A BLUEPRINT FOR EFFECTIVE JUVENILE ADJUDICATION IN MUNICIPAL COURT

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INTRODUCTORY COMMENTS

Legal requirements for cases involving juveniles present certain specific challenges for municipal courts. Consider: When an adult gets a citation, he or she may plead guilty or no contest through the mail or at the clerk's window;[1] a juvenile must enter a plea in open court.[2] If an adult chooses to make a court appearance, he or she appears alone; a juvenile must appear with his or her parent or guardian, and the court must summon the juvenile's parent or guardian to appear with his or her child.[3] If a juvenile fails to appear, or if he or she fails to pay a fine or otherwise comply with a court order, the court cannot issue a warrant for his or her arrest and confinement.[4]

These are by no means the only legal requirements applicable to juveniles in municipal court. But these constraints, and others, coupled with the volume of municipal court cases that involve juveniles have profound implications for the staffing, workload, and efficiency of the municipal court.

Adding to these reflections is the further insight that, for the vast majority of juvenile offenders, their first encounter with the legal system comes in the municipal court. This realization presents both challenges and opportunities. One challenge is to assist juveniles and their parents to understand and conform to the requirements of the justice system. One opportunity is that, if the municipal court can impress upon juveniles the solemnity and seriousness of an encounter with the justice system and direct them to resources that can address burgeoning problems in their lives, the court may be able to lessen the recidivism of these offenders.

This report is presented in three parts. Part I discusses the process by which juvenile offenders are adjudicated in municipal court. Part II addresses juveniles who either fail to respond to a charge or fail to appear for a trial. Part III addresses those juveniles who are ordered to pay a fine, perform community service, or comply with some other court order, but who fail to comply. The procedures applicable to these defendants are not complicated and can be effective in ensuring compliance.

[1] TEX. CODE CRIM. PROC. art. 27.14(b).
[2] TEX. CODE CRIM. PROC. art. 45.0215(a-1)(1).
[3] TEX. CODE CRIM. PROC. art. 45.0215(a-1)(2).
[4] TEX. CODE CRIM. PROC. art. 45.050(b), 45.060(a).

PART I
THE JUVENILE ADJUDICATION PROCESS

A. Introduction

As mentioned in the introduction to this report, municipal court procedures and sanctions in cases involving adults are rather straight forward. Not so the procedures and sanctions involving juveniles. Municipal courts must summon parents to appear with their children in court, must transfer cases to the juvenile court under certain conditions, must impose certain sanctions on juvenile offenders committing certain offenses, must notify juveniles and their parents of certain rights and obligations, and may impose sanctions other than a mere fine on juveniles found guilty of an offense. But one of the more confusing aspects of these procedures and sanctions is determining to whom they apply. The following section addresses that issue.

B. Who is a juvenile?

Who is a juvenile? It depends. The term "juvenile" is a term of art in Texas law; it is not expressly defined in the Texas statutes. Rather, Texas law uses a number of different terms to define offenses committed by young people or to outline special procedures and sanctions applicable to them.

For instance, a "minor" is a person under 21 years old who commits certain offenses defined by the Alcoholic Beverage Code.[5] Tobacco offenses are committed by "individuals" who are younger than 18.[6] Some traffic offenses (generally, those punishable by confinement or imprisonment) are inapplicable to "persons" under age 17.[7]

Failure to Attend School is committed by an "individual" 12 years of age or older and younger than 18 years of age and who is required to attend school but does not.[8] In addition, municipal and justice courts are required to follow certain procedures in adjudicating persons who are at least 10 years old and younger than 17 years old – whom the code calls "children," – and persons who are younger than 18 years of age charged with a Class C misdemeanor under Texas Penal Code § 43.261, Electronic Transmission of Certain Visual Material Depicting Minor.[9] And, these courts may apply special sanctions to "children" defendants who are at least 10 years old and younger than 17 years old.[10]

C. Initiating the Process

Diagram #1 on the following page presents a basic picture of the juvenile adjudication process. The process begins most often when a child is issued a citation, but a

[5] TEX. ALCO. BEV. CODE § 106.01.
[6] TEX. HEALTH & SAFETY CODE § 161.252(a).
[7] TEX. TRANSP. CODE § 729.001(a).
[8] TEX. EDUC. CODE § 25.094(a).
[9] TEX. CODE CRIM. PROC. art. 45.0215, 45.057.
[10] TEX. CODE CRIM. PROC. art. 45.057.

child can also be charged when a probable cause affidavit and a complaint are filed. In either case, the court must issue a summons to the child's parent(s) or guardian(s) to appear in court at a certain date and time with the child.[11] (See Table 1 below.)

Table 1: When Must Parents be Summonsed to Court?		
If the defendant is aged . . .	**and is charged with . . .**	**Authority**
10 to 16[12]	A fine only offense including an alcohol or tobacco offense	Tex. Code Crim. Proc. art. 45.0215(a), (a-1) & 45.057(e)
17 to 18	Electronic Transmission of Certain Visual Material Depicting Minor	Tex. Code Crim. Proc. art. 45.0215(a-1), (b)
12 to 18	Failure to Attend School	Tex. Code Crim. Proc. art. 45.054(c); Tex. Educ. Code § 25.085(b), (e); 25.094(a)

Texas law also requires that children and their parents be notified of their obligation to keep the court informed of changes in the child's address.[13] The court's failure to give this required notice has implications for bringing the child into court on the charge after he or she turns 17. A more thorough discussion of these implications is included in Part II.

For now, it is sufficient to observe it is easy to provide the required notice. First, the notice can be provided on the citation.[14] Second, the notice can be provided in the summons. Finally, the notice can be provided when the child and his or her parent(s) appear in court.

[11] TEX. CODE CRIM. PROC. art. 45.0215, 45.054(c), 45.057(e) (directing that summonses be issued to the parents of children at least 10 years old and younger than 17); TEX. ALCO. BEV. CODE § 106.11(b) (directing that summonses be issued to the parents of "persons under 18 years of age." The court must also summon the parent(s) of a person 17 or older who is charged with Failure to Attend School. *Compare* TEX. EDUC. CODE § 25.085(b), (e); 25.094(a), *with* TEX. CODE CRIM. PROC. art. 45.054(c). Some courts also require parents of 17 year olds charged with a tobacco offense to attend court.

[12] A minor aged 17 through 20 entering a plea of guilty to an offense in the Alcoholic Beverage Code must do so before a judge. TEX. ALCO. BEV. CODE § 106.10. Presumably, then, such a minor could enter a plea of no contest through the mail or at the clerk's window. But is this an efficient practice? Many courts require all juveniles charged with an offense in the Alcoholic Beverage Code to appear in court. It is thought this procedure ensures the court can more uniformly apply the special sanctions and enhanced punishments applicable to these offenses. It must be acknowledged, however, that the court could inform the juvenile by mail of the application of these sanctions without requiring a court appearance. Either approach is acceptable as long as the court follows the law regarding the application of special sanctions and enhanced punishments.

[13] TEX. CODE CRIM. PROC. art. 45.057(h)-(j).

[14] TEX. CODE CRIM. PROC. art. 45.057(j)(2).

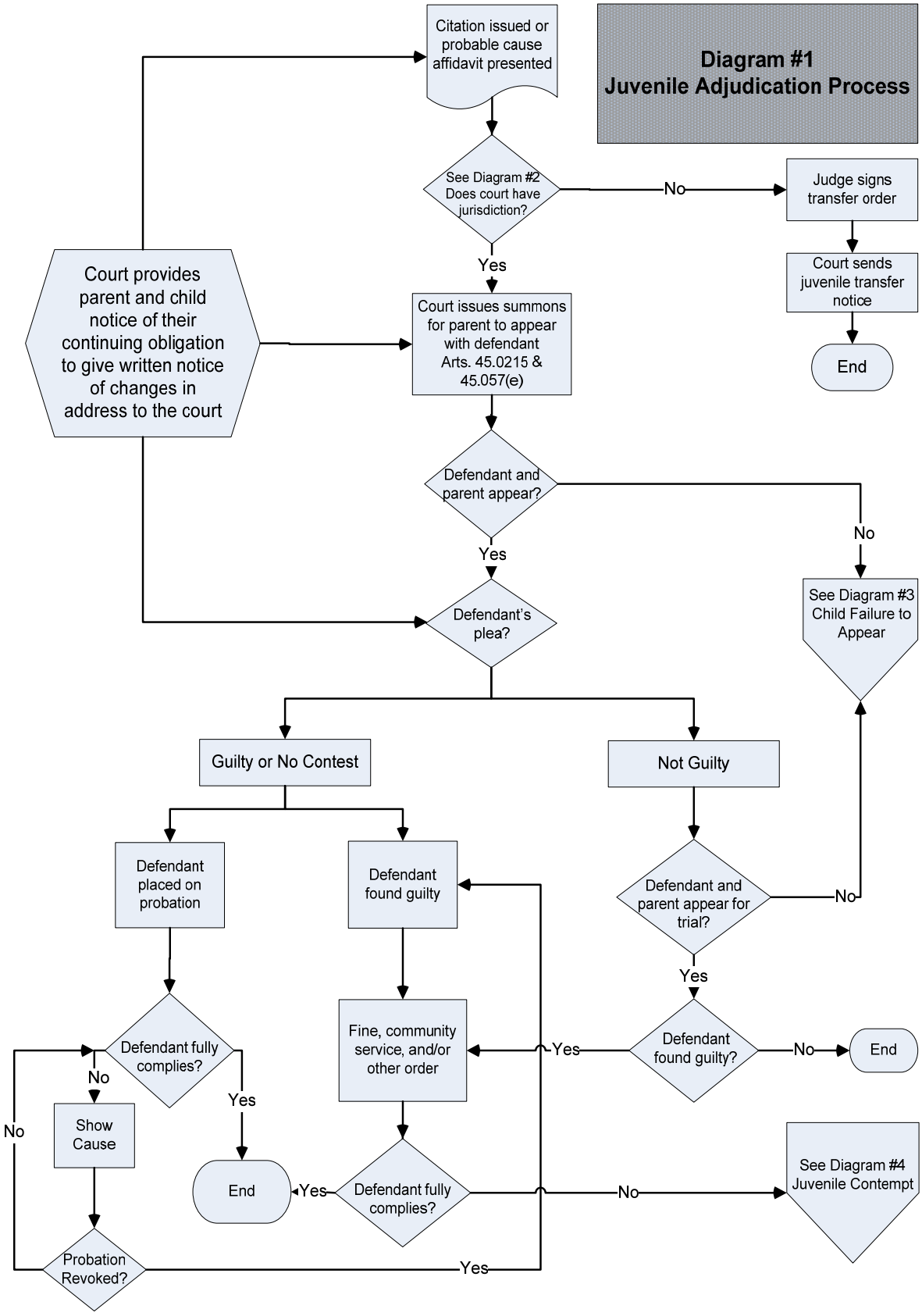
Diagram #1
Juvenile Adjudication Process
Citation issued or probable cause affidavit presented
See Diagram #2 Does court have jurisdiction?
No
Judge signs transfer order
Court sends juvenile transfer notice
End
Yes
Court provides parent and child notice of their continuing obligation to give written notice of changes in address to the court
Court issues summons for parent to appear with defendant Arts. 45.0215 & 45.057(e)
Defendant and parent appear?
No
See Diagram #3 Child Failure to Appear
Yes
Defendant's plea?
Guilty or No Contest
Not Guilty
Defendant placed on probation
Defendant found guilty
Defendant and parent appear for trial?
No
Yes
Defendant fully complies?
Fine, community service, and/or other order
Yes
Defendant found guilty?
No
End
No
Show Cause
Yes
End
Yes
Defendant fully complies?
No
See Diagram #4 Juvenile Contempt
No
Probation Revoked?
Yes

D. Transferring Jurisdiction

Texas Family Code § 51.08(b)(1)(A) requires the court to transfer a complaint alleging a violation of Texas Penal Code § 43.261 (Electronic Transmission of Certain Visual Material Depicting Minor) committed by a person younger than 17 years of age.[15] Transfer is mandatory even if the court has implemented a juvenile case manager program.

Texas Family Code § 51.08(b)(1)(B) requires that, unless the municipal court has implemented a juvenile case manager program, the municipal court must transfer jurisdiction to the juvenile court any non-traffic case when the child has two previous non-traffic convictions in municipal court.[16] Health and Safety Code § 161.257 deprives the juvenile court jurisdiction over tobacco related offenses involving minors.[17] These two statutes, when read together, mean that the municipal court must transfer non-traffic, non-tobacco cases in which the child has two previous non-traffic convictions. These concepts are embodied in Diagram #2.

A few examples could help to make these requirements more concrete.

Scenario #1: A child charged with a traffic offense has two previous non-traffic convictions. The municipal court retains jurisdiction because Family Code § 51.08(b) requires the transfer of non-traffic cases only.

Scenario #2: A child charged with a non-traffic offense has two previous convictions, one for a traffic offense and one for a non-traffic offense. The municipal court retains jurisdiction because Family Code § 51.08(b) only requires transfer of a non-traffic case when the child has two (not one) previous non-traffic convictions.

Scenario #3: A child charged with a tobacco offense has two previous non-traffic convictions. The municipal court retains jurisdiction because Health and Safety Code § 161.257 deprives the child court of jurisdiction over tobacco cases.

Scenario #4: A child charged with a non-traffic, non-tobacco offense has two previous non-traffic convictions. The municipal court must transfer jurisdiction.

A court seeking to avoid the transfer requirement must implement a juvenile case manager program. This is fairly easy to do. The municipal court may simply designate a juvenile case manager with the city council's approval.[18] In McKinney, where I work, the city council simply approved a line item in its budget, but a more formal approach such as an ordinance or resolution would also be appropriate. Recent legislative changes require the city council also to adopt a code of ethics and training standards for the city's juvenile case managers.[19]

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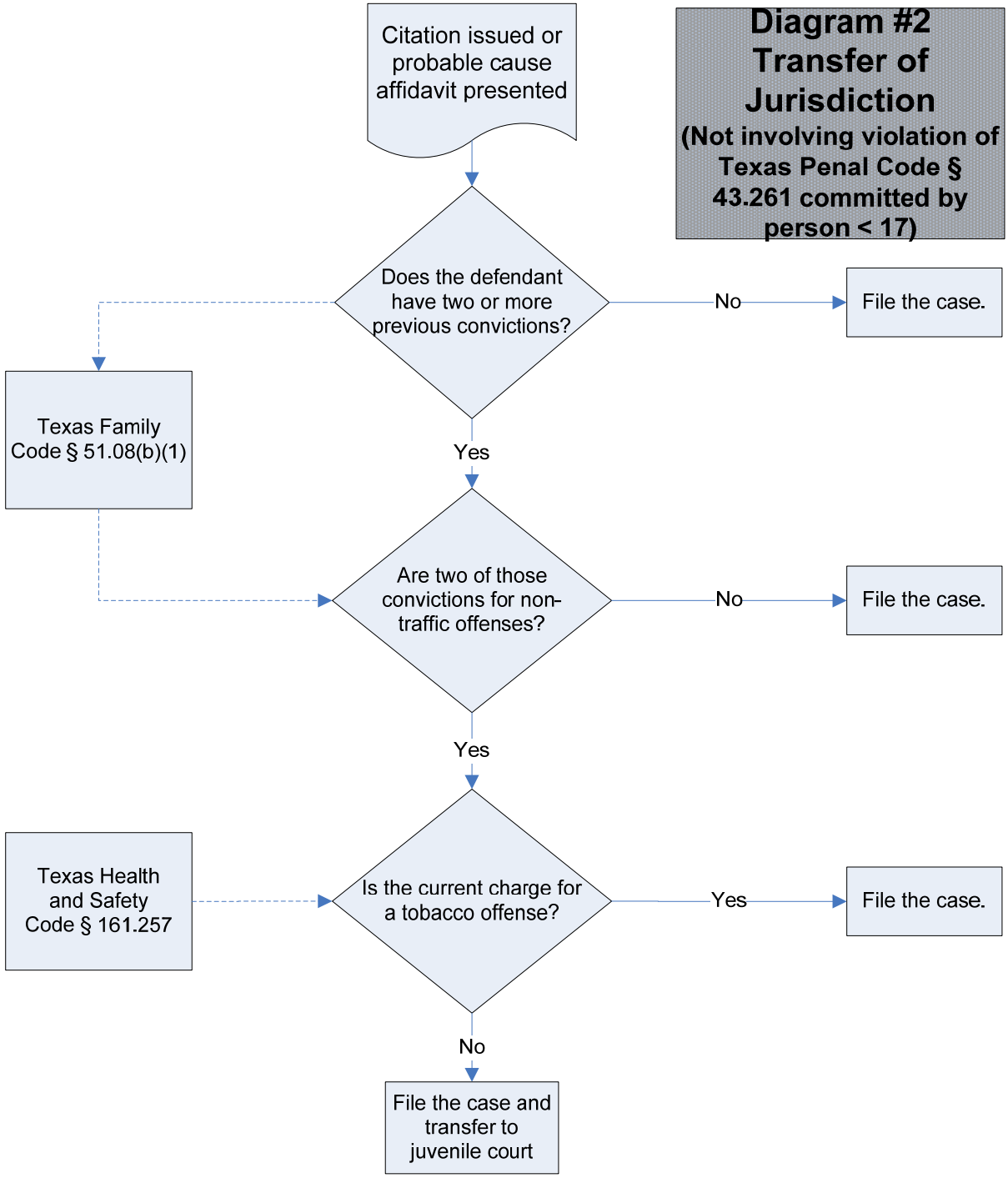
[15] TEX. FAM. CODE § 51.08(b)(1)(A).
[16] TEX. FAM. CODE § 51.08 (b).
[17] TEX. HEALTH & SAFETY CODE § 161.257.
[18] TEX. CODE CRIM. PROC. art. 45.056(a).
[19] TEX. CODE CRIM. PROC. art. 45.056(f).



Cities can fund the juvenile case manager position in a number of different ways. The city council may fund the position from the city's general fund. The city may partner with other governmental entities such as another city, a school district, a juvenile probation department, a county, or another appropriate governmental entity to fund the position.[20] The city may apply for and receive reimbursement from the criminal justice division of the

[20] TEX. CODE CRIM. PROC. art. 45.056(a)(2).

governor's office for the cost of a juvenile case manager if the city can present a comprehensive plan to reduce juvenile crime in the city's jurisdiction that addresses the case manager's role in that effort.[21] And the city may create a juvenile case manager fund by ordinance and collect a court cost of up to $5.00 per case as long as the city employs a juvenile case manager.[22]

Even when a court employs a juvenile case manager, the court still has discretion to transfer a non-traffic, non-tobacco case to the juvenile court if it wishes to do so.[23]

E. The Appearance

If the child and his or her parent fail to appear, the court should undertake the procedures depicted in Diagram #3 and discussed in Part II. If the child and his or her parent do appear, the court should proceed to take the child's plea.

If the child pleads guilty or no contest, the court must impose a fine. The court may permit the child to perform community service or participate in a court-approved tutoring program in lieu of the fine and costs.[24] A tutoring program is only an option if the violation occurred at the defendant's school.[25]

Alternatively, the court can defer a finding and put the child on deferred disposition probation or, in traffic cases, order him or her to take a driving safety course. In that event, the court may also permit the defendant to perform community service or participate in a court-approved tutoring program in lieu of the probation fee and costs.[26] Here again, a tutoring program is only an option if the violation occurred at the defendant's school.[27]

But whether the court imposes a fine or puts the child on probation, there are other orders available to the court, other sanctions that may apply, and other warnings that must be given. The next three subsections outline those provisions.

1. <u>Optional Sanctions for Children & Parents</u>

When the court finds a child guilty of an offense, Texas law permits the court to make other orders clearly designed to rehabilitate the child. (The court may instead place the child on deferred disposition probation and make these or other orders as conditions of the child's probation.[28]) First, the child and the child's parent(s) can be referred for services provided by the Texas Department of Professional and Regulatory Services, such as:[29]

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[21] TEX. CODE CRIM. PROC. art. 45.056(b).
[22] TEX. CODE CRIM. PROC. art. 102.0174(b), (g).
[23] TEX. FAM. CODE § 51.08(d).
[24] TEX. CODE CRIM. PROC. art. 45.049(a); 45.0492(b).
[25] TEX. CODE CRIM. PROC. art. 45.0492(a).
[26] TEX. CODE CRIM. PROC. art. 45.051(a).
[27] See TEX. CODE CRIM. PROC. arts. 45.051(a) and 45.0492(a).
[28] TEX. CODE CRIM. PROC. art. 45.051(b).
[29] TEX. CODE CRIM. PROC. art. 45.057(b)(1); TEX. FAM. CODE § 264.302(f).

- Crisis family intervention
- Family Counseling
- Youth coping skills training
- Mentoring
- Emergency short-term residential care
- Parenting skills training
- Advocacy training

Second, the court can order the child to attend a special program. The statute is unclear concerning who is to provide these special programs. Are they to be designed and implemented by the court, the school system, or third-party providers in the community? More than likely, the answer is that any or all of these options would be acceptable, as long as the court concludes the specific program serves a rehabilitative purpose. The statute does give several examples of what areas these programs could address:[30]

- Rehabilitation
- Self-esteem and leadership
- Job interviewing and work preparation
- Parenting
- Violence avoidance
- Sensitivity training
- Community service
- Advocacy
- Counseling
- Work and job skills training
- Self-improvement
- Manners
- Tutoring
- Parental responsibility
- Restitution
- Mentoring

Further, the court can order the child's parent(s) to pay up to $100.00 for the costs of a special program the court orders the child to attend.[31] And the court can order the child's parent(s) to do any act or refrain from doing any act that the court determines will increase the likelihood the child will comply with the court's orders and that are reasonable and necessary for the welfare of the child.[32] Such an order might include an order for the parent(s) to attend a parenting class or a parental responsibility program, or to attend the child's school classes or functions.[33]

In addition to the above orders, the court may enter the following dispositional orders after a defendant (even one who is 17 years old) is found guilty of Failure to Attend School:[34]

1. Order the defendant to attend school without unexcused absence;
2. Order the defendant, in certain circumstances, to attend a preparatory class for the high school equivalency examination;
3. Order the defendant to take the high school equivalency examination;
4. Order the defendant, and the defendant's parent(s), to attend a class for students at risk of dropping out of school and enforce that order against the parent(s) by contempt;
5. Order the defendant to complete reasonable community service;

[30] TEX. CODE CRIM. PROC. art. 45.057(b)(2).
[31] TEX. CODE CRIM. PROC. art. 45.057(c).
[32] TEX. CODE CRIM. PROC. art. 45.057(b)(3).
[33] *Id.*
[34] TEX. CODE CRIM. PROC. art. 45.054(a).

6. Order the defendant to participate in a tutorial program at the school he or she attends;
7. Order the defendant's driving privileges suspended for up to one (1) year;
8. Order the defendant to attend a special program, e.g.:

- An alcohol/drug abuse program
- A counseling program
- A work/job skills training program
- Training in manners
- Sensitivity training
- A rehabilitation program
- Training in self-esteem and leadership
- Training in parenting
- Training in violence avoidance
- Training in advocacy/mentoring

The duration of the Failure to Attend School dispositional orders may not extend beyond 180 days or the end of the school year whichever is longer.[35] If the defendant complies with the court's dispositional order, the court is required to dismiss the complaint.[36] And, the court must also dismiss the complaint if the defendant presents proof that he or she has obtained a high school diploma or a high school equivalency certificate.[37]

Finally, and perhaps most significantly, the court can enforce the above orders against the child by contempt (See Part III below).[38] And the court can enforce orders issued to the child's parent(s) by contempt.[39]

2. Mandatory Sanctions for Alcohol and Tobacco Offenses

In contrast to the discretionary orders available to the court outlined above, Texas law requires that, when a minor is convicted of or receives deferred disposition for an alcohol or tobacco offense, the court must apply other particular sanctions. These sanctions are in addition to any fine, condition of deferred disposition, or other order the court otherwise imposes.

a. Alcohol-Related Offenses & Minor DUI or BUI

Courts must apply special sanctions to minor defendants convicted of or placed on deferred disposition for an alcohol-related offense or a Minor Driving or Boating Under the Influence of Alcohol (DUI or BUI) offense. For purposes of this discussion, an alcohol-

[35] TEX. CODE CRIM. PROC. art. 45.054(f).
[36] TEX. CODE CRIM. PROC. art. 45.054(i)(1).
[37] TEX. CODE CRIM. PROC. art. 45.054(i)(2). The language of this provision is potentially quite broad. Read expansively, it would seem to require dismissing any complaint no matter how old if the person presents proof that he or she obtained a high school diploma or high school equivalency certificate. And what kind of dismissal would this be? Would it be similar to a dismissal after completion of a driving safety course? Or is it more like a dismissal after a deferred disposition? Would it be a dismissal entitling the defendant to return of court costs and fine monies paid? In my view, the best reading is to limit this provision to the up to 180 day period a dispositional order could be in effect. That is, if the defendant were to present proof he or she obtained a high school diploma or high school equivalency certificate before the dispositional order ended, the case would be dismissed. But the language can be read as requiring a broad application.
[38] TEX. CODE CRIM. PROC. art. 45.050(c), 45.057(l).
[39] TEX. CODE CRIM. PROC. art. 45.054(b), 45.057(l).

related offense includes Public Intoxication committed by a person under 21 years old[40] and those Class C misdemeanors listed in Chapter 106 of the Texas Alcoholic Beverage Code except for Minor DUI or BUI.[41]

For an alcohol-related offense, three different sanctions potentially apply: (1) community service, (2) completion of an alcohol awareness program, and (3) suspension of driving privileges.[42] For a Minor DUI or BUI offense, two sanctions potentially apply: (1) community service, and (2) completion of an alcohol awareness program.[43] (Driving privilege suspensions for Minor DUI or BUI offenses are handled through an administrative proceeding outside the municipal court.)[44]

Generally, community service must be related to education about or prevention of misuse of alcohol, but if community service touching on those subjects is unavailable, the court may order any type of community service.[45] In addition, any time the court orders a person younger than 18 to attend an alcohol awareness program, it may also order the person's parent to attend the program with his or her child.[46]

Applying these special sanctions can be tricky because they are different depending on (1) whether the court finds the minor guilty or places the minor on deferred disposition probation, (2) whether the minor has committed previous alcohol-related or Minor DUI or BUI offenses, and (3) whether the minor was convicted of or placed on deferred disposition for those previous offenses. A further complicating factor is that the statutes sometimes define previous convictions as including previous orders of deferred disposition.[47]

Table 2 summarizes how these sanctions are applied to minors committing a first, second, or third alcohol-related offense:

Table 2: Special Sanctions Applying to Alcohol Related Offenses

	Result	Previous Offense Results	Community Service	Alcohol Awareness	Driving Privileges Suspension
1st Offense	Conviction	N/A	8-12 Hours	Required	30 days
	Deferred	N/A	8-12 Hours	Required	None
2nd Offense	Conviction	1 previous deferred	20-40 Hours	Required	60 days
	Conviction	1 previous conviction	20-40 Hours	Discretionary	60 days

[40] TEX. PEN. CODE § 49.02(e).
[41] These offenses are Purchase of Alcohol by a Minor, Attempted Purchase of Alcohol by a Minor, Minor Consuming Alcohol, Minor in Possession of Alcohol, and Misrepresentation of Age by a Minor. *See* TEX. ALCO. BEV. CODE §§ 106.02, 106.025, 106.04, 106.05 & 106.07.
[42] *See* TEX. ALCO. BEV. CODE §§ 106.071(d), 106.115(a).
[43] *See* TEX. ALCO. BEV. CODE §§ 106.041(d), 106.115(a).
[44] *See* TEX. TRANSP. CODE § 524.001 – 524.051.
[45] TEX. ALCO. BEV. CODE §§ 106.041(e), 106.071(e).
[46] TEX. ALCO. BEV. CODE § 106.115(a).
[47] TEX. ALCO. BEV. CODE §§ 106.040(d), 106.041(h), 106.071(f). But note: The alcohol awareness statute does not treat previous orders of deferred disposition as previous convictions. *See* TEX. ALCO. BEV. CODE § 106.115.

	Deferred	1 previous deferred	20-40 Hours	Required	None
	Deferred	1 previous conviction	20-40 Hours	Required	None
3rd Offense	Conviction	2 previous deferreds	20-40 Hours	Required	180 days
	Conviction	1 previous conviction; 1 previous deferred	20-40 Hours	Discretionary	180 days
	Conviction	2 previous convictions	20-40 Hours	Discretionary	180 days
	Deferred[48]	2 previous deferreds	20-40 Hours	Required	None
	Deferred[48]	1 previous conviction; 1 previous deferred	20-40 Hours	Required	None
	Deferred[48]	2 previous convictions	20-40 Hours	Required	None

Note how attendance at an alcohol awareness program is required any time the court places the minor on deferred disposition probation.[49]

Note also how the alcohol awareness statute does not treat previous orders of deferred disposition as previous convictions. Consequently, a minor convicted of a second or third alcohol-related offense may or may not have to attend an alcohol awareness program depending on whether he or she was convicted of the previous offenses or received deferred disposition. If the minor was convicted of any of the previous alcohol-related offenses, then the court has discretion whether to require the minor to attend the alcohol awareness program.[50] If the minor received deferred disposition for all the previous offenses, then he or she must attend the alcohol awareness program for the present offense as well.[51]

Finally, note how driving privilege suspensions are required only when the minor is convicted of an alcohol-related offense,[52] and not when he or she receives deferred disposition.[53] Also, driving privilege suspensions are longer depending on whether the minor has committed previous offenses, regardless of whether he or she was convicted of those previous offenses or received deferred disposition. This is true because previous orders of deferred disposition are treated as previous convictions for purposes of driving privilege suspensions.[54]

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[48] A person committing a third Minor Consuming Alcohol offense is not eligible for deferred disposition. TEX. ALCO. BEV. CODE § 106.04(d).

[49] TEX. ALCO. BEV. CODE § 106.115(a) ("On the placement of a minor on deferred disposition for an offense . . . the court *shall* require the defendant to attend an alcohol awareness program") (emphasis added).

[50] TEX. ALCO. BEV. CODE § 106.115(a) ("If the defendant has been previously convicted once or more of an offense . . . the court *may* require the defendant to attend the alcohol awareness program") (emphasis added).

[51] TEX. ALCO. BEV. CODE § 106.115(a) ("On conviction of a minor of an offense . . . the court . . . shall require a defendant who has not been previously convicted of an offense . . . to attend the alcohol awareness program").

[52] TEX. ALCO. BEV. CODE § 106.071(d)(2) ("[T]he court shall order the Department of Public Safety to suspend the driver's license or permit of a minor *convicted* of an offense . . . or . . . to deny the issuance of a driver's license or permit . . .") (emphasis added).

[53] This is true because the statute only requires driving privilege suspensions when the minor is convicted; orders of deferred disposition are not convictions. *See* TEX. ALCO. BEV. CODE § 106.071(d)(2); TEX. CODE CRIM. PROC. art. 45.051(a);

[54] TEX. ALCO. BEV. CODE § 106.071(f).

Table 3 summarizes how these special sanctions apply to a first, second, or third Minor DUI or BUI offense (again, note that driving privilege suspensions for Minor DUI or BUI offenses are handled through an administrative proceeding outside the municipal court):[55]

Table 3: Special Sanctions Applying to Minor DUI or BUI Offenses				
	Result	**Previous Offense Results**	**Community Service**	**Alcohol Awareness**
1st Offense	Conviction	N/A	20-40 Hours	Required
	Deferred	N/A	None	Required
2nd Offense	Conviction	1 previous deferred	40-60 Hours	Required
	Conviction	1 previous conviction	40-60 Hours	Discretionary
	Deferred	1 previous deferred	None	Required
	Deferred	1 previous conviction	None	Required
3rd Offense	Conviction	2 previous deferreds	40-60 Hours	Required
	Conviction	1 previous conviction; 1 previous deferred	40-60 Hours	Discretionary
	Conviction	2 previous convictions	40-60 Hours	Discretionary

Note that if a minor receives deferred disposition for a Minor DUI or BUI offense, the minor is not required to perform community service.

Note also how the alcohol awareness requirement operates the same for Minor DUI or BUI offenses as it does for alcohol-related offenses. (In fact, a previous alcohol-related offense has implications for whether the minor must attend an alcohol awareness program after a subsequent Minor DUI or BUI offense, and vice versa). That is, attendance at an alcohol awareness program is required any time the court places the minor on deferred disposition. Also, a previous order of deferred disposition does not count as a previous conviction for purposes of determining whether to send the minor to an alcohol awareness program.

Finally, note that deferred disposition is not an option for a person committing a third Minor DUI or BUI offense.[56] In fact, a third alcohol-related or Minor DUI or BUI offense committed by a person ages 17 to 20 is not a Class C misdemeanor at all.[57] The municipal court does not have jurisdiction of these offenses committed by defendants in these age ranges.[58] (A third alcohol-related or Minor DUI or BUI offense committed by a person under age 17 may be subject to mandatory transfer to the juvenile court. See Part I, D. on pages 5 – 6.)

[55] *See* TEX. TRANSP. CODE § 524.001 – 524.051.
[56] TEX. ALCO. BEV. CODE § 106.041(f).
[57] TEX. ALCO. BEV. CODE § 106.041(b), (c); 106.071(b), (c).
[58] TEX. GOV'T CODE § 29.003(b)(2).

A minor ordered to attend an alcohol awareness program or perform community service must return proof of completion within 90 days (or up to 180 days if the court determines there is good cause).[59] (Technically, the 90-day requirement only applies when the minor is convicted and not when he or she receives deferred disposition, but most courts apply the 90-day requirement in either case.) If the minor provides the required proof on time, then the court may reduce the amount of the fine by up to half.[60] If the minor fails to provide the proof of completion, the court must suspend the minor's driving privileges for up to six months.[61] In addition, the court can order the minor's parent to perform any act or refrain from doing any act if the court determines that performing the act or refraining from the act will increase the likelihood the minor will present the required proof.[62]

b. Tobacco Offenses

When a minor (less than 18 years of age) is convicted of a tobacco offense (e.g., possession of tobacco, purchase of tobacco, consumption of tobacco, acceptance of a cigarette or tobacco product, or misrepresentation of age to acquire tobacco), the court is required to impose a sentence, but then suspend execution of the sentence (while collecting the court costs)[63] and require the minore to attend a tobacco awareness program.[64] The court can also order the minor's parent(s) to attend the tobacco awareness program.[65]

The minor has 90 days in which to return proof of completion of the tobacco awareness program.[66] If the minor does not timely return the proof of completion, then the court must order the minor's driving privileges suspended for up to 180 days.[67]

When the minor returns the proof of completion, the court must discharge him or her and dismiss the complaint without executing the sentence if the minor has no previous tobacco convictions.[68] The minor would not be considered as having a conviction for a tobacco offense unless he or she is later cited for another tobacco offense.[69] If the minor does have a previous tobacco conviction, then the court must execute the sentence, but may reduce the amount of the fine previously assessed by up to half.[70]

The tobacco adjudication procedure is maddeningly uncertain in its application. One question is: What can the court do if the minor chooses not to take the tobacco awareness program, but a suspension of his or her driving privileges is not sufficient to ensure his or her

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[59] TEX. ALCO. BEV. CODE § 106.115(c).
[60] TEX. ALCO. BEV. CODE § 106.115(c).
[61] TEX. ALCO. BEV. CODE § 106.115(d)(1).
[62] TEX. ALCO. BEV. CODE § 106.115(d)(2).
[63] State law treats the suspension of a tobacco sentence as a conviction for purposes of requiring the collection of court costs. TEX. LOC. GOV'T CODE § 133.101; TEX. CODE CRIM. PROC. art. 102.011(j), 102.017(c), 102.0172(b); 102.0174(e).
[64] TEX. HEALTH & SAFETY CODE § 161.253(a).
[65] *Id.*
[66] TEX. HEALTH & SAFETY CODE § 161.253(e).
[67] TEX. HEALTH & SAFETY CODE § 161.254(a).
[68] TEX. HEALTH & SAFETY CODE § 161.253(f)(2).
[69] TEX. HEALTH & SAFETY CODE § 161.253(g).
[70] TEX. HEALTH & SAFETY CODE § 161.253(f)(1).

compliance? Presumably, the court could use the juvenile contempt procedures outlined in Part III below.

But what happens if the minor completes the tobacco awareness requirement late – even a year or more later than the statute allows? Can the sentence be executed and a conviction reported? Or must the court accept the proof of completion, discharge the minor, and dismiss the complaint? The language of the statute arguably supports either approach, but the better view is that the court can execute the sentence and report a conviction when the minor returns late the proof of completion of the tobacco awareness program. To do otherwise would arguably frustrate the statute's purpose.

Finally, can the court place a person charged with a tobacco offense on deferred disposition, or is the punishment system for tobacco offenses intended to be an exclusive remedy? Both approaches involve suspending the imposition of the sentence and requiring the defendant to meet certain conditions; therefore, they overlap to some extent. A complete discussion of this issue is beyond the scope of this report, but the better view is that the legislature intended that both remedies be available to the court.

c. Applying These Sanctions

The special sanctions required for alcohol and tobacco offenses mean that the court must be made aware when a peron who is charged with an alcohol or tobacco offense has committed previous alcohol or tobacco offenses. But who is to inform the court and when? And is the defendant to be informed that the previous offenses may be used to enhance his or her sentence? If so, by whom and when?

Some courts treat previous alcohol or tobacco offenses strictly as punishment issues. That is, if during sentencing, evidence from any source is presented to the court that the defendant has committed previous alcohol or tobacco offenses, then the court will enhance the defendant's sentence for the current charge. On the other hand, others take the position that the prosecutor must allege previous alcohol or tobacco offenses in the complaint and offer proof of those previous offenses at the time of trial or sentencing.

To the extent the latter position requires pleading previous offenses in the complaint, it is at variance with case law. In *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997), the Texas Court of Criminal Appeals held "prior convictions used as enhancements must be pled in some form, but they need not be pled in the indictment – although it is permissible and perhaps preferable to do so."

Brooks applies most readily in the context of felony and higher level misdemeanor cases where the procedures for charging and arraigning a defendant are far more formal. In municipal court, however, a defendant can enter a plea on a citation without the preparation of a formal complaint. In fact, most cases are resolved this way.

At the same time, *Brooks* makes clear that a defendant is entitled to notice that his or her previous convictions will be used to enhance his or her sentence for a current charge.

Therefore, if without prior notice to a defendant, a municipal court accepts evidence of the defendant's previous alcohol or tobacco offenses when taking the defendant's plea on a current alcohol or tobacco offense, then the court is violating the defendant's rights.

So, the prosecutor must decide whether to seek an enhanced punishment and must either prepare a complaint alleging the previous offenses or file a notice of intent to seek the enhanced punishment. (If the prosecutor files a notice of intent to seek an enhanced punishment, then the notice should be served on the defendant. If the prosecutor alleges the previous offenses in the complaint, then the defendant is entitled to have the complaint read at his or her trial.). In courts in which enhanced punishments for alcohol or tobacco offenses are routinely sought, the clerk's office and/or the juvenile case manager works with the prosecutor to notify him or her of charges pending against a defendant who has committed previous alcohol or tobacco offenses.

3. Expunction Rights

For certain offenses, a defendant has the right to obtain an expunction of a conviction from the municipal court. And in certain situations, the court has an affirmative duty to inform the defendant of his or her expunction rights before he or she enters a plea.

A person can obtain an expunction of an alcohol conviction if (1) the person is at least 21 years old and (2) the conviction was the only alcohol conviction he or she had.[71] The court must collect a $30.00 fee.[72] This right to an expunction through the municipal court does not apply to alcohol charges that have been dismissed after completion of deferred disposition probation.[73] The court does not have a duty to inform defendants of this right.

A person can obtain an expunction of a tobacco conviction if the court finds he or she satisfactorily completed a tobacco awareness program.[74] Unlike defendants who are convicted of an alcohol offense, defendants convicted of a tobacco offense can have more than one conviction expunged and do not have to wait until they are a certain age before obtaining an expunction. The court does not have a duty to inform defendants of this right.

The tobacco expunction provision is odd because if the defendant had completed the tobacco awareness program, the charge would have been dismissed and there would not have been a conviction, so no expunction would be possible. Does this mean that the dismissal, which can be treated as a conviction for subsequent tobacco violations, is also treated as a conviction for expunction purposes? Or does it mean that a defendant who did not timely complete a tobacco awareness program to avoid a conviction can complete a tobacco awareness program to obtain an expunction? The statutes do not say clearly, but the strictest reading of the statute favors the latter interpretation.

[71] TEX. ALCO. BEV. CODE § 106.12(a).
[72] TEX. ALCO. BEV. CODE § 106.12(d).
[73] See TEX. CODE CRIM. PROC. Chapter 55.
[74] TEX. HEALTH & SAFETY CODE § 161.255.

A person can obtain an expunction of a Failure to Attend School conviction if (1) the person is at least 18 years old, and (2) the conviction is the only Failure to Attend School conviction he or she has.[75] In addition, the court must expunge a conviction for Failure to Attend School if the person has complied with a dispositional order of the court.[76] (See the discussion of dispositional orders in Failure to Attend School cases at the end of page 8 through the middle of page 9 of this report.) And the court must expunge a conviction for Failure to Attend School if by the person's 21st birthday the person provides proof he or she has obtained a high school diploma or a high school equivalency certificate.[77] The court has an affirmative duty to inform a defendant charged with Failure to Attend School and his or her parent(s) of the defendant's expunction rights and to provide a written copy of the expunction statute.[78]

Finally, a person can obtain an expunction of a conviction for a fine-only misdemeanor if (1) the person is at least 17 years old, (2) the conviction occurred when the person was under 17, and (3) the person had only one conviction for a fine-only misdemeanor while the person was under 17.[79] In addition, records of a person under 17 may be expunged if the person (1) was placed on deferred disposition probation for a fine-only misdemeanor, (2) fully complied with the requirements of that probation, and (3) had the charges dismissed.[80] The judge has an affirmative duty to inform the defendant and his or her parent(s) of these expunction rights and to provide a copy of the expunction statute.[81]

The right to an expunction of a penal offense covers a number of different offenses, but it does not cover alcohol offenses, tobacco offenses, Failure to Attend School offenses, or traffic offenses.[82] It does apply to offenses under the Texas Penal Code (e.g., assault, disorderly conduct, criminal mischief) except for public intoxication. It also applies to city code violations such as possession of fireworks and curfew violations. Finally, it applies to offenses under the Texas Education Code other than Failure to Attend School.

What procedure could a court use to inform a defendant and his or her parent of the defendant's expunction rights? The statutes require that the notice be given at the beginning of the proceedings, in open court, and that a copy of the relevant expunction statute be provided.

A court could adopt any number of procedures for disseminating this information. One idea is to have the judge raise the expunction issue at the beginning of the hearing at

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[75] TEX. CODE CRIM. PROC. art. 45.055(a).
[76] TEX. CODE CRIM. PROC. art. 45.055(e)(1).
[77] TEX. CODE CRIM. PROC. art. 45.055(e)(2).
[78] TEX. CODE CRIM. PROC. art. 45.054(e).
[79] TEX. CODE CRIM. PROC. art. 45.0216(b).
[80] TEX. CODE CRIM. PROC. art. 45.0216(h). This provision is a bit uncertain in its application. Must a child obtain an expunction before he or she turns 17? If a child has had more than one charge dismissed after completing deferred disposition probation, can he or she have any of those cases expunged? The language of the statute arguably supports either approach. But the better view is that the child must obtain the expunction before he or she turns 17, and may have more than one case expunged.
[81] TEX. CODE CRIM. PROC. art. 45.0216(e).
[82] TEX. CODE CRIM. PROC. art. 45.0216(g); *compare* TEX. CODE CRIM. PROC. art. 45.0216(b) *with* TEX. PEN. CODE § 8.07.

which the defendant enters his or her plea. Another possibility is to have the judge raise the expunction issue only with those defendants who could eventually qualify for an expunction (i.e., those who do not have more than one conviction for the expungeable offense). Under the latter scenario, the clerk would be responsible for flagging for the judge those cases in which the defendant could eventually qualify for an expunction.

Each of these approaches tends to be over inclusive. Under either approach, a defendant would be informed of the expunction procedures even when he or she may never be convicted of the offense (e.g., by completing deferred disposition probation for an offense other than a fine-only offense or by being found not guilty at a trial). But this over inclusiveness is a product of the statute, which requires the court inform the defendant and his or her parent(s) of the expunction procedure at the beginning of the proceedings.

Even so, the first option is still broader in scope than the second. Under the first procedure, defendants who could not qualify for an expunction (i.e., those who already have more than one conviction for the offense) would be informed of the expunction procedure. But, under the second option, the judge would only inform the defendant if he or she could eventually qualify for an expunction. On the other hand, the first option has the advantage of being easier to administer than the second.

4. Confidentiality of Records

Records, including electronic records, pertaining to children who have been convicted of or satisfied a judgment for a nontraffic, fine-only misdemeanor are confidential and may not be disclosed to the public.[83]

There are two exceptions. First, records are not confidential when they are provided by a law enforcement agency or a prosecuting attorney to a school pursuant to the requirements of Texas Code of Criminal Procedure article 15.27.[84]

Second, records may be open to inspection by judges and court staff, a criminal justice agency for a criminal justice purpose, the Texas Department of Public Safety, an attorney to a party to the proceeding, the child defendant, and the defendant's parent(s), guardian(s), or managing conservator(s).[85]

[83] TEX. CODE CRIM. PROC. art. 45.0217(a).
[84] *Id.* See also TEX. CODE CRIM. PROC. art. 15.27
[85] TEX. CODE CRIM. PROC. art. 45.0217(b).

PART II
FAILURE TO APPEAR

A. Introduction

When an adult is given a citation, the burden is on him or her to appear at or within the time set by the court and either dispose of the citation or make an appearance before a judge.[86] But, as mentioned in Part I, children are not obligated to appear until the court sends their parent(s) a summons notifying them of the date and time at which they must appear in court.[87]

What happens if a child does not appear for court to enter a plea or does not appear for a trial after pleading not guilty? When an adult fails to appear under such circumstances, a warrant can be issued for his or her arrest, and a new charge of Failure to Appear or Violation of Promise to Appear can be filed.[88]

But a child cannot be arrested on a warrant.[89] And, Failure to Appear and Violation of Promise to Appear may not be appropriate given the requirements that the child appear with his or her parent(s) and that the court summons the parent(s) to appear with the child. Consequently, many courts feel powerless to bring children within the scope of its authority.

Can the court wait until the child turns 17 and then issue a warrant? Many courts followed (and perhaps still follow) this practice, but the legislature has made clear that a warrant cannot be issued for the arrest of a person for an offense that occurred while the person was under 17.[90]

To hold children accountable when they fail to appear in court, the legislature has established two sets of remedies. The first set of remedies can be used while the defendant is still a child. This is the subject of subsection C.1. below. The second set of remedies can be used when the child turns 17. This is the subject of subsection C.2. below. The court can only use the second set of remedies if it informed the child and his or her parent(s) of their obligation to keep the court informed of changes in the child's address as discussed in Part I.

Texas law also authorizes courts to hold parents accountable when they fail to appear with their children. This is done through the filing of charges against the parent. And,

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[86] TEX. CODE CRIM. PROC. art. 14.06(b); TEX. TRANSP. CODE § 543.006(a). Courts handle this requirement in one of two ways. Some courts print an appearance date and time on the citation. Other courts instruct the defendant to appear within a certain number of days (no less than 10).

[87] In theory, the court could use for juveniles the same procedure for requiring appearances as it does for adults. That is, the court could print appearance dates and times on citations and send summonses to parents ordering them to appear at those dates and times. Alternatively, the court could instruct juveniles to appear within a certain number of days to schedule a court appearance. The court could then summon parents to appear at the juvenile's court appearance. Most courts use a third approach in which summonses are sent to parents ordering them to bring their children to court for a setting devoted to juveniles and their parents.

[88] TEX. TRANSP. CODE § 543.009(b); TEX. PEN. CODE § 38.10(a).

[89] TEX. CODE CRIM. PROC. art. 45.060(a).

[90] *Id.*

because the court can issue warrants for the arrest of adults, parents are subject to arrest on those charges. This is the subject of subsection B, which follows.

Diagram #3 shows how these three remedies interrelate.

B. Parents' Failure to Appear

As mentioned in Part I, the court must issue a summons to the parents of children charged with an offense ordering them to appear with their children. Parents who receive a summons and fail to appear in response may be charged with a Class C misdemeanor: Parent Failure to Appear (PFTA).[91] The court can also issue a warrant for the arrest of parents on that charge.

Courts encounter two difficulties in holding parents accountable under these provisions. The first is learning the name of the parent(s) or guardian(s). Many courts address summonses to "The Parent(s) or Legal Guardian(s) of . . . ." But if a parent is to be charged with Parent Failure to Appear, a specific name must be alleged in the complaint.

One response to this difficulty is to have police officers include a parent's name on the citation or in an incident report. But, there would be no guarantee that information would or could be provided in every instance. The information also may not be reliable because it would be obtained from the offender.

The second difficulty courts have in holding parents accountable is demonstrating that the parent received the summons. Many courts send summonses through regular first-class mail, so it is impossible to know whether the letters are actually delivered or, even if delivered, whether they ended up in the parents' hands.

One possible response is to send the summons by certified mail. But sending certified letters on such a large scale may be cost prohibitive. And certified mail is no guarantee that the parent will receive the letter. If the post office returns the letter unclaimed, then this is affirmative proof that the parent(s) did not receive it. If someone other than a parent signs for the letter, then it may be difficult to prove the parent received the letter.

Another possible response is to have a city marshal and/or the juvenile case manager contact by telephone the parents of children who fail to appear. A summons could then be resent or even personally served. If the child and his or her parent(s) again fail to appear, the case could be forwarded to the prosecutor and charges filed.

[91] TEX. CODE CRIM. PROC. art. 45.054(d), 45.057(g).

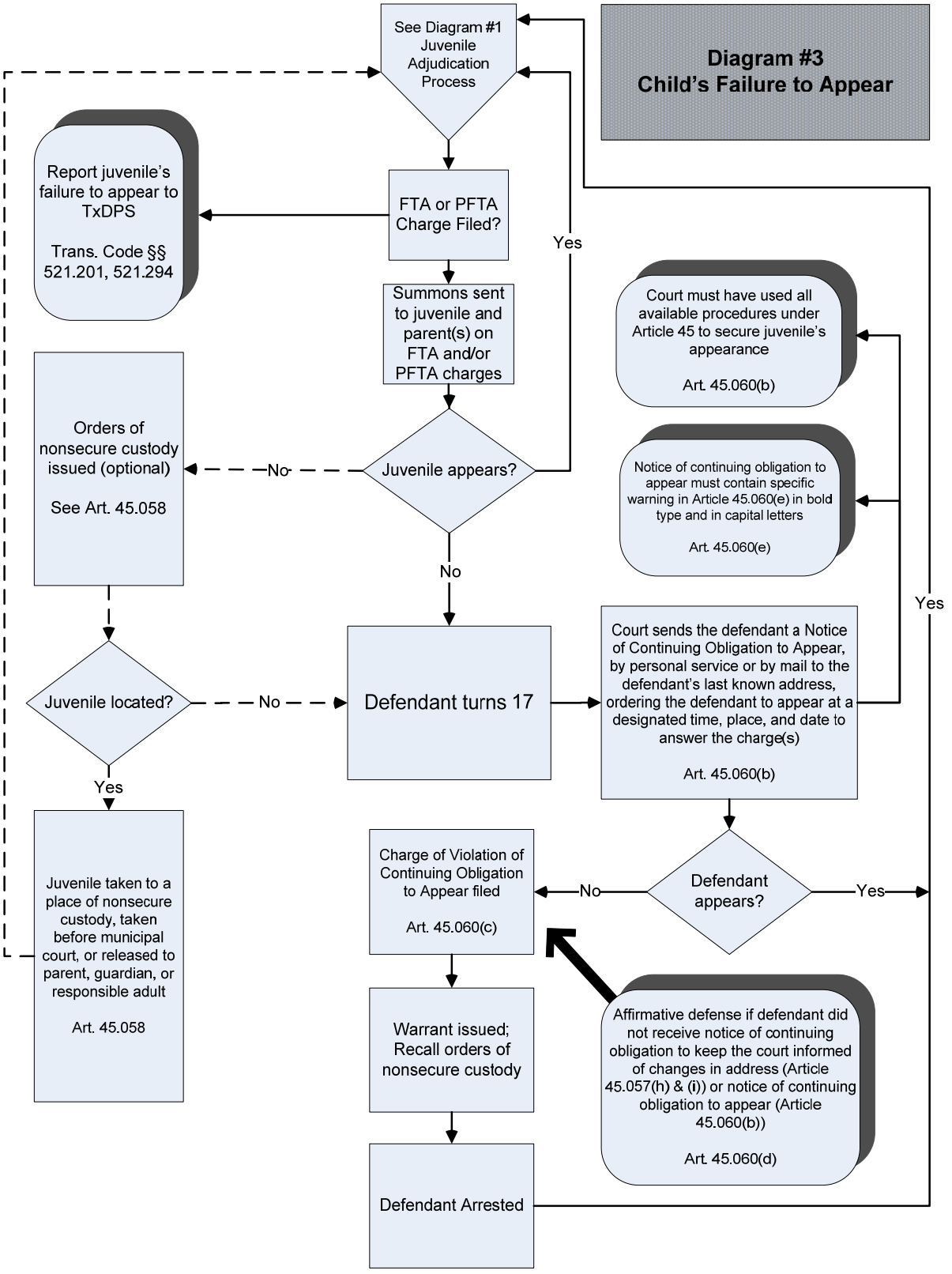
Diagram #3
Child's Failure to Appear
See Diagram #1 Juvenile Adjudication Process
Report juvenile's failure to appear to TxDPS
Trans. Code §§ 521.201, 521.294
FTA or PFTA Charge Filed?
Yes
Summons sent to juvenile and parent(s) on FTA and/or PFTA charges
Court must have used all available procedures under Article 45 to secure juvenile's appearance
Art. 45.060(b)
Orders of nonsecure custody issued (optional)
See Art. 45.058
No
Juvenile appears?
Notice of continuing obligation to appear must contain specific warning in Article 45.060(e) in bold type and in capital letters
Art. 45.060(e)
No
Yes
Juvenile located?
No
Defendant turns 17
Court sends the defendant a Notice of Continuing Obligation to Appear, by personal service or by mail to the defendant's last known address, ordering the defendant to appear at a designated time, place, and date to answer the charge(s)
Art. 45.060(b)
Yes
Juvenile taken to a place of nonsecure custody, taken before municipal court, or released to parent, guardian, or responsible adult
Art. 45.058
Charge of Violation of Continuing Obligation to Appear filed
Art. 45.060(c)
No
Defendant appears?
Yes
Warrant issued; Recall orders of nonsecure custody
Affirmative defense if defendant did not receive notice of continuing obligation to keep the court informed of changes in address (Article 45.057(h) & (i)) or notice of continuing obligation to appear (Article 45.060(b))
Art. 45.060(d)
Defendant Arrested

C. Child's Failure to Appear

1. Remedies while the Child is Under 17

a. Charge the Child with Failure to Appear or Violation of Promise to Appear?

Normally, if a person signs a citation he or she is agreeing to appear on or by a certain date to answer the charge. The failure to do so is either one of two offenses: Violation of Promise to Appear or Failure to Appear.[92] Violation of Promise to Appear applies to "Rules of the Road" offenses in Subtitle C of the Transportation Code (e.g.. moving violations, vehicle inspections, vehicle equipment, etc.); Failure to Appear applies to most other offenses.

A person commits the offense of Violation of Promise to Appear if after signing a written promise to appear for a Subtitle C offense, he or she willfully violates the promise to appear.[93] A person commits the offense of Failure to Appear if he or she intentionally or knowingly fails to appear for court having been released with or without bail on condition that he or she subsequently appear.[94] Many courts routinely file these charges when a defendant fails to appear for court. A summons is generally sent to the defendant ordering him or her to appear at a certain date and time to answer the charge.

But many courts instruct children on the citation that the Court will send their parents a summons notifying them of a court date. This procedure would seem to negate the elements of both Failure to Appear and Violation of Promise to Appear because the court is telling the child not to appear until he or she receives notice from the court.

In addition, not all defendants receive a citation; some are charged through the filing of a probable cause affidavit and a complaint. Those defendants cannot be charged with Violation of Promise to Appear because they never signed a written promise to appear and cannot be charged with Failure to Appear because they were never in custody.

But for those that are issued a citation, what if the court altered the language on the citation to make clear that a child has a responsibility to respond to the citation and schedule a court appearance? The court could then summon the parent(s) to attend that court appearance. In theory, the sending of a summons to a parent is separate and apart from the notification to the child of the requirement to appear embodied in a citation. An argument could then be made that if the child did not respond to the citation, he or she would be committing Violation of Promise to Appear or Failure to Appear.

I know of no court that takes this approach. In fact, the idea of filing additional charges against any defendant – even an adult – who fails to appear for court can be controversial. Critics contend the practice creates additional work for court staff, increases

[92] TEX. TRANSP. CODE § 543.009(b); TEX. PEN. CODE § 38.10(a).
[93] TEX. TRANSP. CODE § 543.009(b).
[94] TEX. PEN. CODE § 38.10(a).

the court's uncollectible revenue, and actually makes the person less likely to appear because, when they do, they will face the likelihood of having to pay more fines than they would have if they had appeared in the first place.

Proponents contend that allowing people to avoid their obligation to attend court – potentially without any penalty – diminishes respect for the court's authority. They also observe that Failure to Appear and Violation of Promise to Appear can be proved with documentary rather than eyewitness evidence, unlike other charges that grow stale with the passage of time. Further, the summons sent to the defendant on the Failure to Appear or Violation of Promise to Appear charge serves as another reminder of the outstanding charge. These same justifications are in play when a child does not appear for court and filing an additional charge against the child is contemplated.

The point of this discussion is to caution courts that if Failure to Appear or Violation of Promise to Appear are being filed against children, the court's own procedures and the language on the citation or other court documents may undermine the viability of that charge. As a prosecutor, I never file Violation of Promise to Appear charges against children, and I only file Failure to Appear charges when a child schedules a trial and then fails to appear for that trial. Under those circumstances, the child has been released from the court's custody pending trial and has failed to appear in compliance with the terms of that release.

b. Report the Child to the Department of Public Safety

When a child fails to appear for court to enter a plea or for a trial in a traffic case, the court must report the child's failure to appear to the Texas Department of Public Safety (TxDPS).[95] The court may also report a child who fails to appear in a non-traffic case to TxDPS.[96] TxDPS will suspend the child's driving privileges until such time as the child appears and disposes of the citation.[97] Essentially, the child cannot drive or obtain a license to drive until the case reaches final disposition.

Potentially, this is a powerful weapon the court can use to bring children into court. But it is not a magic bullet.

First, TxDPS itself is a bureaucracy. Suspension requests must be made on a particular form, and it may take some time for TxDPS to process the request. Indeed, there have been anecdotal complaints from some courts that some driving privilege suspensions are never processed. These concerns mean the court must diligently follow up on driving privilege suspension requests to ensure they are actually done and that they stay done.

Second, some children are apparently immune to this remedy, and it is not clear why. Perhaps these children never attempt to get a driver's license. Perhaps when they do, TxDPS fails to recognize that they are the person whose driving privileges were earlier suspended.

[95] *See* TEX. TRANSP. CODE § 729.003(c); *see also* TEX. TRANSP. CODE §§ 521.201(7); 521.294(6).
[96] *See* TEX. TRANSP. CODE §§ 521.201(7); 521.294(6).
[97] *See id.*

Whatever the reason, the court cannot rely solely on driving privilege suspensions to hold children accountable for appearing in court.

c. Issue Orders of Nonsecure Custody

A municipal court can order a law enforcement officer to take into custody a child who has failed to appear on a charge.[98] In such situations, the child must be detained in a place of nonsecure custody until he or she can be released to his or her parent(s) and/or brought before the municipal court.[99]

Basically, a place of nonsecure custody has the following characteristics: (1) It is unlocked; (2) it is a multipurpose area not used for residential purposes; and (3) it has been designated by the head of the law enforcement agency having custody of the child as a place of nonsecure custody.[100] Children taken to a place of nonsecure custody can only be held so long as is necessary to identify, investigate, process, and release them to their parent(s) or arrange for transportation to a municipal court.[101] In no event may a child be held more than six hours.[102] While in a place of nonsecure custody, children may not be secured physically to a stationary object such as a desk, chair, or cuffing rail.[103] They also must be under the continuous visual supervision of a law enforcement officer or facility staff person.[104]

Orders of nonsecure custody can be powerful tools for several reasons. First, whereas adults can be difficult to locate if they change their address, courts can generally find children through the school system. Though it can be difficult for marshals to serve warrants on adults who are not home during the day, marshals can usually predict where children will be at certain times during the day.

Second, just as a warrant can effectively motivate an adult to dispose of a citation, detaining a child on an order of nonsecure custody communicates to the child and his or her parent(s) that the court is serious about resolving the charge. Third, because children tend to be a discrete community, detaining a child on an order of nonsecure custody sends a message to other children that they too must resolve charges against them or face being detained by a law enforcement officer.

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[98] Some find authority for orders of nonsecure custody in Articles 45.058 and 45.059 of the Texas Code of Criminal Procedure. But those statutes do not authorize courts to issue orders of nonsecure custody. Rather, they describe the procedures law enforcement officers must follow when taking a juvenile into custody. Presumably, this would include situations when a law enforcement officer needs to take a juvenile into custody for a reason other than pursuant to a court's order. Rather, courts have inherent power to order law enforcement officers to take into custody anyone who fails to appear as ordered or who violates one of the court's orders. Articles 45.058 and 45.059 simply encompass what law enforcement officers can and cannot do after taking a juvenile into custody in response to such an order.

[99] TEX. CODE CRIM. PROC. art. 45.058(a), (b).

[100] TEX. CODE CRIM. PROC. art. 45.058(a), (c), (d)(3).

[101] TEX. CODE CRIM. PROC. art. 45.058(d)(2).

[102] TEX. CODE CRIM. PROC. art. 45.058(e).

[103] TEX. CODE CRIM. PROC. art. 45.058(d)(1).

[104] TEX. CODE CRIM. PROC. art. 45.058(d)(4).

2. Remedies when the Child turns 17

When a child who has failed to appear turns 17 the court may make one final effort to bring the defendant into court. First, the court may issue, by mail or by personal service to the defendant's last known address, a Notice of Continuing Obligation to Appear reminding the defendant of the pending charge and ordering him or her to appear at a certain date, time, and place to answer the charge.[105]

But the court cannot issue this notice if it did not inform the defendant and his or her parent(s) of their continuing obligation to keep the court informed of changes in the child's address.[106] It is important to note that if it appears the child and his or her parent(s) have not kept the court informed of changes in the child's address, charges can be filed against the child, the parent(s), or both for Failure to Keep the Court Informed of Changes in Child's Address, which is a Class C misdemeanor.[107] Parents can be arrested on this charge.[108]

Second, if the defendant fails to appear at the date, time, and place specified in the court's order, then the defendant may be charged with a new offense: Violation of Continuing Obligation to Appear.[109] Third, the court should then rescind any outstanding orders of nonsecure custody against the child and may issue a warrant for the defendant's arrest. A warrant is legal because the most recent violation occurred when the defendant was an adult. Still, at trial, the defendant would have an affirmative defense to the charge if he or

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[105] TEX. CODE CRIM. PROC. art. 45.060(b).

[106] *Id.* Some take the position that, before a court may issue a Notice of Continuing Obligation to Appear, it must also have issued an Order of Nonsecure Custody while the defendant was a juvenile. This view is premised on the theory that Articles 45.058 and 45.059 authorize issuance of orders of nonsecure custody and that therefore orders of nonsecure custody are an "available procedure" under Article 45. And the statute requires the court to use "*all available procedures under [Chapter 45]* to secure the individual's appearance" before issuing a Notice of Continuing Obligation to Appear. *See* TEX. CODE CRIM. PROC. art. 45.060(b) (emphasis added).

But while courts should issue Orders of Nonsecure Custody for juveniles, it is not Articles 45.058 and 45.059 that authorize these orders. *See* note 92 supra. Rather, a court has inherent power to order taken into custody any person who fails to appear before it as required. Articles 45.058 and 45.059 simply outline the procedures law enforcement must use anytime a juvenile is taken into custody, including when a juvenile is taken into custody pursuant to an Order of Nonsecure Custody. Therefore, orders of nonsecure custody are not a precursor to issuing Notices of Continuing Obligation to Appear.

It is also worth noting that many law enforcement entities have no means to track whether an order of nonsecure custody has been issued. In the North Texas area, when a warrant is issued for the arrest of an adult, the warrant is entered into a regional database accessible in most jurisdictions in North Texas. No such database exists for orders of nonsecure custody. Consequently, the order may be issued but very few people may know about it. It makes little sense to consider as "required" an order whose reach is so short.

In McKinney, where I work, the court issues orders of nonsecure custody to apprehend a juvenile when the juvenile case manager or the court becomes aware of where the juvenile is. Then a marshal, a school resource officer, or a peace officer takes the juvenile into custody. But if the court through its contacts in the school system, at juvenile probation, and in other areas cannot determine where the juvenile is, issuing an order of nonsecure custody would be a largely fruitless act because very few people will know the order has been issued.

[107] TEX. CODE CRIM. PROC. art. 45.057(h).

[108] *Id.* Issuing a warrant for the arrest of a juvenile on this charge depends on whether the failure occurred before or after the defendant turned 17 years of age.

[109] *See* TEX. CODE CRIM. PROC. art. 45.060(c).

she did not receive notice of the obligation to keep the court informed of changes in his or her address discussed at the beginnings of Part I and Part II.[110]

3. What Happens if the Court Does Nothing?

At this point, it is useful to consider what happens if the court does nothing, i.e., does not refer children to DPS for suspension of driving privileges, does not issue orders of nonsecure custody, does not file Failure to Appear charges and send a summons to the child, and/or does not send a Notice of Continuing Obligation to Appear when the child reaches 17. In that instance, the court will have to wait until the child is charged with another offense, either as a child or later as an adult, and appears on that charge.

Of course, if the child is later charged with another offense as a child, he or she has no incentive to appear (in fact, he or she has every incentive not to appear) and has learned that the court will not pursue the matter if he or she does not appear. If the child is charged with another offense as an adult, the court can issue a warrant if he or she does not appear on that charge. But the charges he or she incurred as a child are likely so stale from the passage of time that he or she could not be convicted at a trial. Most often, however, the child will never be prosecuted on the charges on which he or she failed to appear, most likely because he or she has moved and will not be cited in the court's jurisdiction.

[110] TEX. CODE CRIM. PROC. art. 45.060(d).

PART III
JUVENILE CONTEMPT PROCEDURES

What happens when a child fails to pay a fine or otherwise comply with a court's order after being convicted of an offense? When an adult fails to pay a fine, the court can issue a capias pro fine, an order to bring the defendant before the court or confine the defendant until he or she can be brought before the court.[111]

But a capias pro fine cannot be issued for a child until he or she turns 17, and then only under certain conditions.[112] If a child fails to pay a fine or otherwise comply with a court's order, the court must hold a show cause hearing. The court must send a notice instructing the defendant (and the defendant's parent(s) if the defendant is under 17) to appear at a certain date, time, and place for the hearing.[113] (If the defendant is before the court on another matter, the court can hold the hearing at that time, but must give the defendant an opportunity to gather any evidence needed before making a finding.)

Even if the defendant does not appear for the hearing, the court can make a determination. If the defendant is under 17, the court can (1) elect not to hold the defendant in contempt, (2) find sufficient basis for holding the defendant in and refer the case to the juvenile court, or (3) retain jurisdiction of the case, hold the defendant in contempt, and fine the defendant up to $500.00, order the defendant's driving privileges suspended, or both.[114] If the defendant is 17 or older, the court may (1) elect not to hold the defendant in contempt, or (2) hold the defendant in contempt and (a) fine the defendant up to $500.00, (b) order the defendant's driving privileges suspended, or (c) order both the fine and the driving privileges suspension.[115] Regardless of whether the court holds the defendant in contempt, the court may issue other orders designed to ensure the defendant pays the fine or complies with the court's previous orders.

If the defendant is under 17, the court may issue orders of nonsecure custody for the defendant.[116] When the defendant turns 17 or older, the court may issue a capias pro fine if the court (1) has previously found the defendant in contempt, and (2) finds the capias is justified after considering (a) the defendant's sophistication and maturity, (b) the defendant's criminal record and history, and (c) the reasonable likelihood of bringing about the judgment through procedures and services currently available to the court.[117] But the court cannot issue a capias pro fine while the defendant is still a child and cannot issue a capias pro fine unless it has previously found the defendant in contempt.[118]

Diagram #4 depicts the contempt procedure.

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[111] TEX. CODE CRIM. PROC. art. 45.045(a).
[112] TEX. CODE CRIM. PROC. art. 45.045(b).
[113] *See* TEX. CODE CRIM. PROC. art. 45.050(c).
[114] TEX. CODE CRIM. PROC. art. 45.050(c)(1), (2); TEX. TRANSP. CODE § 521.3451.
[115] TEX. CODE CRIM. PROC. art. 45.050(d), (e), (g); TEX. TRANSP. CODE § 521.3451.
[116] *See* TEX. CODE CRIM. PROC. art. 45.045(c).
[117] TEX. CODE CRIM. PROC. art. 45.045(b).
[118] TEX. CODE CRIM. PROC. art. 45.045(b).

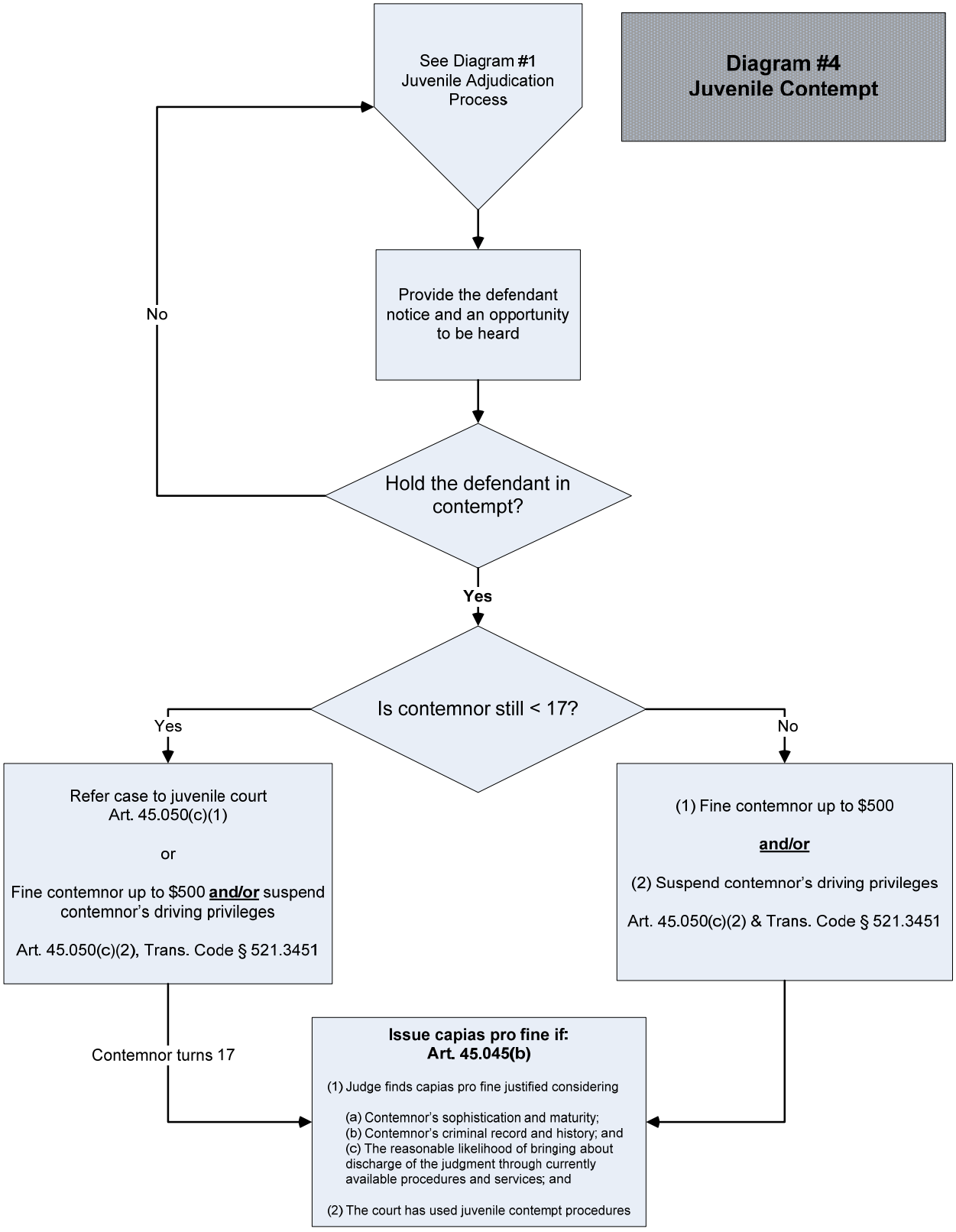
Diagram #4
Juvenile Contempt
See Diagram #1
Juvenile Adjudication
Process
Provide the defendant notice and an opportunity to be heard
Hold the defendant in contempt?
No
Yes
Is contemnor still < 17?
Yes
No
Refer case to juvenile court
Art. 45.050(c)(1)
or
Fine contemnor up to $500 and/or suspend contemnor's driving privileges
Art. 45.050(c)(2), Trans. Code § 521.3451
(1) Fine contemnor up to $500
and/or
(2) Suspend contemnor's driving privileges
Art. 45.050(c)(2) & Trans. Code § 521.3451
Contemnor turns 17
Issue capias pro fine if:
Art. 45.045(b)
(1) Judge finds capias pro fine justified considering
(a) Contemnor's sophistication and maturity;
(b) Contemnor's criminal record and history; and
(c) The reasonable likelihood of bringing about discharge of the judgment through currently available procedures and services; and
(2) The court has used juvenile contempt procedures