NOTICE: DID YOU KNOW WHAT YOU ARE BEING ACCUSED OF AND WHERE YOU ARE SUPPOSED TO BE?

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Different types of notice exist in Texas law including constitutional notice of the crime, notice of the charge, notice of statutory elements and notice of all hearings and proceedings. Notice can be tricky and often courts have questions on notice issues when a defendant comes in on a charge which is not typical or when the City Council adopts a new ordinance. But do not worry. Most notice issues are easy to cure or can be waived, but you must be aware of their existence. There are a few which can never be waived and can be raised for the first time on appeal. But again, they are easy to either comply with or to fix if an error is discovered.

The essential element to keep in mind to comply with almost all notice provisions is that if you want a person to do something (or not do something) you have to let them know what it is with sufficient clarity that a reasonable person would know what it is they are supposed to do (or not do).

Matters appear before your municipal court after a particular series of events. First a law exists which the person has violated. The law must be sufficiently clear to let the person know what is was they were supposed to do (or not do). In order to trigger your jurisdiction, the charging instrument has to let the Defendant know exactly which law they are being charged with and what they did in violation of the law. In order to be hauled in front of your court, the Defendant must be told about the proceeding with sufficient time so they know to attend.

Each of these steps requires a certain level of notice. Often times a defendant will object citing a lack of notice of which they are not entitled to obtain. It is important to understand what due process must be provided and what information need not be provided.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordea*n, 234 U.S. 385. ***The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, *supra*, and it must afford a reasonable time for those interested to make their appearance, *Goodrich v. Ferris*, 214 U.S. 71.

Notice of the Law

Language of the Law

For conduct to be criminalized, it must be defined by statute or as otherwise provided in section 1.03(a) of the Texas Penal Code. "An individual's conduct although it may be reprehensible is not criminal unless proscribed." *Sanchez v. State*,182 S.W.3d 34, 59-60 (Tex. App. -- San Antonio 2005)(citing 22 C.J.S. Crim. Law § 8 (West 1980)). The Legislature is vested with the lawmaking power of the

people in that it may define crimes and prescribe penalties by statute. See TEX. CONST. art. III, § 1; *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000); *McNew v. State*, 608 S.W.2d 166, 176 (Tex. Crim. App. 1980) (op. on reh'g); *Frieling v. State*, 67 S.W.3d 462, 468 (Tex. App.-Austin 2002 pet. ref'd); State v. Wofford, 34 S.W.3d 671, 676 (Tex. App.-Austin 2000, no pet.).

Section 1.02 of the Penal Code provides for the general purposes of the code and states that it should be construed to achieve the following objectives:

> (2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;
>
> (4) to safeguard conduct that is without guilt from condemnation as criminal;

TEX. PEN. CODE ANN. § 1.02 (2), (4) (West 2005).

Section 6.01(a) and (c) provides:

> (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
>
> (c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

TEX. PEN. CODE ANN. § 6.01 (a) , (c) West 2005).

A penal statute should explicitly establish the elements of the crime it creates and provide some reasonable ascertainable standards of guilt. *Sanchez v State*, See 22 C.J.S. Crim. Law § 26 (West 1989). Purely statutory offenses cannot be established by implication. *Id.* at § 215. Section 1.07 (a) (22) of the Penal Code provides:

"Element of offense" means:

> (A) the forbidden conduct;
>
> (B) the required culpability;
>
> (C) any required result; and
>
> (D) the negation of any exception in the statute.
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> TEX. PEN. CODE ANN. § 1.07(a)(22) (West 2005).

The Sixth Amendment to the United States Constitution guarantees a right to trial by jury while the Fourteenth Amendment focuses on due process protections which the United States Supreme Court has determined require juries to find every element of a charged offense beyond a reasonable doubt. See U.S. CONST. amend VI, XIV; *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1987); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); see also TEX. CONST. art. I, § 19, art. V, § 13. The Penal Code also requires that "no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." TEX. PEN. CODE ANN. § 2.01 (Vernon 2005) (emphasis added).

For most state law offenses which appear before your court, these issues have

already ben flushed out. However, when the Legislature creates a new law or when your City Council pass a new ordinance, a conviction can only apply if these constitutional requirements are met.

Access to the Law

In addition to being properly defined by the law, the individual must have access to the law. Public libraries and many state facilities provide access to state laws for anyone to inspect, so you normally need not worry about that. However, sometimes a City Council will adopt an ordinance which incorporates by reference some other document. A common example is the International Building Code. A City's ordinance may be simply one line adopting the Code. The ordinance may also adopt some of the Code, but provide various changes it wishes to utilize within the City. In order to do this, by law, the City Secretary must have a copy of the referenced materials and allow and inspection by anyone who wishes to look at them. The State does not have to prove the defendant had access or even knew about the law or ability to ask, but some defendants are intelligent enough to object if they attempt to access the law and are denied for some reason. On occasion, the City Secretary may lose the referenced codes or never obtain them in the first place. Be aware, you cannot force a defendant to purchase a code (from the International Code Commission) in order to find out what behavior is permissible. Nowadays, however, the internet provides free access to such codes as long as the individual has the URL, which the City Secretary should provide.

Notice within the Complaint

A complaint is what triggers the jurisdiction of the municipal court. In 1985, Texas voters approved an amendment to Section 12 of Article V of the Texas Constitution stating that the presentation of an indictment or information vests the trial court with jurisdiction over the case. See TEX. CONST. art. V, § 12; see also *Studer v. State*, 799 S.W.2d 263, 272 (Tex. Crim. App. 1990). A defendant waives any defect of form or substance in an information if no objection is made before the date trial commences. See TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon 2005). *Tollett v. State*,219 S.W.3d 593, 597 (Tex. App. -- Texarkana 2007).

In order to vest jurisdiction the charging instrument must comply with TEX. CONST. art. V, § 12. For the trial court to have jurisdiction, all that means is the court has the power to hear that type of case, such as a speeding case committed within the court's geographic jurisdiction. Once the court has jurisdiction over that "type" of case, then the question becomes does the charging instrument provide sufficient notice of the circumstances surrounding the commission of the offense so the defendant knows what behavior is being alleged and can prepare a defense. The Court of Criminal Appeals held complaints sufficient because "from reading the complaint, [the accused] could ascertain with reasonable

certainty with what he was being charged so as to properly prepare a defense." *State v. Zorrilla*,404 S.W.3d 734, 737 (Tex. App. San Antonio2013); see also *Cisco v. State*, 411 S.W.2d 547, 548 (Tex. Crim. App. 1967) (driving while intoxicated "upon a public highway in said Harris County"); *Nam Hoai Le v. State*, 963 S.W.2d 838, 844 (Tex. App.—Corpus Christi 1998, pet. ref'd) (speeding "upon a public highway outside an urban district upon a federal highway" "in the County of Jackson")

A person cannot waive an objection to jurisdiction and jurisdiction can be challenged for the first time on appeal. A challenge to a complaint which is jurisdictional, i.e., one that concerns the trial court's power to adjudicate the dispute, cannot be waived. *Motherwell v. State*, 2000 Tex. App. LEXIS 5907, 2000 WL 1240005(Tex. App. -- Dallas Aug. 31, 2000). However, once the court has jurisdiction, the defendant can waive any objections they may have to the notice elements and behavior. A defendant charged by complaint who wishes to challenge defects in the complaint must do so in the justice or municipal court and not wait for the appeal. *Motherwell v. State*,2000 Tex. App. LEXIS 5907,2000 WL 1240005 (Tex. App. -- Dallas Aug. 31, 2000)(distinguishing *Huynh* after enactment of a statute specifically dealing with defects in complaints, article 44.181 of the code of criminal procedure.).

When we are talking about establishing the municipal court's jurisdiction, the omission of an element of the offense, does not prevent the instrument from triggering jurisdiction. The Texas Court of Criminal Appeals held, in *Studer*, that "the language in Art. V, § 12, 'charging a person with the commission of an offense,' does not mean . . . that each element of the offense must be alleged in order to have an indictment or information as contemplated by Art. V, § 12." *Studer*, 799 S.W.2d at 272. "To comprise an [information] within the definition provided by the constitution, an instrument must charge: (1) a person; (2) with the commission of an offense." *Cook v. State*, 902 S.W.2d 471, 476 (Tex. Crim. App.1995). "[A] written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the indictment is otherwise defective." *Tollett v. State*, 219 S.W.3d 593, 597 (Tex. App. Texarkana 2007)(citing *Duron v. State*, 956 S.W.2d 547, 550-51 (Tex. Crim. App.1997).

Once the trial court has jurisdiction over the case, such as a speeding offense, then the defendant must be provided sufficient notice of the offense within the charging instrument. And while the State does not need to plead all elements of the crime to trigger jurisdiction, it should plead all elements of the crime to properly comply with statutory notice provisions. *Tollett v. State*, 219 S.W.3d at 599.

Be aware that not all charging instruments are created equally. There are three types of charging instruments in Texas--indictments, informations and

complaints. Indictments and informations are provided for and defined in the Texas Constitution. They are also defined in the Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. arts. 21.01, 21.20. Complaints are not addressed in the Constitution, but are provided for in the Code of Criminal Procedure in a variety of contexts. A complaint is a sworn affidavit charging the commission of an offense and serves as the basis for an arrest warrant. *Id.* at arts. 15.03, 15.04, 15.05. A complaint serves as the sole charging instrument in municipal court. *Id.* at arts. 45.01, 45.17; *Huynh v. State*, 901 S.W.2d 480, 481 (Tex. Crim. App.1995). Certain procedural aspects apply to indictments and informations which do not apply to complaints. However, most of those do not kick in until a defendant appeals a municipal court conviction and is in county court. So, for practical purposes, you can think of all "charging instruments" as having the same general requirements, but be aware there are procedural elements which can distinguish them for prosecutors going from municipal to county court. *Nam Hoai Le v. State*,963 S.W.2d 838, 842 (Tex. App. Corpus Christi 1998)(holding a "complaint" in county court has a different meaning than a "complaint" in justice or municipal court.)

A defendant is entitled to notice of a complaint not later than the day before the date of any proceeding but may waive the right to notice granted. Tex. Code Crim. Proc. art. 45.018 (West 1999). The required elements of a complaint state that, without regards to form, it must substantially comply with the requirements Tex. Code Crim. Proc. art. 45.019 (West 1999). The complaint must be in writing, signed by an affiant, state the name of the accused (or provide a reasonably description), show the accused committed an offense or the affiant has reason to believe and does believe the accused committed the offense, state the date of the offense to the extent the affiant is able, state the territorial limits of the municipality where the offense allegedly occurred, and be sworn. However, if the defendant does not object to any defect or irregularity contained within a complaint before the date of trial, then such defect or irregularity is waived. Tex. Code Crim. Proc. art. 45.019(f)(1999). This is because the defendant is presumed to have been provided sufficient enough notice of the crime and behavior to prepare a defense if they do not object to the complaint within the proscribed time period.

Unlike an indictment and information, which proscribes that all elements of an offense must be plead and everything that must be proven be listed, the elements of the offense are not specifically listed in art. 45.019 for complaints as a requirement. So the validity of a complaint is not necessarily in jeopardy for not listing every element. However, since an appeal to a county court usually means the charging instrument would become or require an information, it is an advisable best practice to draft complaints held to the high standard of an information. Then, the procedural traps which can arise will not come into play.

When a typical state law offense comes before a municipal court judge, such as speeding, the elements of the offense and substantial compliance of a complaint can be more easily examined and researched. However, when a city council adopts a criminal ordinance, either directly or by incorporation, the elements of the offense may not be as easy to ascertain. City councils often do not draft the criminal provisions of their ordinances with as much knowledge as to criminal wording and elements of an offense as does the Legislature. There are various guiding principles to determine if a fact is actually an element of an offense, but far too many scenarios to provide a quick reference list.

Notice of Proceedings

The final element of notice to touch upon is proper notice to appear before the court. "A fundamental element of due process is adequate and reasonable notice of proceedings." *Murphree v. Ziegelmair*, 937 S.W.2d 493, 495 (Tex. App.—Houston [1st Dist.] 1995, no writ) (quoting *Green v. McAdams*, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ)).

Different notice standards apply depending on the type of proceeding. General notice to appear in court in a typical traffic offense is different that notice for a criminal contempt proceeding. Different still are the standards for use under civil administrative enforcement, such as substandard building issues. Each notice element must be applied according to the type of proceeding.

Generally, however, oral notice is inadequate. *Ex parte Vetterick*, 744 S.W.2d 598, 599, 31 Tex. Sup. Ct. J. 218 (Tex. 1988). Constructive notice is also generally considered inadequate as well. *Gonzalez v. State*, 187 S.W.3d 166 (Tex. App.-Waco 2006, no pet.) (declining to adopt a rule that constructive notice of a contempt hearing or of contempt charges can be appropriate). *Ex parte Acevedo*, 2006 Tex. App. LEXIS 9776, 2006 WL 3240829 (Tex. App. -- Corpus Christi Nov. 9, 2006).

In relation to administrative matters, Chapter 54 of the Texas Local Government Code provides municipalities with the general authority to enforce rules, ordinances, and police regulations enacted by their governing bodies. See TEX.LOC.GOV'T CODE ANN. § 54.001(a)(West 2008). In addition, Chapter 214 of the Code provides municipalities with specific authority to pass substantive ordinances regulating the identification, repair, and demolition of substandard buildings. See TEX. LOC. GOV'T CODE ANN. § 2141.001(a)(West 2011). Chapter 214 contains minimal procedural standards for administrative proceedings related to the enforcement of those standards, as well as the procedures for judicial review. See TEX. LOC. GOV'T CODE ANN. §§ 214.001, 214.0012 (West 2008). In short, Chapter 54 provides the framework for notice and hearing for municipal ordinance violations, while Chapter 214, in relevant part, outlines the procedures following an administrative determination that a building is substandard. See TEX. LOC. GOV'T CODE ANN. §§

54.001, 54.035; TEX. LOC. GOV'T CODE ANN. § 214.001 et seq. *Kuykendall v. City of San Antonio,*360 S.W.3d 670, 672-673,2012 Tex. App. LEXIS 818, 5-6,2012 WL 292958(Tex. App. El Paso2012)

In short, do not assume all of the notice provisions you typically use in your court system work equally with all types of notices. As the judge you should hold the parties (State/Plaintiff and Defendant/Interested Party) to the proper burdens of establishing notice from their part as well as making sure the parties have adequate notice from the court under the specific statutes.

Conclusion

The elements of notice all have constitutional foundations which must be observed. Different types of notices require different standards. However, all apply a practical approach to some extent. The court and State do not have to "overly" notify a defendant, but you must provide the defendant sufficient notice of what it is they are expected to do (whether it be not speed or appear in court on a certain day).