

Legal Q&A

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Is a municipal court required to have a prosecutor?

Yes, a municipal court requires—at a minimum—a judge, prosecutor, and court clerk. State law requires that all prosecutions in a municipal court shall be conducted by the city attorney or by a deputy city attorney. TEX. CODE CRIM. PRO. art. 45.201(a). Thus, each municipal court must have a prosecutor who has been appointed by the city. The prosecutor does not have to be the city attorney, or from the same firm as the city’s attorney, but must be appointed as a deputy city attorney in order to prosecute. *Id.* The county attorney may also prosecute in municipal court, though he or she must do so without compensation by the city. *Id.* § 45.201(b). Nothing in state law governs the appointment or removal of a municipal prosecutor, but the requirements for the removal of municipal officers found in Chapters 22, 23, and 24 of the Texas Local Government Code or a city’s home rule charter would still apply to a city attorney serving as the prosecutor. TEX. LOC. GOV’T CODE §§ 22.077; 23.053; 24.052, 26.041.

How long is the term of a municipal judge?

The judge in a municipal court that is not a court of record serves a two-year term. TEX. GOV’T CODE § 29.005. At the end of that term, once a ninety-day “grace period” has passed and the judge has not been reappointed or replaced, the judge is automatically reappointed for another two years. *Id.*

In a municipal court of record, the term is set by the city council in an ordinance, and the term may range anywhere from two to four years. *Id.* § 30.00006(d).

How may a municipal judge be removed from office?

While there is no provision for removal of a judge in a non-record court, a city may be able to remove a municipal judge in the same manner as any other appointed municipal officer, particularly if the ordinance creating the position of municipal judge clearly defines it as an “office.” See TEX. LOC. GOV’T CODE § 22.071. For a Type A general law city, the city’s governing body may remove a municipal officer after due notice and an opportunity to be heard, but only for “incompetency, corruption, misconduct, or malfeasance in office.” *Id.* § 22.077(a). To remove an officer for a different reason or without due process and the opportunity to be heard requires a vote of no confidence from two-thirds of the council. *Id.* § 22.077(b). Type B and C general law cities may remove an officer appointed by the city council at any time, and a home rule city may remove officers in compliance with its charter. *Id.* §§ 23.053; 24.053; 26.041. However, no court has directly addressed the issue of removing a municipal judge before his or her term is completed, and it continues to be somewhat of a gray area.

Texas courts have been very clear in their holdings, stating that municipal court judges are members of the judiciary and must be able to make rulings independent of the city’s governing body. *See, e.g., City of Roman Forest v. Stockman*, 141 S.W.3d 805, 810 (Tex. App.—Beaumont 2004), citing *Thompson v. City of Austin*, 979 S.W.2d 676, 683 (Tex. App.—Austin 1998). Though these cases deal specifically with courts of record in home rule cities, the issue of judicial independence applies equally to non-record courts in general law cities.

The judge in a general law municipal court of record may be removed from office at any time, but only using the procedure outlined in Chapter 21 of the Texas Local Government Code (in which any citizen may petition a district judge for removal, followed by a trial), and for the reasons given in that chapter (incompetency, official misconduct, or intoxication). TEX. GOV'T CODE § 30.000085; TEX. LOC. GOV'T CODE §§ 21.025 *et seq.* A municipal judge in a record court of a home rule city may be removed from office by the governing body under the procedure outlined in the city's charter. If the charter is silent, the judge may be removed by the State Commission on Judicial Conduct as provided by Section 1-a, Article V, Texas Constitution, or by the same procedure used for a judge in a general law city's record court. TEX. GOV'T CODE § 30.000085. In any case, a city should consult with its attorney before taking any action toward removing a municipal judge.

What are the duties of a municipal court clerk, and how long is the term of the clerk?

The court clerk's term in a municipal court which is not a court of record is also set by statute at two years, or longer if provided for by the city's governing body. TEX. GOV'T CODE § 29.010(b). In a court of record, the court clerk does not have a term. *Id.* § 30.00009(a). The court clerk's duties include keeping minutes of the proceedings of the court, issuing process, and generally performing the duties for the municipal court that a county clerk performs for a county court. *Id.* §§ 30.00009; 29.010(c).

Is a bailiff a required member of a municipal court staff?

Certain municipal courts of record must also have at least one bailiff for each court. *See, e.g.,* TEX. GOV'T CODE §§ 30.00129 (El Paso); 30.00465 (Sweetwater); 30.00605 (Midland); 30.01448 (Coppell). Other municipal courts may wish to appoint a bailiff to provide security, but are not required to do so.

Can an individual who serves as a city employee in another capacity also serve as the municipal judge in the same city?

If the court has been created as a court of record under Chapter 30 of the Texas Government Code, a municipal judge is expressly prohibited from other employment with the same city. TEX. GOV'T CODE § 30.00006(g). If a municipal judge in a court of record accepts employment with the same city in which she serves, the judicial office is automatically and immediately vacated. *Id.*

In a court that has not been created as a court of record and operates under Texas Government Code Chapter 29, each situation must be examined on a case-by-case basis. In deciding whether a city employee may serve as a municipal court judge, a city must be careful to consider the fact that judges operate not only under state law, but also under their own canons of ethics, known as the Code of Judicial Conduct. These rules are clarified by opinions published by the attorney general and the State Commission on Judicial Ethics. For example, the attorney general found in a 2004 opinion that neither Article XVI, Section 40, of the Texas Constitution nor the common-law doctrine of incompatibility prohibited a city finance director from serving as a temporary municipal judge in the same city. However, the opinion specifically pointed out that the Commission on Judicial Conduct would be the only body authorized to examine the judicial ethics issues that might be involved with such an appointment. *Tex. Att'y Gen. Op. No. GA-199 (2004)*. One such opinion held that a city attorney may not simultaneously serve as the municipal

judge for that city. Comm. on Jud. Ethics, State Bar of Tex., Op. No. 173 (1994). The commission concluded that a municipal judge serving as the city attorney for the same city would violate several provisions of the Code of Judicial Conduct, including canons stating that a judge must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and that a judge may be paid only if the source of such payment does not give the appearance of impropriety. *Id.*, citing Tex. Code of Jud. Ethics, State Bar of Tex., Canon 1; Canon 4I. While that opinion was specific to the office of city attorney, many of the arguments regarding the appearance of impropriety could be applied to many, if not all city employees. This is an issue that should be discussed in depth with the city’s attorney before any city employee is considered for the position of municipal judge.

In addition, the Texas Committee on Judicial Ethics has specifically found that it is improper under the Texas Code of Judicial Conduct for a certified peace officer to serve as a municipal judge. In a 1999 opinion, the Committee held that a peace officer serving as a judge would create an appearance of impropriety in violation of Canon 2A of the Code of Judicial Conduct, which states that “a judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Comm. on Jud. Ethics, State Bar of Tex., Op. No. 242 (1999). Only a peace officer who is “totally on inactive status” may serve as a municipal court judge. *Id.*

May a council attempt to influence the decision of the judge in a pending case or discuss decisions made in past cases?

In one situation for which the State Commission on Judicial Conduct issued an opinion, members of a county commissioners court wished to discuss previous decisions of a county judge in cases where the county was a party. Specifically, the commissioners were concerned that the judge was not impartial in eminent domain cases, though no future or pending cases would have been discussed specifically at the meeting. The commission held that such a meeting would have been improper under the Code of Judicial Conduct. Comm. on Jud. Conduct, State Bar of Tex., Op. No. 133 (1990). While this opinion dealt specifically with a county governing body, the same arguments may be applied to a city’s governing body and a municipal judge. The commission cited several canons of judicial conduct in its decision, including a provision requiring a judge to be unswayed by “partisan interests, public clamor, or fear of criticism.” *Id.*, citing Tex. Code of Jud. Conduct, State Bar of Tex., Canon 3B(2). To apply it to a city, by meeting with members of the city’s governing body to discuss specific past rulings, a judge could give the appearance of being swayed by fear of criticism, particularly because the city council appoints the municipal judge and determines his salary and that of his staff. The commission also held that—even if a meeting to discuss past rulings did not touch on pending decisions—it could give the appearance that the judge was “accepting an invitation to comment on impending future cases,” which also violates judicial canons of conduct. *Id.*, citing Canon 3B(10).

In addition to a judge being specifically barred by Canon 3B(10), a city council should refrain from discussing any pending cases with a municipal judge because the city is, for all intents and purposes, a party in the proceeding. A municipal court judge is barred by Canon 6C(2) from what is known as *ex parte* communications, or communication with one party without the other present. While the *ex parte* rules apply specifically to the defendant and the prosecutor as the

representative of the state, it would still be improper for a city council to discuss a pending case based on an ordinance written by that body with the municipal judge, particularly in an attempt to sway his or her opinion.

May a city council or city staffer direct judges in how they must assign punishment?

Canon 3B(10) requires a judge to abstain from any public comment regarding a pending or impending proceeding that may come before the court that would suggest the judge's probable decision in the case. If a council dictates fine amounts and other creative judicial orders, that may be construed as suggesting the judge's decision in related cases. Many cities have a fine schedule for certain city ordinance violations, and many judges choose to follow these schedules.

However, a judge may not be required to follow a fine schedule or other punishment directive created by the city council beyond the general caps on fines set out in the Texas Government Code and other statutes. TEX. GOV'T CODE § 4.14(a).