in any way to get elected. He would be great for the city and Judge Dudd agrees. Judge Dudd can ethically tell his clerk that she can:

a. Hand out his cards at the court window

b. Put his bumper sticker on her car and in her yard

c. Campaign for him during parades and speaking events

d. All of the above

e. None of the above

11. While shopping at a local convenience store, Judge gets into a verbal dispute with a customer which results in the store manager calling the local police for assistance. When the police arrive the judge and the customer are still yelling and calling each other everything, but a "good shopper." The police officer cites the judge and the customer for peace disturbance. Could the citation for peace disturbance give rise to the judge being disciplined or sanctioned?

a. Maybe, if the citation results in a conviction.

b. No, the act of being cited for peace disturbance would not give rise to

discipline.

c. Yes, even if the citation does not result in a conviction.

d. All of the above.

12. The judge requested that his clerk ask the prosecutor some questions to clear up a matter that wasn't clear from the evidence presented during the trial. Is it appropriate for the clerk to contact the prosecutor in this instance?

a. Yes, so long as the clerk memorializes the conversation in a docket

entry in the court file.

b. No because the clerk has the same responsibilities and prohibitions as

the judge.

c. Yes, so long as the other side is notified.

13. While conducting a call docket, the defense attorney appears before the court on Webex video conferencing wearing a baseball cap and smoking a cigar. Would it be appropriate for the judge to ask defense counsel to step off camera and dress appropriately for court and to extinguish the cigar in this instance?

a. No, because a call docket conducted via Webex is not a court proceeding

under Missouri Supreme Court Rules.

b. No, the judge should not be concerned with the dress code of defense

counsel.

c. Yes, and if he they refuse, the judge should expel defense counsel from the Webex meeting room.

14. Are Judges duty bound to report an attorney who appears in court and appears to be under the influence?

a. Yes, an attorney under the influence may result in ineffective assistant of counsel.

b. No who doesn't like to drink before court appearances.

c. It depends if the attorney can be under the influence and still perform their duties.

15. John, the prosecutor, has a glass of wine with his dinner prior to arriving to court. When speaking with the clerk prior to the start of court, he notices that John is slurring his words and has bloodshot eyes. The clerk advises the judge of his observations. What should the judge do in this instance?

a. Observe John during the court proceedings and take action only if John is unable to do his job as the prosecutor.

b. Before the start of the docket, the judge should advise John that tonight he will not be serving as the prosecutor for the docket.

c. If a is true, then John should be referred to a lawyer assistance program.

d. All of the above are correct.

e. Only a and c are correct.

16. Recently a DWI caused a death of a young girl in a residential neighborhood and the public has been calling for stronger sentences and jail time for DWI's. At dinner, an old friend of yours stops by the table to say hello. He states that he disagrees with a local article on the subject as a friend's son has just gotten a DWI and "is a good college kid that just made a mistake." At the time of this interaction, you do not know if the case he is talking about is in front of you or not. The Defendant then appears on your next docket.

a. Yes.

b. No.

c. Maybe.

17. Judge is getting married and learns that their fiancée is the Prosecutor's distant cousin. Can the Judge and the Prosecutor continue to work in the same court?

a. Yes

b. No

c. It depends on how distant the cousin is and if the Prosecutor sends them a nice wedding gift.

18. Judge Fair appears in Court with Prosecuting Attorney Doubledealing once a month. They both have practices outside of Municipal Court. On the June docket, defendant John Smith appears in court on a traffic offense. Defendant Smith wants to set his case for trial. Judge Fair knows that the Prosecutor just bragged to him at the last bar meeting how he had cross examined John Smith in a civil matter recently and made him look like the liar he is. Judge Fair calls the prosecutor to the bench and says "Hey, isn't he on the other side of that civil matter you were talking about?" The Prosecutor says "Yes, but I have no problem continuing on the case." What should the Judge do?

A. Nothing, the Prosecutor does not see a conflict- Not your box

B. Remove the Prosecutor from the case, the Judge sees a conflict.

C. Ask the defendant if he feels the Prosecutor is biased and should recuse

D. Ask the Prosecutor and the defendant if they are close to a deal on the civil matter

19. Tony Soprano appears on your virtual call docket and pleads not guilty. It is your practice to require in person trials, but Tony is in New Jersey and asks for a virtual trial. What do you do?

A. Deny his request. Tell him you know he has the money to fly his private plane to your court.

B. Deny his request. It is your policy and the law requires trials in person.

C. Grant his request if he agrees to waive his right to an in-person trial.

D. Grant his request, the law does not require trials in person.