OFFICE OF THE COUNTY ATTORNEY

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CODE ENFORCEMENT IN MONTGOMERY COUNTY:

Process and Procedure From Citation to Trial and Beyond

By Franklin M. Johnson, Jr.
Assistant County Attorney
Principal Counsel, Code Enforcement

Second Edition
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Code Enforcement Training: Welcome & Introduction

By Frank Johnson, Asst. Co. Atty. and Principal Counsel, Code Enforcement

I consider the work of code enforcement to be among the most important tasks government can perform for its citizens. It is through code enforcement that the laws passed by our Executive and County Council are made effective. Laws, however mighty, do not themselves address neighborhood problems, prevent consumer problems or correct building code violations. They have to be enforced to be meaningful.

Code enforcement is also critically linked to neighborhood stability and the general quality of life in our community. Often the enforcement of the law is the key link in preventing neighborhood decline – and sometimes the critical factor in turning a neighborhood around and allowing a new, strong sense of community pride. Obviously a community feels better about itself when homes are maintained and zoning laws preventing auto repair and other businesses in residential areas are enforced.

Code enforcement is also linked to the community's sense that the government can be part of the solution rather than part of the problem. When a community has to struggle just to get the law enforced, government stands as one of the barriers to solving problems. Where, however, our government acts proactively to investigate matters of concern, and then acts to try to solve community and neighborhood problems, citizens are more likely left with a feeling that their government is responsive to their concerns. Of course, it is rarely the case that everyone can be made happy through code enforcement. What most persons seek, however, is not necessarily vindication, but that their government respond to their concerns and attempt to solve problems. Code enforcement is linked perhaps more than any other area to this vital community connection.

I look upon code enforcement as a team effort. It involves citizens and community leaders to identify problems, and County agencies to try to address them. It involves Code Enforcement officers as they try to resolve problems and, where necessary, issue citations when problems can't be easily resolved. And then it involves us, the County Attorney's Office, when legal action is needed on a citation. All of us need to work together to ensure that our laws are enforced.

Working together requires communication, and that requires that the Code Enforcement Unit is available to the community. I look forward to regular meetings with Code Enforcement Officers and other interested persons, but I also want to hear from the community. Whether with the County or not, call me at 240-777-6754 if you are interested in hearing from us, have a question about our work, or have a concern to express. You may also e-mail me at johnsf@co.mo.md.us.

I know that sometimes the work of enforcing our laws can be somewhat thankless. Let me offer thanks to everyone who plays a role in our efforts to enforce the County's laws. I look forward to working with and hearing from you.

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Process and Procedure

From Citation to Trial - and Beyond

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Welcome to the code enforcement team! It has been said that passing laws is important, but the heart and soul of effective government comes down to enforcing the laws that are enacted. It is certainly true that a society's priorities are reflected in its laws. In some ways, then, code enforcement is arguably among the most important work the county government can do. Code enforcement is certainly a major priority both for County government generally and for Chuck Thompson, County Attorney. My priority as Principal Counsel for Code Enforcement is to see that the laws of Montgomery County are enforced, fairly, reasonably but also effectively. I also seek to instill the sense that all of us working in code enforcement, throughout county government, are working together on the same team. That means being available for support, concerns and questions, for employees, citizens, complainants and others.

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INTRODUCTION: OFFICE OF THE COUNTY ATTORNEY

The Office of the County Attorney is the legal arm of the Montgomery County government. The County Attorney is appointed by the County Executive, subject to confirmation by the County Council. Charles W. "Chuck" Thompson, Jr. has served as County Attorney since 1995. The County Attorney and his staff serve to advise and represent County agencies, the County Executive and the Council exclusively. In fact, the staff are prohibited by the Charter from engaging in any other legal practice.

The assistance the County Attorney's Office provides ranges from offering advice to drafting legislation. The Office advises the Council and agencies about many areas, including contracts, personnel, inter-governmental issues, and County Code and law enforcement issues. The Office also represents the County in court - whether code enforcement, contract litigation, or a case in which the County is sued. The County Attorney's Office also serves the citizens of Montgomery County directly. Although staff cannot offer legal advice to individuals, we can offer guidance on the application of Montgomery County law and can help to direct those with questions to appropriate agencies. The Office also responds to questions regarding code enforcement matters. We can be reached at (240) 777-6700.

THE CODE ENFORCEMENT UNIT

The Code Enforcement Unit, as part of the County Attorney's Office, serves to help enforce County laws. The unit represents agencies when they take action to issue a citation for a violation of the County Code. Generally, when neighborhood or other problems arise -- whether they involve selling cigarettes to minors, building code violations or animal cruelty -- a complaint is made to one of the County agencies (see page 3 for some of the important phone numbers). Inspectors and other agency staff will try to resolve the problem, but if the problem persists or cannot be simply and easily resolved, a citation is issued charging a violation of Montgomery County law. Usually, the County seeks a $500 fine and/or a court order directing that the activity violating the law ceases. The main goal is, simply, to ensure compliance with the law and solve the problems leading to the citation.

Even after receiving a formal citation, a person can pay the fine and not stand trial, or contact the agency to work something out without standing trial. When a person has been cited and wishes to contest the citation in court, or does not contact the County seeking to work something out, the County Attorney's Office will represent the County in court.

The Code Enforcement Unit's mission is to serve the community by helping to fairly and reasonably enforce our County Code. We seek to be available to the community, both to provide information, as in this newsletter, and address questions and concern from citizens. We are also available to speak to community groups or agencies about our work. Please contact Frank Johnson, Principal Counsel for the Code Enforcement Unit, at (240) 777-6754 or johnsf@co.mo.md.us. if you have questions or concerns.

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Code Enforcement Agency Training Outline

I. INTRODUCTION

A. My role, your role
B. Teamwork focus
C. Info, resource, etc.

II. CODE ENFORCEMENT OVERVIEW

A. Purpose, intent from Co Atty point of view
    1. Problem solving
    2. Neighborhood stability
    3. Overall quality of life
B. Complaints - citizen, council, etc.
C. The focus - uncooperative/unresponsive

III. PROCESS

A. Complaint
B. Investigation
C. Contact w/deft
D. Notice of Violation
E. Citation
F. Hearing & Appeals
G. "Clean and Lien"
H. Abatements, Contempt

03

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IV. THE CITATION

A. When issued
B. Filling the form out
    1. Deft info, address
    2. Code violation & description
    3. Service - deft signs, cert mail/restr deliv
    4. The Box
        a. Fine amount - Class A,B,C; 1st or 2nd offense
        b. Deadlines - 15/20 to dispute/pay
        c. Abatement orders for repeat offenses
    5. Sign, date, ph number

V. THE HEARING

A. Preparation
    1. Co atty
    2. Any witnesses
    3. The investigator: describe, describe, describe
    4. Pictures - really worth a thousand words?
    5. Doc evidence
    6. The questions:
        a. Famil w/wit
        b. Describe what happened on =[date of viol]
B. The Process
    1. Plea - guilty/not guilty
    2. Co case, deft cross ex, co closes
    3. Deft case, co cross ex, deft closes
    4. Decision by court
    5. Disposition: fine, abatement
C. The Options
    1. Settle before court
    2. Default - double fine
    3. Default - abatement needed
    4. Guilty plea - fine/abatement
    5. Full trial

VI. POST HEARING PROCEEDINGS

A. The Motion to Reopen
B. The Appeal to Circuit Court (new trial)
C. Abatements & Contempt Process

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1. Abatement questionnaire/compliance period
2. Order to Show Cause
3. Hearing: issue of compliance or not
4. Postponements, dismissals, etc.

VII. SPECIAL ISSUES

A. Confidentiality
B. Warrantless Searches
C. Seizures, Inspections, Restitution
D. If noncompliance: Clean & Lien vs. Contempt
E. Specific Agency issues
F. Questions, concerns

#: 05

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BASIC CITATION INSTRUCTIONS

1. ***The court, county and defendant.*** Fill in "Montgomery County" on the top 2 lines and defendant's name on the third.

2. ***Defendant information.*** Give as much information as possible – name, address and telephone number are essential. Description can also be helpful.

3. ***The charge.*** Give date, time and place, and describe succinctly the violation in question. Bear in mind what the ordinance requires in laying out the description.

4. ***The law.*** Before the first box – cite "Montg Co Code" and give the specific title, chapter and section number of the violation.

5. ***Defendant's signature.*** Defendant needs to sign or you can write "refused". If sent by mail you can write "sent certified mail". You can also write "private process server", if applicable.

6. ***The fine, the date to pay and the date to contest the charges.*** Fill in the next box (the first one, "Municipal Infractions") giving the fine and deadlines:

> You may pay a fine of [state fine amount] by [usually, date *20 days* after citation date. We give 5 extra days to request trial date, which is usually 15 days] at [Office of the County Attorney, 101 Monroe Street, Rockville, MD, 20850]
>
> If you elect to stand trial you must notify in writing [Office of the County Attorney by [date *15 days* after citation date, 60 if out of state. For certified mail service, we suggest giving 30 days, 75 days if out of state]].
>
> IF SEEKING AN ABATEMENT – check abatement and indicate that [Montgomery County] is seeking abatement of the infraction.

7. ***The "must appear in court" box.*** Ignore it or you can cross it out!

8. ***Your info, signature and date.*** Sign your name and print it somewhere legibly, also giving your agency/subagency, ID number and telephone number as well as the date.

9. ***To call any witnesses in court other than you, the issuing officer***, you must list witnesses' names and addresses on the back of the citation form.

10. *Finally* - Please write **legibly**; and if there is any **additional information**, including informal notes, investigative reports or the like – please attach them to the citation when they're sent to our office.

Rev. 08

- see citation sample on the back -

If any questions - Contact Frank Johnson, Principal Counsel for Code Enforcement, Office of the County Attorney
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BASIC CITATION INSTRUCTIONS
(back)

UNIFORM MUNICIPAL INFRACTION/
CIVIL CITATION

Z

(1) District Court of Maryland for Montgomery County (1)

Montgomery [insert agency name]
County/Municipality/State of Maryland Agency

(2) vs. [Insert defendant's name, last name first] (2)
Defendant's (Last) Name First Middle

[Give full address including zip code]
Current Address in Full

City State Zip Code

DOB Height Weight Sex Race Hair Eyes
[Give description if avail or if driver's lic reviewed]

Related Citations
[If any]

Telephone No.
Day: IMPORTANT Night: IMPORTANT!

Note, §1-18(b)(3) reqs. deft to show ID, Class C viol ($50) if refusal

(3) It is formally charged that the above named defendant on [Give date of offense] (3)
at [time] M at [address of location]
in Montgomery County, Maryland
did [describe offense with code section in mind, need to demonstrate clear violation of the specific provision]

This citation is based upon an affidavit of [if any citizen affidavits] (See attached.)

In violation of: ☐ Md. Ann. Code ☐ COMAR ☒ Municipal Ordinance/Public Local Law/Local Code

NOTE: To call any witness besides the officer, you MUST GIVE NAME & ADDR ON BACK OF CITATION

(4) Document/Article Section Sub Section Paragraph (4)
Montg Co Code [Chapt] [Sec] [Subsec] [para]

I sign my name as a receipt of a copy of this Citation and not as an admission of guilt. I will comply with the requirements set forth in this Citation.

(5) X Defendant's Signature [Defendant's signature, "refused", "sent certified mail" or "private process server"] (5)

Municipal Infractions

YOU MUST EITHER ELECT TO STAND TRIAL OR PAY A FINE.

NOTE: Failure to either pay the fine or request a trial date by the below mentioned date will deem you liable for the fine assessed, the fine may be doubled and a judgment on affidavit entered against you including an Order of Abatement.

OR If you request a trial date and then fail to appear in Court, the fine may be doubled and a judgment on affidavit may be entered against you.

FINE MAXIMUMS:
Cls A - 500/750
Cls B - 100/150
Cls C - 50/ 75

(6) YOU MAY PAY A FINE OF $ [amount] BY [date plus 20] AT (Payment Location) Ofc of County Atty, 101 Monroe St., Rockville, MD 20850 (6)
THIS WILL BE DEEMED AN ADMISSION OF GUILT AND NO TRIAL DATE WILL BE SET. OR
IF YOU ELECT TO STAND TRIAL, DO NOT FORWARD PAYMENT OF THE FINE, BUT YOU MUST NOTIFY IN WRITING Office of County Atty by [date plus 15]
AND THE DISTRICT COURT WILL NOTIFY YOU OF A TRIAL DATE AND LOCATION.

Check abatement box if applicable, for repeat/ongoing problems

☒ IN ADDITION, [Montgomery County] IS SEEKING ABATEMENT OF THIS INFRACTION. YOU MAY BE ORDERED TO ABATE THIS INFRACTION OR BE ASSESSED THE COSTS FOR THE ABATEMENT, AS WELL AS A FINE OF UP TO $1,000, PLUS COURT COSTS. FAILURE TO APPEAR SHALL RESULT IN JUDGMENT ON AFFIDAVIT.

Civil/Code Violations

IGNORE THIS BOX! Cross out or leave blank (7)

☐ YOU MUST APPEAR IN COURT: A court date will be sent to you by mail.
☐ YOU MAY ELECT TO STAND TRIAL OR YOU MAY ELECT TO PAY A PRESET FINE OF $ ..... to the District Court of Maryand at
..... (7)
and AVOID TRIAL. A court date will be sent to you by mail. Payment must be made on or before the scheduled trial date.
AFTER TRIAL the Court may impose a fine up to $ .....
plus court costs.
FAILURE TO APPEAR OR, IF PERMITTED, PAY THE PRESET FINE LISTED ABOVE, WILL RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST.

I solemnly affirm under the penalties of perjury, and upon personal knowledge or based on the affidavit, that the contents of this citation are true and that I am competent to testify on these matters. The defendant is not now in the military service, as defined in the Soldier's and Sailor's Civil Relief Act of 1940 with amendments, nor has been in such service within thirty days hereof.

(8) Officer's Signature [Issuing officer's signature] Date [Date signed] (8)

Agency Sub-Agency I.D. No. Phone
[Initials of agency/div] [ID or ext no] [Officer ph no]

DC 28 (Rev. 10/94) MUNICIPALITY / COURT COPY

OFFICE OF THE COUNTY ATTORNEY

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From Citation to Trial and Afterwards: The Code Enforcement Process

1. *Citation issued.* Agencies send citations to our office for processing after they are issued and served upon defendants. Normally we receive the citation 7 to 10 days after it is issued, and immediately create a file and enter the information into our Code Enforcement database. If the fine is not paid by the 20-day deadline (or if the fine is paid but an abatement order is needed), usually within a week the case is sent to District Court for processing. The District Court will then set in a hearing date and notify the parties, inspector, our office and any witnesses noted on the back of the citation form.

2. *Request trial or default.* Goes to court without further delay if the defendant requests a trial date, usually in a month if the defendant does not respond to the citation. We can settle cases without putting anything "on the record" in court, but only prior to sending the citation to court. Once the case is sent to court for processing, we have to put our actions "on the record". Note that the standard $5.00 court costs are not imposed as long as we can settle the matter before the court issues a judgment in open court (or approves a settlement).

3. *Trial Preparation.* Attorneys in our office obtain the files 2 weeks or more before their Tuesday docket. Normally defaults are separated from contested matters.

   Defaults without trial requests need the least preparation and do not require the inspector to be present. If the defendant appears, the court will normally permit the defendant to avoid a default judgment, but will require the defendant to put in a written trial request and will at that time set a new court date. Note: while the inspector need not be present, it can be a good tactic to have the inspector there, especially if there is any suspicion that the defendant *might* appear, and be prepared to put the case on immediately. This forces the defendant to trial immediately, rather than giving the defendant yet more time to prepare.

   Defaults with abatement orders will require direct evidence, from the inspector, as to the nature of the violation, especially the continuous or ongoing nature of the problem. The inspector will have to come to court on these to provide evidence.

   Trial requests. Many defendants will send a letter more or less disputing the charges and will at some point in the letter indicate they want a trial. Others will outright dispute the charges, and some will have attorneys write the dispute letters. All of these are considered contested cases,

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and will have to be tried in court if not settled. That means considering inspector testimony, any other witnesses and considering any documents or pictures to be admitted into evidence. Generally inspectors should expect to hear from the attorney handling the docket at least a week ahead of time, and should feel free to call the attorney directly if by then they have not heard. Preparation may include:

A. A brief meeting or telephone discussion to learn more about the background and any especially useful information about the violation;

B. Review of the agency file to consider use of any documents or pictures;

C. Discussion as to any witness testimony (if witnesses are noted on the back of the citation); the attorney may directly contact the witness if questions exist about the testimony, or may rely upon the inspector to make sure the witness knows about the court date and is prepared to appear and testify

4. *Settlements.* They happen, and we encourage them. Usually the issue is whether a settlement should be entered. The County Attorney serves as a prosecutor in code enforcement matters, and thereby has the final word. However, before settling any matter we generally want to discuss it with the inspector. We take very seriously the inspector's point of view and recommendations, since they are usually the only persons who have dealt with the defendants directly, and were present during or shortly after the code violations in question. We will therefore talk with inspectors before settling matters, unless we aren't able to reach the inspector or have no other option (as when the inspector doesn't appear in court and we would otherwise face a dismissal). While it is difficult to agree to a specific settlement schedule in advance, it is most helpful for the inspector to simply indicate the amount of the fine they're comfortable having the defendant pay under the circumstances. This also helps to give the attorney some guidance in considering any resolution of the matter.

   Occasionally inspectors will settle cases without *our* input. This is dangerous since though we are usually willing to take the inspector's lead in such matters, we could well decide not to follow through for any number of reasons, leaving the inspector and County in a somewhat embarrassing position. The best approach is simply to check with the docket attorney or Frank Johnson, Principal Counsel, before entering settlement discussions. This ensures we are all on the same page and should minimize any embarrassing situations.

5. *Post-Trial.* Unless a defendant is found not guilty, there is usually follow-up of some sort to be conducted at some level.

   A. Collections. We will often have to collect the fine through our collections unit, which is part of the County Attorney's Office.

   B. Abatement Orders. If requested on the citation, we can ask the court to sign an order requiring the defendant to act (or not to act) in a certain manner. Typically this would include a requirement to not allow further violations of the code in question, make repairs or changes as needed to comply within 30 days, or even pay a consumer restitution for their losses. If there are ongoing problems that are not solved by the citation being issued, and remain issues at the time of trial, the court is often willing to enter such an order. If the court does so, we depend very much on follow-up by the agency:

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1. To serve the order on the defendant personally, in court or otherwise, and return an "affidavit of service" to our office for filing with the court;
2. To follow up afterwards to check on compliance;
3. If the defendant complies, to let our office know so that we can close the file;
4. If the defendant does not comply, to also let our office know so that we can prepare to file a Motion for Contempt and Order to Show Cause;
5. If we file a Motion to Show Cause, we will also need the inspector to personally serve the defendant with the Order to Show Cause, which essentially sets the hearing date on the contempt motion; and
6. Of course we will need the inspector's testimony at the Show Cause hearing to establish that the defendant has willfully not complied with the court's order.

C. *Motions to Vacate.* Some defendants will default at trial but then file a Motion to Vacate upon receiving notice of the court's judgment. It is important that the inspector attend the motions hearing (usually scheduled in the afternoon on Tuesdays) in order that we can present our case should the defendant appear. While we need not agree to allow the case to be reopened (and will not unless the defendant is at least timely), normally the court does permit the matter to be reopened. If no inspector attends, the court sets in a trial date, but if an inspector does attend, we can generally conduct the trial immediately. We should treat the case as a normal code enforcement trial unless other circumstances exist.

D. *Appeals.* Every district court judgment can be appealed to the Circuit Court, where the defendant will have a "de novo" trial, meaning an entirely new trial before a Circuit Court judge. Although somewhat more formal in nature, meaning that evidentiary rules and court protocols are more stringently followed, the trial should essentially be handled and prepared for in the same manner as in District Court.

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The Code Enforcement Process: Why Does it Take So Long?

1. *In General: Due Process of Law and the District Court process.* Although in the long run the legal system usually works, one of the biggest complaints is that it takes so long. Reasons for delay vary, ranging from the County's processes to the dictates of the Constitution. In some cases, citations cannot even be issued until 30 days or so after a warning or "notice of violation". Further delays accrue simply because under our Constitution, defendants must be given notice and a hearing. Even when the defendant violates a court order to comply, it takes time to schedule a contempt hearing and give the defendant notice. And some delays occur even after a trial or hearing, such as when the defendant appeals to the Circuit Court. The reality is that solving problems through the legal system takes time, sometimes years, but in the long run we can normally expect to win compliance.

2. *Specifically - When can we expect a hearing on a citation?* If a "notice of violation" is required, usually 30 days must pass until a citation can be issued. Once a citation is actually issued (whether initially or after a Notice of Violation), a defendant has 15 days to request a trial or 20 days to pay the fine. If after 3 to 4 weeks the matter is still outstanding – meaning, the case isn't resolved, the fine isn't paid or the fine may have been paid but issues remain, such as when the county is seeking an abatement order from the court - then the citation is sent to the District Court for a court date. The court date is usually set 6 to 8 weeks from the date the citation is sent over. This delay is necessary to allow scheduling and to ensure that everyone gets notice of the trial date. Overall, then, normally a hearing occurs in 3 to 4 months after a citation is issued, depending on the size of the weekly docket and the court schedule in general.

3. *Postponements.* With delay a frequent source of complaints about the legal system, the District Court has been reluctant to grant multiple postponements. Usually the court will grant one postponement without explanation, rescheduling for a date suggested by the County or defendant, except for certain last minute postponements based only on the fact that one side or another isn't ready to go forward. The court will normally deny further postponements without an excellent reason. Good reasons include ongoing serious settlement discussions, extremely complex cases that will take significant time to litigate, or an emergency situation if both parties consent.

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When to Issue Multiple Citations

One of the more frequent questions we receive is when multiple citations can be issued to a single defendant. Almost important is the question of *whether* to issue multiple citations even when we *can.*

Generally the rule is that a defendant should receive only one citation for a single act (or failure to act), even if several code violations are involved. However, the Montgomery County Code generally, and in several specific sections as well, provides that each day a violation continues constitutes a separate offense – meaning that a separate citation can be issued every day until the violation is corrected. Hence, if a violation continues, a defendant is subject to separate citations for every day.

There are other times when a defendant is subject to multiple citations as well, such as when the defendant commits several distinct violations even by committing one act or omission, or violates several code sections in a series of related acts.

This memo introduces those instances but also addresses the critical question of when to issue multiple citations even when the defendant is clearly subject to them. Even when a defendant could be issued many citations, the fact is that there are a number of practical considerations in determining whether to issue one, two or many citations to a single defendant.

1. *Multiple Acts vs. Multiple Laws.* As noted, a defendant may violate several code sections, and we are often asked whether it is possible to cite for multiple offenses. The question is whether the defendant is being cited for a single act/failure to act or multiple actions. If, for example, the defendant commits a single wrong but in doing so violates several laws, generally the defendant should receive only one citation, which can refer to all laws violated (depending on the space available on the form!) When the defendant takes multiple actions (or has multiple failures, such as by violating several separate sections of the Chapter 26 housing maintenance code), he or she is subject to a separate citation for each act or failure to act. The question is whether the violation is a separate and independent act: if it is, then the defendant can receive a separate citation. And as noted above, the same act (or failure) constitutes a new violation for every day it continues.

2. *The Question of Discretion: When* ***Not*** *to Issue Multiple Citations.* In many cases even for a single act a defendant could face a barrage of citations. But is it always appropriate to issue a new citation for each day? The answer is often no, given the general goal of code enforcement to solve problems as opposed to collecting fines; additionally, if the problem is ongoing we would be better served by seeking an abatement order. It is a fact that a barrage

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of citations for the same offense rarely impresses the district court. Indeed, multiple citations have in some cases appeared to weaken the County's position, making the defendant seem "victimized", especially vulnerable and put upon by our enforcement efforts. Hence, if a homeowner has already been cited for a failure to maintain gutters on a home, for example, usually there is little to gain by adding new citations for that offense until the court hearing.

Of course, a separate citation for each maintenance failure – fence, gutters, trim, etc. – is appropriate since each violation is separate and independent.

3. *When to Consider Multiple Citations.* There are cases in which it is appropriate to issue multiple citations for what is ostensibly the same offense. Ultimately it depends on the enforcement agent's discretion, but circumstances may include: new complaints, a need to seek an abatement order if one was not requested originally, a failure to follow through on an agreement to resolve the problem, a change or intensification of the violation, especially serious code violations or the like. In such cases daily citations should still be avoided: a new citation could be written monthly or every other week, depending on the situation. Experience teaches that except in outrageous cases, more than 2 or 3 citations for the same act can actually hurt the County's position.

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CODE ENFORCEMENT IN MONTGOMERY COUNTY:

Process and Procedure

From Citation to Trial - and Beyond

Part 3
The Trial

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It is said that for every hour of courtroom time, there has been 3 to 4 hours of preparation. For code enforcement work, that's probably an understatement. Much work goes into each and every citation, by citizens, inspectors, agents and the county attorneys, all geared to the "day in court" - hopefully the source of satisfaction, sometimes the source of delay, at times the source of frustration. No matter what the goal or the result, the fact is that the "buck stops here". What we seek to prove at trial is disarmingly simple: that the violation occurred on the specific day, time and place noted in the citation. It is easy, in the midst of a busy docket day, to forget the fact that how our system accomplishes these trials is something both unique and miraculous. Our system allows each side to have their "day in court", to question each other, to argue over the desired result, and finally provides for an impartial verdict. Afterwards, the system permits enforcement efforts, and allows for appeals, in some cases even "new bites of the apple". While sometimes frustrating and often time consuming, the system is also just as often quite effective. The trial system ultimately seeks fairness – and in the long run usually achieves it.

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10 General Considerations for Every Trial

1. Preparation!
   - -Agency witnesses
   - -Other witnesses
   - -Documents & agency file
   - -Copy of code section
   - -Anticipate objections, argument, etc.

2. Personal observation of violation required, in some manner!

3. Documents & Pictures – have evidentiary rules & regs covered
   - Foundation - authenticate by signature/seal
   - If picture: fair and accurate representation at the time taken, who took it
   - Hearsay Exception/CJP/etc ready
   - Mark, Publish, Lay Foundation, Introduce into Evidence

4. Time and Place
   - -Where did violation occur
   - -Time that counts is time of the violation - describe conditions as of that time

5. The citation
   - -Is it valid re: proper code violation?
   - -Service (requirements may vary)
   - -Names and addresses

6. Hit all of the elements you're required to prove!

7. Credibility of defendant
   - -Inconsistency on the stand
   - -Prior inconsistency
   - -Prior record/repeat offense
   - -Expertise re: should/must have known

8. Expertise and credibility of agency
   - -Experience
   - -Training
   - -Familiarity with this type of case/situation

9. Willfulness
   - -Defendant will try to show mitigation
   - -We will try to show willfulness re: full fine, abatement, etc.

10. Relief
    - -Fine (varies depending on violation)
    - -Abatement (if requested and reasonable)
    - -Restitution (if appropriate)

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Docket Morning: Getting Started

Docket morning is a time of some stress, or if you prefer, excitement, for both the County Attorney and the inspector. The attorney has organized their files and hopefully knows what cases they're calling and when; the inspectors are prepared to give testimony; and both know which cases have been settled. So what is going on, from both the attorney and agent's point of view, when you actually show up in court for the Tuesday docket?

1. Location. Civil infraction cases, also known as "municipal infractions" or the "MI Docket" are heard at the Silver Spring location of the District Court, 8665 Georgia Avenue (on the left side of Georgia Avenue headed into Washington, DC, between Cameron Street and Colesville Road). The courtroom for infraction cases is on the second floor and is known as courtroom 3. On court notices, it is usually referenced as "SS-3".

2. Parking. You can park close by in one of 2 Montgomery County lots (on Spring or Cameron) but the lot on Cameron Street is preferred and closest.

3. Time of arrival in court. Court notices indicate that the docket starts at 8:30; in fact the judge rarely takes the bench until a bit after 9:00. Inspectors should try to arrive by 8:30; the County Attorney will try to arrive in the courtroom between 8:00 and 8:15 so that they can get organized and talk with the officers, agents and defendants.

4. When you get in the courtroom. The County Attorney will have their files on the table at the front of the room to the right as you face the bench.

5. Last Minute Discussion & Preparation. This is entirely expected, to some extent. Inspectors will almost always want to check in with the attorney, if for no other reason than to let the attorney know you're there. It's also a good time to cover any "last minute" preparation on cases, allow the attorney to review any exhibits, if they haven't already seen them. It is also a good time to give the last update on the status of the code violation (is it continuing, i.e., is the dog now licensed? Is the housing violation continuing?).

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6. Last Minute Settlements. These happen all the time; it is best to be prepared for them! The County Attorney will normally want to know which defendants are in court, to have a sense of which cases will truly be contested or defaults. Usually two or three times before 9:00 the attorney will announce who they are and ask defendants to check in. Quite often in "checking in" defendants will have some interest in settling a case, usually to pay a reduced fine. With the county's inspector present, normally it is quite simple to work out settlements at this stage:

   A. What Amount? At the last minute defendants with any interest in settling are normally happy to take any reasonable reduction. The judge will rarely issue the "full fine" against a defendant; generally half or more is considered a good settlement, and in some cases if the problem has been resolved – and the inspector agrees – even a nominal settlement of $25 to $50 makes sense (the judge in such cases has been known to go as low as $10.00). If, however, you offer a reduction and the defendant refuses without making a counteroffer, normally "dickering" isn't worthwhile: let them "tell it to the judge" in that case.

   B. Taking the Payment. As a technical matter, note that if a settlement is worked out and the defendant can pay immediately, the County Attorney will handle the mechanics of taking the payment, writing out a receipt, noting the date, amount paid, whether cash or check, and that it is in full settlement of the citation number, and signing it with a "Montgomery County" notation on the signature line. Note: if the defendant pays by check, often they won't need a receipt since the check itself once returned from the bank will serve as their receipt. We will issue one, however, if they request, even if they write a check.

   C. Case is settled but they can't pay immediately. We will generally postpone the case for settlement; normally it is best to tell the defendant he or she needs to pay in 10 days or 2 weeks, but ask for a postponement of 3 to 4 weeks. This avoids the "check is in the mail" problem.

   D. Instructions to the Defendant. If the case is settled, either with payment or the promise of payment and a postponement, the County Attorney will present that information to the court. This means that the defendant and any witnesses (including the inspector) are free to leave. Often this is enough incentive for both sides to reach agreement!

   E. Telling the court/marking the file. Usually around 8:30 to 8:45 the clerk will bring the files for that day up to the courtroom. For those files "paid and satisfied", dismissed or "nol prossed", the County Attorney will as time permits pre-mark the court's file. The judges all appreciate this since it saves actual court time. We simply ask the clerk to pull the files, which includes settlements and "paid and satisfieds".

      1. For "paid and satisfied", we have a stamp to mark the "trial sheet" in the actual court file.

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2. For "nol prossed", we find the "trial sheet" in the court file and check the "NP" or "nol pros" box (plus we put the date and our signature on the line next to it.)

3. For the relatively rare "dismissal", as with "paid and satisfied" we use the stamp to mark the trial sheet.

4. *NOTE: we cannot premark postponements, consent abatement orders or any other action that the court will have to approve.* We can only pre-mark the "paid and satisfieds", using the stamp.

7. Settlements between inspector and defendant. Often the attorney may not have time to work out a settlement between the inspector and defendant, and may further be at a disadvantage in not knowing the defendant or the overall situation as well as the inspector might. Occasionally, we therefore ask the inspector to talk directly with the defendant in the hope of working out something acceptable for the defendant and the County. This is of course subject to the attorney's approval (though one can come up with little reason to disapprove of what has been resolved if the inspector and defendant have worked something out). Our feeling is that as long as the problem's been resolved and the inspector is willing to entertain settlement, this can be an effective way to resolve cases, permit the inspector to play a role in the resolution, and save time for the attorney who is dealing with 40 to 60 cases or more.

8. The Unexpected. Although it can be stressful, one of the more interesting aspects of any courtroom activity is "the unexpected". For the attorney there's usually a minimum or one or two, sometimes more, "unexpected events" for every docket. Since usually "the unexpected" is not necessarily good news, it can be likened to the other shoe dropping. Specifically in the civil code enforcement context, it means an inspector or a key witness not showing up to provide evidence when the defendant has filed a notice and is present. In that case, unless the inspector is just going to be late (meaning we can try to call the case later on in the docket to give the inspector time to appear) we sometimes have little choice but to consider settling the case. Why? Because (a) something paid on the fine is better than nothing, and (b) payment under the County code does constitute an admission of guilt and further does establish a first offense. If without evidence we don't resolve the case, we almost certainly will be facing a dismissal! If in this circumstances the defendant (wisely enough) refuses to settle and we have no evidence to present, we still have the option of "nol prossing" the matter rather than suffer a court dismissal. The benefit with a "nol pros" rather than a dismissal is that the county does under a "nol pros" have the option of reissuing a citation. *Of course, if the case is in default mode because the defendant never filed a trial request, the court will merely set a trial date for later on, so no settlement or other action is necessary if an inspector or witness doesn't appear.* The reason there is that the entire reason for filing a trial request is to ensure that we have the inspector or witness available; if no request is filed, we wouldn't have known to have the inspector present.

9. Who Goes First? Once, time permitting, everyone's checked in, settlements are finalized, court files are marked and we areready to go, the judge will take the bench. In fact, the judge will normally take the bench in the midst of this preparation: we

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just have to begin the docket at that point. We start at the County table, but in many cases other "MI" matters will as a matter of courtesy go first, with our cooperation:

A. Park police and other police cases, which are prosecuted by the officers themselves;
B. We usually let other jurisdictions with only one or two cases go first, normally including Rockville, Takoma Park and/or Gaithersburg;
C. Note that often the court will interrupt the docket or take first any domestic violence or requests for protection from violence.

10. First words. Starting out can be the hardest part. The County Attorney starts the docket simply start by saying: Good morning, your honor, giving their name and indicating that they represent the County. The inspector's first question will, inevitably, always be their name, followed by their agency, and usually the third will be how long they've worked for that agency. The fourth question will normally ask for a brief description of the inspector's duties. Normally by then the questions simply flow, and in fact, sometimes there are only two or three more questions. These can be: how are you familiar with the defendant, what happened on the date/time/location of the citation, was it in Montgomery County, and is the problem continuing?

Good luck, and remember to learn as much as you can while you observe and take part in the citation case. Even for the most experienced inspectors and court observers, it always seems there is something more to be learned every Tuesday morning!

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Docket Day: The Citation Trial

1. *Preparation.* The key to any successful court case is preparation, and in the code enforcement context that means preparation by the inspector and the county attorney handling the case. Preparation by the inspector includes knowing the facts in the citation and the background details, but must also include having discussed the hearing with the attorney. The attorney's preparation will include knowing the "essential elements" that must be proven for the offense in question and the important background facts that need to be brought to the court's attention. Both the agency inspector and attorney should be familiar with any witnesses that will be needed in addition to the inspector.

2. *Arrival on docket day.* The courtroom typically used is on the second floor at 8665 Georgia Avenue, Silver Spring, Maryland. The dockets, sometimes called "MI" or "Municipal Infraction" dockets, are usually on Tuesdays, beginning at 8:30 AM. Afternoon dockets are usually reserved for Motions to Vacate, contempt motions and other matters subsequent to the original trial.

   Usually the county will take the table at the front of the courtroom which is on the right, and most county inspectors and officers tend to sit on the bench along the right wall of the courtroom until called. Although doubtless the county attorney will be talking with several defendants and inspectors, it is helpful to check in with the county attorney when you arrive so that he or she knows you're there. This is a good time for any last minute questions or updates before the trial. Realistically it is also the time when many defendants decide settlement is a good option, so the inspector should be prepared to at least discuss the idea of resolving the matter.

3. *Order of the docket.* All cases scheduled for the morning are, under the "docket call" method, set for the same time. Hence, the question is how the cases are called. Generally the court will hear any police or park police matters first, and the county has traditionally allowed any municipalities, such as Takoma Park, Gaithersburg or Rockville to handle their matters first, on the theory that they usually have only a few cases to handle. Once the county cases begin, they are usually only interrupted by domestic violence or other emergency petitions for the court to hear. During the county's docket, the specific order of the cases is generally within the attorney's discretion; they are called by the attorney, not by the court or clerk.

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Although on occasion we hear frustration expressed at the order in which cases are called – since most persons would just as soon have their cases called early so that they can leave - there is some method to our madness. Generally, contested matters are called before settlements, postponements and dismissals. Although every docket is a bit different, our first priority is usually to get citizen witnesses and police out of the courtroom. We also try to accommodate inspectors with contested matters, and may call defaults or other uncontested cases involving that inspector to allow the inspector can safely leave. While someone's case always has to be first and someone else's last, if you do have reason to leave the court early, please let the docket attorney know!

4. *The hearing.* The hearing has actually eight parts, as follows:

   (1) The call. The attorney calls the case; if the defendant does not appear, then "judgment on affidavit" (or, judgment by default) is requested. If the defendant never filed a "notice of intention to defend", otherwise known as a trial request, then the County asks that the fine be doubled. Testimony in a default case is not needed unless the inspector is seeking an abatement order. If the inspector is seeking such an order, the inspector will be sworn in and the attorney will ask a few questions about the longstanding and continuing nature of the violation, hence demonstrating the need for an order from the court to stop the violation.
   If the defendant does appear, he or she will be directed to the table at the front of the courtroom, on the left. Generally the court will combine all citations against a single defendant and proceed on all at once.

   (2) The plea. If the defendant is present, the court will immediately read the charges from the citation or citations and ask whether the defendant pleads guilty or not guilty to each one. Many choose "guilty with an explanation" (an option technically permitted in traffic violation cases). For multiple citations, some will plead guilty to some, not guilty to others. If the defendant pleads guilty, then the court will hear from the County as to the fine. If the county has anything to say about the fine other than generalities about a second offense, the inspector must be sworn in to testify about the continuing nature of the problem. This is especially true if the ounty seeks an abatement order. Otherwise, the court will turn immediately to the fine and make a judgment based simply on what the defendant has to offer about his or her guilt. Normally the fine is reduced, in fact the fine may be significantly reduced depending on the offense and the county's response.

   (3) The County's case. If the defendant pleads "not guilty", the case proceeds first with the county's "case in chief". The inspector and any witnesses are sworn in, and the attorney begins by asking about the specific date in question. Essentially the key is to establish that the inspector is familiar with the defendant, that the inspector or witness has actual, personal knowledge of what happened on the day in question, and then to establish what exactly happened. It is also important to establish the place of the violation, and that it occurred in Montgomery County. The attorney may ask questions that seem legalistic, but these are often where the law requires that we prove certain "essential elements", such as property ownership in a zoning matter, for example.
   It is only important for the inspector at this stage to describe the violation and what happened: details of the law or technicalities can be left up to the attorney. It is also

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important to focus only on the citation itself and what happened on the day in question. While past history may play a role in the disposition (fine) stage of the trial, in the "case in chief" or liability phase, the only issue is whether the defendant committed the violation in question on the date in question. What happened even the day before isn't important.

The county's case usually begins with the attorney asking a few questions. Occasionally the judge will interject a question or two as well for clarification. The inspector is generally permitted to look at notes in giving testimony, but should be careful to know the facts well enough that he or she is not merely reading from the notes (technically it is objectionable merely to read notes, since the witness is supposed to use the notes only to refresh memory and then is expected to testify from that refreshed memory).

Any documents or pictures that need to be entered into evidence will be presented at this time. Usually documents only require the inspector or witness to indicate they are familiar with the item, explain what it is, and establish that it is truly that. For documents such as letters, familiarity with the signature or letterhead is critical; for pictures, simply stating that the picture is a "true and accurate" depiction of the place at the time the picture was taken is sufficient.

When the county is finished with a witness or the inspector, the judge will ask whether the defendant has any questions to ask. This is the defendant's chance to ask any "cross examination" questions. Once that process is complete, and all questions asked, the county will generally "rest" and shift the burden to the Defendant to dispute the charges.

(4) *The defendant's case.* This is the defendant's chance to say whatever he or she has to say. Some defendants will have witnesses, particularly those with attorneys representing them, and the questioning will proceed as with the county's case. When the defendant is finished with each witness, the county has a chance for any cross examination.

(5) *Rebuttal.* Sometimes a defendant raises questions or new issues that the county did not address in its "case in chief", and is therefore permitted to bring on a witness (normally the inspector again) for a few questions. The defendant, in turn, is of course permitted to ask questions by way of cross examination again, and though rarely done, also has the chance to rebut anything the county might bring out in its own rebuttal.

(6) *Closing.* At the close of all the evidence, each side has a chance for a closing argument. The county's argument will generally be brief and to the point, with a focus on liability alone rather than abatement orders or the fine. The evidence is simply that the violation clearly occurred; often the defendant, even in disputing the charges, admits liability in their testimony. The court will hear from each side and immediately announce a verdict.

(7) *Verdict.* The court will announce the verdict at that time, guilty or not guilty on each offense. Usually the court will then ask whether the parties have any comment on the fine or disposition. If the court fails to ask, normally the county will, if it has anything to offer, ask to be heard.

(8) *Fine.* Past history now becomes important for the first time in the morning. Past violations, chronic problems, related issues and the ongoing nature of the current violation are all relevant as the court decides the amount of fine to be issued, as well as whether or not to issue an abatement order, if the county has so requested. Normally defendants will seek to show they have complied, or explain why they cannot; some

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defendants will also argue that the violations are minor in nature or that the county has overreached in some way in prosecuting the matter. The court at the end of this stage of the argument will announce the final verdict and explain to the defendant his or her appeal rights (they may appeal to Circuit Court within 30 days of the judgment).

5. *The aftermath.* The outcome of a citation hearing, unless the defendant is found not guilty, will involve three possibilities in addition to the fine: an abatement order, contempt/show cause, and a potential appeal or Motion to Vacate.

The fine. If the court imposes judgment, the fine is paid not to the county but to the court, and is expected to be paid immediately. Some defendants will ask for more time, and the court will generally give up to 30 days, under penalty of limited jail time if the amount is not paid. Fines are generally payable to the county only when paid before trial, or if the court does not specifically render judgment on the amount of the fine.

(1) Abatement Order. If the court issues an abatement order, generally at least 3 copies will be presented – one each for the defendant, county and court. If the defendant is present, it is important for the inspector to serve the defendant in court with the order, and then sign an affidavit, presented by the county attorney, testifying to that effect. If the defendant is not present, then the inspector will need to make arrangements to personally serve the abatement order on the defendant and return the affidavit to the attorney once that is accomplished.

(2) Show Cause Order. If the defendant is issued a court order and the inspector reports to our office that he or she does not comply, then the county will file a Motion for Contempt and seek a Show Cause Order from the court setting in a hearing on the contempt motion. The inspector will have to serve on the defendant the court's Show Cause Order setting the hearing date, but only after the court has scheduled a hearing.

(3) Appeals and Motions to Vacate. Defendants will occasionally appeal their case to Circuit Court seeking a new trial, which is conducted by the court on essentially the same grounds as the District Court. The evidence is the same as well as the relief we seek, including the fine and an abatement order, if requested on the citation. The only difference is that the cases are not heard on a "municipal docket", and the setting is slightly more formal, especially as to witnesses, documents and rules of evidence. In addition to an appeal, defendants can also file a Motion to Vacate within 30 days of a judgment, asking the District Court for a new hearing. Usually only those defendants with default judgments against them file Motions to Vacate (normally right after getting notice of the judgment). These hearings are also held on Tuesdays, in the afternoon, and if the defendant appears and the court permits reopening, will generally proceed as a normal citation hearing. Note that usually in a default case in which the defendant files a Motion to Vacate within the required 30 days, the court will permit reopening, and the county will therefore not protest. We do, however, prefer to have the inspector present at that time so that we can move to present the case immediately rather than postponing the trial for another date.

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Giving Testimony at Trial

Sometimes the most nerve-racking thing about having to testify is not the substance of what you will say, but the details: where to stand, how to say it, and what to expect. This memo attempts to address those basic details.

Basic Steps. For the most part, the basic five steps of testifying are as follows:

(1) When the case is called (usually by the County Attorney), you should come forward to our table, the one on the right facing the judge. You don't need to *wait* to be specifically called to the front, but should come forward once the case itself is called.

(2) Usually you will start by standing at the far right of the table. Some judges will request that you step into the area in the middle of the two tables, which is right in front of the judge. This helps ensure that the testimony is properly recorded but also during the trial helps the judge to hear what you have to say.

(3) The first questions should always be: your name, your position, years in that position, and perhaps a basic description of what that position entails.

(4) Next comes the specific questions regarding the case: Are you familiar with the defendant? What caused you to write the citation in the case? Describe for us what happened.

(5) We also need to be sure to establish all of the essential "elements" or requirements of the offense, including the specific date, time and place in question. Note that we make a special point of establishing that the location of the violation is *in Montgomery County.* This establishes not only the County's authority to issue the citation but also the court's power to hold the trial and issue a judgment.

Pictures. If there are any pictures, we will need you to testify as to what the picture depicts, and that the picture is a "fair and accurate" representation of what you saw. It is most important that the picture show some aspect of a violation at the time and place indicated on the citation, or afterwards for ongoing problems.

Documents. If there are relevant letters or other documents (deeds and plats may be relevant, for example, in zoning violation cases) we will need your testimony in order to establish a basis for introducing the documents. You will normally prepare with the code enforcement attorney ahead of time, but most important will be to establish what the document is, that it is authentic (via a signature that you recognize, a seal, or that it is a letter you received) and then what the document demonstrates.

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In the Midst of Trial: When do we ask leading questions?

The purpose of this memo is to give the witness some idea of the rules we use in asking certain types of questions at certain times.

For the most part, there are two basic types of questions an attorney can ask a witness: leading or open-ended (also, rather unimaginatively, known as non-leading questions). The basic rule is that leading questions are acceptable on cross examination, but not during direct examination. While true as a general rule, in fact there are important exceptions to consider.

First, to be clear about definitions. *Leading* questions are those which suggest the answer, and can be answered by a "yes" or "no" response; in asking a leading question it is the attorney, not the witness, providing the dialogue. A leading question, particularly of an adverse witness (in our case, the defendant or defendant's witness) can generally always start out with "Isn't it true that. . . " and/or may end with the words "isn't it?" or "didn't you?". The intent of a leading question, at least when used in cross examination, is to box the witness in, or force the witness to admit some aspect of testimony.

Open-ended questions are those requiring a description; they can't be effectively answered by a one-word response. The dialogue for open-ended questions is provided not by the attorney but by the witness. In most cases they can be introduced by the word "describe", "explain", "tell us about" or "what happened". These type of questions aren't intended to box the witness in, but to permit the witness to provide a description or explanation of what happened: to tell the story.

Leading questions on cross-examination. As a general rule, *every* question asked on cross examination should be leading. The purpose of a leading question in cross examination is *not* to elicit testimony from the defendant, but to force the defendant to admit some aspect of the facts that he or she would like to ignore. This suggests the rule that an attorney never asks a question on cross to which he or she doesn't already know the answer: if there's danger of being surprised, generally we are better off not even asking the question. Indeed, one of the more effective cross examinations can be "no questions, your honor", and we generally suggest that cross examination be limited to two to five questions (less if a defendant is pro se).

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Do note that the leading question is not necessarily intended to intimidate, frighten or shock the defendant: in fact, in many instances one is able to obtain admissions more readily the more mildly cross examination is handled. But cross, however mildly it is handled, is always intended to get the defendant to admit something they'd rather not. Cross is intended at a minimum to tie the defendant down and avoid waffling on key issues, such that the defendant is essentially forced to say "yes" or "no". This raises the issue of control over the witness: in cross examining, the attorney needs to be sure that the defendant almost *never* gets to "explain" (i.e., yes, but): that is for re-direct. In fact once we get our "yes" or "no", if the defendant tries to explain we will usually cut the defendant off immediately. At the same time, once we have our "yes" or "no" (or it is obvious we won't get either one, which can in itself be as damaging to the defendant as actually answering the question), there is no purpose in trying to reach ultimate conclusions on cross examination: that is for closing argument or summing up later.

Leading questions on direct. Many think this is a "no-no", that we cannot ask leading questions on direct. Although the purpose is far different than when asked on cross, in *fact* there are several instances in which we can, and indeed sometimes must, ask leading questions on direct:

A. To lay an evidentiary foundation for admission of a document or demonstrative evidence (such as a photo). Here, the basic standards are provided by Maryland's rules of evidence, and we simply ask the basic questions. Open-ended questions are not appropriate because we aren't seeking a description; rather, we are seeking to establish whether the basic standards are met to allow the introduction of the evidence.

B. To direct our witness to the day/time/place in question or the subject matter at hand. Even in a month-long trial, courts don't want to waste any time and therefore attorneys are encouraged to use leading questions to direct the witness to the basic subject matter. The only reason to avoid leading questions on direct is to avoid having the *attorney* give the testimony. This purpose isn't violated in the least by questions that will help direct the witness to the right day and relevant issues.

C. In default cases. There is no point to the wide and open ended questions if the case is in default, because liability has accordingly been admitted. In that instance we will presumably only have a witness in order to provide testimony supporting our request for an abatement order to get the problem resolved. We then need to "cut to the chase" in that instance and can ask leading questions in order to get direct answers.

D. In cases in which the defendant is not represented by an attorney. Generally code enforcement cases are more drawn out when a defendant has counsel, and normally the judge and opposing counsel will more strictly follow the general rule of avoiding leading questions on direct examination. This is less true when a defendant is *pro se*, when the court is seeking to get to the heart of the matter as quickly as reasonably possible. Although not every question should be leading, we can lead in order to get reasonably quick answers to the ultimate question of liability.

Occasionally you may hear an objection after a leading question on direct, or the judge may suggest we are going too far. There's no reason for the attorney or witness to panic: the

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question can always be rephrased. The attorney need only remember the words "explain" and "describe": we can usually start an otherwise leading question with one of those words, or include them in the question and avoid any "leading question" problem.

Conversely, remember that we *almost always ask leading questions on cross*. This can't be overstated. Our purpose in cross examination is not to get a description: hopefully our own witness will provide the description we need. On cross we are trying to keep the defendant honest, to keep him or her from waffling away from responsibility, to admit what is undeniable. The defendant's interest is to give his or her own testimony, to explain the problem away, to provide an excuse or to suggest the impact of a given violation isn't that great. That's permitted on his or her own direct examination or perhaps in redirect, but not in cross examination. Just remember, in cross examination we seek not descriptions but, essentially, admissions that almost always even the most polite defendant would like to avoid making.

Of course, in a given case and at the right time there are even exceptions to exceptions, and legal lore is replete with true aficionados who can violate these rules and still win victory. Bear in mind, however, that almost always even the "true aficionados" follow these rules, and know the risk they're taking when they take the chance to violate them. Generally speaking – it's not worth the risk!

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OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

CODE ENFORCEMENT IN MONTGOMERY COUNTY:

Process and Procedure

From Citation to Trial - and Beyond

Part 4
Trial Results & Problem Solving

Focusing on the Fine Page 32

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Winning isn't everything, in football or in code enforcement – even when you win! What counts in code enforcement is whether a problem is actually solved by our considerable efforts in seeking to enforce the law. Sometimes a fine helps deter future problems, especially when the right message is sent to the defendant that the system takes the violation seriously. But just as often we have to be creative when problems aren't solved and they recur. Then it sometimes takes more than the citation, more than the fine, and more than a court judgment alone. That's when we have to propose court orders stopping the problem, and enforce those orders through contempt proceedings or by taking action as permitted under those court orders.

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FOCUSING ON THE FINE

Introduction

We have emphasized the importance of problem solving through abatement orders, and it is hoped we will continue to do so, by continuing to prepare more specific, well written orders.

There is also the fine to consider. It seems to be a habit of the judges to dramatically reduce fines even after finding a defendant guilty of a civil infraction. Often this practice can discourage effective code enforcement efforts – by the inspector, citizen witness or complainant, and even the attorney. Fines are important because they emphasize the importance of the violation and of the enforcement of the law. Continuous, significant reductions tend to send a message that the law, and enforcement thereof, is not of great importance.

While this will be an issue raised with the district court, code enforcement attorneys can emphasize the importance of the "fine" or disposition part of the code enforcement case.

This memo will delve into the apparent reasons for fine reduction with the view of giving a better understanding of what may be going on when a $500 Class A violation is reduced to $50.00. In the second part, arguments in favor of higher fines will be presented.

Reasons for reducing fine and for imposing larger fines

There appear to be at least 10 main reasons for the reduction of fines even when the court has found a defendant guilty. Sometimes there are multiple reasons for the reductions, which usually result in more dramatic reductions from the bench:

Evidentiary based reasons for reduction:

1. Resolution of the problem at the time of trial;
2. Multiple offenses against one defendant;
3. Attempt by defendant to comply even if full compliance not achieved;
4. Excuse/misunderstanding/mistake;
5. History - lack of repeat offenses or ongoing issues.

Impressionistic or Mythical reasons for reduction:

6. No argument from County (your discretion your honor);
7. Minor nature of the violation or technicality of the violation;
8. Limited financial means of the defendant;
9. Doubt about the importance of the violation even if not minor in nature;
10. Suspicion that County has acted in a heavy handed manner;

11. Feeling that the case should have been settled anyway;
12. Doubt about strength of case given reduced standard of proof from criminal.

The first 5 reasons for reductions are based on some evidence, usually from the defendant, and normally will come out in some way during the liability portion of the trial or at disposition. All except multiple offenses may be good reasons to try to settle the case prior to taking it before a judge - or to dispute the evidence (by a proffer, as is normally done during the disposition stage, or direct evidence if necessary).

The last 7 reasons for reductions are not based on direct evidence to the same extent as the first 5. These are reasons that may lurk in the judge's mind – *especially if the County Attorney makes no effort to dispel the myths!* Since the court is interested in moving the docket along, it will not be worthwhile to spend an inordinate amount of time dispelling each and every myth. There is no reason, however, that the most applicable myth or impression can't be quickly dealt with.

The most distressing reason for reductions in the fine is number 6 – when the County Attorney says nothing regarding the fine. This tends to send a message to the judge that the County doesn't particularly care about the fine, and it can be significantly reduced. Merely making some brief argument can dispel that impression.

The judge is similarly free to apply any of the other 6 remaining "myths", without some proffer or statement from the County Attorney. Even if in the liability stage certain evidence is inadmissible – such as prior violations and the like – the judge will listen at the disposition stage. This is the time when a brief statement dispelling any one of the "myths" can make a significant difference in the amount of the fine. Statements that can make a difference include: a suggestion by the attorney about the importance of the violation, about how hard the County tried to work with the defendant before citing him or her, about the fact this may not be the first incident, even about how strong the evidence was of the violations.

Remember that at the disposition stage, any statement by the county attorney immediately dispels impression no. 6 – that we don't care about the fine. The statement itself should dispel at least one or two other reasons for reducing the fine, whether based on some evidence or based entirely on impression or myth. In fact there would seem to be about a dozen reasons for not reducing fines:

Reasons for NOT reducing fines:

1. The problem hasn't been resolved and issues are ongoing;
2. History of past violations/citations;
3. History of excuses from defendant for not complying;
4. Lack of good faith/serious attempt by defendant to comply even after being cited;
5. Lack of cooperation from defendant;
6. Frustration dealing with defendant/underlying reason inspector issued citation;
7. Effect on the community and need to send message;

8. Importance of the code section violated/important benefits;
9. Efforts by county to work with defendant to resolve this;
10. Evidence of County's reasonableness;
11. Lack of valid excuse for noncompliance;
12. Overall strength of the evidence in the case.

Note that all of the reasons noted are not based on impression or feeling. Generally they are based on facts at some level, even if specific evidence will not be introduced to demonstrate the main argument to be made.

Conclusion

Even as we emphasize the importance of community problem solving by use of abatement orders and settlements, we should not overlook the importance of the amount of the fine imposed by the court. The amount of the fine imposed as compared to the fine charged in the citation sends an important message about the importance of our laws and of enforcing those laws.

Most of the judges handling code dockets delineate contested cases into 2 parts – liability and disposition. While it will not be possible to delve into great depth and long argument at the disposition level, the importance of raising just one of the 12 arguments in favor of a larger fine cannot be gainsaid. It must also be kept in mind that merely by making a statement, the myth that the county doesn't care is dispelled.

Of course, there will be cases in which a reduced fine is appropriate. In those cases it is entirely proper to leave the amount of the fine up to the judge, or even to suggest that the county would have no problem with a reduction in the fine – as long as some reason exists to make that statement. It is also important to consider the effect of what we say upon the county inspector and/or citizens who have taken time to assist in our prosecution of the civil offense. Little is gained in the way of law enforcement if the inspector and/or citizens are left feeling they've wasted their time.

I would be surprised if the result of focusing on disposition and the fine as I've suggested does not result in somewhat increased fines being imposed. Of course, focus on the disposition stage of the code enforcement case should not mean a great deal of preparation time and cannot mean that we spend a great deal of time making the argument. Merely making a proffer regarding one of the 12 main reasons to impose larger fines should be sufficient to dispel any myths or incomplete evidentiary conclusions a judge may be making. It should have the effect of increasing the amount of fines where appropriate. It may also have the more subtle long term effect of emphasizing to the judges and our own agency staff that we consider these laws important enough to vigorously enforce. A potentially more sympathetic bench is certainly a result worth pursuing!

OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

All About Abatement Orders

1. *What are abatement orders?* Our purpose in code enforcement is to solve problems, and ensure that the Montgomery County Code is followed. Often the difficulty in code enforcement cases is getting the defendant to take the matter seriously, much less follow the law. As we all know, some defendants will simply pay a fine as the "cost of doing business". To address this problem, the Montgomery County Code at §1-18(e) specifically allows the court to enter an order requiring compliance and preventing future violations. The penalty for violating the court's order, then, is not payment of a fine but contempt of court, which in extreme cases can result in a defendant being imprisoned to ensure compliance.

2. *Can abatement orders make a difference?* In code enforcement our primary goal is to solve problems. We don't just seek fines, but to stop violations and prevent future ones. When problems are ongoing, one of the most important forms of relief is an abatement order from the court. Such an order prohibits future violations, requires the defendant to take specific steps to comply with the County Code, and provides the County with power to act on its own if the defendant doesn't comply (such as by making the repairs and charging the costs as real estate taxes). If the defendant fails to comply, we can also file a petition asking the Court to step in and impose penalties (usually fines or the threat of 30 to 90 days in jail, though we can be creative in this regard as well). We have form abatement orders for most offenses, but each order should be crafted for the needs at hand. Inspectors should let us know what specific provisions might be helpful in a given case.

3. *When & how do we obtain an abatement order?* Asking for an abatement order is easy: check the applicable "box" on the citation form. Except for specific arrangements with certain divisions, the choice whether to seek an abatement order is with the officer writing the citation. The question is when to ask for an order: an abatement order is not always appropriate. Usually, courts do not entertain the idea of an abatement order for first offenses, unless there is a history with the defendant, we have additional new violations, or a continuing problem even up to the date of trial. Accordingly, to obtain an abatement order we need testimony that the problem still exists, and that it is a chronic, ongoing issue: if the problem has been solved, there is no basis for arguing that an order is needed. Hence, the court is least likely to approve an abatement order in a first offense, unless we can show some history of working with the defendant, and that issuing the citation has not solved the problem. Of course, repeat offenses are most helpful, but any history can help. Do note that if the inspector does not ask for an abatement order in the citation, we can't ask for it later at the court trial! Accordingly, inspectors should err on the side of seeking an abatement order. We can always choose not to pursue it if before trial the defendant does take care of the problem.

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4. *What do we include in abatement orders?* Usually an abatement order consists of at least 5 parts:
   (1) A clause preventing future violations of the code for which defendant was cited;
   (2) A clause requiring immediate compliance except as laid out by the court;
   (3) A clause requiring compliance on specific issues on a time schedule acceptable to the court, but usually within 30 days;
   (4) A clause specifically providing that failure to comply constitutes contempt of court;
   (5) A self-effectuating clause permitting the County to take action, at its option, to correct the problem if the defendant does not within the deadline, and then bill the defendant. In some cases this can be more effective than only filing contempt proceedings.

5. *How long are abatement orders valid?* As a court judgment, abatement orders are valid for up to 12 years. Even so, if a new offense is committed after 2 to 3 years of compliance or more, the defendant should be given a chance to correct the matter before contempt proceedings are filed. The proper course of action will naturally be determined by the circumstances of each individual case.

6. *A new citation or contempt of court?* When an abatement order has been issued, we should in most cases be careful to use the power of contempt of court rather than simply issue a new citation. While circumstances vary, if neither the original citation nor the court's order were successful in gaining compliance, sometimes only the threat of contempt of court can win compliance.

7. *Enforcing it: how do we prove contempt of court?* Most Code violations don't require evidence that the defendant *intended* to violate the law; it is enough to show that the violation occurred. For contempt, while we only have to prove a violation by a "preponderance" of the evidence, as with the original citation, we do have to show "willful disobedience", meaning that the defendant knew what the court ordered and essentially flaunted it. In addition, we seek *civil* contempt, that is, *compliance* – not just *punishment* as in *criminal* contempt. Hence, the defendant can comply by the time of the contempt hearing and arguably avoid contempt. We therefore need evidence that as of the date of the contempt hearing, the problem is continuing, and that the defendant knew what the order required, which we show by proof of service. Note that in defending a contempt case, evidence of some "good faith" effort or even partial compliance can be enough to show the disobedience was not willful. Contempt can also be difficult to show in cases prohibiting certain activity (as in zoning and parking cases, for example), since they are subject to the claim that "I haven't parked my truck there since". In those cases, a defendant's failure to immediately correct a violation or repeated violation of the court's order can be sufficient to show willful disobedience and can win a contempt finding, even if the defendant isn't in technical violation as of the hearing date.

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OFFICE OF THE COUNTY ATTORNEY

To: _____

From: Jan Lillard, Legal Assistant

Date: _____

ABATEMENT ORDER QUESTIONNAIRE

Defendant: _____ Citation No.: _____

Address: _____

The compliance period in the referenced abatement order has passed. To ensure that violators comply with the Code and the court's order, please respond within the next 2 weeks by:

(1) Checking the appropriate answers below;
(2) Signing and dating on the front or the back, as appropriate;
(3) Returning to Jan Lillard, Office of the County Attorney, EOB, 3rd Floor, fax (240) 777-6706, *within the next 2 weeks.*

If you have questions or need to discuss the matter, please call Jan Lillard at (240) 777-6756, e-mail lillaj@co.mo.md.us. Thank you!

____ Yes ____ No 1. The order in this matter was personally served on the Defendant. *If yes*, please give date of service: _____

____ Yes ____ No 2. Defendant has fully complied with all conditions of the order. *Please give names of witnesses contacted:* _____

_____

Defendant has complied with the Abatement Order as of _____ [insert date].

_____ _____

Inspector's Signature **Date**

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IF DEFENDANT HAS *NOT* FULLY COMPLIED
PLEASE ANSWER QUESTIONS 3, 4 AND 5 AND SIGN ON THE BACK

PLEASE ANSWER THE FOLLOWING AND SIGN BELOW
IF THE DEFENDANT HAS *NOT* FULLY COMPLIED

____ No compliance ____ Partial compliance 3. Please specifically describe the extent of defendant's compliance: _____

_____

____Yes ____No 4. I have given Defendant until _____ [insert date] to fully comply, for the following reason (good faith, emergency, partial compliance, etc.) [please describe in detail]: _____

_____

___Yes ___No 5. I believe the case should proceed to contempt proceedings (an attorney will contact you).

Other general questions:

6. Other comments about the case: _____

_____

_____

_____

7. Any suggestions for better abatement orders [please describe any problems with this or similar orders]: _____

_____

_____

DEFENDANT HAS NOT FULLY COMPLIED WITH THE ABATEMENT ORDER.

_____ _____

Inspector's Signature **Date**

SETS ___ COPY

IN THE DISTRICT COURT FOR MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY, MARYLAND	*	
	*	
Plaintiff	*	
	*	
v.	*	Case Nos. 0Z33562508
	*	1Z33562509
JANET HUTNER	*	2Z33562510
	*	
Defendant	*	

ORDER FOR ABATEMENT

Upon consideration of the verified citation filed herein and any evidence presented at trial in this case, the Court finds that Defendant has committed the violations of Montgomery County law stated in the above-referenced citations and that the Plaintiff, Montgomery County, Maryland, is entitled to this Order of Abatement pursuant to Montgomery County Code, Section 1-18(e), and it is thereupon, this 6e day of Feb, 2001, by the District Court of Maryland for Montgomery County

ORDERED that the Defendant shall refrain from further violations of Montgomery County Code, Sections 26-8(a), (f), and (g); and it is further

ORDERED that the Defendant shall take the following actions to correct the conditions at 13410 Bartlett Street, Rockville, Maryland which constitute a continuing violation of County law:

1. Repair or remove deteriorated gutter or soffit boards;

2. Repair deteriorated wood siding; and

3. Clean and remove any obstruction from the gutters and maintain roof to allow rain water to drain properly; and it is further

ORDERED that compliance with this Order shall be completed within thirty (30) days of the date of this Order; and it is further

ORDERED that a representative of Montgomery County shall be permitted to inspect the premises to verify that the terms of this Order have been complied with; and it is further

SETS ___ COPY

ORDERED that if the Defendant fails to abide by this Order within 30 days of the date of this Order, the Plaintiff, Montgomery County, Maryland, has permission to enter the Defendant's property mentioned above and abate the violations by repairing or replacing the conditions as may be necessary to assure the property complies with the Montgomery County Code, and it is further

ORDERED that if the Plaintiff, Montgomery County, Maryland, abates any code violation upon the Defendant's property mentioned above, pursuant to Maryland Rule 3-648, the Plaintiff, Montgomery County, shall send the Defendant a bill for the cost of correction by regular mail to the Defendant's last known address or by any other means that is reasonably calculated to bring the bill to the Defendant's attention. If the Defendant does not pay the bill within 30 days after it is presented, the Plaintiff may file a verified statement of the costs of correcting violations with the Court; and it is further

ORDERED that once the Court has entered a judgment against the Defendant for the cost of correcting violations, the Plaintiff may enforce a judgment in the same manner as any other civil judgment for money, or collect the judgment in the same manner as it collects real property taxes.

FAILURE TO COMPLY WITH THIS ORDER IS PUNISHABLE BY CONTEMPT.

Judge, Sixth District Court for
Montgomery County, Maryland

I:\AP Barrs Code Enforcement\2-6-01\Hutner Abatement.wpd

SETS ___ COPY

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

MONTGOMERY COUNTY, MARYLAND c/o Office of the County Attorney Executive Office Building 101 Monroe Street, Third Floor Rockville, MD 20850	*	
Plaintiff	*	
vs.	*	Citation No. 0Z33562508, 1Z33562509, 2Z33562510
JANET HUTNER 63410 Bartlett Avenue Rockville, MD 20850	*	
Defendant	*	

AFFIDAVIT OF SERVICE

I, Travis Aldous, Inspector with the Montgomery County Department of Housing and Community Affairs, state that:

1. I am now and at all times referred to in this Affidavit have been an adult above the age of eighteen years, a citizen of the United States of America and of the State of Maryland;

2. I am competent to make this Affidavit and that I do so upon my own information and knowledge, and that further I am competent to testify to the matters contained herein;

3. That I served a copy of the Order for Abatement dated February 6, 2001 in this proceeding personally on Defendant, Janet Hutner, on the ___ day of _____, 2001, at ___ a.m./p.m.

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing Affidavit are true to the best of my knowledge and belief.

_____
Travis Aldous, Inspector
Department of Housing & Community Affairs

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

MONTGOMERY COUNTY, MARYLAND *
c/o Office of the County Attorney *
Executive Office Building *
101 Monroe Street, Third Floor *
Rockville, MD 20850 *
*
Plaintiff *
*
vs. * Citation Nos. 6Z33506297,
* 0Z33506298, 1Z33506299
KENT WILLARD HOWARD *
13114 Briarcliff Terrace *
Apartment 409 *
Germantown, MD 20874-2678 *
*
Defendant *

PETITION FOR CONTEMPT AND
ORDER TO SHOW CAUSE

COMES NOW, Montgomery County, Maryland, by its undersigned attorneys, and respectfully quests this Honorable Court to hold Kent Willard Howard, 13114 Briarcliff Terrace, Apartment 409, Germantown, Maryland, 20874-2678 in contempt for failing to abide by this Court's Order of Abatement issued June 27, 2000 and for reasons states the following:

1. Montgomery County is a body corporate and politic of the State of Maryland and is the local legislative body for the unincorporated areas of Montgomery County and is authorized by various laws and statutes to exercise the police power within Montgomery County and to enforce its laws and those of the State of Maryland.

2. On February 28, 2000, a civil citation was issued to Kent Willard Howard for committing deceptive trade practices, including failing to perform repairs on an auto after

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contracting and receiving payment to do so. This constituted a violation of the Montgomery County Code, §§§11-4(1)(e),(f),(m) and (o). Two further citations were issued to Kent Willard Howard, on February 28 and March 9, 2000, for acting as a motor vehicle repair business without being registered to do so, constituting a violation of the Montgomery County Code, §31-A-2.

3. A hearing was held on June 27, 2000 and an Order of Abatement was issued by the Court ordering the Defendant to take action to correct the violation of the Montgomery County Code, including to

A. Not act as a motor vehicle repair business or engage in the business of motor vehicle repair without first being registered to do so; and

B. Refund $850.00 to Thomeka Ray within 30 days.

The Order of Abatement was served on the Defendant on July 10, 2000.

5. Defendant has failed to take action to comply with the court's June 27, 2000 order, and has acted as a motor vehicle repair business and engaged in the business of motor vehicle repair without first being registered to do so, and has further failed to refund $850.00 to Thomeka Ray. These violations of the Order of Abatement are willful and constitute contempt of Court.

WHEREFORE, the Plaintiff prays:

1. That Kent Willard Howard show cause as to why he is not in contempt of Court for failure to abide by this Court's Order of Abatement dated June 27, 2000;

2. That the Office of the County Attorney be appointed to prosecute this contempt proceeding;

3. That this Honorable Court find Kent Willard Howard in contempt and impose sanctions against him as this case may demand;

4. And for such other and further relief as the nature of this cause may require.

Respectfully submitted,

CHARLES W. THOMPSON, JR.
COUNTY ATTORNEY

Asst County Atty

for

Franklin M. Johnson, Jr.
Assistant County Attorney
101 Monroe Street, Third Floor
Rockville, Maryland 20850
(240) 777-6754

POINTS AND AUTHORITIES

1. POINT: Any party to an action in which an alleged contempt occurred . . . may initiate a proceeding for constructive contempt by filing a petition with the court against which the contempt was allegedly committed.

AUTHORITY: Maryland Rule 15-206(b).

2. POINT: Unless the court finds that a petition for contempt is frivolous on its face, the court shall enter an order. That order and any order entered by the court on its own initiative, shall state:

(a) the time within which any answer by the Defendant shall be filed, which absent good cause, may not be less than 10 days after service of the order;

(b) the time and place at which the Defendant shall appear in person for a hearing, allowing a reasonable time for the preparation of a defense.

(c) if incarceration to compel compliance with the court's order is sought, a notice to the defendant ....

AUTHORITY: Maryland Rule 15-206(c).

SETS ___ COPY

3. POINT: The Order, together with a copy of any petition and other documents filed in support of the allegation of contempt, shall be served on the Defendant pursuant to Rule 2-121 or 3-121 or if the Defendant has appeared as a party in the action in which the contempt is charged, in the manner prescribed by the court.

AUTHORITY: Maryland Rule 15-206(d).

4. POINT: "In a narrow sense, a contempt has been defined as a despising of the authority, justice, or dignity of the court; in a more general sense, a person whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during litigation, or otherwise tends to impede, embarrass, or obstruct the court in the discharge of its duties, has committed a contempt."

AUTHORITY: Goldsborough v. State, 12 Md. App. 346, 355, 278 A.2d 623 (1971).

Asst County Atty

for Franklin M. Johnson, Jr.
Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, ~~2000~~ 2001, a copy of the foregoing Petition for Contempt, Points and Authorities and Show Cause Order was mailed, first-class, postage prepaid, to defendant, Kent Willard Howard, 13114 Briarcliff Terrace, Apartment 409, Germantown, Maryland, 20874-2678.

Franklin M. Johnson, Jr.
Assistant County Attorney

SETS ___ COPY

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

MONTGOMERY COUNTY, MARYLAND *
c/o Office of the County Attorney *
Executive Office Building *
101 Monroe Street, Third Floor *
Rockville, MD 20850 *
*
Plaintiff *
*
vs. * Citation Nos. 6Z33506297,
* 0Z33506298, 1Z33506299
KENT WILLARD HOWARD *
13114 Briarcliff Terrace *
Apartment 409 *
Germantown, MD 20874-2678 *
*
Defendant *

RECEIVED
DISTRICT COURT OF MD
SILVER SPRING
FEB 15 4 02 PM '01

SHOW CAUSE ORDER

Upon the Petition for Contempt filed by the Plaintiff, MONTGOMERY COUNTY, MARYLAND, which alleges that Kent Willard Howard has violated the Order of this Court dated June 27, 2000, issued by the Honorable Steven P. Johnson, it is

ORDERED this 20 day of Feb, 2001, by the District Court of Maryland for Montgomery County, that the Defendant, Kent Willard Howard, show cause, if any they have, why the relief prayed therein should not be granted; and it is further

ORDERED that a hearing on said Motion for Contempt will be held on the 17th day of April, 2001, at 12:30 p. m., if the Defendant has been served on or before the 3rd day of April, 2001, and it is further

ORDERED that the Office of the County Attorney for Montgomery County shall prosecute this proceeding.

SETS ___ COPY

TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:

1. It is alleged that you have disobeyed a court order, are in contempt of court, and could go to jail until you obey the court's order.

2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note:

(a) A lawyer can be helpful to you by:

(1) explaining the allegations against you;

(2) helping you determine and present any defense to those allegations;

(3) explaining to you the possible outcomes; and

(4) helping you at the hearing.

(b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.

(c) If you want a lawyer but do not have the money to hire one, the Public Defender may provide a lawyer for you. You must contact the Public Defender at least 10 business days before the date of the hearing. The court clerk will tell you how to contact the Public Defender.

(d) If you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible.

(e) DO NOT WAIT UNTIL THE DATE OF YOUR HEARING TO GET A LAWYER.

If you do not have a lawyer before the hearing date, the court may find that you have waived your right to a lawyer, and the hearing may be held with you unrepresented by a lawyer.

3. IF YOU DO NOT APPEAR FOR THE HEARING, YOU MAY BE SUBJECT TO ARREST.

JUDGE, District Court for Montgomery County, Maryland

COPY

OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

TO: Mark Moran, DPS
FR: Frank Johnson, County Atty's Office
DA: 12/10/00
RE: Jose Franco Beck Petition for Contempt/Motion to Show Cause
Citation No. 1Z33258233

We have received the Show Cause order back from the court in this matter. The court hearing is scheduled for the afternoon of Tuesday, January 23rd.

What will be necessary is for you to ensure that Mr. Franco is served with *both* the Petition and signed Show Cause Order no later than Tuesday, January 9, 2001.

Once Mr. Franco has been served, please fill out the Affidavit of Service which is also attached, and send it to me so that we can file it with the Court.

If you have any questions or concerns, please let me know. Thanks!

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SETS ___ COPY

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

MONTGOMERY COUNTY, MARYLAND c/o Office of the County Attorney Executive Office Building 101 Monroe Street, Third Floor Rockville, MD 20850, Plaintiff vs. STEVEN GOLDMAN T/A Dinettes & Stools Warehouse 4119 Howard Avenue Kensington, MD 20895 Defendant	*	Citation Nos. 3Z33223326, 4Z33223327, 5Z33223328

AFFIDAVIT OF SERVICE

I, Eric Friedman, Investigator with the Montgomery County Department of Housing and Community Affairs, Consumer Affairs Division, state that:

1. I am now and at all times referred to in this Affidavit have been an adult, above the age of eighteen years, a citizen of the United States of America and of the State of Maryland;

2. I am competent to make this Affidavit and that I do so upon my own information and knowledge, and that further I am competent to testify to the matters contained herein;

3. That I served a copy of the Petition For Contempt And Order to Show Cause in this proceeding personally on Defendant, Steven Goldman, on the 21 day of April, 2001, at 4:05 a.m./p.m.

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing Affidavit are true to the best of my knowledge and belief.

Eric L. Friedman

Eric Friedman, Investigator
Dept. of Housing & Comm. Affs., Cons. Aff. Div.

OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

CODE ENFORCEMENT IN MONTGOMERY COUNTY:

Process and Procedure

From Citation to Trial - and Beyond

Part 5
Settlements

Settlement Options Before Trial Page 52

Settlements and Court Costs Page 55

Communication and Settlement Page 57

Our focus in code enforcement is on solving the problem. This may mean "upping the pressure" in some cases, seeking court orders and later on enforcing them, but it can also mean settling a matter once a problem has been solved. And in many citation cases we are seeking only imposition of the fine, rather than an abatement order. It is helpful to understand the options that are available in considering resolutions of citation cases in court, but critical to understand the practical settlement options, the considerations, and the different roles played by the county attorney and the inspectors in considering settlements.

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When the case settles before trial: which is the best option?

Comparing:

* *settlement*
* *"paid & satisfied"*
* *dismissals*
* *"nolle prosequi" and*
* *stet*

Our purpose in code enforcement is to solve the problem, and not every case requires a court judgment to accomplish that. Many code violation cases are settled before court, especially those involving a fine only (when the County does not seek an abatement order). The question often arises how to handle a settled matter, and this memo attempts to offer some ideas by discussing the effects of the various settlement routes available. Generally, this memo suggests that we need to keep in mind that the future is always uncertain, even resolved problems can recur, and even with the best of intentions defendants don't always follow through. Accordingly, we should always strive even in settling cases to keep the county's options open for the future.

It may help to define a few terms. "Nol pros" stands for *nolle prosequi*, technically a criminal procedure under Md. R. 4-247 but one that does apply to civil code enforcement proceedings. It permits the County to choose not to prosecute a matter. It is different than a dismissal in that it does not suggest innocence, but merely exercises the County's option not to proceed with prosecution. The County has the power to enter a nol pros in any case prior to trial (or before the trial actually begins). Do note that if a nol pros is entered, in order to reactivate the charge *a new charging document (citation) must be issued.*

"Stet" is a much more rarely used procedure in civil code enforcement. It is another technically criminal process, under Md. R. 4-248, and merely postpones a case indefinitely. With the "stet" the County is only able to prosecute on the matter within a year of entering the stet. The County doesn't have an absolute right to a stet; the defendant can object to it. By definition there is no suggestion that the County isn't choosing to prosecute: the case is merely being postponed. Hence, unlike the nol pros procedure, no new citation needs to be issued in order to reactivate the charges – we would simply file a notice with the court to that effect (if within a year of the stet). Again, this process is rarely used, but is available in the appropriate case.

1. *Paid and satisfied.* At almost every docket on Tuesday, the County Attorney will announce that certain cases have been "paid and satisfied". That doesn't necessarily mean that the defendant voluntarily paid the full fine. It can also mean that the defendant agreed to pay a

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reduced fine. What "paid and satisfied" means is that the matter has been resolved without the court having to intervene. If the fine is paid before trial, or a reduced amount based on a settlement is paid, we simply mark the file as "paid and satisfied", either in open court on docket day or by filing a "paid and satisfied" line.

2. *Does a "paid and satisfied" case involve a finding of guilt?* Since the court in a "paid and satisfied" case never actually enters judgment against the defendant, one might ask whether that means there has been any finding of guilt. The answer is that under the County Code, voluntary payment of any part of the fine is an admission of guilt, and specifically establishes a "first offense" in the event of future problems. This is why it is often advisable even when the problems have been entirely resolved to accept even a small, nominal payment rather than dismiss a case outright. As an admission, it establishes the "first offense" which can either permit imposition of higher fines within a year of the first, and may be the deciding factor if, in the future, the County decides to seek an abatement order prohibiting further violations.

3. *No fine vs. minimal fine: or, settle or dismiss?* Occasionally the inspector will report, often enough just before court on Tuesday, that the problem has been resolved and he or she would just as soon have the matter dismissed or "nol prossed". Often what hasn't been considered is to have the defendant pay even a minimal fine, but it should be. Paying even a $5.00 fine can, as noted above, establish the "first offense" to permit a higher fine to be imposed should the defendant commit the same offense again (yes, even completely solved problems can rear their ugly heads again, and sometimes only a few days or weeks after the matter is "resolved"). With payment of the minimal fine, we can simply mark the file as "paid and satisfied" in open court; no court costs will apply but in the event of future problems the County will be in a much stronger position to enforce the law.

4. *No fine at all: Dismissal or "Nol Pros"?* We don't encourage it, but agencies or the attorney handling the case will sometimes recommend dismissal, normally when the defendant has fully complied so that further prosecution is unnecessary, or some uncertainty arises as to proving the case (a witness or the inspector doesn't show up in court, for example). It is best, however, to "nol pros" (short for *nolle prosequi*), meaning the County is deciding not to prosecute. This suggests nothing as to innocence and we can reinstate the charges by having the agency write a new citation. A dismissal does suggest innocence. In some cases the court has refused to reopen dismissed cases, and in others has dismissed new citations written for the same offense. Hence the "nol pros" preference; it keeps our options open. But of course, as noted above, it is actually best to accept a nominal payment in settlement; even a small payment establishes a "first offense" if later problems arise.

5. *When is dismissal proper?* Dismissal carries with it a presumption of innocence. Hence, when a citation has been written in error, we have the wrong defendant, or for whatever reason it is apparent that the defendant cited should be considered "not guilty", it is appropriate to dismiss the case. If, however, that's not the right message: such as when the defendant may be guilty but for whatever reason we aren't going to proceed, the matter should be "nol prossed". Nol prossing a citation allows us to reactivate the case later on, or (a more likely occurrence) permits the agent to reissue a citation. If, for example, service was improper, a defendant's name wasn't spelled correctly, the wrong code section was noted, and these problems are seen as fatal to the case (sometimes they are, sometimes not) – nol pros is the appropriate action. If an inspector doesn't show up in court, such that we don't have evidence (but may not believe the defendant is innocent, either) – the best approach is to

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inform the Court that the county is nol prossing the matter. This can be done at the last minute in open court; we just have to be sure to act before the Defendant moves to dismiss the case.

6. *When is a "stet" appropriate?* We rarely "stet" a civil code enforcement case, but if the purpose is merely to postpone a case without rescheduling a trial – normally in the hope that within the next year no new offenses will occur – then stet may be an appropriate procedure. This is especially so if there are no technical or other errors to correct, since a new citation will not have to be issued (as it would for a "nol pros"). Again the only goal in a "stet" is to postpone the case indefinitely (though we actually only have a year to reopen the matter) without setting a new trial date or requiring issuance of a new citation to reactivate the matter. As with "nol pros", no court costs will apply.

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Settlements & Court Costs: When Does the $5.00 Apply?

Court costs, when they apply, are $5.00 per citation. Simple enough, but the issue in most cases is: when do they apply?

Court costs *apply* whenever the court renders some level of judgment against a defendant on the merits of a citation case. Hence, if the court imposes a fine, approves a consent abatement order, signs a default abatement order, or takes any action to render judgment, the $5.00 court costs apply. They don't apply to preliminary matters short of judgment: postponements, preliminary motions and the like. The costs also don't apply if the defendant is found not guilty or the matter is dismissed by the court.

Court costs *are not payable* if the matter is resolved in some way without requiring a court judgment. Hence, if the fine is paid and the matter satisfied (i.e., no abatement order is needed) before trial, no court costs attach. Similarly, if the matter is resolved, dismissed, "nol prossed" or settled in some way prior to any court judgment, costs don't apply. And as already noted, costs don't apply if the defendant wins, by a not guilty finding or dismissal by the court.

That may seem clear, but some specific questions arise, which I will try to address below:

1. The $5.00 in court costs for each citation only applies once a judgment at some level is rendered. Hence, postponing the case or continuing a trial won't by itself cause costs to apply: they will only apply when and if at a later time the court renders judgment.

2. Even if the fine is paid, if we seek an abatement order – i.e., a judgment by the court - then the $5.00 court costs apply. We cannot mark a file "paid and satisfied" and still obtain an abatement order from the court. Paid and satisfied means that no court judgment is needed, and no costs apply: once we try to mark a file as paid and satisfied, no abatement order is possible. Hence, when the fine is paid or settled and we're still seeking an abatement order (by consent or otherwise), the fine can be included in the order or simply ordered by the court, and we will file a Notice of Satisfaction right away.

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3. Consent abatement orders are both settlement agreements between the parties and, since the court must approve them, court judgments. As court judgments, the $5.00 court costs must apply. The only way to avoid court costs in such a situation is to reach an out-of-court settlement agreement and mark the citation file as dismissed, nol prossed or paid and satisfied. (Generally, it is best to get the $5.00 paid and obtain a consent judgment rather than a settlement agreement since the power of contempt immediately applies).

4. If the $5.00 court costs do apply, the defendant needs to make out a separate payment to the District Court of Maryland. This can be sent to our office along with the fine or settlement payment.

5. The $5.00 court costs apply for each citation on which judgment at some level is rendered against the defendant. Hence, if 10 citations are issued, 8 are "paid and satisfied" before trial and only two are court-ordered, then only $10.00 ($5.00 times 2) must be paid in court costs. Similarly, if the 8 citations were not satisfied but the defendant was found not guilty, only the $10.00 court costs on the 2 judgments would apply.

6. It is possible to avoid the court costs after the fact, but only if the case is reopened after a judgment and then dismissed, nol prossed or marked "paid and satisfied". This is because the reopening of the case removes the court judgment (and the $5.00 costs), and then the standard rules apply anew as to whether the $5.00 courts attach.

I hope this clarifies the court cost conundrum, but if you have any questions, let me know. Thanks!

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OFFICE OF THE COUNTY ATTORNEY

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Communication & Settlement

This memo is to clarify how we handle settlement of code enforcement cases, and provide some basic policies to help avoid misunderstandings. What follows are guidelines we generally use in considering settlement of cases (except for those agencies and issues for which more specific guidelines apply).

1. What is a settlement?

A pretrial settlement of a code enforcement case may be total or partial. Other than total resolution of a matter or full payment of a fine, options include:

Settling the fine but leaving the order entirely up to the court or disputing only the order;
Settling the order but leaving the fine up to the court or disputing the fine;
Settling part of the order but disputing the balance, and either disputing the fine or not;
In the case of multiple citations, dismissing some but disputing some or all of others;
Reaching a settlement agreement but disputing the fine or leaving the fine up to the court.

2. General policy for settlements

The County Attorney is charged under the Montgomery County Code with the same discretion as that of a prosecutor handling a criminal matter, Code §1-18(b)(6). At the same time, we will avoid settling any matter without contacting the inspector or investigator first. This is necessary as we are all part of the same team; moreover, only the investigator or inspector will be able to offer critical background facts and expertise. The County Attorney, on the other hand, should be familiar with the law, and has the responsibility of prosecution – so inspectors and investigators should in turn avoid settling citations without contacting the County Attorney's office first. The only exceptions should be when direct communication isn't realistic, of when prearranged guidelines have been worked out with an agency or inspector.

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Of course, in the natural course of events, mistakes do happen. Communication is especially important when that does happen to help ensure that special circumstances or good faith mistakes do not lead to serious misunderstandings in the future.

3. Settling the case – Communication in General

When attorneys contact inspectors, inspectors need to be sure to let the attorney know about any strong feeling regarding particular clauses that are needed in abatement orders (whether by consent or not) or settlement agreements. The same is true for settlements of fines. Even so, the attorney will need to use some discretion in reaching settlement. Settlement discussions are by their nature somewhat fluid. Hence, while the final terms should be in the range of what was discussed, the exact terms of a fine and agreement (or consent abatement order) may not be specifically what the investigator or inspector wanted. Given the volume of dockets and press of business generally, from both the county attorney and agency point of view, it is not realistic to expect the county attorneys to check back repeatedly regarding the details of reasonable variances in fines and orders. Unless other understandings are arranged, as a general matter the ranges for fine settlements are:

Full payment or nearly full payment – 75 to 100%
Half - 33% to 66%
Minimal/small – 25% or less.

Obviously, if there are fine amounts an investigator feels especially strong about or particular clauses for an order that are essential, the investigator must express that to the attorney. At the same time, the attorney should let agency staff know whether a clause or fine amount they prefer is realistic, and if it isn't, what is more possible.

The final word on communication is that it needs to occur between the attorney and the inspector or investigator before trial. This requires that calls be returned. As to settlement, agency staff need to note that often an attorney may indicate that a certain settlement will be assumed acceptable unless a call is returned by a certain date or time, and agency staff may also take this approach in working out settlements with individuals. What matters is that we openly communicate and treat each other within the county government as team members.

4. Specific settlement guidelines – Abatements and settlement agreements

While fines can help enforce the code, orders and agreements can be more effective in getting problems solved. Court orders or "abatement orders", with our without the defendant's consent, are important because violating them is punishable by contempt. Settlement agreements can also be enforced, either by a new citation based on the repeat violation, by violation of the agreement or by injunction. They cannot, however, be enforced directly by way of filing a contempt action.

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Abatement orders can be sought only when requested on the citation, though a settlement agreement (not signed by the court) can be arranged regardless. Assuming an abatement is requested on the citation, agency staff, when contacted by the County Attorney's Office about a case, should be prepared to indicate why an abatement order was recommended, and whether current circumstances still make an abatement order necessary. Even if an abatement is requested on the citation, if it is the first citation and/or the violation in question is not continuing (or is not of a continuing nature), it is not likely that the court would issue an order.

If the citation is not the first, or if the circumstances suggest the problem is continuing, at a minimum a settlement agreement is probably needed, unless one was already entered with the first citation. If the defendant has violated one settlement agreement already, it does not make sense to enter another one. It is best in that instance to seek an abatement order from the court (whether by consent or not), because the court's power of contempt is available if the defendant violates the agreement. For the same reason it is usually wise to seek an abatement order, whether by consent or not, for repeat offenses.

5. Repeat offenders

It is especially important for inspectors and investigators to let the County Attorney's Office know about other offenses. These can include related offenses, past offenses or even offenses occurring since the citation was issued. Even if prior or subsequent citations have not been issued, it is important to know about any more informal contacts with the defendant that might shed light on whether the defendant is a "bad actor" or that may not be taking the citation process seriously enough. This information can affect settlement, how we approach proposing an abatement order, and what we argue as to the fine to be imposed.

6. In the Heat of Battle: Settlements in Court

Occasionally in the midst of a court docket settlements are quickly reached, sometimes by the attorney handling the docket and sometimes by the inspector. Cooperation is key as both of us try to work together to handle the docket of cases; often the attorney may ask the inspector to step into the hallway outside the courtroom to work something out with a defendant or consider a defendant's settlement proposal. Occasionally too the attorney will have that morning just discussed the case with a defendant and will have a proposal for the inspector to consider. In such last minute circumstances, the need for some flexibility is usually apparent, and we all need to understand that perfect communication is simply not possible.

Especially when an inspector or witness does not appear in a contested case, the attorney prosecuting the case will normally seek some level of settlement, even a nominal fine, rather than suffer an outright dismissal. At a minimum, payment of even a nominal fine establishes a first offense, which can permit imposition of a higher fine if a subsequent offense is committed within a year, and can also provide support should the County seek an abatement order in a later proceeding.

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7. *Conclusion - To Settle or Not*

It seems that residual bad feeling is most often caused by misunderstandings regarding settlement. Occasionally agencies have suggested that as a general matter their cases never be subject to settlement ("we never settle") or that a specific case not be settled. Although there's no question that some cases are more amenable to settlement than others, overall it is not possible for our office to agree, in advance, not to settle a certain type of case. There are enough variances in proof and circumstances that we would not be fulfilling our duty to zealously represent the interests of Montgomery County if settlement in a certain type of case is ruled out.

What seems to be behind some of the concerns is an occasionally expressed feeling that settlements constitute little more than unconditional surrender, and may be indications of case weaknessness or unwillingness to enforce the law. In some cases that signal may be sent by settlements. Yet the fact is that settlements generally result in more fines than does trying cases. Moreover, settlement agreements can be important to give the County other enforcement options and to move a defendant to take steps on their own to correct problems.

Settlements should always be entered based on what the attorney, in their professional judgment, expects to achieve in open court. The overall purpose of code enforcement is to enhance our quality of life in Montgomery County, by solving problems and gaining compliance with the law. Hence, except in dire circumstances, settlements which are surrenders, which will not lead in some way to problem solving, should generally not be entered.

If, however, settlements are based on what the attorney believes can be achieved in open court, settlements can actually be positive and should be considered victories in themselves.

The county attorney's office will seek to communicate with agency staff before settling a given matter, and will try to accomplish the spirit of what the agency as long as that is reasonable. We hope agency staff will likewise communicate with us, and understand the level of discretion that has to come into play regarding settlements. Overall – we need to openly and regularly communicate, discussing mistakes and misunderstandings so that we can better accomplish our task to make life better for Montgomery County residents.

Lastly, when problems occur and direct communication doesn't seem to resolve them, I encourage attorneys and agency staff alike to contact me. I can only address concerns and perhaps answer questions if I know the concerns exist.

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OFFICE OF THE COUNTY ATTORNEY

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CODE ENFORCEMENT IN MONTGOMERY COUNTY:

Process and Procedure

From Citation to Trial - and Beyond

Part 6
Roles & Relationships

Potential Players in the Process Page 62

County Attorney's Role in the Process Page 65

Code enforcement not only involves many procedures but many players as well. From the citizen who files the initial complaint to the judge, each person has a critical role to play. Although the overall goal of the system is to ensure that justice is done, naturally each person performs their role with differing goals in mind. Of course, their goals are set by the pressures they face. Clearly, the more we understand about these various goals and players, the better we are able to manage an effective code enforcement system.

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Potential Players in the Code Enforcement Process

1. *The citizen complainant.* All local governments engage in some level of code enforcement, but none have sufficient budgets to permit enforcement by continual agent inspections. Nor would such a system of continuous inspections to ensure full compliance be fully permitted under our Constitution. Hence, for practical and legal reasons, we depend on citizens and neighborhoods to take action when problems arise in code enforcement. In that regard, one occasionally heard truism must be dispensed with. It is sometimes said that a given neighborhood problem must not be serious *if only one person is complaining.* In code enforcement, sometimes there will only be one person who cares enough to take the time and make the effort to let us know about a problem. One person may stand in the shoes of many dozens who are too busy, who don't want to take a chance of offending a neighbor, or who don't care enough to pick up the telephone and call us. In that sense, it can almost be said that a community gets the code enforcement it requests and demands, but in most cases, only to the extent that community takes part in the process. Without the neighborhood citizen raising a complaint, in many cases the county would never know about a problem, and it would never be addressed.

2. *The defendant.* Groucho Marx is quoted as saying he wouldn't be anywhere without his Mother; likewise we in code enforcement wouldn't have much to do without defendants. The defendants may include just the citizen homeowner or violator, or may include, in a business context, both the individual person and the company overall. Defendants come in many types and have varied reactions to code enforcement efforts, but there are about six basic reactions that can be gleaned from experience – and they come with specific "rules to live by" for each type:

   (1) The penitent defendant. This is the defendant who admits fault and wants to solve the problem. Many if not most of the defendants fall into this category. It is within this group that most settlements and resolutions are worked out.

   (2) The defendant with the excuses. This defendant wants to solve the problem and normally isn't confrontational, but has difficulty seeing his or her own actions as being the root cause. Essentially, there's always some outside reason compelling the code violation, or not permitting the defendant to solve the problem in a timely manner. Normally this defendant can be reasoned with, but doing so requires time and patience. We have to bear in mind in working with this defendant that our purpose is to solve problems; to the extent we can do that by working with this defendant and perhaps resolving the matter, the time and patience can be well invested.

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(3) The defendant in denial. This is the defendant who simply denies it – the violation didn't occur, it didn't occur as stated on the citation, or if it did occur, he or she isn't responsible. As long as the citation is apparently correct, these are cases that probably have to go to trial. Of course, mistakes happen, and sometimes defendants are correct, either on a technical legal argument or in convincing the judge on the facts. Do note, however, that often these defendants are less willing to solve the problem at the citation stage, but more willing to work with the county once the trial date has been set. Hence the attorney may be able to work out a settlement with this defendant even where the inspector cannot.

(4) The paranoid defendant. This is the defendant who can see with clarity all the similar violations by other defendants, but not his or her won. Often too there is a suggestion (or outright accusation) that the inspector is out to get the defendant. Sometimes as well this defendant will allege that the county is merely placating a single oversensitive neighborhood complainer. These cases rarely settle, but likewise these defendants are usually found guilty because of their focus on issues besides the specific violation in question.

(5) The futuristic defendant. This is the defendant whose favorite song might well be "Tomorrow, tomorrow". They are usually cooperative in person or on the telephone and agree to resolve the problem, but nothing ever happens. This means that fine settlements even if worked out aren't paid, and agreements to correct conditions are somehow never carried out. These defendants always need more time. We have to prosecute these cases aggressively, especially after missed deadlines. It is also especially important to seek abatement orders as well in order to ensure the problem is corrected.

(6) The principled defendant. This defendant may have little or no dispute on the specific facts, but cannot accept that he or she is liable or that the facts constitute a violation of the code. This defendant may not agree with the code itself or may be cited for a longstanding condition not previously raised as a violation. This type of defendant is more common in a business context, especially when the company in question either has a good record of compliance otherwise or when the company is being held responsible on the theory of *vicarious liability* (which arises when the employee committing the violation as well as the company is cited). Even without a major fact dispute, it is nearly impossible to resolve these cases unless this defendant seeks legal counsel. Generally these cases simply have to be presented to the court.

3. *The investigator/ inspector.* This is probably the hardest working and most critical player of the code enforcement process. The investigator is the person who issues the citation. This is the person who may personally witness a violation and thereby serve as the main proof of the complaint; the investigator may also be the person whom the complaining citizen contacts and who subsequently will have to determine whether a violation of the code has occurred. Hence, the investigator has to handle the citizen, the defendant and even the attorney, and at many levels has to present the evidence and then take the lead role in enforcing any court orders.

4. *The county attorney.* In general it is the county attorney's job to prosecute the code enforcement caes. Although the weekly code enforcement docket rotates among 9 to 12

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attorneys, including Chuck Thompson himself, Frank Johnson is the Principal Counsel for Code Enforcement. His e-mail address is johnsf@co.mo.mc.us and phone number is 240/777-6754. Questions and concerns should be addressed to him directly unless they relate to a specific case or docket being handled by another attorney.

In general, the county attorney assigned to the docket will prepare the cases with the inspector's cooperation, sometimes sharing document and witness preparation and the like. It should be noted that under the County Code, the county attorney is granted the discretion to dismiss or settle such cases as a prosecutor would have. While that means the County Attorney has the last word on settlements of citation matters, as members of the same team we will generally not settle citations without talking with the inspector first. In fact, since it is the inspector who knows about the situation most directly, we will usually try to take the inspector's lead in resolving matters. Of course, exceptions to that rule may include legal difficulties with a citation or with the law allegedly violated; a dispute of fact making proof more difficult; judgment as to the court's likely reaction even if we win a guilty verdict; and when we aren't able to reach the inspector. On docket day settlements also happen at the last minute - that day poses a number of immediate situations and we are sometimes least able to get in touch with an inspector not otherwise in court.

5. *The judge.* The judge in District Court has a number of interests: seeing that justice is done, making sure the courtroom operates efficiently, and ensuring that everyone who wants to be heard at least gets a fair hearing. Often the judges have a good understanding of the code and accept the importance of enforcing the law, but must remain impartial and ensure fairness of the proceedings. Accordingly, we may often disagree on the final outcome. The biggest complaint usually circles around reductions of fines: occasionally the court will seek to "split the difference" or even reduce a fine much more significantly than seems reasonable to the inspector (or the attorney). It is with this in mind that the county attorney may suggest settling a given case rather than relying upon the judge to levy a fine. Occasionally too experience before a certain judge or court may suggest that it will be best to resolve a specific case given the facts rather than take a chance.

   In general, judges are sensitive to the call of the docket; they want the docket to move and a key value is usually to try to empty the courtroom as soon as possible. They tend to react very negatively if the county appears to be acting disproportionately against a defendant or a violation, such as by issuing multiple violations when one or two separate acts have really occurred. Judges also react negatively to defendants who behave unreasonably or suggest a level of disrespect for the law, as occasionally happens when defendants seek to defend themselves.

   One should not be surprised if a judge seems to be seeking a middle ground between the parties or some result that gives both sides some level of satisfaction.

6. *Other parties.* There are a number of other persons playing a role in code enforcement. These other parties sometimes include the County Council or Executive, either on behalf of a defendant or, more likely, a complaining citizen. Occasionally other agencies may be involved in complicated cases, or even the Circuit Court if a case is appealed. The court clerks always have some level of involvement in code matters, as do a host of support staff and secretaries within and without the agencies. The full number of persons involved in a specific code enforcement matter, from complaint to trial and beyond, can be daunting indeed!

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OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

From Fines to Settlements: The County Attorney's Role In the Code Enforcement Process

Introduction. There are a number of issues raised by prosecuting code violations, and each should be addressed in a deliberate manner, beginning with the citation and ending with collections and the contempt process. In reviewing the process and our guidelines, bear in mind that our purpose in prosecuting each citation is not necessarily to collect maximum fines, but to solve the problem or violation leading to the citation in the first place. Our values in doing so are that code violations should be aggressively prosecuted; that at the same time we seek a fair and just result; that the attorney handling the matter should be given some discretion; and that our results in similar circumstances should be as consistent as possible.

Issues Covered:

Part 1: Writing the Citation

Part 2: Sending Citations to the County Attorney's Office

Part 3: Scheduling for Trial

Part 4: Settlements

Part 5: Court Judgments

Part 6: Appeals

Conclusion

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1. *Writing the Citation.* It is important that the inspector writing the citations correctly fill out the "Uniform Civil Citation Form". Our current guideline is attached. The most important information that needs to be noted on the citation form is as follows:

   A. Defendant name and address – critical that the address be correct.
   B. Defendant DOB: A critical identifier for checking MVA and other records in collecting a judgment or locating a defendant to enforce compliance with a court order.
   C. Specific citation for the violation in question.
   D. Brief description of the violation – be clear, brief and legible!
   E. Amount of the fine. Code violations are either Class A, $500 first offense, $750 second or subsequent; Class B, $100 and $150, or Class C, $50 and $75. An offense is a second or subsequent offense if committed within a year of the first.
   F. Deadlines by which to pay the fine and avoid trial, or to dispute the citation and request a trial. Generally, 15 days to dispute, 20 days to pay the fine. Usually add 2 to 3 days even if personal service, up to a week if certified mail service.
   G. Location to which fines or trial request must be sent, which should be the County Attorney's Office, 101 Monroe St., Rockville, MD, 20850.
   H. Whether an abatement order seeking cessation of the activity (only granted for ongoing or repeat violations) will be sought.
   I. Identification and contact information for the official writing the citation. Important that this be readable and legible if only for benefit of the County Attorney's Office!

2. *Sending Citations to County Attorney's Office.* After citations are written they should be forwarded to our office. Generally three options will be available for each citation. The defendant will pay the fine and we will then close the matter; the defendant will dispute the case and we will then send the citation to court for a court hearing; or the defendant will not respond in any way, and we will send the citation to court for a default hearing.

   We ask that any additional notes, memos or other information that may be of assistance in prosecuting the citation be attached in some form. Only the citation itself is provided to the court, except for defendant names listed on the back of the citation or specific affidavits from complaining citizens supporting the citation. Any additional information is kept in our files and can be critical in helping the attorney prepare for trial or consider a settlement which accomplishes your goals, and is fair and reasonable.

3. *Scheduling for Trial.* Citations are handled by the District Court's Silver Spring location, 8665 Georgia Avenue. Generally citations are scheduled for trial approximately 6 to 8 weeks after they are received at the District Court. Citation trials are on Tuesdays. The morning docket starts at 8:30 and generally consists of all

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original citation hearings. The afternoon docket starts at 12:30 and generally includes motions to vacate, contempt actions and other proceedings subsequent to the original trial.

Except for default judgments in which no abatement is sought, the issuing officer and any complainants needed as witnesses (who would be noted on the back of the citation form) must attend the hearing. Generally the county attorney prosecuting the matter will call the inspector 1 or 2 weeks before the hearing to discuss the matter and prepare for trial. Inspectors should call the county attorney's office at least a week before the trial if they have not heard from our office.

Preparation for trial may in some cases involve only a brief telephone call, but may also extend to follow-up meetings, meetings with witnesses, review of agency files or more intensive preparation as needed.

If a postponement is ever needed, the inspector should contact the County Attorney's Office and speak with me or the attorney handling the docket for that day as soon as possible, preferably at least a month prior to the scheduled hearing.

4. *Settlements.* Many citations are settled prior to court judgment. The Montgomery County Code makes clear that the County Attorney prosecutes citations with the normal discretion of a prosecuting attorney. This means that the final decision on settlement of a matter rests with the attorney handling the citation. At the same time, we do employ several guidelines in reaching settlements:

   A. Our purpose is not necessarily to settle citations, but to solve the problem. While we believe in aggressive enforcement of code violations, in prosecuting we also seek a fair result and some consistency in similar matters.

   B. We do vest attorneys handling code cases with the normal discretion of a prosecutor. This means that the attorney, in consultation (as necessary) with the Principal Counsel of the Code Enforcement Unit, has the final word on whether to settle a given matter.

   C. We do not as a rule resolve matters without communicating with the inspector writing the citation. The inspector will be in the best position to determine whether the problem is ongoing, and can give the best guidance on how the goal of resolving the problem might be achieved. While we may not be able to comply with the inspector's wishes, we carefully consider the information and perspective the inspector offers and seek to reach a decision on the matter jointly.

   D. Circumstances of each code enforcement case vary greatly. Accordingly, it is not realistic to lay down hard and fast rules for settlement. We do, however, consider the following:

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1. Whether the problem is ongoing. If the problem is continuing, it is less likely that settlement will solve the problem.
2. Whether an abatement order is being sought as part of the citation. In such circumstances, both the fine amount and need for a court order are considered.
3. Posture of the complainant and agency. Reluctance on the part of either party to proceed does not necessarily mean that the citation should be settled before court, but may be an important factor.
4. Likely result in court. The attorney must use judgment to consider the likely outcome of a trial, taking into consideration the legal standards, likely fine amount to be awarded, credibility and the like. The attorney should communicate his or her consideration of these factors with the inspector as the case is discussed between them.
5. Defendant's posture. In some cases a defendant's willingness to work with the County to resolve the problem can be the key factor in resolving a matter. A defendant's unwillingness to take responsibility or work with us can, conversely, be the key factor in going to trial.
6. Details of the specific offense.
7. Overall context. This includes whether the offense is a repeat offense, multiple offenses are involved, the offense is an isolated incident and/or the offense is an ongoing problem.

E. Settlements may be partial or total, especially when an abatement order is sought. It is sometimes possible to resolve either the fine or order portion of a matter, leaving the unresolved portion to trial or the court's discretion.

F. Amount of the fine obtained through settlement can vary from a nominal amount of 25% or less, to roughly half to 75% or more. In cases in which only a fine (no abatement order) is sought and no other circumstances weigh in favor of prosecution, settlement between 50 to 75% of the fine sought on the citation should be expected. In first offenses and cases in which the problem has been resolved and/or the defendant has exhibited a degree of cooperation, nominal settlements may be appropriate. Naturally, legal considerations, which may range from sufficiency of the citation as written to whether a substantive violation can be proven, will also affect the County's settlement posture.

G. Abatement orders are important because they are court orders, and a defendant who violates such an order is subject to contempt proceedings. Penalties can include additional fines, ordering follow-up actions, or even imprisonment. Abatement order requests can in some cases be resolved by a Consent Order, which is presented to the court for signature, and carries the penalty of contempt for a violation. In some instances a settlement agreement may be appropriate, which would be enforced either through the injunction process or through issuance of a citation based upon the violation of the agreement (rather than violation of a specific code provision).

H. Possible settlement actions. Citations can be disposed of in a myriad of ways, including:

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1. Payment of the fine. No court action is involved if the fine is paid within the deadline given on the citation (normally at least 20 days after issuance), and no abatement order is sought by the County.
2. Paid and Satisfied. A case sent to court for trial but settled or paid prior to the hearing (i.e., settled even as late as 2 minutes before the case is called, which is not an unusual occurrence) can be marked as paid and satisfied.
3. Notice of Satisfaction. The County Attorney must file a "Notice of Satisfaction" for any case in which the court has rendered judgment, even on default, and the judgment has been satisfied by payment of the fine (plus court costs of $5.00 on each citation).
4. Nolle Prosequi. Although technically a criminal procedure, some citations are "nol prossed" upon motion of the County Attorney, rather than being dismissed. The procedure is only used when matters have been resolved and for whatever reason prosecution is deemed unnecessary or unwarranted. The "Nol Pros" procedure is much preferred over a dismissal, since "Nol Pros" merely withdraws the prosecution and does not suggest that the Defendant is innocent. A new citation can be issued for the same offense (subject to the 1-year statute of limitations), and in theory at least, upon motion the charges can be reinstated
5. Dismissal. The County Attorney can dismiss cases for the same reasons they can be "nol prossed". A dismissal, however, is more final, and in most cases judges consider dismissal to be tantamount to an admission by the County that the Defendant is not guilty. Hence, in many cases courts have refused to permit a new citation to be written for the same offense (i.e., the same act or omission occurring on the same date and time as the original). Dismissal is more appropriate for citations issued in error but otherwise the "Nol Pros" procedure should be used.
6. Nominal Payment of Fine. The most preferred way to resolve citations for problems which have been resolved through the full cooperation of the Defendant is not either dismissal or "nol pros", but to accept a nominal sum to resolve the fine. This is because payment of any sum by a defendant, even $25.00 or less, establishes a "first offense" – which can permit imposition of higher fines for subsequent offenses within a year, and can also be a critical factor should an abatement order be needed. The important consideration here is to keep the County's options open in the event the "cooperative defendant" turns less cooperative after the matter has been resolved.
7. Court Orders. The court can issue abatement orders, which are, effectively, mandatory injunctions commanding the defendant to resolve the problem and not commit the same offense again. The district court may entertain an abatement order if evidence is presented that the problems are ongoing. This does require evidence from the issuing officer, and the court will consider repeat offenses (whether citations were written or not) as well as whether the problem is continuing. Abatement orders can be settled by consent, in which case the court issues a consent order. In those circumstances, testimony and

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evidence will not be required for the court to issue the order, except that court costs of $5.00 per citation will need to be paid before the court will sign the order.

I. Circumstances vary widely in code enforcement cases, and it is probably not possible to offer specific guidelines for every type of case or posture. As long as the critical components of settlement guidelines are (1) communication and working as a team; and (2) seeking to solve the problem that led to the citation, it is anticipated that we will be able to resolve concerns as they arise. Principal Counsel for Code Enforcement is responsible for oversight of the prosecution of code cases and is available for questions or concerns as to specific cases or the overall process.

5. *Court judgments.* Court judgments, as noted, may impose a fine, or an abatement order, or both.

   A. Costs. Settlements reached prior to a court judgment are not assessed costs, but with any court judgment the defendant is assessed costs of $5.00 for each citation on which judgment is rendered. These costs have to be paid at the time of the judgment if the matter is partially or entirely resolved, unless the County Attorney dismisses the case or marks it as paid and satisfied or nol prossed prior to judgment.

   B. Default judgment. If the defendant requests a trial but does not appear, the court will issue an "affidavit judgment" for the amount of the fine sought on the citation, plus court costs of $5.00. If the defendant does not request a trial and does not appear, the court can (and almost always will) issue a judgment for twice the amount of the fine sought, plus court costs of $5.00. If the defendant did respond by requesting a trial but does not appear on the trial date, the judgment is limited to the amount of the original fine.

   C. Judgment for the fine. The court will at the conclusion of a trial determine guilt or innocence, and impose a fine when finding the defendant guilty of the offense charged. Judgments are rarely for the full amount of the fine. Indeed, except for repeat offenders or in special circumstances, judgments are rarely more than half the amount of the fine sought in the citation. For first offenses without special circumstances, nominal judgments of as little as $10.00 are not unheard of.

   D. Abatement Orders. The court can issue abatement orders commanding the defendant to resolve the problem. The district court will usually only issue an abatement order if evidence is presented that the problems are ongoing, chronic, or if a consent abatement order is presented. Except when the defendant joins in a consent order, to issue an abatement order the court does require evidence from the issuing officer. The court will consider repeat offenses (whether citations were written or not) as well as whether the problem is continuing or chronic in nature. Perhaps the most critical factor is whether the problem has been resolved before trial: in many cases the

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inspector will be required to check the condition or property in question for compliance a day or two before trial. The basic question for the court is whether the citation has been effective in resolving the problem; if not, then an abatement order is seen as appropriate to consider. Abatement orders generally provide that:

1. Defendant will refrain from further violations;
2. Defendant will take certain delineated steps to abate the violations in question, usually within 30 days or such other time as the court orders or the parties agree;
3. Agency staff may enter the premises to inspect for compliance;
4. If the defendant fails to comply, the County may abatement the infraction and charge the defendant the costs for doing so;
5. The defendant is subject to contempt for failure to comply.
6. Orders can also provide specific penalties for a finding of contempt if the order is violated, such as to shut certain operations down entirely, allow for removal of a zoning violation if not otherwise covered by the order, and the like.

While citations must be issued within a year of a given violation, abatement orders are, like other court judgments, effective for 12 years.

E. Court judgment follow-up. Judgments are only effective to the extent they are enforced, which involves both collecting fines as well as enforcing abatement orders:

1. Fines. Fines are collected by the County Attorney's Office. We send a letter to the defendant demanding payment of the judgment, usually after the 30 day window allowing the Defendant to file a motion reopening the case. If payment is not received based on that letter, the matter is referred to our Collection Unit for further collection efforts, which may involve garnishment, lien filing and the like.

2. Abatement orders. We depend on the official or inspector to follow up to determine compliance with the abatement order. Within the county, we send a form to the inspector and request that he or she fill it out and return it as soon as possible. Requests for contempt proceedings are considered by Principal Counsel for the Code Enforcement Unit and Motions to Show Cause are prepared by Principal Counsel or the attorney who handled the matter at the hearing. Contempt ("Show Cause") hearings are normally handled on the afternoon of our Tuesday docket, by the attorney with responsibility for a given docket day. The key issue in a civil contempt proceeding is simply whether the defendant has complied, and what the County would seek by way of enforcing compliance. Obviously, preparation for a contempt hearing can be even more important than for the original citation trial, since the stakes are so much higher (imprisonment for violating an abatement order is not impossible). The main concerns the court will

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have before issuing a judgment of contempt, even if the defendant doesn't appear, are:

(a) Was the abatement order personally served on the defendant? Under Maryland law, a defendant cannot be held in contempt for a court order unless the court has evidence that he or she is aware of it.

(b) Was the Show Cause Order scheduling the hearing personally served on the defendant? As with the original abatement order that is the subject of the contempt proceeding, the Show Cause Order setting the hearing date also must be personally served.

(c) Has a violation actually occurred? Generally this is the easiest part of the inquiry – the question is extremely narrow, whether the defendant has complied with the specific order, and the evidence is either that he or she did or did not. Usually the inspector's testimony is sufficient, but occasionally additional witnesses are necessary to establish a violation of the order.

(d) Is the violation willful? While a citation judgment is rendered as long as a violation is proven, the court in contempt proceedings will only issue a contempt judgment if some evidence is presented that the defendant willfully violated the order. While in most cases the evidence is limited to the fact that the defendant knew about the order and has simply taken no action to comply, inspectors should be prepared for this line of questioning from the judge or the County Attorney. Occasionally, depending on what was required for compliance, the judge will go so far as to inquire whether the defendant can actually afford to comply!

(e) If the defendant fails to appear and the court agrees that the violation occurred and appears to be willful, usually the court will issue a bench warrant or "Failure to Appear". The defendant will then be arrested by the Sheriff or police and brought to court at some point in the future.

(f) If the defendant appears and the court agrees that the violation occurred and that it was willful, the court will find the defendant in contempt. Typically the court does not impose imprisonment but will set certain compliance deadlines, the violation for which is, however, imprisonment for a given period of time (often 30 days). It is important before the contempt hearing to consider exactly what the County wants. Imprisonment, in itself, is rarely worthwhile, nor entirely appropriate to ask for in civil proceedings. What the County wants is compliance with the court order. Typically a homeowner with housing code violations, for example, is given 2 to 4 weeks to make repairs, on penalty of imprisonment. Occasionally an offense has recurred and the source of the problem – a barking dog, for example – will be ordered removed at the defendant's cost. Although more appropriate for "criminal" contempt proceedings (handled by the State's

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Attorney, where compliance is not the key issue) occasionally additional fines can be imposed at the time of the hearing or in the event of future noncompliance.

6. *Appeals.* Defendants have the right to a *de novo* appeal of the district court's judgment. "De novo" means that the defendant will have an entirely new trial at the Circuit Court level. Any appeal has to be filed within 30 days, and trials are normally scheduled in 2 to 3 months in the Circuit Court. The Circuit Court has the same power as the District Court to issue a judgment for a fine and/or abatement order. While the evidence is generally the same, because of the more formal Circuit Court setting additional preparation may be required. Additionally, appeal hearings may be scheduled several months after the District Court trial, and while we seek to assign the same attorney as handled the matter at the district level, another attorney could also prosecute them.

As with district court, the issuing inspector and any complainants noted as witnesses on the back of the citation form must attend the hearing. The Circuit Court must behave as if the earlier trial didn't even happen, so we must be prepared to put on an entirely new case. Generally the county attorney prosecuting the matter will call the inspector 3 to 4 weeks before the hearing to discuss the matter and prepare for trial. Inspectors should call the county attorney's office at least three weeks before the trial if they have not heard from our office. Note that the Circuit Court does not notify witnesses as in District Court, and we depend especially on agencies and inspectors to make sure that any witnesses are aware of the Circuit Court proceedings. We also need additional lead time if subpoenas for other witnesses or certain documents are necessary.

Preparation for trial at the Circuit Court level will generally require a meeting or so, review of agency files, and may extend as needed to follow-up meetings and meetings with witnesses.

Conclusion. This memo is intended as a fairly comprehensive overview of the role of the inspector and County Attorney in the prosecution of citations. In so doing, it also presents an overview of the courtroom process, both as to initial trials and follow-up procedures. Overall, this is intended to present not inflexible, mandatory rules to be followed in every case, but rather our guiding purposes and basic guidelines. The basic point to be made is that code enforcement cannot be effectively accomplished unless all members of the "team" work closely together. This means that not only agencies and the county attorney's office should work closely together, but that other agencies also need to work together – after all, problems are not always neatly within only one agency's jurisdiction.

Often inspectors will have questions or concerns before a citation is written, or questions that don't even relate to a specific citation. Agencies should feel free to call our office, specifically Principal Counsel Frank Johnson, with any questions. Our office is also very happy to present trainings and/or attend staff meetings to help answer questions and explore concerns as they arise.

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CODE ENFORCEMENT IN MONTGOMERY COUNTY:

Process and Procedure

From Citation to Trial - and Beyond

Part 7
Special Issues in Code Enforcement

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Code enforcement often focuses on a small code section, but may impact a number of constitutional rights. Sometimes these major legal issues are raised without notice in the midst of an otherwise simple code enforcement case. Some of the memos that follow are an effort to erase the mystery behind some arguments that occasionally arise, such as 4th Amendment or employer/employee liability issues. In addition to arguments raised in open court, several other important concerns frequently arise in the code enforcement process. Most often they include service of citations, confidentiality and deadlines in general. The memos that follow also attempt to address these important issues. It can surely be said that one of the most interesting aspects of code enforcement is that it brings a number of disciplines together – raising many issues and concerns. The following is not an exhaustive discourse on these issues, and inspectors are free to contact Frank Johnson, Principal Counsel for Code Enforcement, at 240/777-6754 with questions and concerns.

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Service of Citations and Court Orders

This memo will discuss the options for serving upon defendants the three major types of documents involved in civil code enforcement matters: the citation, an abatement order from the court, and finally a "show cause" order from the court setting in a date for a contempt of court hearing.

A. *Citations: Can we post the property or mail it by regular mail?* As all inspectors know, citations must be served to provide notice to the defendant that he or she has violated the code and will have to pay a fine or defend the charge. We are often asked whether posting or sending citations by regular mail is acceptable. The answer is that the court rules specifically require personal service (which may for individuals include leaving the citation with a person of suitable age at the residence) or certified mail, *restricted delivery to the defendant only*, return receipt requested. When that doesn't work, the court will almost always give permission to post and/or send by regular mail – but we first have to file a Motion for Alternative Service with the court.

1. *Serving Citations: How to do it.* Unless a defendant is trying to evade service (i.e, evade the citation) we have two options: either hand it to the defendant personally, or send it by certified mail, restricted delivery. Those options are not merely "policy" or preference, but are required by the Maryland Court Rules (Md. Rule 3-121(a) to be exact).

2. *Serving Citations: What if personal or certified won't work?* We do have other options if a person can't be found to be given the citation personally, or if they refuse to sign for certified mail. But we have to ask for court permission first. You have to contact our office (usually Frank Johnson, 240/777-6754) and we can file a motion with the district court asking for permission to serve the citation by posting, regular mail, or both. In order to obtain that permission, we have to demonstrate what we've already tried (usually, both personal and certified) and then wait for the court's permission to try one of the other methods.

3. *Serving Citations: What do we say on the citation?* The citation should reflect how it was served.

   - If a defendant is served personally, by handing him or her the citation, they should be asked to sign on the blank line close to the middle of the citation form. Sometimes defendants refuse to sign. In that case, you should write "refused to sign" on the blank line.

   - If a defendant is served by certified mail, write 'certified mail" on the line. DO NOT write "mail" or "regular mail", since that suggests to the court (and our office) that the citation may not have been properly served.

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4. *For certified mail service, what do I do with the green card?* If a defendant is served by certified mail, you need to send the signed card (or a copy of it) to our office along with the citation. If you send the citation before getting the green card back, when you do get the green card you should send it to our office. That way, we will have some evidence that the citation was sent and/or signed for.

5. *The deadlines on the citation form: do I add a few days if I send it certified?* Generally under the Maryland rules a defendant has 15 days after getting the citation to request a trial, or 20 to pay the fine, and we note the dates of those deadlines on the citation form itself. When the citation is sent by certified mail, it is usually wise to add 5 to 7 days to the deadline to allow for processing. And when the citation is sent to an out of state defendant, who has 60 days to respond, obviously we have to give the defendant at least the 60 days to respond.

B. *The Abatement Order: How to Serve the Defendant?* There are no specific court rules regarding service of abatement orders, but in effect the requirements for service are more stringent than for citations. Rather, the Maryland courts have simply insisted that a person must have actual knowledge of an order before he or she can be charged with violating it. Sellman v. Sellman, 238 Md. 615, 618 (1965). The basic rule is that before a person can be held in contempt for violating an order, the person must know about it, and its terms must be reasonably definite and specific so that the defendant knows what the order requires. Goldsborough v. State, 12 Md. App. 346, 356 (1971). Generally, courts require an affidavit detailing how the defendant was given personal, actual notice of the court order. Even certified mail will not suffice: personal service, by the inspector or a private process server, is required. This is quite different than serving the original citation, because for contempt of court we must show that the defendant had *actual knowledge* of the court's order, and the only way to do so is to show that the defendant was personally given the order.

C. *The Show Cause Order*. The Show Cause Order is issued by the court after a Motion for Contempt has been filed. It is the order setting in the hearing date and commanding the defendant to appear in court; should the defendant fail to appear, the court will generally issue a warrant for the defendant's arrest unless the court is unconvinced that the defendant is guilty of a willful contempt. The court requires that the Show Cause Order be personally served upon the defendant, just as the Abatement Order itself.

Show Cause and the evading defendant. As to the Show Cause Order, if, as with the original citation, it becomes clear that the defendant is evading service, we can always ask the court for permission to proceed with certified mail, regular mail or even posting of the property – but we must ask permission first. Additionally, we must be careful to ask in succession for the service most calculated to give the defendant actual notice. Hence, just because personal service doesn't work, we can't ask for permission to post: we would first have to ask for certified mail, then perhaps regular mail and posting. Note, however, that it can be more difficult to handle the defendant who is evading the actual *abatement order*, since as described above any contempt proceeding requires first that we show the defendant had actual knowledge of the order. While it may not be impossible in some extreme cases to ask for certified mail service of an abatement order, generally personal service will be required for abatement orders.

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Statute of Limitations for Citations and Court Orders

1. *One-year deadline for issuing a citation.* The deadline for issuing a citation after an offense is one year, under Md. Courts & Judicial Proceedings Code Ann., §107. Even so, the court may question delays of several months in serving citations, and may reduce the fine in the event of a guilty finding. If there is some reasonable excuse for a significant delay of six months or more in serving a citation – inability to serve, attempt to resolve the matter, requirement that we send Notice of Violation first – the court will generally not penalize the County (by a reduced fine) for delays.

2. *Repeat offenses & the one-year rule.* Repeat offenses carry higher fine amounts under all 3 classes of civil fines provided for by the Montgomery County Code, §1-19, as follows:

   Class A: $500 first offense, $750 second or subsequent offense
   Class B: $100 first offense, $150 second or subsequent offense
   Class C: $ 50 first offense, $ 75 second or subsequent offense

   Under the Montgomery County Code, a repeat offense must be committed within one year after the initial offense in order to charge the higher fine amount. Code §1-18(c)(7). Offenses occurring more than a year after the initial offense may still, however, be considered when the court decides the exact fine amount to impose in open court, and in considering any requested abatement orders preventing future offenses. Also note that paying a fine does establish a first offense for calculating repeat offenses.

3. *How long are abatement orders valid?* Occasionally I hear that abatement orders are valid only for 1 year. In fact, orders are valid for up to 12 years, under Md. Courts & Judicial Proceedings Code Ann., §102 and the Maryland court rules, Md. Rule 3-625. Even so, if a new offense is committed after 2 to 3 years of compliance or more, the defendant in most cases should be given a chance to correct the matter before contempt of court proceedings are filed. The proper course of action will naturally be determined by the circumstances of each individual case.

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Searches – You Don't Always Need a Warrant!

Occasionally in the midst of code enforcement cases – quite often with little or no notice - 4th Amendment issues arise. Normally this happens when a defendant questions the County's right to search a given area. Often it is assumed that under the 4th Amendment, all searches are *verboten* unless the officer has a valid warrant, and the courts may entertain such an initial reaction as well. In fact, for most of our cases one of several exceptions likely applies. Below is a brief outline of 4th Amendment case holdings describing the most common instances in which a warrant is not required. You may want to have this memo available in the event a 4th Amendment issue arises in the midst of a docket.

I. Preliminary issues.

Under the 4th Amendment, citizens are protected from "unreasonable searches and seizures". This is commonly understood to require that a warrant is required before the government may conduct a search. In fact, a warrant is not always required: what is required is that the search be reasonable. Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 2590 (1979). In determining whether a given search is unreasonable, courts first consider whether the search invades a legitimate expectation of privacy that society recognizes as reasonable. Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 2782 (1985). This requires the courts to balance the importance of the privacy interest being affected against the legitimate government interest at hand. U.S. v. Montoya de Hernandez, 473 U.S. 531, 105 S.Ct. 3304, 3308 (1985).

The balance is most often struck against the government when a residence is involved, as the highest expectation of privacy is, not surprisingly, in a private dwelling. U.S. v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 3084-3085 (1976). This expectation of privacy extends to "curtilage" or the immediate area around the dwelling house that is used as a private area, such as a side yard or back yard. U.S. v. Dunn, 480 U.S. 294, 107 S.Ct. 1134, 1139 (1987). Outside of the home there is less expectation of privacy. In particular, there is less privacy which the courts are willing to protect in anything mobile, whether a mobile home or vehicle. California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 2068-2069 (1985).

It is true that a warrantless search will usually be considered unreasonable unless an "exception" has been recognized. U.S. v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 3303 (1984). Several "exceptions" exist which permit warrantless searches, and these are outlined below.

II. When warrants are not required.

In several common scenarios, the Supreme Court has made it clear that a search is permissible without the need for a warrant in advance. The most common instances are introduced and explained below.

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A. Plain view. Generally, an officer need not first obtain a warrant just to view items which are in plain view – as long as the officer is viewing the items from a place in which the officer can be without a warrant, such as a public street. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 2308 (1990), Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 1152 (1987). Government officers are not required to shield their eyes on a public street when they view what is immediately apparent. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 2136-2137 (1993), California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 1812 (1986). The often-cited "open fields" exception is actually a "plain view" exception: under the "open fields doctrine", what an officer can see from standing a public area and looking towards an open field does not require a search warrant. Oliver v. U.S., 466 U.S. 170, 104 S.Ct. 1735, 1740 (1984). Often an open field is defined by reference to a residence's curtilage – the open field begins where curtilage ends.

B. Consent. Persons can always consent to a search even if a warrant would otherwise be required. Schneckloth v. Bustamente, 412 U.S. 218, 93 S.Ct. 2041, 2044 (1973). Of course, the consent must be voluntary given, not coerced or given under duress. Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417, 421 (1996), Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 2398 (1991). It is important to note that even a third party can consent to a search of someone else's residence as long as they appear to have general access to and authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 110 SA.Ct. 2793, 2801 (1990).

C. Abandonment. Anything a person has clearly abandoned, such as garbage placed at the curb, does not require a warrant before it can be searched. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 1628-1629 (1988). It is necessary to ensure that the person has relinquished all privacy interests in the item being searched: garbage not set out by the street, but left near the home, may not suggest abandonment. Id.

D. Closely Regulated Industry. This is one of the most important exceptions to the warrant requirement, and applies to commercial enterprises. The key requirements are that a search be specifically authorized by statute, and that the industry in question be considered "highly regulated", such as taxicabs, waste haulers, motor vehicle repair or the like. New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 2642-2643 (1987). The statute authorizing the search must provide some reasonable constraints as to time and place, thereby providing some of the protections that would be provided by a warrant. Whren v. U.S., 517 U.S. 806, 116 S.Ct. 1769, 1773 (1996). Naturally, the search itself must also meet the "reasonable" test. Note, however, that "reasonable" doesn't always mean that a search must be by appointment. The Supreme Court in United States v. Biswell, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596 (1972) recognized that for highly regulated industries, unannounced, frequent inspections could be essential to enforcement efforts and are permissible as long as authorized by statute

E. Closely Regulated Industry – Documents. In general, there is no special sanctity in papers and documents. Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 2745 (1976). Documents that are required to be kept by statute can usually be reviewed without a warrant, assuming there is a statute authorizing reasonable access. *See* National Mining Association v. U.S. Department of Interior, 939 F.Supp. 8, 14 (D.DC. 1996); Abateco Services, Inc. v. Bell, 477 S.E.2d 795, 800 (Va. App. 1996).

F. Emergencies. Courts will not require that an officer of the government seek a warrant in the face of an emergency occurring directly in the officer's presence. U.S. v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 3304-3305 (1984). The situation must, however, present truly "exigent" circumstances amounting to an emergency. Id. Further, any search or seizure conducted has to be related to the original exigency. Arizona v. Hicks, 480 U.S. 321, 107 S.CT. 1149, 1154 (1987).

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G. Aerial Surveillance. Courts have not given any special protection to citizens from aerial surveillance. California v. Ciraolo, 476 U.S. 270, 106 S.Ct. 1809, 1813 (1986). In general, what one can see in plain view from the air does not require a warrant, even if the area were not visible from the ground. Florida v. Riley, 488 U.S. 445, 109 S.Ct. 693, 697 (1989). As long as the airplane is in navigable air space when the area in question is viewed, the area is considered an open field rather than curtilage. Dow Chemical Co. v. U.S., 476 U.S. 227, 106 S.Ct. 1819, 1827 (1986).

H. Flashlights. As long as the area being viewed is otherwise subject to a warrantless search, use of a flashlight to illuminate an area does not change the privacy expectation to require a warrant. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 1542 (1983).

III. Conclusion

The 4th Amendment does not to require a warrant before every search, but prohibits searches which are unreasonable. The circumstances determine when it is reasonable to require the protection of a warrant before an area can be searched. In general, the greatest level of protection exists for a private residence; the least is in a commercial setting. The Supreme Court has made it very clear that the expectation of privacy in a commercial setting is significantly less than one might enjoy in a private home. New York v. Burger, 482 U.S. 691, 699, 107 S. Ct. 2636 , 2642 (1987). The court has specified, for example, that "curtilage" cannot exist in an industrial setting open to the public, viewing such areas as akin to "open fields". Dow Chemical Co. v. U.S., 476 U.S. 227, 106 S.Ct. 1819, 1827 (1986).

The expectation of privacy by a commercial concern is even less for certain "closely regulated" industries. Id.; *See also* Donovan v. Dewey, 452 U.S. 594, 600, 101 S.Ct. 2534, 2538 (1981). Indeed, the Supreme Court has gone so far as to suggest that given the history of government oversight, certain industries have little or *no* reasonable expectation of privacy. Marshall v. Barlow's, Inc., 436 U.S. 307, 313, 98 S.Ct. 1816, 1821 (1978).

Even if a warrant is clearly not required, questions can still arise as to the extent of the search that can be permitted. For a warrantless search, the scope depends on the character of the exception. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 2309 (1990). Essentially, the analysis is not signifcantly different for searches with or without warrants: in each case, the extent of a search is limited by the object of the search. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 1804 (1991). Generally, a search extends to the entire area in which the object of a permitted search may reasonably expect to be found. U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 2172 (1982).

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Vicarious Liability: Can We Cite Both Employer AND Employee for a Violation?

In many cases the county cites both the operator or cashier as well as the company or employer. These citations include selling tobacco to minors, uncovered trucks (solid waste), etc. It is well established law that both the employee and employer can and should be cited for code violations. Below is a quick argument with cites that you can use should the argument ever be raised that a company should not be held responsible if the employee is cited.

1. We are not seeking reimbursement for the violation. Hence we're not trying to gain merely civil "joint and several" liability in which we can only win one reimbursement. We are seeking to enforce the law in what is really a quasi-criminal proceeding. Hence all parties responsible can be cited. The individual employee, by his/her acts, is responsible, and at the same time, the employer, via the master-servant legal relationship.

2. Vicarious liability is the theory which attributes wrongdoer's acts to the principal/employer. *Rivera v. Pr Geo Co Health Dept*, 102 Md. App. 456, 475 (1994). There is no question that a company is vicariously liable for the acts of their agents. *Carroll v. State*, 63 Md. 551, 557 (1885). It is the agency relationship that makes employer responsible, not any specific act by the employer. The point is that no action by employer in furtherance of the violation is required to impose responsibility. *See Gary v. State*, 341 Md. 513, 520 (1996), *Johnson v. State*, 303 Md. 487, 512 (1985), *State v. Ward*, 284 Md. 189, 197 (1978).

3. It has long been the law that liability is imposed when an agent acts within scope of employment, for the employer's benefit/in furtherance of employer's interests. *Carroll v. State*, 63 Md. 551, 557 (1885). The theory is that the employer reaps the gain of being in business, and must likewise be responsible for the risk of violations of the law by its agents. *Id.*

4. "It would be impossible to effectuate enforcement [otherwise] . . . **The law would be a dead letter.**" *Carroll v. State*, 63 Md. 551, 557 (1885), *See also Embrey v. Holly*, 293 Md. 128, 136 (1982). This is in part because a company which is incorporated can as a legal matter only act through its agents. *Embrey v. Holly*, 293 Md. 128, 136 (1982).

5. A policy forbidding the violation or even specific instruction thereto does not insulate the employer as long as the act is in furtherance of the employment. *Cox v. Pr Geo Co*, 296 Md. 162, 170 (1983), *A & P Co. v. Noppenberger*, 171 Md. 278, 391 (1937).

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Admitting the results of a testing instrument: The Basic Hurtles

Most of the evidence in a code enforcement case consists of what an officer, investigator or citizen sees or hears. Occasionally we have a few documents to admit or a few photographs. The exception seems to be noise control cases in which the citation is for a defendant's emission of excessive decibel levels, as detected by a noise measurement machine. As it turns out, with some preparation we should have no trouble having testing results admitted into evidence. To that end, I have prepared the following research memo and recommendations for covering ourselves and the agency on this issue in the future.

ADMITTING RESULTS OF TESTING INSTRUMENTS

I. PRELIMINARY ISSUES.

Any measurement made with a testing instrument can only be admitted if it complies with the basic rules laid down for scientific evidence. This standard, in Maryland, is known as the "Frye/Reed" standard. It requires before a test can be admitted into evidence that the test be "generally accepted" by the scientific community, and that the relevant scientific community agrees that the technology used for the test will produce an accurate result. The "Frye/Reed" standard was adopted by the Maryland Court of Appeals in Reed v. State, 283 Md. 374, 391 A.2d 364 (1978), largely based on the seminal standard enunciated in Frye v. US, 293 F. 1013 (D.C. Cir. 1923). Although the Federal courts no longer principally rely on Frye but on the Federal Rules of Evidence, it is still the ruling standard in Maryland (in spite of Maryland's own adoption of rules of evidence at Title 5 of the Maryland Rules.) Hutton v. State, 339 Md. 480, 663 A.2d 1289 (1995); Schultz v. State, 106 Md. App. 145, 664 A.2d 60 (1995).

II. THE TEST.

1. *Is it generally accepted?* Under the Frye/Reed standard, the threshold issue is whether the test has met the "generally accepted" standard. As the Court of Appeals explained in Reed v. State, 283 Md. 374, 381, 391 A.2d 364, 368 (1978), this standard can be met in one of 3 ways: (1) by direct evidence from the relevant scientific community, (2) by the court taking judicial notice of a reported decision from the Court of Appeals or Court of Special Appeals finding that the test satisfies this standard, or (3) by the court taking judicial notice of a state statute accepting the test.

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As to noise control, the General Assembly has provided that sound level meters should be treated by the courts as being "generally accepted". Md. Cts. & Jud. Proc. Code Ann., §10-911, specifically provides that:

> In any legal proceeding of any nature, the quantities and qualities of noise may be proved by evidence of tests made with any instrument designed and constructed to measure and indicated or record the presence of sound, including such devices commonly called sound level meters and frequency analyzers.

With adoption of this statute, the General Assembly has effectively ruled that noise control testing instruments meet the threshold Frye/Reed test, and the Court should not hold any hearing on the "generally accepted" standard. Armstead v. State, 342 Md. 28, 673 A.2d 221 (1996). We need only request the Court to take judicial notice of Sec. 10-911 to move on to the next two steps.

2. If the test is "generally accepted", the next step contains four parts, focusing on (1) the operator's qualifications, (2) procedures used in giving the specific test, (3) whether the equipment is reliable, and (4) whether the machine was properly operating for this specific test. Once the "generally accepted" threshold is met, the court must admit the test results, subject to foundational proof that the test was "properly conducted" and that the unit reported the tests accurately. Kammar v. Young, 73 Md. App. 565, 571-2, 535 A.2d 936, 939 (1988). This requires that two key facts be established before the test results can be admitted: (1) that the equipment was in proper working order, and (2) that the test was properly conducted by a person qualified to do so. *See* Kreisay v. State, 106 Md. App. 55, 665 A.2d 700, *rev'd on other grounds,* 342 Md. 114 (1995). I have broken this two-part test down into four parts: qualifications, procedures, overall reliability of the machine, and whether the machine was operating properly before the specific test in question.

A. Operator qualifications. After the threshold question of whether the test is reliable is satisfied, we turn to the operator. The question regarding the operator is whether the test has been properly given by a "qualified operator". Schultz v. State, 106 Md. App. 145, 664 A.2d 60 (1996). The issue a qualified operator calls into question the operator's knowledge of the test, training, and ability to interpret the results. Schultz, 664 A.2d at 76. There is no specific test to determine whether an operator is qualified, but two key factors always come into play:

(1) the operator's training;
(2) the operator's general expertise and years of experience giving the test.

Schultz, 664 A.2d at 76-77.

If there is evidence of one or both of the following, they can be helpful factors to raise:

(1) whether the operator is certified by a government agency or professional group to administer the test;
(2) whether the operator was supervised by a certified instructor.

Id.

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While courts will generally find that an operator who knows how the machine is calibrated and how it operates is fully qualified to give the test, *see* People v. Bynum, 196 Ill. Dec. 179, 629 N.E. 2d 724 (Ill. App. 1 Dist. 1994), it is not necessary that the operator of the instrument have the level of expertise needed to testify about the inner workings of the machine. This is because the "generally accepted" standard has already been met. The operator need only be competent to use the machine and interpret the results properly. Schultz, 664 A.2d at 76-77. There is no specific formula that must be met to show the operator is qualified, but courts basically find that the operator is qualified when there is testimony they have had previous training and experience in using the test in the field. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994).

B. Proper procedures: The operator followed established procedure for this test. Assuming the operator is found qualified to administer the test, the operator (or a supervisor) must then specifically testify that proper, established procedures were used in conducting the specific test in question. *See* Fitzwater v. State, 57 Md. App. 274, 469 A.2d 909, 912 (1984).

C. Reliability: Can we rely on the testing instrument? Once we've passed the threshold "generally accepted" hurtle, and demonstrated that the operator was both competent to give the test and followed established procedure, we turn to the testing instrument itself. We must present evidence that the instrument was in "good working order and accurate at the time" the test was given. *See* Kriesay v. State, 106 Md. App. 55, 665 A.2d 700 (1995), *rev'd on other grounds,* 342 Md. 114 (1995); Fitzwater v. State, 57 Md. App. 274, 469 A.2d 909, 912 (1984). The key factors to determine this are:

(1) Whether the equipment has been properly tested and checked;
(2) Whether proper maintenance records have been kept;

Id.

There is no specific "magic formula" to follow, but a few cases are instructive as to the proof needed to demonstrate that the instrument is reliable. We should be prepared to prove that the instrument came calibrated, was re-calibrated by someone capable of doing so before the test, and that it was working properly. *See* Charley v. State, 651 N.E.2d 300 (Ind. App. 3 Dist. 1995). We can generally do this by putting on evidence, for example, that the machine is checked and calibrated annually, done so according to a traceable, generally accepted standard in the field; we should also point out if, in fact, no problems have arisen as to the machine's reliability. Robinson v. State, 634 N.E. 2d 1367 (Ind. App. 4 Dist. 1994); State v. Butler, 615 So.2d 496 (La. App. 3 Cir. 1993).

We should in noise cases be prepared to have someone with expertise testify about the certification for the machine in question, as well as introduce the certification itself if an outside company performs the certification. Note that the operator will rarely be able to provide the sufficient foundation necessary for admission of an outside testing company's certification: we will generally need a supervisor or someone else who is certified either to test instruments or to give instruction, and who is familiar with the certification procedures.

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D. Can we rely on the specific results in this case? As long as the operator or a supervisor can testify that the instrument seemed to be working consistently and there is no evidence that the instrument is inaccurate, then the results should be admitted. Charley v. State, 651 N.E.2d 300 (Ind. App. 3 Dist. 1995). As long as the operator performs a practice test with the machine both *before* and *after* the test, with consistent and normal results, then the machine can be said to perform consistently. With the "before" and "after" test, the operator can testify that the machine seemed to be in good working order, State v. Butler, 615 So.2d 496 (La. App. 3 Cir. 1993), and that a miscalibration would have been detected. State v. Lee, 134 N.H. 392, 593 A.2d 235 (1995).

III. CONCLUSION.

In order to have a scientific test such as the results of a noise test admitted, we will need to do the following:

1. *Threshold standard: generally accepted.* Ask the court to take judicial notice of *CJP* 10-911.

2. *Operator qualifications.* At a minimum have the operator testify what test was given, and then about their training and expertise. Special focus on any certifications and the years of experience in the field and in using the instrument is most critical at this stage, as well as any level of supervision that may have been afforded.

3. *Procedures used in this test.* The operator or a supervisor must at a minimum testify that proper, established procedures were used for the test given in this case.

4. *Reliability of instrument.* Someone with certification or expertise (likely a supervisor) will need to testify that the instrument used in this case is the one normally used for such tests, and that the instrument is regularly calibrated - and, of course, that this specific instrument was calibrated. They will need to bring in any certification and/or recent maintenance records for the machine. The supervisor should be prepared to discuss the certification procedure, though as long as there is evidence that no problems have arisen with this machine in the past this standard should be satisfied.

5. *This instrument is reliable.* The operator (or, if appropriate, the supervisor) should testify that the machine was tested both before and after the specific test in question, and the results were both consistent and normal. The supervisor or operator can then specifically testify that the instrument seemed to be working properly and that a problem or miscalculation would likely have been noticed.

   Once those steps are demonstrated, we should move for admission of the test results.

IV. Final Note:

There is no major formula in the Maryland Code or Maryland Rules for admission of scientific tests: we have to just be sure to follow the above procedure. One specific procedure is utilized for breathalyzer tests and is codified at Md. Cts. & Jud. Proc. Code Ann., §10-304(d). This

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process is quite specific to breathalyzer tests, and not only requires that a defendant give notice before raising a specific challenge to the test, but also provides for testimony from the State Toxicologist. *See* Loscomb v. State, 291 Md. 424, 435 A.2d 764 (1981). This procedure clearly does not apply to noise or other testing instruments.

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Complainant Confidentiality: Will my neighbor find out?

1. *Why confidentiality?* In most code enforcement matters the problem is first brought to the County's attention by a citizen or someone in the neighborhood. Usually the agent responding observes the problem and therefore serves as the witness. Even so, some defendants will want to know who filed the original complaint. Often that person will be especially concerned about confidentiality; they may be concerned for their safety, or they may be concerned that the defendant may retaliate against them in some way. They may also simply not want the defendant to know they specifically were the complaining party.

2. *Is confidentiality possible?* Most code enforcement officers probably know that under a recent court ruling, *Bowen v. Davison*, 135 Md. App. 152, 761 A.2d 1013 (2000), as long as the complainant requests confidentiality we do not need to release their name even if a "Public Information Act" request is made. We just need to be sure to make note of the request for confidentiality in the file (or, better yet, have a letter to that effect from the complainant). Please note – without a notation specifically in the agency file, the complainant's name probably will have to be released if the defendant requests that information. It is therefore good practice to ask at the initial investigation stage whether the complainant prefers confidentiality, and even better practice to not only note if the defendant wants to remain anonymous, but also to have the defendant send a letter to that effect.

3. *What happens if the case goes to court on a citation?* In a court prosecution of a code enforcement case, it is equally important that complainant's confidentiality be preserved. Only those complainants willing to serve in court as witnesses are actually noted on the back of the citation, but a defendant will occasionally inquire, in the midst of a hearing, who actually complained. Normally this is part of an argument that the violation is the result of a neighborhood dispute and isn't of particular substance. Although most of the judges hearing code cases are careful to not allow release of the complainant's name, agents and attorneys handling code dockets need to be careful not to let the name slip as well. The agents need to be sure not to give the name even if asked, and the attorneys need to object (unless the court does not allow the question) on the basis of irrelevancy and potential misuse.

4. *What if no one goes on the record and the inspector doesn't witness the violation?* Personal knowledge by someone who witnessed a violation is required before a citation can be issued, or at least prosecuted in court. If an agent does not witness the violation, they can't serve as an effective witness. If it turns out that no one is willing to "go on the record", then the reality is that the code violation can't be prosecuted. While it is not our role to second-guess a neighbor's decision not to "go on the record" – after all, they have to live there - this is nonetheless a difficult reality that simply has to be explained. Where difficulties arise in that respect, the complaining party can be referred to my office for a more complete explanation.

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Notes

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