# TEXAS MUNICIPAL COURTS EDUCATION CENTER

# COURSE MATERIAL
# Odessa
# Judges Program
# June 27-28, 2007

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1609 Shoal Creek Boulevard, Suite 302 Austin, TX 78701
Telephone (512) 320-8274
1 (800) 252-3718
Fax (512) 435-6118
Email: tmcec@tmcec.com
Web Page: www.tmcec.com

**Funded by a grant from the Texas Court of Criminal Appeals**

## A MESSAGE FROM TMCA

On behalf of the Texas Municipal Courts Association, I would like to welcome you to the ***TMCEC Judges & Clerks 12-hour Regional Programs***. Your participation and input is an indication of your commitment to better education and personal performance.

The Texas Municipal Courts Association is an organization created for the purpose of providing support for municipal court personnel and to improve the fair and impartial administration of justice in the municipal courts of Texas. The Association has been supporting municipal court personnel since 1974. In 1983, TMCA was selected by the Texas Supreme Court to receive and administer a grant to provide continuing legal education to municipal court personnel. In that year, TMCA created the Texas Municipal Court Training Center as an independent educational entity. In 1994, TMCTC changed its name to the Texas Municipal Courts Education Center. TMCA sponsors and directs TMCEC programs through policies set by the Board of Directors and the Education Committee, which provides oversight and direction to ensure the educational seminars and clerk certification programs meet state requirements. It is important to understand the distinctive entities because TMCEC, a state grant recipient, cannot maintain legislative activities while TMCA can maintain legislative activities. Although grant funds are used to provide for the education programs and the operating expenses of TMCEC, no grant funds are available for TMCA operating expenses. TMCA is wholly dependant upon its membership dues and fund raising activities for financial support.

If you have not already, we invite you to join TMCA. Your dues and participation are vital to the purpose of supporting municipal court personnel and improving the administration of justice in the municipal courts. What you get in return is immensely beneficial: education, fellowship, advice and, hopefully, some new friends along the way. I encourage you to visit TMCA's website at **www.txmca.com** where you can receive information on how to contact your regional representative, download membership lists, and find other resources.

Thank you for coming!

*Robin A. Ramsay*
President, TMCA

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Thank you for coming!

*Robin A. Ramsay*
President, TMCA

# ODESSA

**MCM Elegante Hotel**
**5200 E. University, Odessa., TX 79762**
**432.368.5885**

**12-Hour Regional Judges Program**
**June 26-28, 2007**

## Tuesday, June 26, 2007

| | |
|---|---|
| 2:00 – 5:00 p.m. | **OPTIONAL PRE-CONFERENCE SESSION**<br>Meichihko Proctor, Program Attorney & Deputy Counsel, TMCEC<br>2:00 – 3:00 **Court Security**<br>3:00 – 4:00 **Court Technology and the Court Technology Fund**<br>4:00 – 5:00 **Rule 12 and the Texas Public Information Act** *(1 hr ethics)*+ |
| 3:00 – 6:30 p.m. | **Registration** |
| 5:00 – 6:30 p.m. | **Welcome Reception**<br>*Sponsored by the Texas Municipal Courts Association* |

## Wednesday, June 27, 2007

| | |
|---|---|
| 6:45 – 8:00 a.m. | **Registration and Breakfast** |
| 8:00 | **Announcements**<br>Course Director: |
| 8:05 – 9:15 a.m. | **Recusal and Disqualification**+<br>Ana Otero, Professor, Thurgood Marshall School of Law, Houston *(1.25 hr ethics)* |
| 9:15 – 9:30 a.m. | **Break** |
| 9:30 – 10:45 a.m. | **Conditions of Bail in DWI and Other Crimes***+<br>Scott Kurth, Municipal Judge, Red Oak and De Soto *(.5 hour ethics)* |
| 10:45 – 11:00 a.m. | **Break** |
| 11:00 – 12:00 p.m. | **Ethics: The Role of the Court in Identifying Attorney Misconduct**+ |
| 12:00 – 1:00 p.m. | **Lunch** |
| 1:00 – 2:05 p.m. | **Case Law and Attorney General Opinion Update**<br>Ryan Kellus Turner, General Counsel and Director of Education, TMCEC |
| 2:20 – 3:00 p.m. | **Custom Deferred Disposition for At-Risk Drivers***+<br>John Bull, Presiding Judge, San Antonio *(.25 hr ethics)* |

## Wednesday, June 27, 2007 *continued*

| | TRACK A | TRACK B |
|---|---|---|
| 3:10 – 4:00 p.m. | **Fraud and Identity Issues in Municipal Court**<br>Meichihko Proctor, Program Attorney & Deputy Counsel TMCEC | **Jury Charges**<br>Linda Frank, Municipal Judge, Plano & Chief Municipal Court Prosecutor, Arlington |
| 4:05 – 5:00 p.m. | **What Every Judge Must Know About Extraterritorial Jurisdiction**<br>Lawrence G. Provins, Assistant City Attorney, Pearland | **Older Drivers***<br>Meichihko Proctor, Program Attorney & Deputy Counsel, TMCEC |

5:05 – 6:35 p.m. **Optional Debriefing Session**
Ryan Kellus Turner, General Counsel and Director of Education, TMCEC

## Thursday, June 28, 2007

6:45 – 8:00 a.m. **Breakfast**

| | TRACK A | TRACK B |
|---|---|---|
| 8:00 – 9:15 a.m. | **Possession: Care, Custody and Control***<br>W. Clay Abbott, DWI Resource Prosecutor, Texas District & County Attorney Association, Austin | **A Protocol for Conducting Dangerous Dog Hearings**<br>Adrianna Martinez Goodland, Attorney-at-Law, Richardson |
| 9:20 – 10:20 a.m. | **Aggressive Driving***<br>W. Clay Abbott, DWI Resource Prosecutor, Texas District & County Attorney Association, Austin | **Juvenile Case Managers**<br>Deanna Burnett, Municipal Judge, Carrollton |

10:35 – 12:00 pm **Citations: Tickets Are for Concerts and Sporting Events***
Ryan K. Turner, General Counsel and Director of Education, TMCEC

12:00 p.m. **Adjourn**

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* Denotes Municipal Traffic Safety Initiatives (MTSI) curriculum funded by a grant from the Texas Department of Transportation.
+ Denotes course that shall be submitted for ethics MCLE credit (possible program total of 4.0 hours).

**Odessa Judges 12- Hour Regional June 27-28, 2007**
**Odessa - MCM Elegante**
**June 27 - 28, 2007**

| Full Name | Company | ADDRESS | City | Zip | Phone Numer |
|---|---|---|---|---|---|
| Paul Hemphill | South Padre Island | 4501 Padre Blvd | South Padre Island | 78597-7326 | (956) 761-3225 |
| Debra A. Herrera | Lytle | PO Box 743 | Lytle | 78052-0743 | (830) 709-3692 |
| Wanda N. Hise | Kermit | 110 S Tornillo St | Kermit | 79745-2612 | (432) 586-2577 |
| Candace M. Holberg | Miles | PO Box 398 | Miles | 76861-0398 | (325) 468-3151 |
| Leon Hurse | Ladonia | PO Box 5 | Ladonia | 75449-0005 | (903) 367-7011 |
| Lori Ann Jasso | Monahans | 114 S Bruce Ave | Monahans | 79756-4324 | (432) 943-6361 |
| Jimmy B. Johnson | Clarendon | PO Box 828 | Clarendon | 79226-0828 | (806) 874-2016 |
| Lydia D. Johnson | Houston | 1400 Lubbock St Rm 214 | Houston | 77002-1526 | (713) 247-5464 |
| Barry E. Jones | Los Indios | PO Box 369 | Los Indios | 78567-0369 | (956) 565-8490 |
| Myra E. Kirkland | Blue Ridge | 200 W Fm 545 | Blue Ridge | 75424-4401 | (972) 752-5791 |
| Scott E. Kurth | Red Oak | 547 Methodist St | Red Oak | 75154-4219 | (972) 224-5334 |
| Patricia Lanford | George West | 404 Nueces St | George West | 78022-3789 | (361) 449-3800 |
| Tom F. Lindsey | Wickett | PO Box 185 | Wickett | 79788-0185 | (432) 943-6765 |
| Belinda A. Loveland | Rowlett | PO Box 370 | Rowlett | 75030-0370 | (972) 412-8818 |
| Kenny L. Maxwell | Sweetwater | PO Box 450 | Sweetwater | 79556-0450 | (325) 236-6691 |
| Tory J. McAuley | Shallowater | PO Box 246 | Shallowater | 79363-0246 | (806) 832-4495 |
| Quinton D. McDonald | Lubbock | PO Box 2000 | Lubbock | 79457-0001 | (806) 744-9671 |
| Glynis A. McGinty | North Richland Hills | 6720 NE Loop 820 | North Richland Hills | 76180-7901 | (817) 446-6112 |
| Joe B. Minter | Como | PO Box 208 | Como | 75431-0208 | (903) 488-3434 |
| Carl C. Moerer, Jr. | Bunker Hill Village | 11977 Memorial Dr | Houston | 77024-6231 | (713) 827-1772 |
| James P. Moon | DeSoto | 211 E Pleasant Run Rd | Desoto | 75115-3901 | (972) 230-9676 |
| Peggy D. Nelson | Oak Ridge | 129 Oak Ridge Dr | Gainesville | 76240-1530 | (940) 665-8474 |
| Filemon Ortiz, Jr. | Del Rio | 109 W Broadway St | del Rio | 78840-5502 | (830) 774-8691 |
| Ron Overman | Patton Village | 16940 Main St | Splendora | 77372-5403 | (281) 689-9511 |
| Bill Pannell | Alvin | 216 W Sealy St | Alvin | 77511-2341 | (281) 388-4251 |
| David J. Pantoja | Roscoe | PO Box 340 | Roscoe | 79545-0340 | (325) 766-3871 |
| William Pattillo | Cut and Shoot | PO Box 7364 | Cut and Shoot | 77306-0364 | (936) 264-3100 |
| Ralph E. Pelaia | Big Sandy | PO Box 986 | Big Sandy | 75755-0986 | (903) 636-5534 |
| Leonard E. Peters | Columbus | PO Box 705 | Columbus | 78934-0705 | (979) 733-0126 |
| Linda B. Pierce | Eastland | PO Box 749 | Eastland | 76448-0749 | (254) 629-8227 |
| William L. Pope | La Feria | 115 E Commercial Ave | La Feria | 78559-5002 | (956) 428-7495 |
| Cindy Pulcher | Splendora | PO Box 1087 | Splendora | 77372-1087 | (281) 399-1352 |
| Mary Gayle Ramsey | Heath | 200 Laurence Dr | Heath | 75032-2068 | (972) 273-4006 |
| Anthony D. Randall | Princeton | 306 Main Street | Princeton | 75407 | (817) 399-9900 |
| Eric Ransleben | Trophy Club | 100 Municipal Dr | Trophy Club | 76262-5420 | (817) 491-8687 |
| Nancy F. Reiter | Hooks | PO Box 37 | Hooks | 75561-0037 | (903) 547-7056 |
| Rhonda B. Rieken | Pecan Hill | 1094 S Lowrance Rd | Red Oak | 75154-7626 | (972) 617-6274 |
| Allen W. Ross | Tyler | PO Box 895 | Tyler | 75710-0895 | (903) 531-1266 |
| James Rush | Odessa | 201 N Grant Ave | Odessa | 79761-5115 | (432) 335-3300 |
| Joe K. Sanders | Lorena | 222 N Frontage Rd | Lorena | 76655-9660 | (254) 857-4641 |
| Stella L. Sanders | Breckenridge | 120 W Elm St | Breckenridge | 76424-3512 | (254) 559-2160 |
| Frank Sandoval | San Antonio | 401 S. Frio | San Antonio | 78207 | (210) 207-7130 |
| Gary Scott | Panorama Village | 99 Hiwon Dr | Panorama Village | 77304-1125 | (936) 856-2821 |
| Troy M. Scott | Denver City | PO Box 1539 | Denver City | 79323-1539 | (806) 592-3963 |
| Michael L. Shobe | Buffalo Springs | 9999 High Meadow Rd | Lubbock | 79404-1913 | (806) 765-9608 |
| John Skotnik | Bonham | 301 E 5th St | Bonham | 75418-4002 | (903) 583-7555 |
| Maria Sparks | El Cenizo | 507 Cadena | El Cenizo | 78046-7947 | (956) 725-9668 |
| Scott Spiller | Jacksboro | 112 W Belknap St | Jacksboro | 76458-2363 | (940) 567-6321 |
| Rodolfo G. Tamez | Corpus Christi | 120 N Chaparral St | Corpus Christi | 78401-2802 | (361) 886-2520 |
| Anita J. Tucker | Edgewood | PO Box 377 | Edgewood | 75117-0377 | (903) 896-4470 |
| Edith Turner | Big Lake | PO Box 310 | Big Lake | 76932-0310 | (325) 884-2511 |
| Luis Vallejo | Houston | 1400 Lubbock St | Houston | 77002-1526 | 713-922-1768 |
| David M. Viscarde | Calvert | PO Box 505 | Calvert | 77837-0505 | (979) 364-2881 |
| Lynnette R. Whitten | Morton | 201 E Wilson Ave | Morton | 79346-2650 | (806) 266-8850 |
| Fad Wilson, Jr. | Houston | 1400 Lubbock St Rm 214 | Houston | 77002-1526 | (713) 247-5464 |
| Terry W. Yates | West University Place | 3800 University Blvd | Houston | 77005-2802 | (713) 662-5825 |
| James W. Zander | Cranfills Gap | PO Box 156 | Cranfills Gap | 76637-0156 | (254) 597-2756 |

# Odessa Judges 12- Hour Regional June 27-28, 2007
## Odessa - MCM Elegante
## June 27 - 28, 2007

| Full Name | Company | ADDRESS | City | Zip | Phone Numer |
|---|---|---|---|---|---|
| Wade Arledge | New Braunfels | 1486 S Seguin Ave | New Braunfels | 78130-3853 | (830) 608-2145 |
| Henry S. Ashford | Malakoff | PO Box 1177 | Malakoff | 75148-1177 | (903) 489-3472 |
| Larry R. Ashley | Tom Bean | PO Box 312 | Tom Bean | 75489-0312 | (903) 546-6321 |
| Stephen Autry | Coleman | 100 S Commercial Ave Ste 20 | Coleman | 76834-4217 | (325) 625-3080 |
| Stephen P. Ballantyne | Terrell Hills | 5100 N New Braunfels Ave | Terrell Hills | 78209-5822 | (210) 828-7852 |
| C. Emery Banker | Honey Grove | 633 6th St | Honey Grove | 75446-1884 | (903) 378-3033 |
| Shannon E. Barnes | Crandall | PO Box 268 | Crandall | 75114-0268 | (972) 897-3259 |
| Joe D. Barron | Caney City | 15241 Barron Rd | Malakoff | 75148-4337 | (903) 489-1844 |
| Keith A. Barton | Abilene | PO Box 60 | Abilene | 79604-0060 | (915) 676-6302 |
| Shawnee L. Bass | Stephenville | 112 W College St | Stephenville | 76401-4214 | (254) 965-1465 |
| Stephanie M. Berry | Pilot Point | 102 E Main St | Pilot Point | 76258-4533 | (940) 349-8334 |
| Glynda D. Beyer | La Ward | PO Box 178 | La Ward | 77970-0178 | (361) 872-2110 |
| Wilbert F. Biggs | Galena Park | PO Box 46 | Galena Park | 77547-0046 | (713) 672-2556 |
| Albert Daniel Bodine | Presidio | PO Box 1899 | Presidio | 79845-1899 | (432) 229-3517 |
| David A. Bonilla | El Paso | 801 E. Overland Street | El Paso | 79901 | (915) 546-2977 |
| George H. Boyett | College Station | 300 Krenek Tap Rd | College Station | 77840-5023 | (979) 693-2695 |
| Kitty F. Bristow | Andrews | 111 Logsdon St | Andrews | 79714-6515 | (432) 523-4820 |
| Edmund Burke | Frisco | 8750 McKinney Rd Ste 100 | Frisco | 75034-3000 | (972) 335-9000 |
| John H. Campbell | Galveston | PO Box 17252 | Galveston | 77552-7252 | (409) 797-3895 |
| Rodolfo F. Cantu | Jacinto City | 10301 Market Street Rd | Houston | 77029-2343 | (713) 928-9087 |
| Susan B. Carver | Brownsboro | PO Box 303 | Brownsboro | 75756-0303 | (903) 849-5243 |
| Erik E. Cary | Austin | PO Box 2135 | Austin | 78768-2135 | (512) 974-2000 |
| Reynolds N. Cate | Helotes | 6394 Fox Run | Helotes | 78023 | (210) 695-8877 |
| Lance T. CeLander | Seminole | 302 S Main St | Seminole | 79360-4346 | (432) 758-3676 |
| Mark D. Chambers, Jr. | Trophy Club | 100 Municipal Dr | Trophy Club | 76262-5420 | (682) 831-4660 |
| Isabell R. Cobb | Goree | PO Box 248 | Goree | 76363-0248 | (940) 422-5306 |
| LaTonda W. Coleman | Anson | 1314 Commercial Ave | Anson | 79501-4313 | (325) 823-2411 |
| Linda H. Conley | San Antonio | 401 S Frio St | San Antonio | 78207-4416 | (210) 207-7130 |
| Yolanda Cortes-Mares | Kempner | PO Box 660 | Kempner | 76539-0660 | 512-932-2180 |
| Dan Cotton | Snyder | PO Box 1341 | Snyder | 79550-1341 | (325) 573-4958 |
| Jerry E. Cowden, III | Crane | 115 W 6th St | Crane | 79731-2628 | (432) 558-3567 |
| Carolee Donna Cox | Aransas Pass | PO Box 112 | Aransas Pass | 78335-0112 | (361) 758-8688 |
| Jay D. Daniel | San Angelo | 110 S Emerick St | San Angelo | 76903-5510 | (325) 657-4371 |
| Kelly L. De La Rosa | Montgomery | PO Box 708 | Montgomery | 77356-0708 | 936-597-6434 |
| Kathleen F. Dow | Bellmead | 3015 Bellmead Dr | Waco | 76705-3030 | (254) 662-5888 |
| Theodore R. Duffield | Morgan's Point Resort | 8 Morgan's Point Resort Blvd. | Morgan's Point Resort | 76513 | (254) 780-1334 |
| Jeanette H. Dunkerson | Kenefick | 3564 Fm 1008 | Dayton | 77535-3370 | (936) 258-2130 |
| Gerry Elias | Lytle | PO Box 743 | Lytle | 78052-0743 | (830) 709-3692 |
| Oscar Espinoza, Sr. | Van Horn | PO Box 517 | Van Horn | 79855-0517 | (432) 283-2050 |
| Donna A. Eyrse | Merkel | 100 Kent St | Merkel | 79536-3612 | (325) 928-4911 |
| Thomas L. Fiedler | Richardson | PO Box 830978 | Richardson | 75083-0978 | (972) 744-4502 |
| Diana G. Fleming | Emory | PO Box 100 | Emory | 75440-0100 | (903) 473-2003 |
| Jerry D. Fleming | Thrall | PO Box 346 | Thrall | 76578-0346 | (512) 898-5395 |
| Lauro G. Flores | Dilley | PO Box 230 | Dilley | 78017-0230 | (830) 965-1733 |
| Margie Flores | Corpus Christi | 120 N Chaparral St | Corpus Christi | 78401-2802 | (361) 886-2520 |
| Kathryne R. Gabbert | Burleson | PO Box 2493 | Burleson | 76097-2493 | (817) 295-4249 |
| William L. Gaines | Center | PO Box 1900 | Center | 75935-1900 | (936) 598-4244 |
| Coy M. Gergen | Dalhart | PO Box 2005 | Dalhart | 79022-6005 | (806) 244-5511 |
| Steven J. Gilbert | Richmond | 402 Morton St | Richmond | 77469-3121 | (281) 342-0578 |
| Larry A. Gillen | Wichita Falls | 611 Bluff St | Wichita Falls | 76301-2310 | (940) 761-7887 |
| Marlene Gonzalez | El Paso | 810 E Overland Ave | El Paso | 79901-2516 | (915) 546-2991 |
| Billy G. Green | Quinlan | PO Box 2740 | Quinlan | 75474-0046 | (903) 356-3306 |
| Timothy Green | Big Spring | 305 Johnson St | Big Spring | 79720-2653 | (432) 264-2530 |
| Shirley A. Griffith | Ranger | 400 W Main St | Ranger | 76470-1219 | (254) 647-3318 |
| Mary A. Hakze | Valley View | PO Box 268 | Valley View | 76272-0268 | (940) 726-3957 |
| Frank Hart | El Paso | 810 E Overland Ave | El Paso | 79901-2516 | (915) 546-2977 |
| Kenneth D. Hartless | Sanger | PO Box 1729 | Sanger | 76266-0017 | (940) 458-7131 |

**ANNOUNCEMENTS**

**FOR**

**12-hour Judges Seminar Attendees**

I

Welcome

II

Funding

Our judicial classes are mandatory for each municipal judge in the state and are provided by a grant from the Texas Court of Criminal Appeals that is funded by dollars that are collected on each conviction.

III

Notices to Attendees

The viewpoints of the instructors for this program do not necessarily express the opinions of the Texas Municipal Courts Education Center, its Board or Committees.

Federal and state statutes prohibit employment discrimination on the basis of disability, age, race, color, religion, sex, or national origin. Sexual harassment is included among the prohibitions. The TMCEC strongly disapproves of any form of discrimination or harassment at its seminars, meetings or within its work environment. Employees, participants, faculty and volunteers who have experienced or observed any acts that they believe may be prohibited by federal, state or common law, should report the incident to the TMCEC Executive Director immediately. All such alleged acts will be investigated and consideration given to the appropriate action, if any, to be taken.

The Texas Municipal Courts Education Center and the Texas Municipal Courts Association, as grantee, do not endorse, recommend or imply approval of any or all vendors represented in person or by materials/displays at or near TMCEC/TMCA sponsored meetings and seminars.

Attendance

The Texas Municipal Courts Association Board of Directors has adopted the following policy: **All judges at the TMCEC seminars must attend and fully participate during all hours as designated by the schedule. Any undue tardiness to class or reading of non-pertinent materials, *e.g.*, newspapers, magazines, *etc.*, or unrelated use of a laptop or PDA (personal data assistant) will place the judge in "non-compliant" status resulting in the loss of that particular class and the non-certification of the judge for that current year. In order to comply with certification rules, those judges in non-compliance must make up those hours lost at another seminar held within that fiscal year at his/her own expense.**

**The Center staff will not inform you of your violation. They will report the infraction to the Executive Director who will make the decision to certify or not. Any questions you might have with infraction and/or loss of certification must be taken up with the Executive Director.**

Your badge is proof of identification. Please wear it at all times during the seminar. The badge also serves as your ticket to enter the room where the breakfasts and lunches are served.

Judges are expected to sign in when they register. If the TMCEC staff perceives that the seminar is not fully attended by all participants at all times, roll will be called or circulated. If you must leave the seminar for an emergency or if you become ill, we ask that you check out with the staff at the registration table.

Concurrent Sessions

During the seminar, there may be concurrent sessions offered giving you a choice of presentations taught at the same time. If requested by TMCEC staff, please sign up for your choice for each concurrent session on the attendance sheets provided at the registration tables. An announcement will be made giving more details about these sessions at a later time.

Program Materials

Your binder is provided to you by the Center and consists of all necessary documents you will need throughout the seminar. You will be provided with a different binder for each seminar that you attend every year.

You must fill in the certification form in order to receive your certificate of completion. Without our receiving this form, we have no other proof of your attendance should you ever need it. You will receive this form at the end of the seminar.

There is also provided a faculty evaluation form which you are asked to fill in as the seminar progresses. Please write your comments fully and remember to add your thoughts for program improvement next year at the end of the form.

Breaks

You will be given several 10-minute breaks throughout the morning and afternoon sessions. This will allow you to smoke (outside) as there is no smoking permitted in the classrooms, dining rooms or areas adjoining the classrooms at any time. Refreshments will be provided in the designated area once each morning and afternoon.

Messages

There is a message board provided near the registration table. Please check it periodically. You should provide your office with the telephone number and extension.

Rooms

The Center pays for the cost of single rooms or double sleeping rooms for judges sharing a room with another judge or clerk and is direct billed for such. However, you must pay for all incidentals, including telephone charges, movies, room service, and cleaning. By the provisions of the grant, the Center **CANNOT** pay for these expenses. Please do not put us in any precarious position regarding this matter.

The hotel may or may not charge extra for your rooming guest. Please check with the hotel at the time of check-in. If there is any extra charge, you must pay this expense at checkout.

Smoking and Alcohol Consumption

The Texas Municipal Courts Association Board of Directors has adopted the following policy: **No one shall smoke in any classroom, dining rooms or any area adjacent to the classrooms during the TMCEC seminars. Smoking will be permitted only outside the hotel or other common areas away from the meeting rooms and break areas. The possession or consumption of alcohol by participants during TMCEC provided classes, breaks or meals is prohibited.**

Meals

Once the sessions begin, catered breakfasts and lunches are provided by the Center. Because of budget restrictions, the dinner meal is not provided.

Shuttle

If a shuttle is provided by the hotel to the airport, please sign up for its use on the morning of departure prior to breakfast.

Check out

The hotel has a set check out time. It will be announced on the first day during the welcoming announcements. Please insure that you do not go beyond this time. Extra-day charges imposed by the hotel will be your responsibility.

## CONTINUING EDUCATION UNITS

The Texas Municipal Courts Education Center will award up to 1.5 CEU to each participant who successfully completes the 12-Hour Judges' Program. The CEU is a nationally recognized unit designed to provide a record of an individual's continuing education accomplishments. Upon written request to the Center, a record will be made available as designated by the participant.

The CEU concept provides individuals with recognition for their efforts to update or broaden their knowledge, skills, or attitudes. Records of CEU awarded provide a framework within which individuals can develop and achieve long-range educational goals.

The availability of the CEU records and documentation permits individuals to maintain and transmit to others a record of their lifelong learning experiences. For example, individuals may use personal records of number of CEU earned for:

- Reporting maintenance or improvement of professional competence;
- Documenting continuing qualifications for renewing licensure, recertification, or registration; or
- Presenting evidence of personal and vocational growth and adjustment to meet changing career demands.

Probably the two most common uses of a CEU record by the individual learner are: (1) to supply an employer or prospective employer with information on continuing education and training experiences pertinent to an occupational competence; and (2) to provide documentation to registration boards, certification bodies, or professional and occupational societies of continuing education undertaken to maintain or increase professional competence.

There is no relationship between CEU and academic credit. By definition, the CEU relates only to non-credit continuing education experiences. Academic credit applies specifically to degree requirements and CEU are not awarded for that purpose. No institutions of higher education are known to give automatic credit for CEU.

State Bar CLE information for attorney judges

# COURSE TITLE:

# TMCEC Judges Seminar

## Up to 15 CLE Participant Hrs. and up to 4.0 CLE Ethics Hours as attended:

Claim up to 15 CLE *Participant Hours* as attended:

3 hrs – *Optional pre-conference session*
10.5 hrs – *Regional Judges Program*
1.5 hrs – *Optional debriefing session*

Claim up to 4 CLE *Ethics Hours* as attended:

*Optional pre-conference session*
1 hr ethics – Rule 12 & the TX Public Information Act

*General session*
1.25 hr ethics – Recusal & Disqualification
.50 – Conditions of Bail
1 hr ethics – Ethics
.25 hr ethics – Custom Deferred

**Please note the following changes to the CLE card:**

- The new CLE card requires you to enter the number of hours attended up to 15 hours.

- The card also requires you to enter ethics hours separately. This seminar has been approved for **4.0** hours ethics, depending on the breakout courses attended.

- There is a $100 charge for MCLE credit. If you have not prepaid, please return a check with your MCLE card to the TMCEC registration desk. TMCEC will then submit the MCLE card to the State Bar of Texas. TMCEC only submits names of attorneys who have paid. Please note that it takes 3-5 days for TMCEC staff to submit the MCLE cards to the State Bar of Texas.

## Judicial Education Credit

This program is approved by the TMCEC Education Committee to meet the mandatory judicial education requirement of 12 hours a year.

## Criminal Law Specialization

This course has been submitted to the Texas Board of Legal Specialization for certification and recertification continuing legal education requirements for attorneys and legal assistants.

# TEXAS MUNICIPAL COURTS EDUCATION CENTER
# FACULTY ROSTER

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## MCM Elegante
## Odessa

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DWI Resource Prosecutor
Texas District & County
Attorney Association
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Austin, TX 78701
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(512)478-4112

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Presiding Judge
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San Antonio, TX 78207
(210) 207-7130

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Municipal Judge
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Carrollton, TX 75006
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(972) 466-3260 (c)
(972) 466-1708 (f)

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Law Enforcement Coordinator
Texas Municipal Police
Association
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(512) 454-8900

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Municipal Judge, Plano &
Chief Municipal Court
Prosecutor, Arlington
City Attorneys Office
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Municipal Judge
Red Oak & De Soto
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Municipal Judge
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# ABOUT THE SPEAKERS

**W. CLAY ABBOTT**

Clay Abbott is DWI Resource Prosecutor for the TDCAA. He grew up in Boulder, Colorado and then attended Lubbock Christian University where he received a BA in History. He went on to receive his Doctor of Jurisprudence from the Texas Tech School of Law, *cum laude*. He was inducted into Order of the Coif in December 1986.

Mr. Abbott served as an Assistant District Attorney in Lubbock County before going into private practice for five years. In 1995 he returned to prosecution as the Chief Deputy for the Lubbock County District Attorney's office. He served TMCEC as General Counsel from 2000 to 2004. With Ryan Kellus Turner, he is the author of TMCEC's *Judges Book.*

Mr. Abbott served as an Adjunct Professor at the Texas Tech School of Law for nine years and is a frequent presenter for TMCEC, TDCAA, and others.

**JOHN BULL**

John Bull is the presiding judge for the City of San Antonio. He earned his Bachelor of Arts degree from Southern Methodist University and his J.D. from St. Mary's University School of Law in San Antonio. Judge Bull practiced law in Pearsall and San Antonio from 1990 until September 1999 in a general practice with a concentration in felony criminal trials and appeals. He was appointed to the San Antonio Municipal Court in September 1999 and reappointed in September 2001.

Judge Bull is also an Adjunct Professor of Trial Advocacy at St. Mary's University since 2000.

**DEANNA BURNETT**

Deanna Burnett has been a Municipal Judge in Carrollton, Texas since 1988. Recently, she began serving as a Municipal Judge in The Colony, as well. She has served as Municipal Judge in Farmers Branch, Plano, and Coppell, Texas. She received her Bachelor of Arts from the University of Texas at Dallas and Juris Doctorate from Texas Tech School of Law, Lubbock. Judge Burnett has been a member of the State Bar of Texas since 1982.

**LINDA FRANK**

Linda Frank is currently an Associate Municipal Judge for the City of Plano. She is also the Chief Municipal Prosecutor for the City of Arlington. She is the former Chief Municipal Prosecutor for the City of Plano.

Judge Frank is a graduate of the University of Oklahoma. She received her juris doctor from the Georgetown University Law Center in Washington, D.C. She received her license to practice law in Texas in 1981.

Judge Frank has served as faculty for the TMCEC since 1998. She has two daughters, both graduates of the University of Texas.

**ADRIANNA MARTINEZ GOODLAND**

Adrianna Martinez Goodland began as a municipal judge in 2000 and served as a municipal judge for the City of Frisco until 2006. She attended Harvard University and the University of Texas at San Antonio, and received her J.D. in 1991 from Harvard Law School. Judge Goodland has also served as a municipal judge for the Cities of McKinney and Princeton.

After graduating law school, Judge Goodland briefly practiced commercial litigation prior to joining the Dallas County Public Defender's

Office and subsequently opening her own law office. She remains active in local bar associations and enjoys speaking to elementary, middle and high school students about various legal topics of interest to students and teachers.

**RENE HENRY**

Rene Henry is retired from the State of Texas and is currently self-employed. His work is focused on both court financial management and personal financial management.

Mr. Henry worked for the Comptroller's Office 20 years and for the Office of Court Administration over eight years. He has authored several financial management articles and handbooks and has provided on-site technical assistance to numerous local governments.

Mr. Henry holds a B.B.A. degree in accounting from the University of Texas at Austin and is a licensed certified public accountant.

**SCOTT KURTH**

Scott Kurth is a Municipal Judge for the City of Red Oak and the City of De Soto. He earned his Juris Doctor from Baylor University in 1982. Judge Kurth also maintains an active federal and state private practice.

**C. VICTOR LANDER**

Victor Lander was born in Georgia and grew up in New York City and Virginia. He received his Bachelor of Arts with honors from Morehouse College in Atlanta, Georgia and his Juris Doctor from the University of Texas in Austin. Judge Lander worked for the Federal Communications Commission in Washington, D.C., before joining his father, the late Fred L. Lander, III, in the private practice of law in state and federal courts in Dallas. He was appointed an Associate (part-time) Municipal Judge for the City of Dallas in 1991 and has served as a full-time Municipal Judge for Dallas since 1996. He was named Outstanding Municipal Judge by the Texas Municipal Courts Association in 2003.

**ANA M. OTERO**

Prior to moving to Houston, Ms. Otero was Senior Attorney at Blackwell & Walker, where she headed the Commercial Litigation division of a large law firm in Miami, Florida. Ms. Otero received her J.D. from Rutgers University in New Jersey where she received the Phillip J. Levin Scholarship and Latin American Society Community Service Award for outstanding contribution to the minority student program.

Judge Otero is a law professor at Thurgood Marshall School of Law where she teaches civil and criminal procedure and is the Director of the Judicial Externship Program. In addition, she teaches at a paralegal school in Houston and has her own seminar company where she teaches education courses for legal assistants throughout Texas on employment, legal writing, and certification courses. Prior to that, Ms. Otero served as an Associate Judge of the Houston Municipal Court.

Ms. Otero received her B.A., cum laude, from Columbia University in New York where she graduated Phi Beta Kappa and obtained the Anthony Mier Prize for literature. She also holds a Masters Degree from the School of International and Public Affairs at Columbia University, and a Masters in Business Administration from Fairleigh Dickinson University in New Jersey.

**MEICHIHKO PROCTOR**

Meichihko Proctor joined the TMCEC staff on August 1, 2006 as the Program Attorney and Deputy Counsel for the Judges' Program. Mrs. Proctor is originally from San Angelo, Texas, where she received a bachelor's degree in government and psychology from Angelo State University. Upon graduation, Ms. Proctor enjoyed a career in speechwriting for the City of Lubbock while pursuing a master's degree in sociology with a minor in public administration at Texas Tech University. She went on to graduate from the St. Mary's Law School in San Antonio in 2002. Prior to joining TMCEC, Ms. Proctor worked as an associate at Bickerstaff,

Heath, Pollan & Caroom practicing municipal law. From 2003-2004, Meichihko was an assistant city attorney for the City of Plano, prosecuting cases in municipal court. She was also the Chief Prosecutor for Domestic Violence in Tom Green County. Her expertise and energy assure a fantastic Judges' Program for FY07.

**MARGARET ROBBINS**

Margaret Robbins is the Program Director for the Texas Municipal Courts Education Center, a position she has held since 1986.

Before joining the TMCEC staff, Ms. Robbins was Court Clerk for three years and then Municipal Court Judge for four years for the City of Cedar Park. Ms. Robbins has served as author and editor to numerous publications including the TMCEC newsletter, TMCEC *Clerks' Procedures Manual*, and the Clerks' Certification Study Guides.

**RYAN KELLUS TURNER**

Ryan Kellus Turner is General Counsel and Director of Education for the Texas Municipal Courts Education Center. Prior to joining the Center, he served as Briefing Attorney for Judge Sharon Keller at the Texas Court of Criminal Appeals. Mr. Turner obtained his juris doctorate from Southern Methodist University School of Law, Dallas, Texas. He received his bachelor's degree in psychology with highest honors from St. Edward's University, Austin, Texas, where he now teaches as an adjunct faculty member in the School of Behavioral and Social Sciences. In 2004 he received the School's Adjunct Teaching Excellence Award. Mr. Turner is currently Deputy City Attorney for the City of Dripping Springs and previously served as a Special Assistant County Attorney for Kendall County.

A native Texan, Mr. Turner was raised in the north Texas town of Vernon. He is the co-author of the book *Lone Star Justice: A Comprehensive Overview of the Texas Criminal Justice System.*

**LOIS WRIGHT**

Lois Wright joined TMCEC in April 2006 as a Program Attorney. Ms. Wright's hometown is Sabinal, Texas, a small town due west of San Antonio. Ms. Wright attended the University of Texas at Austin, where she obtained, first, a bachelor's degree in anthropology, and then her *Juris Doctorate*. In law school, Ms. Wright was active in the Texas Journal of Women and the Law, the Capital Punishment Clinic, and the Mediation Clinic. She clerked at the District Attorney's Office in Travis County throughout law school.

WELCOME!

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# TEXAS MUNICIPAL COURTS EDUCATION CENTER
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# TEXAS MUNICIPAL COURTS EDUCATION CENTER

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# BEFORE TAKING THE BENCH . . .

ALL Municipal Court judges and appointed Clerks of Municipal Courts must file two sworn documents: a Statement of Appointed or Elected Officer and an Oath of Office, both to be filed with your city.

The Statement is no longer filed with the Secretary of State due to a 2001 amendment to the Texas Constitution.

AFTER appointment and BEFORE taking the Oath of office, each judge and appointed clerk must file a Statement with his or her city.

THE TEXAS CONSTITUTION REQUIRES THAT THE STATEMENT OF APPOINTED/ELECTED OFFICER MUST BE FILED BEFORE THE OATH IS TAKEN. If you are using a form that has the Statement of Appointed/Elected Officer and the Oath of Office on the same page, execute the Statement but leave the Oath blank when you submit it to your city. If both are filled out, your city may reject it. Execute the Oath of Office after you submit the Statement of Appointed/Elected Officer.

After the Statement is filed with your city, the Oath of Office must be administered to all judges and appointed clerks. This oath is also filed with your city.

Judges and clerks should execute both a new Statement and a new Oath of Office at the beginning of each new term.

We suggest that you personally confirm that the Statement is filed. If you cannot keep the original Statement or Oath of Office, we suggest you keep a certified copy.

Following is a copy of each of these statements.

**STATEMENT OF APPOINTED/ELECTED OFFICER (Pursuant to Tex. Const. Art. XVI, Sec. 1(c), amended 2001)**

# THE STATE OF TEXAS

**Statement of Appointed/Elected Officer**
(Please type or print legibly)

"I,_____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God."

_____
Affiant

_____
Office to Which Appointed

_____
City

**Sworn to and subscribed** before me by affiant on this _____ day of _____, 20___.

_____
Signature of Person Administering Oath
(Notary Public in and for the State of Texas
or Judge of a Court of Record)

*(municipal court seal)*

_____
Printed Name

_____
Title

**File with your city before filing the Oath of Office.**

**In the name and by the authority of**

# THE STATE OF TEXAS

## OATH OF OFFICE

I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect and defend the Constitution and the laws of the United States and of this State, so help me God.

_____
Affiant

**Sworn to and subscribed** before me by affiant on this _____ day of _____, 20___.

_____
Signature of Person Administering Oath
(Notary Public in and for the State of Texas
or Judge of a Court of Record)

*(municipal court seal)*

_____
Printed Name

_____
Title

**File with your city before filing the Oath of Office.**

# ATTORNEY JUDGES
# INSTRUCTIONS FOR FILLING OUT YOUR MCLE CARD:

1. CLE cards are in the front pocket of your course materials. If your registration payment included the $100 fee to claim CLE credit, please turn your completed form in at the end of Day 2 of the seminar.

2. Please use pencil to complete the CLE form. The Bar will accept forms filled out in ink, but they must be mistake-free.

   Claim up to 15 CLE *Participant Hours* as attended:

   3 hrs – *Optional pre-conference session*
   10.5 hrs – *Regional Judges Program*
   1.5 hrs – *Optional debriefing session*

   Claim up to 4 CLE *Ethics Hours* as attended:

   *Optional pre-conference session*
   1 hr ethics – Rule 12 & the TX Public Information Act

   *General session*
   1.25 hr ethics – Recusal & Disqualification
   .50 hr ethics – Conditions of Bail
   1 hr ethics – Ethics
   .25 hr ethics – Custom Deferred

5. Print your name and sign form.

6. Remove left part and keep for your records.

# TMCEC RESOURCES MATERIALS – ADDITIONAL COPIES*
# PRICE LIST AND ORDER FORM FOR MUNICIPAL COURTS

| Qty | Cost | Title | Extended Price |
|---|---|---|---|
| _____ | 20.00 | The Municipal Judge's Book | _____ |
| _____ | 20.00 | Bench Book for Municipal Court Judges | _____ |
| _____ | 20.00 | TMCEC Municipal Court Forms Book | _____ |
| _____ | 5.00 | CD-ROM Forms Book/Bench Book for Municipal Court Judges (*combined*) | _____ |
| _____ | 5.00 | Role of Municipal Court in City Government (DVD) | _____ |
| _____ | 5.00 | The Judge/Mock Trial videotape | _____ |
| _____ | 25.00 | Level I Clerks Certification Study Guide (looseleaf) | _____ |
| _____ | 25.00 | Level II Clerks Certification Study Guide (looseleaf) | _____ |
| _____ | 8.50 | Level III Clerks Certification Study Questions | _____ |
| _____ | 35.00 | Code Book | _____ |
| _____ | 5.00 | I Object (VHS) | _____ |
| _____ | 5.00 | Pro Se Defendants (DVD) | _____ |
| _____ | N/C | Course Materials [*Specify program:* _____ ] ($25.00 for non-municipal court personnel) | _____ |
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| | | **Subtotal** | _____ |
| | | Shipping charge (based on your order – call TMCEC for cost) | _____ |
| | | **TOTAL** | |

*All orders must be prepaid. Checks payable to Texas Municipal Courts Education Center.*

*Send order to:*

*Texas Municipal Courts Education Center 1609 Shoal Creek Boulevard, Suite 302 Austin, Texas 78701 (512) 320-8274*

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Court Address: _____

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Court Telephone Number: (____) _____ Email Address: _____

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❒ Visa

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Expiration Date: _____

Verification # (found on back of card): _____

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**Authorized signature:** _____

# MERCHANDISE PRICE LIST

The following items will be available for purchase at the TMCEC Registration desk. Sales will be conducted during breaks and lunch during the first day of the conference only.

Checks, cash and VISA/Mastercard are accepted in payment when purchasing at the conference. Sales will be ongoing until 4:00 p.m. during the first day of the program.

| | |
|---|---|
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| CAFÉ MUGS | $8 |
| Insulated Mugs | $6 |
| *Short Sleeve T-Shirts* | |
| TODDLERS (2T, 3T, 4T) | $10 |
| CHILDRENS (XS, S, M) | $11 |
| ADULT SIZES S, M, L, XL | $13 |
| ADULT XXL & XXXL | $15 |
| *Long Sleeve T-Shirts* | |
| SIZES S, M, L, XL | $18 |
| XXL & XXXL | $20 |
| Golf Shirts | $25 |
| Long Sleeve Denim Shirts | $40 |
| Caps | $12 |
| Maroon/Canvas Bag | $15 |
| Ties | $15 |
| Tie Tack/Lapel Pin | $5 |
| Children's Book | $15 |
| "Lone Star Justice" Book | $25 |

Orders may be placed online too. See the TMCEC website at **www.tmcec.com.**

Thanks!

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# RECUSAL AND DISQUALIFICATION

**Presented by**

**Ana Otero**
**Professor**
**Thurgood Marshall School of Law**
**Houston**

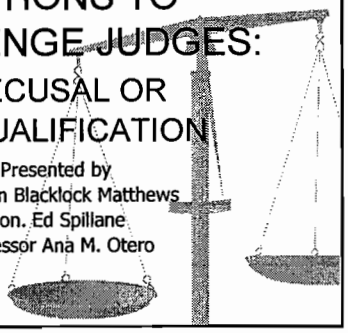
By the end of the session, judges will be able to:

- Identify cases in which the judge should recuse himself or herself;
- Identify cases which the judge is disqualified from hearing; and
- Identify case law and statutory provisions governing recusal and disqualification.

# MOTIONS TO CHALLENGE JUDGES:

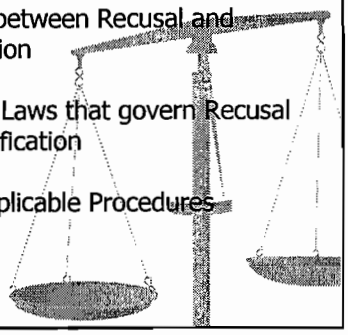
## RECUSAL OR DISQUALIFICATION

Presented by
Hon. Jan Blacklock Matthews
Hon. Ed Spillane
Professor Ana M. Otero



## OUR OBJECTIVES

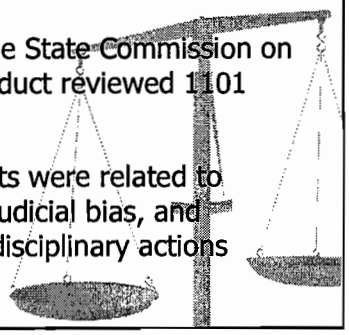
1) Distinguish between Recusal and Disqualification
2) Identify the Laws that govern Recusal and Disqualification
3) Describe Applicable Procedures



## COMPLAINTS TO THE STATE COMMISSION JUDICIAL CONDUCT

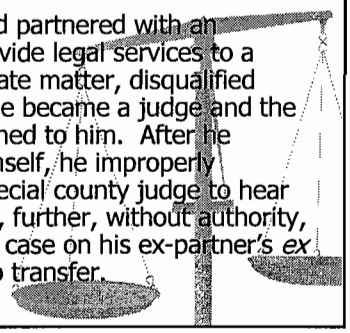
-- In 2005, the State Commission on Judicial Conduct reviewed 1101 complaints

-- 9 complaints were related to charges of judicial bias, and resulted in disciplinary actions



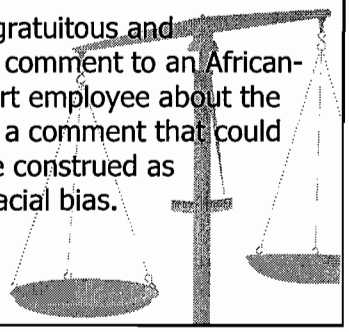
## SAMPLES OF DISCIPLINARY ACTIONS

- Judge, who had partnered with an attorney to provide legal services to a party in a probate matter, disqualified himself when he became a judge and the case was assigned to him. After he disqualified himself, he improperly appointed a special county judge to hear the matter and, further, without authority, transferred the case on his ex-partner's *ex parte* motion to transfer.



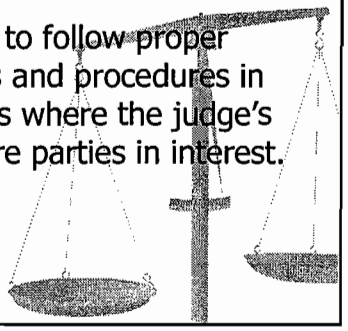
## SAMPLES OF DISCIPLINARY ACTIONS

- Judge made gratuitous and inappropriate comment to an African-American court employee about the Ku Klux Klan, a comment that could reasonably be construed as manifesting racial bias.



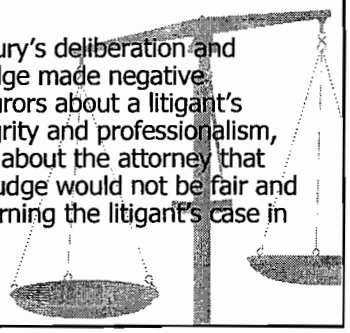
## SAMPLES OF DISCIPLINARY ACTIONS

- Judge failed to follow proper recusal rules and procedures in several cases where the judge's relatives were parties in interest.



## SAMPLES OF DISCIPLINARY ACTIONS

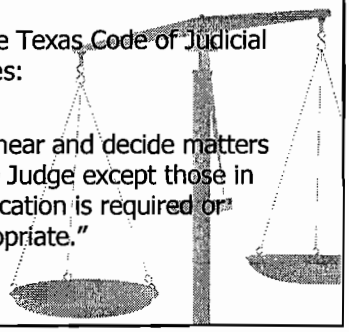
- Following the jury's deliberation and verdict, the Judge made negative comments to jurors about a litigant's attorney's integrity and professionalism, and comments about the attorney that indicated the Judge would not be fair and impartial concerning the litigant's case in the future.



## THE TEXAS CODE OF JUDICIAL CONDUCT

- Cannon 3 of the Texas Code of Judicial Conduct charges:

  "A Judge shall hear and decide matters assigned to the Judge except those in which disqualification is required or recusal is appropriate."

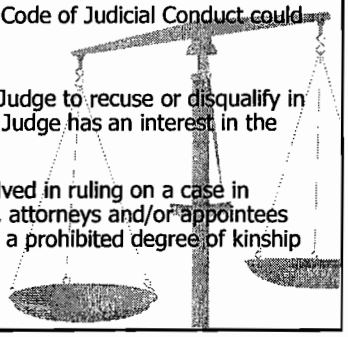


## WHAT CONSTITUTES JUDICIAL MISCONDUCT?

- A violation of the Code of Judicial Conduct could result if...

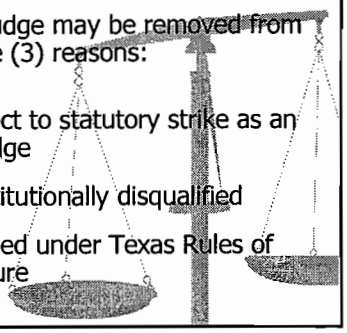
  1) Refusal by a Judge to recuse or disqualify in a case where the Judge has an interest in the outcome.

  2) Judge is involved in ruling on a case in which the parties, attorneys and/or appointees are related within a prohibited degree of kinship to the Judge.



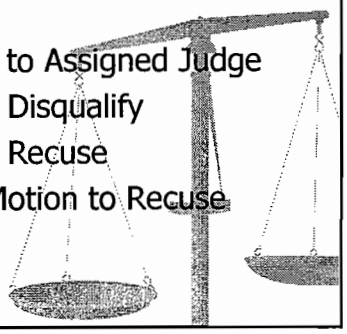
## WHAT CIRCUMSTANCES PROMPT REMOVAL?

- In general, a Judge may be removed from a case for three (3) reasons:
  1) She is subject to statutory strike as an assigned judge
  2) She is constitutionally disqualified
  3) She is recused under Texas Rules of Civil Procedure



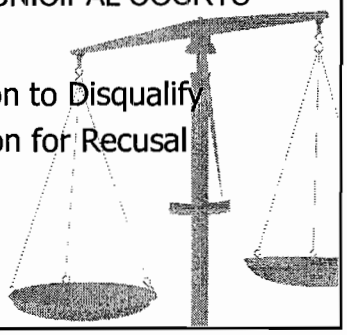
## FOUR TYPES OF CHALLENGES TO THE TRIAL JUDGE

- Objection to Assigned Judge
- Motion to Disqualify
- Motion to Recuse
- Tertiary Motion to Recuse

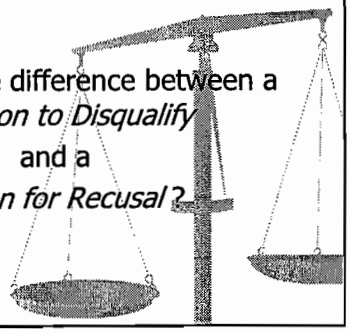


## APPLICABLE TO TEXAS MUNICIPAL COURTS

- Motion to Disqualify
- Motion for Recusal

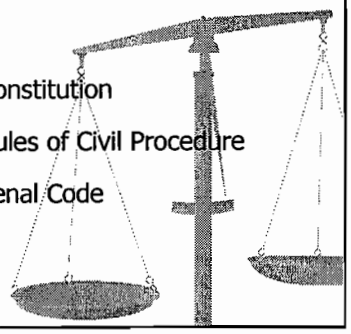


## DISTINGUISHING DISQUALIFICATION AND RECUSAL



What is the difference between a *Motion to Disqualify* and a *Motion for Recusal*?

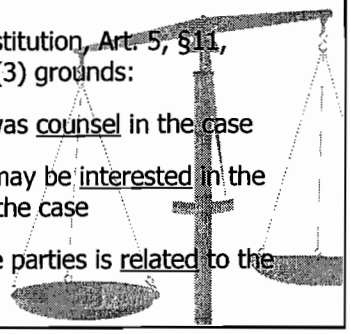
## GROUNDS FOR DISQUALIFICATION



The Law:

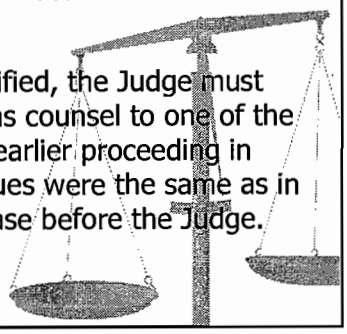
- The Texas Constitution
- The Texas Rules of Civil Procedure
- The Texas Penal Code

## GROUNDS FOR DISQUALIFICATION
## THE TEXAS CONSTITUTION



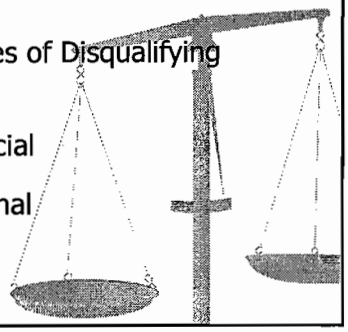
- The Texas Constitution, Art. 5, §11, provides three (3) grounds:
  1) The Judge was counsel in the case
  2) The Judge may be interested in the outcome of the case
  3) Either of the parties is related to the Judge

## DISQUALIFICATION #1
## JUDGE WAS COUNSEL IN THE CASE



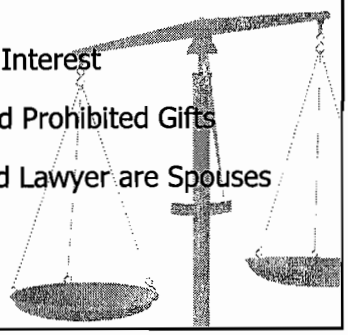
- To be disqualified, the Judge must have served as counsel to one of the parties in an earlier proceeding in which the issues were the same as in the current case before the Judge.

## DISQUALIFICATION #2
## JUDGE MAY BE INTERESTED IN THE OUTCOME OF THE CASE



- Two Types of Disqualifying Interests:
  1) Financial
  2) Personal

## DISQUALIFYING FINANCIAL INTERESTS

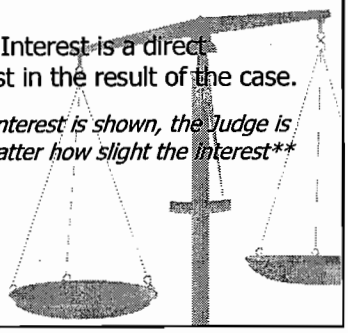


1) Fiduciary Interest
2) Bribes and Prohibited Gifts
3) Judge and Lawyer are Spouses

## DISQUALIFYING PERSONAL INTERESTS

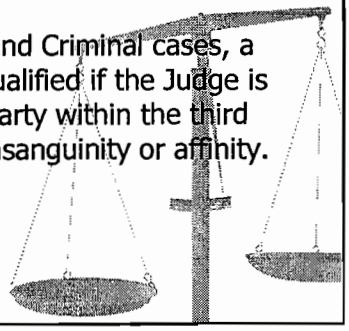
- A Disqualifying Interest is a direct personal interest in the result of the case.

  ***Once a direct interest is shown, the Judge is disqualified no matter how slight the interest***



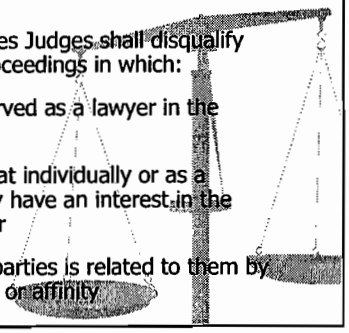
## DISQUALIFICATION #3
## RELATED TO A PARTY

- Both in Civil and Criminal cases, a Judge is disqualified if the Judge is related to a party within the third degree of consanguinity or affinity.

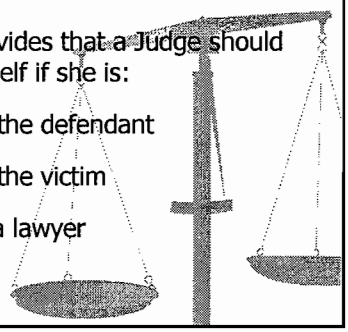


## GROUNDS FOR DISQUALIFICATION
## TEXAS RULES OF CIVIL PROCEDURE

- TRCP 18b(1) states Judges shall disqualify themselves in proceedings in which:
  1) They have served as a lawyer in the controversy
  2) They know that individually or as a fiduciary, they have an interest in the subject matter
  3) Either of the parties is related to them by consanguinity or affinity

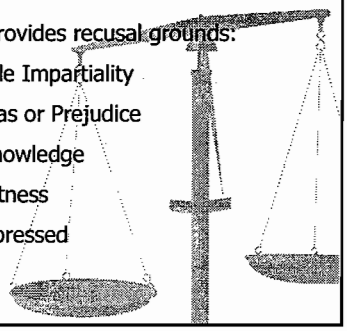


## GROUNDS FOR DISQUALIFICATION
## CODE OF CRIMINAL PROCEDURE



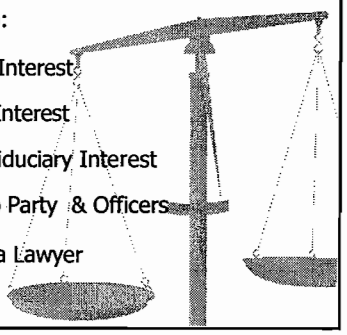
- Art. 30.01 provides that a Judge should disqualify herself if she is:
  1) Related to the defendant
  2) Related to the victim
  3) Served as a lawyer

## GROUNDS FOR RECUSAL
## TEXAS RULES OF CIVIL PROCEDURE



- TRCP 18b(2) provides recusal grounds:
  1) Questionable Impartiality
  2) Personal Bias or Prejudice
  3) Personal Knowledge
  4) Material Witness
  5) Opinion Expressed

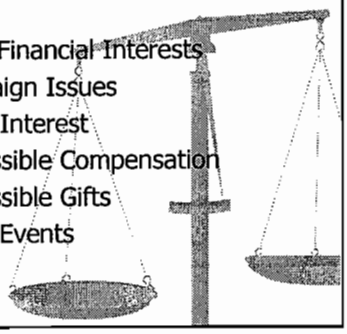
## GROUNDS FOR RECUSAL



- TRCP 18b(2):
  6) Fiduciary Interest
  7) Financial Interest
  8) Family's Fiduciary Interest
  9) Related to Party & Officers
  10) Acting as a Lawyer

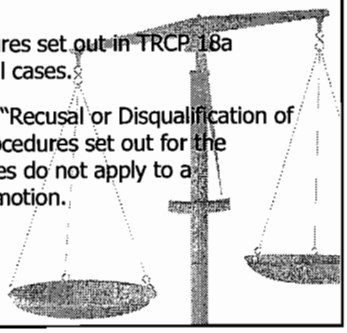
## RELATIONSHIPS THAT DO NOT REQUIRE RECUSAL

- Some Financial Interests
- Campaign Issues
- Public Interest
- Permissible Compensation
- Permissible Gifts
- Social Events



## TWO IMPORTANT POINTS
## TEXAS RULE OF CIVIL PROCEDURE 18a

- Recusal procedures set out in TRCP 18a apply to Criminal cases.
- Despite its title, "Recusal or Disqualification of Judges," the procedures set out for the removal of judges do not apply to a disqualification motion.

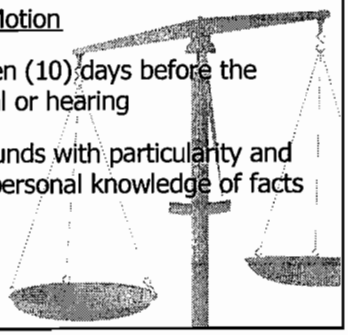


## PROCEDURES TO RECUSE UNDER TRCP 18a

- File a Verified Motion

  -- At least ten (10) days before the date set for trial or hearing

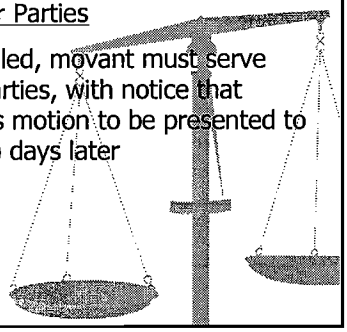
  -- State grounds with particularity and be made with personal knowledge of facts



## PROCEDURES TO RECUSE UNDER TRCP 18a

- Notice To Other Parties

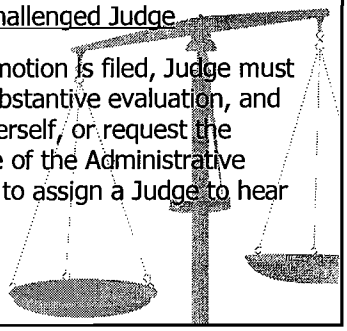
  -- On date filed, movant must serve copies on all parties, with notice that movant expects motion to be presented to Judge three (3) days later



## PROCEDURES TO RECUSE UNDER TRCP 18a

- Response by Challenged Judge

  --Once the motion is filed, Judge must consider the substantive evaluation, and either recuse herself, or request the Presiding Judge of the Administrative Judicial District to assign a Judge to hear the motion.

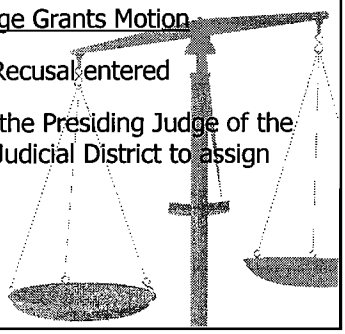


## PROCEDURES TO RECUSE UNDER TRCP 18a

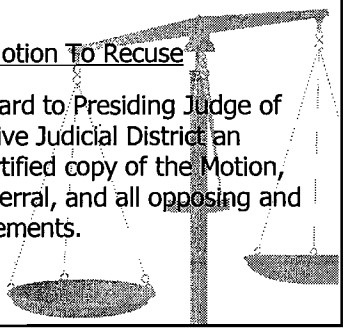
- Challenged Judge Grants Motion

  -- Order of Recusal entered

  -- Requests the Presiding Judge of the Administrative Judicial District to assign another Judge



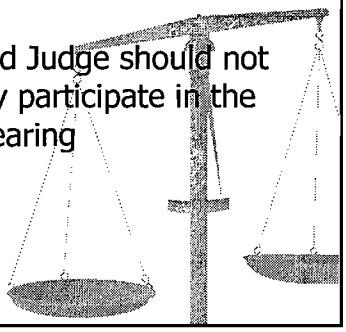
## PROCEDURES TO RECUSE UNDER TRCP 18a



- Judge Denies Motion To Recuse

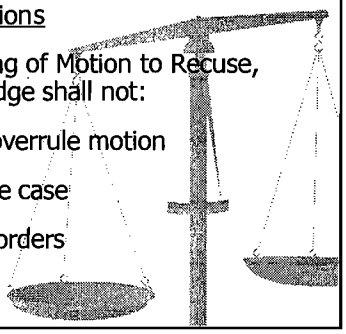
  -- Must forward to Presiding Judge of the Administrative Judicial District an original or a certified copy of the Motion, an Order of Referral, and all opposing and concurring statements.

## PROCEDURES TO RECUSE UNDER TRCP 18a



- Challenged Judge should not voluntarily participate in the recusal hearing

## PROCEDURES TO RECUSE UNDER TRCP 18a



- Prohibited Actions

  --Upon filing of Motion to Recuse, challenged judge shall not:

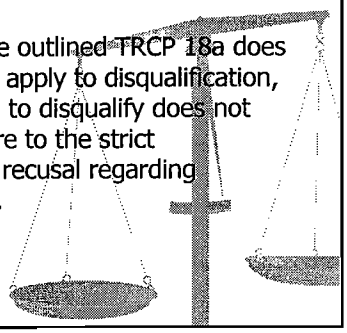
  ignore or overrule motion

  transfer the case

  enter any orders

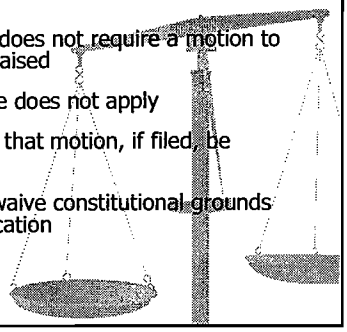
## COMPARING PROCEDURE TO RECUSE WITH DISQUALIFICATION

- The procedure outlined TRCP 18a does not appear to apply to disqualification, so the motion to disqualify does not need to adhere to the strict requirements recusal regarding timelines, etc.



## COMPARING PROCEDURE TO RECUSE WITH DISQUALIFICATION

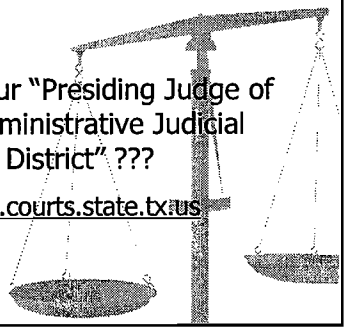
- Disqualification does not require a motion to be properly raised
- Ten day timeline does not apply
- No requirement that motion, if filed, be verified
- Parties cannot waive constitutional grounds for disqualification



## PRESIDING JUDGE OF THE ADMINISTRATIVE JUDICIAL DISTRICT

Who is your "Presiding Judge of the Administrative Judicial District" ???

www.courts.state.tx.us



# REMOVAL OF JUDGES FROM TEXAS CASES: DISQUALIFICATION AND RECUSAL
# A STEP-BY-STEP GUIDE TO THE PROCESS

Written by:
Professor Ana M. Otero
Presented by:
Hon. Jan Blacklock Matthews, Hon. Ed Spillane, and Professor Ana M. Otero

## I. Introduction: Eliminating Judicial Bias

In 2005, the State Commission on Judicial Conduct reviewed 1101 complaints against judges, magistrates, and justices of the peace in the State of Texas.[1] Of those complaints, 9 were related to charges of judicial bias and resulted in judges being disciplined by either private or public reprimands.[2]

Disqualification and recusal of judges are two methods used by this state to alleviate judicial bias. Refusing to abide by the statutory procedure can put a judge in danger of finding herself subject to one of the Judicial Conduct reviews. Article V, Section 1a (6)A of the Texas Constitution defines judicial misconduct as the "willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of that office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice."

As stated in the 2005 Annual Report of the Texas Commission on Judicial Conduct: "Judicial misconduct could arise from a violation of the Texas Constitution, the Texas Penal Code, the Texas Code of Judicial Conduct, or rules promulgated by the Supreme Court of Texas. It could occur through the judge's failure to cooperate with the Commission. Other examples of judicial misconduct could include inappropriate or demeaning courtroom conduct, such as yelling, profanity, gender bias or racial slurs. It could be improper ex parte communications with only one of the parties or attorneys in a case, a public comment regarding a pending case, or a refusal by a judge to recuse or disqualify in a case where the judge has an interest in the outcome. It could involve ruling in a case in which the parties, attorneys or appointees are related within a prohibited degree of kinship to the judge."[3]

One of the guiding principles of the American system of jurisprudence is the ideal of the independent and neutral judiciary. As citizens, living under this system, we expect

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[1] The State of Texas Commission on Judicial Conduct, Fiscal Year 2005 Annual Report available at http://www.scjc.state.tx.us/Annual_Report_2005.pdf.

[2] Information compiled from information available from the State Commission on Judicial Conduct in the following reports: Private Sanction Summaries FY 2000 to Present available at http://www.scjc.state.tx.us/summprivsanctrevised_.pdf, and Public Sanctions FY2005 available at http://www.scjc.state.tx.us/FY2005PUB-SANC.pdf..

[3] Annual Report, supra note 1 at 3.

that we will have our day in court before a judge who will treat our case in an unbiased manner, with objectivity under the law. Of course, we do not live in isolation in the real world. This means that some disputes coming before the municipal judge may affect her personal interests either because she is directly or indirectly related to the parties, or she has a financial interest which may cause bias in her decision-making role.

The Texas Supreme Court, recognizing this danger, has promulgated ethical rules in the Texas Code of Judicial Conduct which mandate that judges, do not hear matters in "which disqualification is required or recusal is appropriate,"[4] or the judge "in the performance of his duties act with bias or prejudice."[5] Thus, the first line of defense, as outlined by the Canon, is the judge herself.[6] The well-trained ethical judge will recognize the grounds for disqualification, potential for bias, or the appearance of bias, and remove herself from the adjudication.

When a judge does not take this preemptive step, though, the litigants may utilize a procedural device – a motion to challenge the judge – that allows them to request the judge's removal.[7] However, as will be discussed below, the motion to challenge the judge is only the first step in the process. Furthermore, as has been noted here, a judge's failure to follow the procedure outlined under Texas practice may lead to disciplinary proceedings. Further, it can also open the door to civil and/or criminal liability for abuse of power. The argument was poignantly stated in an appellate case:

"Public policy demands that the judge who sits in a case act with absolute impartiality. Beyond the demand that a judge be impartial, however, is the requirement that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or integrity of the court. The judiciary must strive not only to give all parties a fair trial but also to maintain a high level of public trust and confidence. The legitimacy of the judicial process is based on the public's respect and on its confidence that the system settles controversies impartially and fairly. Judicial decisions rendered under circumstances that suggest bias, prejudice, or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence."[8]

Thus, it is imperative that every judge observes procedure to ensure both equitable justice and personal protection. This paper will explain the differences between disqualification and recusal, outline the statutory procedure involved in this process, and provide a step-by-step guide for the judge.

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[4] Canon 3(B)(1) of the Texas Code of Judicial Conduct available at http://www.scjc.state.tx.us/txcodeofjudicialconduct.pdf. *Also, see excerpts of Code attached to this handout as Appendix I.*

[5] Canon 3(B)(6).

[6] *Id.*

[7] TEX. R. CIV. P. 18a and 18b (2006).

[8] Gulf Maritime Warehouse Co. v. Towers, 858 S.W. 2d 556, 559. (Tex.App.-Beaumont 1993)(footnotes omitted).

## II. Removal of Judges from Texas Cases. Motions to Challenge a Judge: Distinguishing Disqualification and Recusal[9]

The Texas Code of Judicial Conduct clearly charges that "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate."[10] The Texas Constitution restates this in the negative: "No judge shall sit in any case: wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case."[11]

In general, a judge may be removed from a case for three reasons:[12]

1) she is subject to a statutory strike as an assigned judge (Govt. Code §74.053);
2) she is constitutionally disqualified (Tex. Const. art. 5, §11) ;
3) she is recused under rules promulgated by the Supreme Court (Texas Rules of Civil Procedure (TRCP) 18a-18b).

Types of Motions: There are four types of challenges to the trial judge:[13]

1) **Objection to assigned judges**. An objection to an assigned judge is a peremptory challenge that, if timely made, results in the automatic removal of the assigned judge. (Govt. Code §74.053); (An assigned judge is a person who is assigned under Govt. Code Chapter 74 to sit temporarily for the regular judge of the court).

2) **Motion to disqualify**. A motion to disqualify seeks to prevent a judge from hearing a case for a constitutional or statutory reason. (Tex.Const. art 5 §11, and TRCP 18b);

3) **Motion to recuse**. A motion to recuse seeks to prevent a judge from hearing a case for a nonconstitutional reason. (TRCP 18b(2)).

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[9] The bulk of the discussion regarding disqualification and recusal, as well as the cases included in the footnotes in this section derives directly from the commentaries provided in *O'Connors Texas Rules and O'Connor's Civil Appeals*. See Commentaries, Chapter 5(c ), *O'Connor's Texas Rules, Civil Trials* 2006 (Jones McClure Publishing) and Commentaries, Chapter 13, O'Connor's Texas Civil Appeals, 2004-2005 (Jones McClure Publishing).

[10] Canon 3 of the Texas Code of Judicial Conduct.

[11] Tex. Const. art. 5, § 11, *Disqualification of Judges*.

[12] Commentaries, Chapter 5(c ) 245. O'Connor's Texas Rules, Civil Trials 2006 (Jones McClure Publishing). See also *In re Union Pacific Resources Company*, 969 S.W. 2d 427 (Tex. 1998).

[13] *Id.* at 246.

4) **Tertiary motion to recuse**. The third (or later) motion to recuse or disqualify a judge in the same case by the same party is called a "tertiary motion." Although the substantive law is the same as for motions to recuse, separate rules govern the procedure for tertiary motions.

Although four types of challenges have been discussed above, for purpose of the Municipal Courts, only two of these motions are pertinent: the challenges to disqualify and recuse. These challenges and their effect on the judge's authority to adjudicate in a case will be discussed respectively. One important note must be made at this juncture, however: "...although it appears that the terms disqualification and recusal are used interchangeably, such use is a grievous error. If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void, without effect, and subject to collateral attack."[14]

## Comparison of Disqualification, Recusal[15]

| | | **Disqualification** | **Recusal** |
|---|---|---|---|
| 1 | Source of Challenge | Constitutions, statutes, & rules | Statutes & rules |
| 2 | Discretionary or mandatory | Mandatory | Discretionary |
| 3 | Waivable | No | Yes |
| 4 | Parties may consent to judge | No | Yes |
| 5 | Effect if judge serves after valid challenge | Judgment void | Reversible error |
| 6 | Requires written motion | No | Yes |
| 7 | Judgment subject to collateral attack | Yes | No |

## DISQUALIFICATION

### A. Grounds for Disqualification – The Texas Constitution

The Texas Constitution provides three grounds for disqualifying a judge from sitting in any case: (Tex. Const. art. 5 §11)

[14] Gulf Maritime Warehouse, *supra* note 8 at 559, citing to William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, *infra* note 70.

[15] This table appears in O'Connors, Civil Trials, supra note 9 at 246.

1) the judge was counsel in the case;
2) the judge "may be interested" in the outcome of the case;
3) one of the parties is related to the judge.

The following discussion addresses each of the grounds and their respective elements.

1) **The Judge was counsel in the case**

The Texas Constitution[16] disqualifies a judge from a case if the judge served as a lawyer in the same matter.

- Elements for Disqualification

To be disqualified, the judge must have served as counsel to one of the parties in an earlier proceeding in which the issues were the same as in the case currently before the judge.[17] If the judge represented one of the parties in the past, but the proceeding before the judge is not the same case, the judge is not disqualified.[18]

- No formal relationship

The attorney-client relationship can result in disqualification even if there was no formal attorney-client relationship, as long as the judge performed an act appropriate to counsel (e.g. giving advice).[19] Even if the judge does not recall the act of giving advice, she may be disqualified.[20]

2. **The judge may be interested in the outcome of the case: Disqualifying Interests**

The Texas Constitution[21] disqualifies a judge from a case in which the judge "may be interested." A common interest shared with the public is not a disqualifying

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[16] Tex. Const. art. 5 §11.

[17] Lade v. Keller, 615 S.W.2d 916, 920 (Tex. App.-Tyler 1981, no writ). See In re O'Connor, 92 S.W. 3d 446, 449 (Tex.2002) (judge whose law partner had represented party in divorce proceeding was disqualified); Zarate v. Sun Oper. Ltd. 40 S.W. 3d 617, 621-622 (Tex.App. – San Antonio 2001, pet. Denied) (despite not making physical appearance in case, judge who acted as counsel at hearing & represented party was disqualified).

[18] Dean v. State, 938 S.W. 2d 764, 767 (Tex.App.-Houston[14th Dist.] 1997)( no writ)(representation must have been in same case, not another unrelated case with same defendant).

[19] Conner v. Conner, 457 S.W. 2d 593, 595 (Tex.App.-Amarillo19790, writ dism'd).

[20] Williams v. Kirven, 532 S.W. 2d 159, 160-161 (Tex.App. –Austin 1976, writ ref'd n.r.e.)(even though judge did not recall writing title opinion on property involved in lawsuit before him, public policy required disqualification).

[21] Tex. Const. art. 5 §11. See also Govt. Code § 572.001(prohibits a judge from having financial interest in matters affecting decision, Govt. Code §572.005 (defining prohibited financial interest or control in business entity), Govt. Code §572.051 (prohibits judge from engaging in activities that might influence disclosures, impair judgment, or create conflict of interest); Penal Code §36.02 (prohibits bribery), Penal Code §36.08(e) (prohibits certain gifts to judges); Code of Judicial Conduct, Canon 4D (restricts financial

interest under the constitution.[22] The courts cannot cause the disqualification of a judge merely by naming the judge as a party.[23]

The courts have described the interest requiring disqualification as either financial or personal:

a. Disqualifying financial interests

A disqualifying interest is a direct pecuniary interest in the result of the case.[24] Once a direct pecuniary interest is shown, the judge is disqualified no matter how slight the interest.[25]

i .Fiduciary interests. A judge is disqualified if the judge is a fiduciary that has a financial interest in the subject matter of the lawsuit.[26]

ii. Bribes and prohibited gifts. A judge cannot solicit or accept any benefit from a person who the judge knows is interested in, or is likely to become interested in, any matter before the court.[27] Although the Penal Code does not address disqualification, proof of a bribe or a prohibited gift would probably be grounds for disqualification.

iii. Judge married to a lawyer. Because a judge shares community property with her spouse, if the spouse represents a party in a suit before the judge, the grounds for recusal would probably rise to constitutional grounds for disqualification.[28] To allege a ground for disqualification (as opposed to recusal) when the judge's spouse represents a party in the case, the motion should focus on financial interest gained by the judge as a result of community property.

b. Disqualifying personal interest

A disqualifying interest is a direct personal interest in the result of the case. Once a direct interest is shown, the judge is disqualified no matter how slight the interest.[29]

3. **Related to Party**

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activities of judges0; Tex. R. Civ. P. 18(b)(1)(disqualifies judge who has financial interest). (References from Commentaries – Chapter 13 at 105, O'Connor's Texas Civil Appeals, 2004-2005 (McClure Publishing).

[22] Sears v. Olivares, 28 S.W. 3d 611, 616 (Tex.App.-Corpus Christi 2000, no pet.).

[23] Cameron v. Greenhill, 582 S.W. 2d 775, 776 (Tex. 1979).

[24] *Id.* at 776.

[25] *Id.* at 776.

[26] TEX. R. CIV. P. 18b(1); Also the Code of Judicial Conduct, Canon 4E (fiduciary activities); TRCP 18b(2)(e)(recusal when judge has interest as fiduciary).

[27] TEX. PENAL CODE §36.02(a)(felony in second degree to engage in bribery), TEX. PENAL CODE §36.08(e)(class A misdemeanor to solicit or accept benefits from person subject to judge's jurisdiction); See also Canon 4D(4) (extends to members of judge's household).

[28] See Tex. Const. art. 5, §11; see also Govt. Code §82.066 (attorney cannot appear before judge if related in first degree).

[29] Cameron, *supra* note 23 at 776.

The Texas Constitution[30] disqualifies a judge from a case if the judge is related to one of the parties.

a. Relations that invoke disqualification

The Constitution does not identify the degree of relationship in disqualification. It merely says a judge shall not sit in a case where related to a party "within such a degree as may be prescribed by law."[31]

i. Civil cases

TRCP 18b(1) disqualifies a judge from a case if the judge is related to a party within the third degree by consanguinity or affinity.

ii. Criminal cases

The Code of Criminal Procedure prohibits a judge from sitting in a case when the judge is related to the defendant within the third degree of consanguinity or affinity.[32]

iii. How to count relatives

Consanguinity is a relationship by blood; affinity is a relationship by marriage. The judge's relatives within the third degree of consanguinity include great-grandparents, parents, aunts, uncles, sisters, brothers, nieces, nephews, children, grandchildren, and great-grandchildren.[33] A judge has two groups of relatives by affinity: 1) those persons married to the judge's blood relatives and 2) those persons related to the judge's spouse by blood.

According to TRCP 18b(4)(b), "the degree of relationship is calculated according to the civil law system " – the civil law system of computing degrees. According to this system, each generation counts as one degree. For example a judge is related to the judge's parents by one degree and to the judge's grandparents by two degrees.[34]

Generally, relatives within the third degree of the judge are great-grandparent, grandparent, parent, aunt/uncle, sister/brother, niece/nephew, child grandchild, and great-grandchild.[35] In addition, other persons who are considered relatives are adopted children, half-blood relatives and their spouses, and step relations as long as the marriage that created the relationship still exists.[36] *See the chart in Appendix II which identifies the relatives by degrees.*[37]

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[30] Tex. Const. Art. 5, §11.
[31] Id.
[32] CODE CRIM. PROC. art. 30.01.
[33] O'Connors Texas Civil Appeals, supra note 9 at 106.
[34] O'Connors Texas Civil Appeals, supra note 9 at 106. See Govt. Code §573.021.
[35] Id.
[36] Id.
[37] Id at 107.

## B. Grounds for Disqualification Under Tex. R. Civ. P. 18b(1)

TRCP 18b(1) outlines the grounds for disqualification under the rules of civil procedure, which overlap with some of the constitutional grounds: Judges shall disqualify themselves in all proceedings in which:

1. they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or
2. they know that individually or as a fiduciary, they have an interest in the subject matter in controversy; or
3. either of the parties may be related to them by affinity or consanguinity within the third degree.

## C. Grounds for Disqualification under Code of Criminal Procedure art. 30.01

The Texas Code of Criminal Procedure article 30.01 provides grounds for disqualification in criminal cases, which overlap with some of the constitutional grounds. The prohibitions in art. 30.01 are mandatory, even if the judge did not know about the relationship.[38] The defendant cannot waive the judge's disqualification.[39]

According to art. 30.01, a judge should disqualify herself if she is:

1. Related to the Defendant. A judge should disqualify herself when she is related to the defendant within the third degree of consanguinity or affinity.

2. Related to the victim. A judge should disqualify herself when she is the victim or is related to the victim within the third degree of consanguinity or affinity.

3. Served as a lawyer. A judge should disqualify herself when the judge was counsel for the State or the accused.

# RECUSAL

"The line between disqualification, which is mandatory, and recusal, which is discretionary, is not well defined. The grounds listed in Tex. R. Civ. P. 18b(2) under

[38] O'Connor Civil Appeals, supra note 9 at 108. *Ex parte Vivier*, 699 S.W. 2d 862, 863 (Tex. Crim.App. 1985).
[39] *Gamez v. State*, 737 S.W. 2d 315, 318 (Tex.Crim.App. 1987).

'Recusal' may rise to the level of mandatory disqualification when they impact a litigant's right to due process."[40]

## D. Grounds for recusal under Tex. R. Civ. P. 18b(2)

1. **Impartiality may be questioned**. A judge should recuse herself if the "judge's impartiality might be reasonably questioned." Pursuant to case law, there are a number of ways in which a judge's impartiality might be reasonably questioned:

   a. Judge represented by lawyer. When a lawyer is representing the judge in another proceeding, it is a prima facie basis for recusal.[41] The party challenging the judge must show the attorney-client relationship would permit the judge's impartiality in the case to be questioned.[42]

   b. Financial responsibility with lawyer. A judge should recuse herself if the judge has a financial tie with a lawyer.[43]

   c. Judge aligned with one party. A judge should recuse herself if the judge is aligned with one party and it destroys the appearance of impartiality.[44]

   d. Delicacy & propriety. A judge may, for motives of delicacy and propriety, grant a motion to recuse.[45]

2. **Bias & prejudice**. A judge should recuse herself if the judge has a personal bias or prejudice about the subject matter of the case or about a party. It is difficult to draw the line between the type of bias and prejudice that is a mandatory ground because it rises to the level of constitutional disqualification, and the bias and prejudice that is a discretionary ground because it does not rise to the level of constitutional disqualification. When a judge's bias is so strong that it denies a party due process, it can be ground for mandatory disqualification.[46] To be challenged as a ground for removal, the judge's bias must be extrajudicial and cannot be based on in-court rulings.[47]

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[40] O' Connor's Texas Civil Appeals, *supra* note 9 at 108.
[41] *Id.* at 109.
[42] *Id.* Lueg v. Lueg, 976 S.W. 2d 308, 311 (Tex.App.-Corpus Christi 1998)(where attorney represented judge in unrelated matter, judge was not subject to disqualification, only to recusal).
[43] Id. See, e.g. Judicial Ethics Advisory Opinions No. 23 (1977)(part owner of title insurance business), No. 129 (1989) (receiving salary from corporation), No. 153 (1993) (leasing law office to attorney practicing before her court), No. 179 (renting former law office to lawyers appearing in his court when proceeds benefit his minor children).
[44] Blanchard v. Krueger, 916 S.W. 2d 15, 19 (Tex. App.-Houston [1st Dist.] 1995, orig. proceeding)(judge became aligned with party opposing recusal by joining underlying mandamus action challenging judge's refusal to recuse himself).
[45] Matlock v. Sanders, 273 S.W. 2d 956, 959 (Tex.App. – Beaumont 1954, orig. proceeding).
[46] Westbrook v. State, 29 S.W. 3d 103, 121 (Tex.Crim.App.2000).
[47] In re M.C.M., 57 S.W. 3d 27, 33 (Tex.Ap..-Houston [1st Dist.]2001, pet. Denied).

3. Judge has personal knowledge. A judge should recuse herself if the judge has personal knowledge of a disputed fact and is the fact-finder. If the judge is not the fact-finder, personal knowledge may not prevent the judge from hearing the case.[48]

4. Material Witness. A judge should recuse herself if the judge, a lawyer with whom the judge practiced, the judge's spouse, or any relative within the third degree is a material witness in the case.

5. Judge expressed an opinion. A judge should recuse herself if, while acting as an attorney in government practice, the judge expressed an opinion regarding the merits of the suit.[49]

6. Fiduciary interest. Tex. R. Civ. P. 18b(1)(b) disqualifies a judge from a case if the judge knows that as a fiduciary (e.g. executor, trustee, or guardian) the judge has a financial interest in the subject matter of the lawsuit.[50] The general prohibition in the Texas Constitution regarding the judge's financial interest probably extends to the judge as a fiduciary, making the judge's disqualification mandatory.

7. Financial interest. If a judge knows that she, her spouse, or a minor child residing in her household has a financial interest in the lawsuit, is a party to the lawsuit, or has any other interest that could be substantially affected by the outcome of the proceeding, the judge should not hear the case.

8. Family's fiduciary interest. If a judge knows that she, her spouse or minor child residing in her household has an interest in the subject matter of the lawsuit as a fiduciary (e.g. executor, trust, or guardian) the judge should not hear the case.

9. Related to party & officers. A judge should recuse herself if she or her spouse, or a person within the third degree to either of them or the spouse of such person, is a party to the proceeding, or is an officer, director, or trustee or a party. Because of the overlap between TRCP 18b(1)(c) and 18b(2)(f)(i), if the judge is related to a party within the third degree, it is a ground for both disqualification and recusal.

10. Acting as lawyer. A judge should recuse herself if she or her spouse, or a person within the first degree to either of them or the spouse of such a person, is acting as a lawyer in the proceeding.

## E. Relationships that do not require recusal.

[48] Pan Am. Pet. Corp. v. Mitchell, 338 S.W. 2d 740, 741 (Tex.App. – El Paso 1960, no writ).

[49] But see Shapley v. Texas Dept. of Human Resources, 581 S.W. 2d 250, 253 (Tex. App. – El paso 1979, no writ)(no reversible error when judge made public statement regarding evidence heard after proceeding had started).

[50] TRCP 18b(1)(b), 18b(2)(e); Code of Judicial Canon 4E (fiduciary activities). (Note that Canon 4E may not apply to Municipal Court Judges, see Canon 6 (C)(b).

1. Financial Interests. The following interests do not require recusal. Tex. R. Civ. P. 18b(4)(i-v).

a. Mutual funds.

b. Government Securities.

c. Policy Holder.

2. Campaign Issues. As a general rule, a party supporting or opposing a judge in an election is not a ground for recusal.[51]

3. Public Interest. An interest in the litigation shared with the public at large, such as when the judge is a taxpayer or utility rate payer, does not require recusal unless the outcome of the litigation could substantially affect the liability of the judge more than it affects the public at large.[52]

4. Permissible compensation & reimbursement. Compensation or reimbursement for legitimate services rendered above and beyond official duties does not require recusal if the compensation does not exceed the amount a person who is not a judge would receive for the same service.[53]

5. Permissible gifts. Certain exceptions apply to the rule prohibiting public officials from accepting gifts.[54] A judge may accept the following:

a. A gift given based on kinship, personal relationship, or professional relationship without regard to the judge's official status.[55]

b. Food, lodging, transportation, or entertainment given as a guest if the judge reports the gift as required by law.[56]

c. A benefit that is derived from a function given in honor of the judge if the judge reports any benefit in excess of $50 and uses the benefit to defray nonreimbursable expenses of office.[57]

6. Social events. Attending a lawyer's party and accepting the lawyer's hospitality does not require recusal.[58] Benefits (such as free passes and tickets to football games, plays, and movies from a person or an entity not likely to come before the judge) is acceptable, so long as the parties understand that the gift is not an attempt to influence the judge.[59]

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[51] Supported, see *J-Iv Inv. v. David Lynn Mach., Inc.* 784 S.W. 2d 106, 107-108 (Tex.App. – Dallas 1990, no writ); see Penal Code §36.02(d). Opposed, see *Williams v. Viswanathan*, 65 S.W. 3d 685, 688-89 (Tex. App.- Amarillo 2001, no pet.).

[52] Tex. R. Civ. P. 18b(4)(d)(v).

[53] Code of Judicial Conduct, Canon 4I(l); Penal Code §§36.07(b), 3610(a)(3).

[54] See Penal Code §36.10 (exceptions).

[55] Penal Code §36.10(a)(2); Code of Judicial Conduct, Canons 4D(4)(a-d).

[56] Penal Code §36.10(b)(c); Code of Judicial Conduct, Canon 4D(4)(b).

[57] See Penal Code §36.10(a)(3).

[58] Code of Judicial Conduct, Canon 4D(4)(b).

[59] Code of Judicial Conduct Canon 4D(4)( c).

7. Fabricated ground for recusal. A judge merely being named as a party in the suit or a separate suit is not ground for recusal.[60]

8. Violation of the Code of Judicial Conduct. Although a judge may be disciplined for violating the Code of Judicial Conduct, a violation does not necessarily mean the judge should be recused.[61]

9. Miscellaneous contacts. That the defendant, a medical doctor, had operated on the judge's mother, or that the judge had performed the wedding ceremony for the defendant, were not grounds for recusal.[62]

The greater difference between disqualification and recusal lies in their consequences both to the judge, and to the moving party. Chiefly, the moving party may waive a motion for recusal, whereas a party always maintains the right to move for disqualification. The rules require the moving party to file a motion to recuse "at least 10 days before the date set for trial."[63] Thus, parties failing to file their verified motion 10 days before trial, as required by procedure, waive their complaint.[64]

In the case of a disqualification, any order or judgment made by the judge may be found void and vacated.[65] Furthermore, the judge could then be open to civil and/or criminal liability under both the Texas Constitution and the Texas Code of Judicial Conduct.[66] Thus, one can see the importance of diligence on the part of the judge in determining her potential for judicial bias.

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[60] Cameron, *supra* note 23 at 776.

[61] *Ludlow v. DeBerry*, 959 S.W. 2d 265, 270, 283-284 (Tex.App. –Houston [14th Dist.] 1997, no writ)(trial judge's statements to jurors about their verdict did not require recusal because bias was not sown to have risen from an extrajudicial source).

[62] *Woodruff v. Wright*, 51 S.W. 3d 727, 736-737 (Tex.App. –Texarcana 2001, pet. Denied).

[63] Tex. R. Civ. P. 18a(a) (2006).

[64] *Esquivel v. El Paso Healthcare Sys.*, 2005 Tex. App. LEXIS 7001 (Tex. App. El Paso Aug. 25, 2005) (The court even found in this case that the movant waived the complaint that the judge did not self-recuse because they filed no motion), *Pease v. Pease*, 2004 Tex. App. LEXIS 8258 (Tex. App. Austin Sept. 10, 2004) (Movant failed to meet procedural requirements for motion under the Tex. R. Civ. P. 18a (2006)), Cluck v. Arlitt, 2004 Tex. App. LEXIS 4265 (Tex. App. San Antonio May 12, 2004) (The court found no abuse of discretion by a judge who did not self-recuse when the complainant did not file a motion to recuse), *Carson v. Serrano*, 96 S.W.3d 697 (Tex. App. Texarkana 2003) (A Party that fails to follow Rule 18a's procedure waives the right to complaint over judge's failure to self-recuse), *Harris v. State*, 160 S.W.3d 621 (Tex. App. Waco 2005) (Defendant was aware of grounds for recusal but did not move for such within 10 days before his hearing, and thus failed to preserve review of the issue). Further examples of the waiver of right to complaint *in re* recusal can be found in the LexisNexis annotations for Tex. R. Civ. P. 18a (2006).

[65] *See Ex parte Washington*, 442 S.W.2d 391 (May 8, 1968).

[66] *See* Texas Constitution: article 5, *Judicial Department*, § 1-a, and State Commission on Judicial Conduct; Procedure, §§ 6 and 8.

## III. A Walk-Through the Recusal and Disqualification Procedure under Tex. R. Civ. P. 18a.[67]

Before commencing any proceeding, a judge must first evaluate her potential for bias toward one of the parties, or in regard to the subject matter. As noted above, the Texas Constitution requires that a judge disqualify herself if she has this potential for bias in the proceedings.[68] The rules of civil procedure provide a guideline for determining whether impermissible bias exists for the judge.[69] There are several factors to consider and any one of them, individually, can be enough to require the judge to recuse or disqualify herself.

Two important points must be made about Tex. R. Civ. P. 18a: First, the recusal procedures set out in this civil rule also apply to criminal cases.[70] Second, although its title is "Recusal or Disqualification of Judges," scholars[71] have aptly pointed out that the procedures set out in this rule for the removal of a judge do not apply to disqualification but only to recusal. Clearly, Tex. R. Civ. P. 18b distinguishes between the grounds for disqualification and recusal, but R. 18a does not, and although in the first paragraph it alludes to the general motion that should be filed as to why a judge should not sit in the case, the balance of the rule speaks directly to recusal.

Accordingly, since the requirements for a recusal motion are explicitly set out in Tex. R. Civ. P. 18a, we will address those requirements first.

### A. Procedure for Recusal under Tex. R. Civ. P. 18a

The rule provides a procedural guideline for both the movant and the judge in a recusal situation.[72] *Also, see the Checklist for the Review of a Motion to Recuse attached as Appendix III.*

- File a verified motion. First, the movant must file[73] a verified motion within at least 10 days before the date set for trial or any hearings, and the motion must

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[67] The following is a stepwise guide to the recusal and/or disqualification process. While it is written from the moving parties point of view as outlined procedurally in Tex. R. Civ. P. 18a (2006) and under the standards and definitions of Tex. R. Civ. P. 18b (2006), it should also be useful as a guide when determining whether self-recusal or self-disqualification are appropriate and which steps are taken. *See Also* TEX. R. CIV. P. 18a and 18b (2006) *Disqualification and Recusal: Substantive Checklist,* and *Disqualification and Recusal: Procedural Checklist* included in the Appendix to this handout.

[68] Tex. Const. art. V, ' 11 *Disqualification* (2006).

[69] TEX. R. CIV. P. 18b (2006). *See Also* Appendix for *Disqualification and Recusal: Substantive Checklist.*

[70] Arnold v. State, 853 S.W. 2d 543, 544 (Tex.Crim. App. 1993)(en banc); Moorhead v. State, 972 S.W. 2d 93, 94-95 (Tex.App. –Texarkana 1998, no.pet).

[71] Robert P. Schuwerk and Lillian b. Hardwick, *Texas Practice Series, Handbook of Texas Lawyer and Judicial Ethics: Attorney Tort Standards, Attorney ethics Standards,* etc., Chapters 40.01- 40.08, Disqualification, etc.. (Current through 2005 update). In its article, Professor Schuwerk cites to William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 601 (1986).

[72] TEX. R. CIV. P. 18a (2006). *See Also* Appendix for *Disqualification and Recusal: Procedural Checklist.*

[73] The word "file" in the rule explicitly implies that recusal motion must be in writing. TEX.R. CIV. P. 18a(a).

state the grounds with particularity, and be made with personal knowledge of the facts.[74] Failure to do this, or to meet any of the procedural requirements, can result in the movant waiving the right to argue for recusal.[75] However, there are at least three instances in which a motion to recuse or disqualify may be filed after then ten-day deadline in Rule 18a(a).[76]

- Notice to other parties. On the day the motion is filed, the movant must serve copies of the motion, along with notice that the movant expects the motion to be presented to the judge three days later, on all other parties on the day the motion is filed.[77] After this service any party may file an opposing or concurring statement with the clerk.[78] But note that the parties may waive a ground for recusal after it is fully disclosed on the record.[79]

- Response by challenged judge. At this juncture, the procedural burden shifts to the judge. Once the motion has been filed, the judge must consider the substantive evaluation that was discussed above and either self-recuse, or request the presiding judge of the administrative judicial district to assign a judge to hear the motion.[80] In either case, except for good cause, the judge may not make any further orders, nor take any further action in the proceeding.[81]

  - Judge grants motion. If the judge chooses to recuse herself, then she enters an order of recusal and requests the presiding judge of the administrative judicial district to assign another judge to sit.[82]

  - Judge denies motion –referral. If the judge declines to recuse herself, then she must forward to the presiding judge of the administrative judicial district an original or a certified copy of the motion, an order of referral, and all opposing and concurring statements.[83]
    The trial judge cannot deny the motion without referring the motion to the presiding judge for a hearing.

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[74] TEX. R. CIV. P. 18a(a) (2006).
[75] Spigener v. Wallis, 80 S.W. 3d 174 (Tex.App. –Waco 2002 , no pet.).
[76] There are at least three instances under which a late-filed motion might survive. O'Connon's *Texas Rules Civil Trials*, supra note 9 at 250. A movant can file a motion to recuse after the ten-day deadline in Tex. R. Civ. P. 81a(a): 1) A movant can file a motion to recuse after the ten-day deadline only if the movant learns of the reason for recusal after that deadline and files the motion immediately after learning of the reason. Keen Corp. v. Rogers, 863 S.W. 2d 168, 172 (Tex. App. – Texarkana 1993, no writ); 2) A motion to disqualify based on a constitutional ground can be presented at any time; the motion is not limited by the ten-day timeline; 3) When a case is reversed for retrial, the parties may make a motion to recuse after remand. Winfield v. Dagget, 846 S.W. 2d 920, 922 (Tex.App. – Houston[1st Dist.] 1993, orig. proceeding).
[77] TEX. R. CIV. P. 18a(b) (2006).
[78] *Id.*
[79] TEX.R. CIV. P.18b(5).
[80] TEX. R. CIV. P. 18a(c) (2006). .
[81] *Id.*
[82] *Id.*
[83] *Id.*

- Judge should not participate in recusal hearing. The challenged judge should not voluntarily participate in the recusal hearing or a mandamus proceeding regarding the recusal.[84]

When a motion to recuse is denied, it may be reviewed for abuse of discretion.[85] If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge.

Finally, if a motion to recuse was brought solely for the purpose of delay, the other party may ask for sanctions under Tex. R. Civ. P. 215.2(b).[86]

- Prohibited Actions

Where a motion to recuse has been filed, the trial judge cannot do any of the following:[87]

1) Ignore or overrule. The judge does not have the option to ignore the motion or overrule it and proceed to trial.[88]

2) Transfer. Once a motion to recuse has been filed, the challenged judge cannot transfer the case to another district court to avoid recusal.[89]

3) Orders pending resolution. Once challenged, a judge cannot take any action in the case until the motion to recuse is resolved. Any order signed by the challenged judge while the motion is pending is void.[90]

## B. "Raising the Issue of Disqualification":[91] What procedures apply to this motion?

As previously noted, scholars[92] have aptly argued that the procedure for removing a judge outlined in Tex. R. Civ. P. 18a does not apply to disqualifications.[93] In fact, in a 1986 article, entitled *Disqualification and Recusal of Judges*, the authors suggested that there is no "procedure" per se for the disqualification of a trial judge.[94] This means that

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[84] Blanchard v. Krueger, 916 S.W. 2d 15, 19 (Tex. App. –Houston[1st Dist.] 1995, orig. proceeding).
[85] TEX. R. CIV. P. 18a(f) (2006).
[86] TEX. R. CIV. P. 18a(h) (2006).
[87] O'Connors Texas Rules, Civil Trials, supra note 9 at 250-251.
[88] Johnson v. Pumjani, 56 S.W. 3d 670, 672 (Tex.App. Houston [1st. Dist.] 2005).
[89] In re PG & E Reata Energy, L.P. 4 S.W. 3d 897,901 (Tex. App.-Corpus Christi 1999, orig. proceeding.)
[90] In Re Rio Grande Valley Gas Co., 987 S.W. 167, 179 (Tex. App. – Corpus Christi 1999, orig. proceeding).
[91] Kilgarlin and Bruch in their article cited supra note 71, stated that there is no procedure per se for the raising of a motion to disqualify. Accordingly, they referred to disqualification issues as "raising the issue of disqualification." *See supra* note 71.
[92] See *supra* note 71.
[93] See Schuwerk, *supra* note 71, Chapter 40.2. Procedure for Disqualification.
[94] Kilgarlin and Bruch, *supra* note 71, cited in Schuwerk, *supra* note 71.

for all practical purposes, the motion to disqualify does not need to adhere to the procedure outlined in Tex. R. Civ. P. 18a, in terms of timeline, etc. In fact, there is no requirement that a motion be filed at all.

However, although the key procedural requirements for recusal do not apply to disqualification, case law has addressed the issue of disqualification, and the following statements made by the Texas Court of Appeals in Beaumont regarding disqualification are insightful:[95]

- "A most distinguishing factor between disqualification and recusal is that recusal may be waived if not raised by proper motion.[96] Disqualification, however, is a different creature in that it survives silence. Although Rules 18a and 18b set forth certain distinguishing characteristics between disqualification and recusal, these rules are lacking a fine-line clarity, particularly regarding effect. While recusal requires a certain degree of procedural 'tiptoeing,' not so with disqualification. Disqualification may be raised at any time. Furthermore, disqualification may even be raised for the first time in a collateral attack on the judgment. Either a trial or appellate court may raise the question of disqualification on its own motion."[97]

  What this means is that for all practical purposes, the issue of disqualification does not require a motion in order to be properly raised.[98] (Gulf Maritime Warehouse).

- As noted above, a party can raise the issue of disqualification at any time. The ten-day timeline prescribed in Tex. R. Civ. P. 18a does not apply.[99]

- If a party raises the issue in the trial level through a motion to disqualify, there is no requirement that the motion be verified. When a judge is constitutionally unable to hear the case, lack of verification is not a ground to overrule the motion to disqualify.[100] However, even motions to disqualify should be verified because if the grounds are insufficient to disqualify, they might be sufficient to recuse.[101]

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[95] Gulf Maritime Warehouse Company v. Towers, 858 S.W. 2d 556 (Tex.App. – Beaumont, 1993). (Injured worker sued corporation which had hired worker's employer to provide services after worker fell while unloading railroad hopper cars. Judge's wife was employed by defendant and judge had direct ownership in defendant corporation. Plaintiff sought to disqualify the judge).

[96] *Id.* at 560.

[97] *Id.* at 560.

[98] *Id.*

[99] Buckholts ISD v. Glaser, 632 S.W. 2d 146, 148 (Tex. 1982).

[100] McElwee v. McElwee, 911 S.W. 2d 182, 186 (Tex.App. – Houston [1st Dist.] 1995, writ denied).

[101] O'Connors Texas Rules, Civil Trials, supra note 8 at 250.

- If a motion is filed, it must state the facts and grounds that support the challenge.

- Parties cannot waive a constitutional ground for disqualification.[102]

- It appears that when the question of disqualification is raised, the matter should be referred to the presiding judge of the administrative judicial district for further proceedings. However, the courts that have held this step to be mandatory, have not clearly distinguished between recusal and disqualification. The issue is precisely explained by one scholar: "Since practitioners, whether due to confusion, an abundance of caution, strategic reasons, or some combination of the foregoing, often seek both recusal and disqualification in a single motion, if Rule 18a were uniformly read to apply only to recusal, then the same procedures would be followed even if the result sought was in fact disqualification. The grounds will usually be alleged with at least some particularity, and in many cases the trial judge will conduct a hearing to flesh out the allegations and/or to rebut them. Whether or not the judge then forwards the matter to the presiding administrative judge and a second hearing results – and whether or not the allegations and resulting evidence support recusal or disqualification – the record is complete for appellate consideration."[103]

- If a disqualified judge continues to sit, mandamus is the remedy.[104]

- "Any orders or judgments rendered by a judge who is constitutionally disqualified are void and without effect."[105] In general, the same "prohibited actions" discussed above applies to disqualification.[106]

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[102] Buckholts, *supra* note 99 at 148.

[103] Schuwerk, *supra* note 71, Chapter 40.02 Procedure for Disqualification at 45.

[104] Id. citing In re Union Pacific Resources Co. , 969 S.W. 2d, 427 (Tex. 1998)("[w]hen a judge continues to sit in violation of a constitutional proscription, mandamus is available to compel the judge's mandatory disqualification without a showing that the relator lacks an adequate remedy by appeal."). Id at 427.

[105] *Id.* In re Union Pacific at 428.

[106] See *supra* notes 86-89 and accompanying text.

# APPENDIX I

## THE TEXAS CODE OF JUDICIAL CONDUCT
**(full text available at http://www.scjc.state.tx.us/txcodeofjudicialconduct.pdf )**

### Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. 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.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

### Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(10) AMENDED – Thursday, August 22, 2002
A judge shall abstain from public comment about a pending or impending proceeding that may come before a judge's court in a manner that suggests to a reasonable person the judge's probable decision on any particular case. *This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected.* *A* judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge *or judicial candidate* is a litigant in a personal capacity.

**Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations**

**A. Extra-Judicial Activities in General**

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

**D. Financial Activities.**

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

**(4)** Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows: (very limited incidental, token, professional gifts and gifts within family and close friends for special occasions)

**(c)** a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge...

**Canon 5: Refraining From Inappropriate Political Activity**

**AMENDED - Thursday, August 22, 2002**

**(1)** A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding *pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;*

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent, *or*

(iii) *make a statement that would violate Canon 3B(10)*.

**Canon 6: Compliance with the Code of Judicial Conduct**

**C. Justices of the Peace and Municipal Court Judges.**

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(c ) with Canon 4F*, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation;

*4F. *Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.*

or

(d) if an attorney, with Canon 4G*, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

*4G. *Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.*

**Canon 8: Construction and Terminology of the Code**

**B. Terminology.**

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(12) "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

# APPENDIX II

## THE TEXAS CONSTITUTION

**Article 5 – Judicial Department, § 11 – Disqualification of Judges.**
No judge shall sit in any case:
... wherein the judge may be interested, or
... where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or
... when the judge shall have been counsel in the case. ...

This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

*Amended Aug. 11, 1891, and Nov. 6, 2001.*

## THE TEXAS GOVERNMENT CODE

**§ 21.005. Disqualification**

A judge or a justice of the peace may not sit in a case if either of the parties is related to him by affinity or consanguinity within the third degree, as determined under Chapter 573.

*Added by Acts 1987, 70th Leg., ch. 148, § 2.01(a), eff. Sept. 1, 1987.*
*Amended by Acts 1991, 72nd Leg., ch. 561, § 21, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 76, § 5.95(28), eff. Sept. 1, 1995.*

## THE TEXAS CODE OF CRIMINAL PROCEDURE -

**Chapter 30 —DISQUALIFICATION OF THE JUDGE**

**Art. 30.01. Causes which disqualify**
No judge or justice of the peace shall sit in any case:
... where he may be the party injured, or
... where he has been of counsel for the State or the accused, or
... where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree, as determined under Chapter 573, Government Code.

*Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966; Amended by Acts 1991, 72nd Leg., ch. 561, § 9, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 76, § 5.95(27), eff. Sept. 1, 1995.*

## THE TEXAS GOVERNMENT CODE - RELATIONSHIPS BY CONSANGUINITY OR BY AFFINITY

### § 573.021. Method of Computing Degree of Relationship

The degree of a relationship is computed by the civil law method.
*Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.*

### § 573.022. Determination of Consanguinity

(a) Two individuals are related to each other by consanguinity if:
  (1) one is a descendant of the other; or
  (2) they share a common ancestor.

(b) An adopted child is considered to be a child of the adoptive parent for this purpose.

*Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.*

### § 573.023. Computation of Degree of Consanguinity

(a) The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. A parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree and so on.

(b) If an individual and the individual's relative are related by consanguinity, but neither is descended from the other, the degree of relationship is determined by adding:
  (1) the number of generations between the individual and the nearest common ancestor of the individual and the individual's relative; and
  (2) the number of generations between the relative and the nearest common ancestor.

(c) An individual's relatives within the third degree by consanguinity are the individual's:
  (1) parent or child (relatives in the first degree);
  (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and
  (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree).
  *Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.*

### § 573.024. Determination of Affinity

(a) Two individuals are related to each other by affinity if:
  (1) they are married to each other; or

(2) the spouse of one of the individuals is related by consanguinity to the other individual.

(b) The ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

(c) Subsection (b) applies to a member of the board of trustees of or an officer of a school district only until the youngest child of the marriage reaches the age of 21years.

*Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.*
*Amended by Acts 1995, 74th Leg., ch. 260, § 32, eff. May 30, 1995.*

**§ 573.025. Computation of Degree of Affinity**

(a) A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.

(b) An individual's relatives within the third degree by affinity are:

(1) anyone related by consanguinity to the individual's spouse in one of the ways named in Section 573.023(c); and

(2) the spouse of anyone related to the individual by consanguinity in one of the ways named in Section 573.023(c).

*Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.*

## Relatives by Degrees

| 1st Degree | 2nd Degree | 3rd Degree |
|---|---|---|
| Judge's spouse | Granddaughter & spouse | Great grandmother & spouse, |
| Mother & spouse | Grandson & spouse | Great Grandfather & spouse |
| Father & spouse | Grandmother & spouse | Great granddaughter & spouse |
| Daughter & spouse | Sister & spouse, Brother & spouse | Great grandson & spouse |
| Son & spouse | Sister-in-law, Brother-in-law | Niece, Nephew & spouses |
| Mother-in-law | Grandmother-in-law | Aunt, Uncle & spouses |
| Father-in-law | Grandfather-in-law | Half-aunt, Half-uncle & spouses |
| Stepdaughter | Step-Granddaughter, Step- | Great -grandmother- in –law |
| Stepson | grandson | Great-grandfather-in-law |
| | Half-sister & spouse | Aunt & Uncle in law |
| | Half-brother & spouse | Niece and Nephew in law |
| | Stepsister & spouse | Step great granddaughter |
| | Stepbrother & spouse | Step great grandson |
| | | Step niece, nephew & spouses |

(O'Connors Texas Civil Appeals, Chapter 13 Motion for Disqualification at 107 (2004-05)).

## TEXAS RULES OF CIVIL PROCEDURE

### Rule 18a. Recusal or Disqualification of Judges

(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of

the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

(TEX. R. CIV. P. 18a, O'Connors Texas Rules – Civil Trials (2006)(Amended effective Sept. 1, 1990).

**Rule 18b. Grounds for Disqualification and Recusal of Judges**

**(1) DISQUALIFICATION**

Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

**(2) RECUSAL**

A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

  (i) is a party to the proceeding or an officer, director, or trustee of a party;

  (ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

  (iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;
(b) the degree of relationship is calculated according to the civil law system;
(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
  (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
  (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
  (iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
  (iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;
  (v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

*Changed by amendment effective September 1, 1990: The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).*

## THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

### § 30.016. Recusal or Disqualification of Certain Judges

(a) In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.

(b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification except that the judge shall continue to:

(1) preside over the case;

(2) sign orders in the case; and

(3) move the case to final disposition as though a tertiary recusal motion had not been filed.

(c) A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.

(d) The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.

*Added by Acts 1999, 76th Leg., ch. 608, § 1, eff. Sept. 1, 1999.*

## APPENDIX III: Additional Laws that may be pertinent:

### THE TEXAS GOVERNMENT CODE

**§ 29.003. Jurisdiction.**

(b) The municipal court has concurrent jurisdiction with the justice court of a precinct in which the municipality is located in all criminal cases arising under state law that arise within the municipality's territorial limits or property owned by the municipality located in the municipality's extraterritorial jurisdiction and that:

(1) are punishable only by a fine, as defined in Subsection (c ) or

(2) arise under Chapter 106, Alcoholic beverage Code, and do not include confinement as an authorized sanction.

**§ 29.004. Judge**

(a) The judge and alternate judges of the municipal court in a home-rule city are selected under the municipality's charter provisions relating to the election or appointment of judges. The judge shall be known as the "judge of the municipal court" unless the municipality by charter provides for another title.

(b) In a general-law city, the mayor is ex officio judge of the municipal court unless the municipality by ordinance authorizes the election of the judge or provides for the appointment and qualifications of the judge. If the municipality authorizes an election, the judge shall be elected in the manner and for the same term as the mayor. If the municipality authorizes the appointment, the mayor ceases to be judge on the enactment of the ordinance. The first elected or appointed judge serves until the expiration of the mayor's term.

*Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.*

**§ 29.006. Temporary Replacement in General-Law Municipalities**

If a municipal judge of a municipality incorporated under the general laws of this state is temporarily unable to act, the governing body may appoint one or more persons meeting the qualifications for the position to sit for the regular municipal judge. The appointee has all powers and duties of the office and is entitled to compensation as set by the governing body.

*Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.*

**§ 29.007. Municipal Court Panels or Divisions; Temporary Judges**

(a) A home-rule city by charter or by ordinance may divide the municipal court into two or more panels or divisions, one of which shall be presided over by a

presiding judge. Each additional panel or division shall be presided over by an associate judge, who is a magistrate with the same powers as the presiding judge.....

(c) Each panel or division may exercise municipal court jurisdiction and has concurrent jurisdiction with the other panels or divisions.

(d) Except as otherwise provided by the charter, the municipality by ordinance may establish:

(1) the qualifications for appointment as a judge;

(2) the ability of a judge to transfer cases, exchange benches, and preside over any of the panels or divisions;

(3) the office of the municipal court clerk, who shall serve as clerk of all the panels or divisions with the assistance of deputy clerks as needed; and

(4) a system for the filing of complaints with the municipal court clerk so that the caseload is equally distributed among the panels or divisions.

(g) The municipality may provide by charter or by ordinance for the appointment of one or more temporary judges to serve if the regular judge, the presiding judge, or an associate judge is temporarily unable to act. A temporary judge must have the same qualifications as the judge he replaces and has the same powers and duties as that judge.

*Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.*

### § 29.011. Vacancy

The governing body of the municipality shall by appointment fill a vacancy in the office of municipal judge or clerk for the remainder of the unexpired term of office only.

*Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.*

### § 29.012. Sitting for Disqualified or Recused Judge

(a) If the judge of a municipal court is disqualified or recused in a pending case, the judge of another municipal court located in an adjacent municipality may sit in the case.

(b) A municipal court judge may not sit in a case for another municipal court judge under this section if either party objects to the judge. An objection under this subsection must be filed before the first hearing or trial, including pretrial hearings, over which the judge is to preside.

*Added by Acts 1999, 76th Leg., ch. 912, § 1, eff. Sept. 1, 1999.*

## SUBCHAPTER B. MUNICIPAL COURTS IN CERTAIN CITIES

### § 29.101. Municipality of More Than 250,000

(a) A municipality with a population of more than 250,000 may by ordinance establish two municipal courts. With the confirmation of the governing body of the municipality, the mayor may appoint two or more judges for the courts and may designate the seniority of the judges. ....

(d) The municipality by ordinance may establish: .....

(2) the ability of a judge to transfer cases, exchange benches, and preside over any of the municipal courts;

(f) This section supersedes any municipal charter provision that conflicts with this section.

*Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.*

### § 29.102. Municipality of 130,001 to 285,000

(a) An incorporated municipality with a population of 130,001 to 285,000 by ordinance may establish up to four additional municipal courts. The judge of each additional court must meet the same qualifications and be selected in the same manner as provided in the city charter for the judges of the existing municipal courts. If the charter provides for the election of municipal judges, the governing body of the municipality may appoint a person to serve as judge in each newly created court until the next regular city election.

(d) Except as otherwise provided by the charter, the governing body by ordinance may establish:

(2) the ability of a judge to transfer cases, exchange benches, and preside over any of the municipal court

## THE TEXAS GOVERNMENT CODE

***The Court Administration Act***

### § 74.005. Appointment of Regional Presiding Judges

(a) The governor, with the advice and consent of the senate, shall appoint one judge in each administrative region as presiding judge of the region.

(b) On the death, resignation, or expiration of the term of office of a presiding judge, the governor immediately shall appoint or reappoint a presiding judge.

*Added by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987.*

## *SUBCHAPTER C. ADMINISTRATIVE JUDICIAL REGIONS*

### § 74.041. Definitions

In this chapter:

(1) "Administrative region" means an administrative judicial region created by Section 74.042.

*(2) "Presiding judge" means the presiding judge of an administrative region.*

(3) "Retiree" means a person who has retired under the Judicial Retirement System of Texas, the Judicial Retirement System of Texas Plan One, or the Judicial Retirement System of Texas Plan Two.

*Renumbered from § 74.001 and amended by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 646, § 6, eff. Aug. 28, 1989.*

### § 74.046. Duties of Presiding Judge

A presiding judge shall:

(1) ensure the promulgation of regional rules of administration within policies and guidelines set by the supreme court;

(2) advise local judges on case flow management and auxiliary court services;

(3) recommend to the chief justice of the supreme court any needs for judicial assignments from outside the region;

(4) recommend to the supreme court any changes in the organization, jurisdiction, operation, or procedures of the region necessary or desirable for the improvement of the administration of justice;

(5) act for a local administrative judge when the local administrative judge does not perform the duties required by Subchapter D;

(6) implement and execute any rules adopted by the supreme court under this chapter;

(7) provide the supreme court or the office of court administration statistical information requested; and

(8) perform the duties assigned by the chief justice of the supreme court.

*Added by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987.*

### § 74.047. Authority of Presiding Judge

A presiding judge may perform the acts necessary to carry out the provisions of this chapter and to improve the management of the court system and the administration of justice.

*Added by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987.*

**§ 74.059. Powers and Duties**

(c) A district, statutory probate, or statutory county court judge shall:

(3) request the presiding judge to assign another judge to hear a motion relating to the recusal of the judge from a case pending in his court; ...

*Renumbered from § 74.036 and amended by Acts 1987, 70th Leg., ch. 674, § 2.07, eff. Sept. 1, 1987. Amended by Acts 1995, 74th Leg., ch. 298, § 5, eff. .Sept. 1, 1995.*

http://www.courts.state.tx.us/trial/adminreg.asp

# Administrative Judicial Regions

(Texas Government Code Secs. 74.041-74.062)

The state is divided into nine administrative judicial regions. Each region has a presiding judge that is appointed by the Governor to serve a four-year term.

The presiding judge may be a regular elected or retired district judge, a former judge with at least 12 years of service as a district judge, or a retired appellate judge with judicial experience on a district court.

The duties of the presiding judge include promulgating and implementing regional rules of administration, advising local judges on judicial management, recommending changes to the Supreme Court for the improvement of judicial administration, and acting for local administrative judges in their absence. The presiding judges also have the authority to assign visiting judges to hold court when necessary to dispose of accumulated business in the region.

## First Administrative Judicial Region

**Presiding Judge:** The Honorable John Ovard
**Address:** 133 N. Industrial Blvd., LB 50
Dallas, Texas 75207
**Web Site:** www.firstadmin.com

**Counties Served**

Anderson, Bowie, Camp, Cass, Cherokee, Collin, Dallas, Delta, Ellis, Fannin, Franklin, Grayson, Gregg, Harrison, Henderson, Hopkins, Houston, Hunt, Kaufman, Lamar, Marion, Morris, Nacogdoches, Panola, Rains, Red River, Rockwall, Rusk, Shelby, Smith, Titus, Upshur, Van Zandt, and Wood

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## Second Administrative Judicial Region

**Presiding Judge:** The Honorable Olen Underwood
284th District Court Judge
**Address:** 301 North Main, 2nd Floor
Conroe, Texas 77301-5742
**Web Site:** www.co.montgomery.tx.us/dcourts/2ndadmin/

**Counties Served**

Angelina, Bastrop, Brazoria, Brazos, Burleson, Chambers, Fort Bend, Freestone, Galveston, Grimes, Hardin, Harris, Jasper, Jefferson, Lee, Leon, Liberty, Limestone, Madison, Matagorda, Montgomery, Newton, Orange, Polk, Robertson, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Waller, Washington, and Wharton

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## Third Administrative Judicial Region

**Presiding Judge:** The Honorable B.B. Schraub
**Address:** 101 E. Court St., Rm. 302
Seguin, Texas 78155-5779
**Web Site:** Not Available

**Counties Served**

Austin, Bell, Blanco, Bosque, Burnet, Caldwell, Colorado, Comal, Comanche, Coryell, Falls, Fayette, Gonzales, Guadalupe, Hamilton, Hays, Hill, Lampasas, Lavaca, Llano, McLennan, Milam, Navarro, San Saba, Travis, and Williamson

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## Fourth Administrative Judicial Region

**Presiding Judge:** The Honorable David Peeples
224th District Court Judge
**Address:** Bexar County Courthouse
100 Dolorosa
San Antonio, Texas 78205
**Web Site:** http://www.courts.state.tx.us/pj/4th/pjhome.asp

**Counties Served**

Aransas, Atascosa, Bee, Bexar, Calhoun, DeWitt, Dimmit, Frio, Goliad, Jackson, Karnes, LaSalle, Live Oak, Maverick, McMullen, Refugio, San Patricio, Victoria, Webb, Wilson, Zapata, and Zavala

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## Fifth Administrative Judicial Region

**Presiding Judge:** Vacant
**Address:** 974 E. Harrison, 4th Floor
Brownsville, Texas 78520
**Web Site:** Not Available

**Counties Served**

Brooks, Cameron, Duval, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kleberg, Nueces, Starr, and Willacy

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## Sixth Administrative Judicial Region

**Presiding Judge:** The Honorable Stephen Ables
216th District Court Judge
**Address:** Kerr County Courthouse
700 Main
Kerrville, Texas 78028
**Web Site:** Not Available

**Counties Served**

Bandera, Brewster, Crockett, Culberson, Edwards, El Paso, Gillespie, Hudspeth, Jeff Davis, Kendall, Kerr, Kimble, Kinney, Mason, Medina, Pecos, Presidio, Reagan, Real, Sutton, Terrell, Upton, Uvalde, and Val Verde

## Seventh Administrative Judicial Region

**Presiding Judge:** The Honorable Dean Rucker
318th District Court Judge
**Address:** 200 W. Wall, Ste. 200
Midland, Texas 79701
**Web Site:** Not Available

**Counties Served**

Andrews, Borden, Brown, Callahan, Coke, Coleman, Concho, Crane, Dawson, Ector, Fisher, Gaines, Garza, Glasscock, Haskell, Howard, Irion, Jones, Kent, Loving, Lynn, Martin, McCulloch, Menard, Midland, Mills, Mitchell, Nolan, Reeves, Runnels, Schleicher, Scurry, Shackelford, Sterling, Stonewall, Taylor, Throckmorton, Tom Green, Ward, and Winkler

## Eighth Administrative Judicial Region

**Presiding Judge:** The Honorable Jeff Walker
96th District Court Judge
**Address:** Tarrant County Courthouse
401 W. Belknap
Fort Worth, Texas 76196
**Web Site:** Not Available

**Counties Served**

Archer, Clay, Cooke, Denton, Eastland, Erath, Hood, Jack, Johnson, Montague, Palo Pinto, Parker, Somervell, Stephens, Tarrant, Wichita, Wise, and Young

## Ninth Administrative Judicial Region

**Presiding Judge:** The Honorable Kelly Moore
121st District Court Judge
**Address:** 500 W. Main, Rm. 204W
Brownfield, Texas 79316
**Web Site:** www.courts.state.tx.us/pj/9th/pjhome.asp

**Counties Served**

Armstrong, Bailey, Baylor, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hutchinson, King, Knox, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Terry, Wheeler, Wilbarger, and Yoakum

## THE TEXAS GOVERNMENT CODE

### *SUBCHAPTER D. ADMINISTRATION BY COUNTY*

### § 74.091. Local Administrative District Judge

(a) There is a local administrative district judge in each county

*Added by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 646, § 12, eff. Aug. 28, 1989.*

### § 74.0911. Local Administrative Statutory County Court Judge

(a) There is a local administrative statutory county court judge in each county that has a statutory county court.

*Added by Acts 1989, 71st Leg., ch. 646, § 13, eff. Aug. 28, 1989.*

### § 74.092. Duties of Local Administrative Judge

A local administrative judge, for the courts for which the judge serves as local administrative judge, shall:

(1) implement and execute the local rules of administration, including the assignment, docketing, transfer, and hearing of cases;
(4) recommend to the regional presiding judge any needs for assignment from outside the county to dispose of court caseloads;
(5) supervise the expeditious movement of court caseloads, subject to local, regional, and state rules of administration;
(10) coordinate and cooperate with any other local administrative judge in the district in the assignment of cases in the courts' concurrent jurisdiction for the efficient operation of the court system and the effective administration of justice; and

*Added by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 646, § 14, eff. Aug. 28, 1989; Acts 1991, 72nd Leg., ch. 746, § 68, eff. Oct. 1, 1991.*

**§ 74.093. Rules of Administration**

(a) The district and statutory county court judges in each county shall, by majority vote, adopt local rules of administration.

(b) The rules must provide for:

(1) assignment, docketing, transfer, and hearing of all cases, subject to jurisdictional limitations of the district courts and statutory county courts ...

*Added by Acts 1987, 70th Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 646, § 15, eff. Aug. 28, 1989.*

**§ 74.094. Hearing Cases**

(a) A district or statutory county court judge may hear and determine a matter pending in any district or statutory county court in the county regardless of whether the matter is preliminary or final or whether there is a judgment in the matter. ....

(e) A judge who has jurisdiction over a suit pending in one county may, unless objected to by any party, conduct any of the judicial proceedings except the trial on the merits in a different county.

(f) A pretrial judge assigned to hear pretrial matters in related cases under Rule 11, Texas Rules of Judicial Administration, may hold pretrial proceedings and hearings on pretrial matters for a case to which the judge has been assigned in:

(1) the county in which the case is pending; or

(2) a county in which there is pending a related case to which the pretrial judge has been assigned.

*Added by Acts 1987, 70th Leg., ch. 674, § 2.10, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 2, § 8.40(a), eff. Aug. 28, 1989; Acts 1989, 71st Leg., ch. 179, § 2(d)(2), eff. Sept. 1, 1989.*

*Amended by Acts 1999, 76th Leg., ch. 1551, § 1, eff. Sept. 1, 1999.*

# PROCEDURAL CHECKLIST FOR THE REVIEW OF A MOTION TO RECUSE

| **Checklist**: | **Notes:** |
|---|---|
| **1) A motion to recuse must:** | |
| ☐ a. Be filed within at least 10 days before the date set for trial or any hearings. | Tex. R. Civ. P. 18a(a) (2006). Note: If within ten days of the date set for trial or hearing a judge is assigned to the case, then the motion must be filed at the earliest practicable time prior to the commencement of the trial or hearing. Tex. R. Civ. P. 18a(e) (2006). |
| ☐ b. Be verified and state with particularity the grounds why the judge should not sit in the proceedings. | |
| ☐ c. Be made on personal knowledge and set forth such facts as would be admissible in evidence. | |
| **2) On the day the motion is filed:** | |
| ☐ a. Copies shall be served on all other parties or their counsel of record with notice that movant expects the motion to be presented to the judge three days after the filing of the motion. | Tex. R. Civ. P. 18a(b) (2006). Note: Any party may file an opposing or concurring statement with the clerk any time before the motion is heard. |
| **3) Prior to any further proceedings, judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion.** | Tex. R. Civ. P. 18a(c) (2006). |
| **4) If judge recuses himself, he shall**: | Tex. R. Civ. P. 18a ( c)(2006). |
| ☐ a. Enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders, and shall take no further action in the case except for good cause stated in the order in which such action is taken. | |
| **5) If the judge declines to recuse himself, he shall:** | Tex. R. Civ. P. 18a(d) |
| ☐ a. Forward to the presiding judge of the administrative judicial district an original or a certified copy of the motion, an order of referral, and all opposing and concurring statements. Except for good cause, judge shall take no further action in the case. | Note: If the motion is denied, it may be reviewed for abuse of discretion upon appeal. Tex. R. Civ. P. 18(a)(f) (2006). See Tex. R. Civ. P. 18a(e-h) for the procedure to be followed by the presiding judge of the administrative judicial district. |

## SUBSTANTIVE CHECKLIST FOR DISQUALIFICATION AND RECUSAL

| Checklist | Notes |
|---|---|
| **1. Judges must self disqualify if:** | Note: These rules arise out of Tex. Const. art. 5, § 11 (2006), which requires disqualification of judges from cases in which they may be biased in any of the ways noted in this checklist. |
| ☐ a. They have served as a lawyer in the matter in controversy. | |
| **OR** | |
| ☐ b. They know that, individually or as a fiduciary, they have an interest in the subject matter in the controversy. | Tex. R. Civ. P. 18b(1)(a) (2006) (This includes when a lawyer with whom the judge practiced served in the matter during their association). |
| **OR** | |
| ☐ c. Either of the parties is related to them by affinity or consanguinity within the third degree. | Tex. R. Civ. P. 18b(1)(b) (2006).<br><br>Tex. R. Civ. P. 18b(1)(c) (2006) (This includes any relationship through marriage or through common descent. |
| **2. A judge must self recuse if:** | |
| ☐ a. The judge's impartiality may be questioned. | Tex. R. Civ. P. 18b(2)(a)(2006). (This is arguably a very broad standard). |
| **OR** | |
| ☐ b. The judge has a personal bias or prejudice concerning either the subject matter or a party, or personal knowledge of evidentiary facts concerning the proceeding. | Tex. R. Civ. P. 18b(2)(b) (2006) |
| **OR** | |
| ☐ c. The judge or a lawyer with whom the judge has previously practiced law is a material witness in the matter. | Tex. R. Civ. P. 18b(2)(c) (2006) (This is a broader standard than for disqualification). |
| **OR** | |
| ☐ d. The judge participated as counsel, adviser, or material witness, or, while acting as a | Tex. R. Civ. P. 18b(2)(d)(2006. |

| | |
|---|---|
| government attorney, expressed an opinion concerning the merits of the matter.<br>**OR** | |
| ☐ e. The judge, or a spouse or minor child residing in the judge's household, has a financial interest in the subject matter, or in a party to the proceeding, or has an interest that could be substantially affected by the outcome of the proceeding.<br>**OR** | Tex. R. Civ. P. 18b(2)(e) (2006). |
| ☐ f. The judge, or the judge's spouse, or a person within a third degree of relation: | Tex. R. Civ. P. 18b(2)(f) (2006) (This interest can be either an individual or fiduciary in nature). |
| ☐ 1. Is a party<br>**OR** | Tex. R. Civ. P. 18b(2)(f) (2006) (This is a more detailed definition than that given for disqualification).<br>Note: Officers, directors, and trustees of a party are included in this definition.<br>Note: A judge has an affirmative duty to inform herself about personal and fiduciary financial interests, as well as personal financial interests of her spouse and minor children residing in the household. Tex. R. Civ. P. 18b(3) (2006). |
| ☐ 2. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.<br>**OR** | |
| ☐ 3. Is known by the judge to be a likely material witness in the proceeding.<br>**OR** | |
| ☐ g. The judge, the judge's spouse, or a person within the first degree of relationship to either of them is acting as a lawyer in the proceeding. | Tex. R. Civ. P. 18b(2)(g) (2006). |

*The following private reprimands involve judges who most likely should have self-recused or self-disqualified. They were reprimanded for their obvious bias in the prodeedings.*

**Private Reprimands:**

The judge, who had previously partnered with an attorney to provide legal services to a party in the administration of an estate, disqualified himself from presiding over the same heirship contest after being sworn into office as County Judge. After agreeing he was disqualified due to his relationship with the attorney and party, the judge improperly appointed a Special County Judge to hear the matter and further, without authority, transferred the case on his ex-partner's *ex parte* motion to transfer. [Violation of Canons 2B and 3B(5) of the Texas Code of Judicial Conduct.] *Private Reprimand and Order of Additional Education of a County Judge* (03/07/06).

The judge attempted to mediate a private dispute, even though no case was pending in the judge's court. Additionally, the judge engaged in *ex parte* communications with a law enforcement officer about the merits of a criminal case, and issued a fine without giving the defendant the opportunity to enter a plea and without holding a hearing. [Violation of Canons 2B, 3B(8) and 6C(2) of the Texas Code of Judicial Conduct.] *Private Reprimand and Order of Additional Education of a Justice of the Peace (01/25/00)*

During telephone calls with a litigant, the judge made disparaging comments about the litigant and told the litigant that the judge would throw the litigant in jail if the litigant came to the judge's court. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Warning and Order of Additional Education of a Justice of the Peace (01/25/00)*

Following the jury's deliberation and verdict, the judge made negative comments to jurors about a litigant's attorney's integrity and professionalism, and comments about the litigant that indicated the judge would not be fair and impartial concerning the litigant's case in the future. (The judge had continuing jurisdiction over the litigant's case.) [Violation of Canon 3B(10) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge (02/10/00)*

The judge made a gratuitous and inappropriate comment to an African-American court employee about the Ku Klux Klan, a comment that could reasonably be construed as manifesting racial bias. [Violation of Canons 3B(4) and 3B(6) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge (8/21/00)*

*These private reprimands were made as a direct result of the judge failing to follow proper recusal procedure.*

The judge failed to follow proper recusal rules and procedures in several cases where the judge's relatives were parties in interest. [Violation of Canon 3B(1) of the Texas Code of Judicial Conduct.] *Private Warning of a District Judge* (10/21/05).

The judge was overheard loudly criticizing a colleague for not recusing himself from a case involving the judge's child. [Violation of Canon 2B of the Texas Code of Judicial Conduct.] *Private Warning of a District Judge* (10/21/05).

*The following public reprimands were given in situations where judges showed clear bias and most likely should have self-recused or self-disqualified.*

## Public Reprimands:

### HONORABLE EDDIE J. VOGT
### FORMER JUSTICE OF THE PEACE, PRECINCT 1
### BOERNE, KENDALL COUNTY, TEXAS

During its meeting in Austin, Texas, on October 13-15, 2004, the State Commission on Judicial Conduct concluded a review of allegations against the Honorable Eddie J. Vogt, Former Justice of the Peace, Precinct 1, Boerne, Kendall County, Texas. Judge Vogt was advised by letter of the Commission's concerns and provided written responses. Judge Vogt appeared before the Commission on October 14, 2004, and gave testimony. After considering the evidence before it, the Commission entered the following Findings and Conclusions:

**FINDINGS OF FACT**

1. At all times relevant hereto, the Honorable Eddie J. Vogt was Justice of the Peace for Precinct 1 in Boerne, Kendall County, Texas.
2. In March 2002, Judge Vogt won the primary election for the office of Kendall County Judge. He was unopposed in the November 2002 general election.
3. Ruth Ann Lucchelli owned property in Kendall County adjacent to that of Dennis Lempar. At the time of the incident in question, Lucchelli and Lempar were involved in a well-known dispute over the boundary line dividing their properties.
4. Judge Vogt, a personal friend of Lucchelli, was aware of the on-going boundary dispute between Lucchelli and Lempar.
5. On the morning of September 13, 2002, Judge Vogt came to Lucchelli's home to watch the removal of a fence and old automobiles owned by Dennis Lempar, all of which Lucchelli claimed were located on her side of the property line.
6. Also present to observe this activity was Lucchelli's friend and attorney, Russell Busby.
7. Busby had won the March 2002 primary election for the position of Kendall County Commissioner and, like Judge Vogt, was unopposed in the November 2002 general election.
8. With Judge Vogt and her attorney present, Lucchelli planned to build a new fence based on the property line contained on her survey. To accomplish this task, Lucchelli employed a fence crew to use a "bobcat" to push the vehicles onto what she believed was Lempar's property.
9. Sometime after Judge Vogt's arrival, a physical altercation ensued between Busby, and Kenneth Lempar, Dennis Lempar's brother, over the removal of Lempar's fence and automobiles.
10. Judge Vogt witnessed the altercation, but took no action regarding the combatants.

11. The Kendall County Sheriff's department was dispatched to investigate the disturbance, but no arrests were made.
12. An Austin attorney retained by County officials to conduct an independent investigation into the incident concluded that Judge Vogt's "presence at the scene of the altercation further complicated an already difficult situation" and may have "contributed to the aire [sic] of impropriety surrounding the incident."
13. In his appearance before the Commission, the judge explained that he was present at the scene to "socialize" and to meet with a fence crew in order to make sure Lucchelli was "getting a good deal."

**RELEVANT STANDARD**

Canon 2B of the Texas Code of Judicial Conduct states, in pertinent part: "A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

**CONCLUSION**

The Commission concludes from the facts and evidence presented that by going to Lucchelli's property to oversee the removal of Lempar's automobiles and the placement of a new fence on a disputed boundary line, Judge Vogt did lend the prestige of his judicial office to further the private interests of his friend, in violation of Canon 2B of the Texas Code of Judicial Conduct. The Commission further concludes that Judge Vogt's failure to take appropriate action as a magistrate upon witnessing a physical altercation between Busby and Lempar demonstrated that Judge Vogt allowed his relationship with Busby to influence his judicial conduct or judgment and allowed Busby, in turn, to convey the impression that he was in a special position to influence the judge, also in violation of Canon 2B of the Texas Code of Judicial Conduct.

**********

In condemnation of the conduct described above that violated Canon 2B of the Texas Code of Judicial Conduct, it is the Commission's decision to issue a **PUBLIC WARNING** to the Honorable Eddie J. Vogt, Former Justice of the Peace, Precinct 1, Boerne, Kendall County, Texas.

Pursuant to the authority contained in Article V, Section 1-a(8) of the Texas Constitution, it is ordered that the conduct described above is made the subject of a **PUBLIC WARNING** by the State Commission on Judicial Conduct.

The Commission has taken this action in a continuing effort to protect public confidence in the judicial system and to assist the state's judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Texas Code of Judicial Conduct.

Issued this ___2nd____ day of November, 2004.

**ORIGINAL SIGNED BY**

_____

Honorable Joseph B. Morris, Chair
State Commission on Judicial Conduct

**PUBLIC REPRIMAND:**
**HONORABLE LUIS AGUILAR**
**120TH DISTRICT COURT**
**EL PASO, EL PASO COUNTY, TEXAS**

During its meeting in Austin, Texas on December 8-10, 2004, the State Commission on Judicial Conduct concluded a review of allegations against the Honorable Luis Aguilar, 120th District Court, El Paso, El Paso County, Texas. Judge Aguilar was advised by letter of the Commission's concerns and provided written responses. Judge Aguilar appeared with counsel before the Commission on August 12, 2004, and gave testimony. After considering the evidence before it, the Commission entered the following Findings and Conclusion:

**FINDINGS OF FACT**

1. At all times relevant hereto, the Honorable Luis Aguilar was Judge of the 120th District Court in El Paso, El Paso County, Texas.
2. Jo Ann Levison was employed as the Court Coordinator for the 120th District Court from January 1, 2003 through July 3, 2003. Prior to her employment as Judge Aguilar's Court Coordinator, Levison had worked for the judge in his private law practice.
3. According to sworn affidavits from Levison and the judge's former Court Reporter, Judge Aguilar made derogatory remarks and gestures of a sexual nature about women, including female judges, prosecutors, probation officers, and others with whom the judge deals in his official capacity. Most of these comments were made in the judge's chambers or offices, but in the presence of court staff.
4. According to witnesses, Judge Aguilar used such terms as, "hot tamale," "fucking bitch," "fat pig," "fucking lazy," "stupid bitch," and the like to refer to women. He also referred to one female judge as being "in heat."
5. On more than one occasion, witnesses observed Judge Aguilar lose his temper and scream at female prosecutors, attorneys, and court staff in front of other people.
6. On or about March 28, 2003, Laura Franco Gregory, an Assistant District Attorney for El Paso County, appeared before Judge Aguilar to obtain default judgments in two asset forfeiture cases.
7. Witnesses reported that during the course of the proceedings, Judge Aguilar raised his voice and shook his finger at Gregory in a condescending and berating manner.
8. Gregory then stated, "Judge, please stop berating me in open court." According to Gregory and other witnesses, the courtroom was full of inmates, defendants, and attorneys.
9. Judge Aguilar then ordered Gregory to sit down. When she was unable to sit down fast enough, the judge, visibly upset, yelled at her to sit down a second time.
10. Finally, Judge Aguilar "lost control," yelling at Gregory to see him in chambers. Gregory, along with the judge's bailiff, followed Judge Aguilar into his chambers where, according to Gregory, Judge Aguilar continued to berate and curse at her, telling Gregory that she "had better damn well show respect" for him and his court.
11. According to Gregory, Judge Aguilar was so out of control and full of rage that

she believed the judge was going to hit her.

**RELEVANT STANDARD**

Canon 3B(4) of the Texas Code of Judicial Conduct states, in pertinent part: "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . .."

**CONCLUSIONS**

The Commission concludes from the facts and evidence presented that Judge Aguilar's persistent use of derogatory, demeaning, and sexual remarks toward women, including female judges, prosecutors, probation officers, and others with whom the judge deals in his official capacity, and, in particular, his abusive treatment of Laura Franco Gregory before a courtroom full of people, lacked the patience, dignity and courtesy required of a judicial officer, in violation of Canon 3B(4) of the Texas Code of Judicial Conduct. It is apparent from the description of this event that Judge Aguilar's principal motivation in berating Ms. Gregory was the need to exert his power as a judge over the attorney by means of intimidation and fear. In condemning Judge Aguilar's conduct toward Ms. Gregory, the Commission is mindful of the historic role that the judiciary has played in mentoring lawyers in order to foster the continually high ethical standards of the legal profession. In this regard, Judge Aguilar's course of conduct has undermined that goal, as well as the public's confidence in the integrity, impartiality, and independence of the Texas judiciary.

**********

In condemnation of the conduct described above that violated Canon 3B(4) of the Texas Code of Judicial Conduct, it is the Commission's decision to issue a **PUBLIC REPRIMAND** to the Honorable Luis Aguilar, Judge of the 120th District Court, El Paso, El Paso County, Texas.

Pursuant to the authority contained in Article V, Section 1-a(8) of the Texas Constitution, it is ordered that the conduct described above is made the subject of a **PUBLIC REPRIMAND** by the State Commission on Judicial Conduct.

The Commission has taken this action in a continuing effort to protect public confidence in the judicial system and to assist the state's judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Texas Code of Judicial Conduct.

Issued this ___21____ day of December, 2004.

ORIGINAL SIGNED BY

_____

Honorable James A. Hall, Chair
State Commission on Judicial Conduct

Cause No. 132272

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL |
| | § | |
| VS. | § | OF RECORD |
| | § | |
| CHUNG CHI KING | § | CITY OF KELLER, TEXAS |

**NOTICE OF DISQUALIFICATION**

Comes now, Matthew A. King, Judge of the Keller Municipal Court, and finds that he is disqualified from sitting in and trying this case according to section 21.005 of the Texas Government Code, for the reason that he is married to the above referenced Defendant.

SIGNED this _____ day of _____, 2004.

_____
MATTHEW A. KING
Judge Presiding

**CERTIFICATE OF SERVICE**

On this the _____ day of _____, a true and correct copy of the foregoing Notice of Disqualification, has been hand delivered to the City Attorney for the City of Keller, Texas, 76248.

_____
MATTHEW A. KING
Judge Presiding

Cause No. 132272

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL |
| | § | |
| VS. | § | OF RECORD |
| | § | |
| CHUNG CHI KING | § | CITY OF KELLER, TEXAS |

**ORDER OF RECUSAL**

THEREFORE, Matthew A. King, the undersigned judge, hereby recuses himself from the trial of this case, and pursuant to section 29.012 of the Texas Government Code, assigns and appoints the Honorable Stewart Bass, City of Watauga Municipal Judge, to sit in the case.

SIGNED this _____ day of _____, 2004.

_____
MATTHEW A. KING
Judge Presiding

FUNDED BY A GRANT FROM THE
TEXAS COURT OF CRIMINAL APPEALS

**TEXAS MUNICIPAL COURTS EDUCATION CENTER**

1609 SHOAL CREEK BLVD., SUITE 302 AUSTIN, TEXAS 78701
TELEPHONE (512) 320-8274
1-800-252-3718
FAX (512) 435-6118

# CONDITIONS OF BAIL IN DWI AND OTHER CRIMES

**Presented by**

**Scott Kurth**
**Municipal Judge**
**Red Oak & De Soto**

By the end of the session, judges will be able to:

- Identify the statutory provisions relating to a defendant's right to bail;
- Distinguish situations where bail is not required from situations where bail is required; and,
- Recognize their responsibilities with regard to setting the conditions of bail, with a particular emphasis on the conditions of bail in cases where the defendant is charged with the offense of driving while intoxicated.

Funded by a grant from the Texas Department of Transportation.

# BOND CONDITIONS

Presented by:
Matthew A. King
Municipal Judge, City of Keller

Scott Kurth
Municipal Judge, Cities of Red Oak & De Soto

Stewart Milner
Presiding Judge, City of Arlington

## BOND CONDITIONS
## Code of Crim. Proc. Art. 17.00

- CCP 17.40- related to victim & safety
- CCP 17.41- child victim
- CCP 17.43- home curfew
- CCP 17.44- home confinement and drug testing
- CCP 17.441- ignition interlock
- CCP 17.45 – aids and HIV instruction
- CCP 17.46 - stalking offenses
- CCP 17.47- submission of specimen

## Code of Crim. Proc. Art. 17.40 (Reasonable Condition)

- Any reasonable condition that:
  - is rationally related to securing the defendant's presence at trial; and,
  - Provides reasonable protection for the victim and community
- Related to the safety of:
  - ➢ Victim
  - ➢ Community

## Code of Crim. Proc. Art. 17.40

- Not necessary to relate directly to securing defendant's presence in court
- Sufficient if indirectly increases likelihood that defendant will appear
  - Rodriguez v. State (744 SW2d 361 (Tex. App.- Corpus Christi 1988, *no pet*)

## CCP 17.41- (Child victim)

- Charged with offense under Penal Code:
  - 21- Sexual offenses
  - 22- Assault offenses
  - 25.02- sexual contact
  - 43.25-sexual performance

## CCP 17.41- (Child victim)

- May order defendant:
  - Not communicate with victim
  - Not go near a school, residence, or other location
- May allow supervised visitation
- Overrules any conflicts with other possession orders up to a 90 day limitation

## CCP 17.41- (Child victim)

**BAIL CONDITION ORDER - PURSUANT TO ART. 17.41**

**THE COURT FINDS THE FOLLOWING:**

That the alleged victim is a child twelve (12) years of age or younger: and
That the Charge against the Defendant is an offense under Chapter 22; and

That the Defendant is eligible for bail in this case in the amount of $35,000.00 and that the additional conditions be imposed on said bail pursuant to Art. 17.41 of the Texas Code of Criminal Procedure.

It is therefore ORDERED that in addition to any other conditions of bail imposed on the Defendant, that the Defendant abides the following conditions of bail:

- That the Defendant not come within 300 feet of any residence of JOHN DOE, specifically 1018 JODIE Drive, Arlington Texas 76001
- That the Defendant not come within 500 feet of the location of any child care provider for the child JOHN DOE,
- That the Defendant not have access, of any manner, to the child JOHN DOE, the alleged victim.

- It is further ORDERED that pursuant to Art. 17.41 of the Texas Code of Criminal Procedure, that to the extent that a condition imposed under this article conflicts with an existing court order granting possession of or access to the alleged child victim, that the conditions imposed pursuant to this Bail Condition Order, prevail for a period of only 90 days from the date of the Magistrate's signature.

## Internet Related Offenses

**IT IS ORDERED AND ADJUDGED, AND DECREED that the Defendant John Doe, comply with the following conditions of bond:**

- No contact with the complainant in this case;
- No unsupervised contact with any child under 17 years of age;
- No working around children or supervising activities with children;
- No children sleeping overnight at Defendant's residence;
- Not possess, own, distribute, purchase or view any book, publication or image in any form that depicts or displays simulated sex acts, or the nudity of adults or children.
- Not possess, own, or operate any computer at any location that has access to the internet.
- If internet access is required for employment purposes, the defendant shall be responsible for installing monitoring software designed to prohibit the viewing and receipt of images or text that is sexually oriented, and shall provide access to the community supervision and corrections department for their approval.
- Not possess, own, or operate any computer that has "wiping or washing" software installed that is capable of destroying data or preventing forensic software from accessing viewed images, text or files that reside on any computer medium.

Any violation of these conditions could result in the bond being held insufficient and a warrant for arrest issued.

_____
Judge/Magistrate

**You plan to release a person charged with a misdemeanor offense on a personal bond. You want to make sure he stays around his house and does not get in further trouble, particularly in the evening. What can you do?**

a. As a magistrate you can order a peace officer to watch his hou in the evenings for the next few nights, OR

b. You can issue a bail condition order that imposes a curfew on t defendant and requires him to wear an electronic monitoring device, OR

c. None of the above.

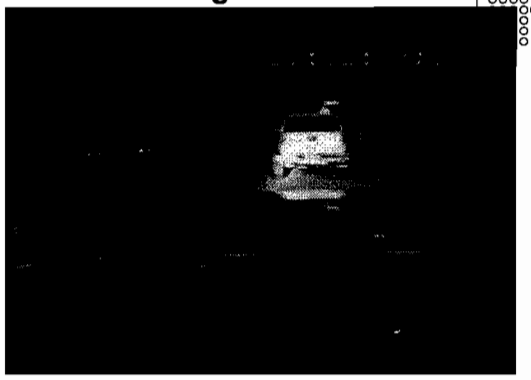
## CCP 17.43- (Home curfew)

- Home curfew
- Only on personal bond
- Electronic monitoring by magistrate designated agency
- Costs paid for by defendant

## CCP 17.44- Home confinement and drug testing

- Home confinement
- Electronic monitoring
- Weekly drug tests
- Violations result in warrant
- Grant funds available to counties for electronic monitoring programs

## CCP 17.441- Ignition interlock



**You are reviewing a case for magistration involving a female charged with boating while intoxicated. You have been presented with her criminal history that indicates a previous charge for flying while intoxicated. Is there a bail condition order that would or should apply?**

1. YES
2. NO

**You are reviewing a case for magistration involving a person charged with a DWI offense. You are given information that he/she has been charged with a DWI before but not convicted. Is there any bail condition order that would or should apply?**

1. YES
2. NO

## CCP 17.441- Ignition Interlock

- **Shall** require when defendant charged with a subsequent offense under the Penal Code for:
  - 49.04 - DWI
  - 49.045 – DWI Child Passenger
  - 49.05 – Flying
  - 49.06 – Boating

  OR an offense under:
  - 49.07- Intoxication assault
  - 49.08 – Intoxication Manslaughter

## CCP 17.441- Ignition Interlock

Magistrate shall require on release that a defendant install a deep-lung breath analysis mechanism:

- On the motor vehicle owed by or most regularly driven by the defendant, and
- Defendant not operate any vehicle unless device installed

## CCP 17.441- Ignition Interlock

Also:

- Installed at defendant's expense within 30 days after release on bond
- Magistrate can designate agency to verify installation and monitor
- Agency can receive monthly fee not exceeding $10 for monitoring

CAUSE NUMBER 05-010001

STATE OF TEXAS
VS.
John Doe
Date of Birth12/15/62

BAIL CONDITION ORDER
Offense Charged: Driving While Intoxicated

The Court finds that the defendant is eligible for bail in this case in the amount of $ 3,500 that the additional conditions be imposed on said bail. Accordingly,
It is ORDERED that in addition to any other conditions of bail imposed on the Defendant, that the Defendant abide by the following conditions of bail:

That the Defendant have installed on the motor vehicle owned by the Defendant or on the vehicle most regularly driven by the Defendant, a device that uses a deep lung breath analysis mechanism to make impractical the operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator; and

That the Defendant not operate any motor vehicle unless the vehicle is equipped with that device.

IT IS FURTHER ORDERED that the Defendant is required to have the device installed on the appropriate motor vehicle, at the Defendant's expense before the 30th day after the date the Defendant is released on bond.
Tarrant County Pretrial Release Agency is designated as the agency which will verify installation of the device and will monitor it. The Defendant is ordered to report to Tarrant County Pretrial Release Agency, 100 North Lamar, Fort Worth, within 3 business days after being released from jail, between the hours of 8:30 a.m. to 3:00 p.m..
The Defendant shall pay a monitoring fee of $10.00 per month to Tarrant County Pretrial Release Agency.

Signed on 11/18/05.

Stewart Milner
Magistrate, Municipal Court of Arlington
Arlington, Texas

( ) Given in Spanish ____.
DEFENDANT'S ACKNOWLEDGMENT
On the above-mentioned date, I received a copy of this Bail Condition Order.

Defendant

**You are reviewing a case for magistration involving a first time charge of Driving While Intoxicated. The report indicates he told the arresting officers that he often drives drunk and the arrest is not going to slow him down. He also said he has nothing to lose, is an alcoholic, likes getting drunk and has no one else to drive him around. Is there a bail condition order that could apply?**

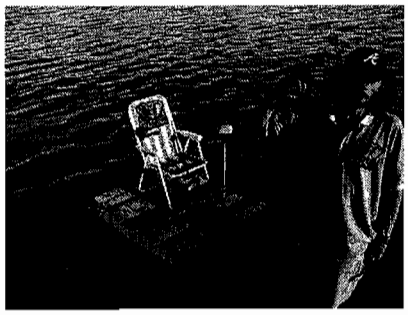
1. YES
2. NO

## CCP 17.441- Ignition Interlock

- Installed on boat?
- Installed on plane?
- What if defendant doesn't own a car?
- When would it be not in the best interest of justice?
- What about company owed vehicles?
- What if current case involves drugs only, no alcohol?

Definition of vehicle: includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation

## CCP 17.441- Ignition Interlock



## CCP 17.441- Ignition Interlock

## CCP 17.45 – Aids and HIV Instruction

- May require AIDS counseling or education or both
- Defendant must be charged with prostitution under Penal Code Section 43.02

**You are reviewing a case for magistration involving a defendant who is charged with stalking. The victim calls you and explains she is scared and does not know the defendant.**

**Is there a bail condition order you can issue to prohibit the defendant from contacting the victim in any manner?**

1. YES
2. NO

## CCP 17.46 - Stalking Offenses

- May require Defendant not:
  - Communicate directly or indirectly with victim
  - Go near residence, school, or business

➢ Must describe distances and locations

## CCP 17.46 - Stalking Offenses

- Emergency Protective Order?

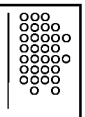
Time limitations:

➢EPO -good for maximum 91 days
➢Bond condition – good until case is disposed, or otherwise released by Court

**As a magistrate you are reviewing a report of an individual arrested for public intoxication to determine if there was probable cause for the arrest. You determine that there was probable cause and put the case aside for arraignment. The arresting officer comes in and advises that he believes that the arrestee may be a suspect in a series of rapes near the area where he was arrested. Each of the rapes provided significant evidence, but so far the investigation is stymied. The officer has nothing other then a hunch and some very vague inconsistent descriptions to back up his belief. Is there a bail condition order that could help resolve or maybe even solve the rapes?**

1. YES
2. NO

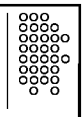
## CCP 17.47(b)- Submission of DNA Specimen



- Shall order DNA specimens
- When defendant has been **indicted** for:
  - Aggravated kidnapping w/ injury or sexual assault
  - Indecency w/ a child
  - Sexual assault and aggravated sexual assault
  - Prohibited sexual conduct
  - Burglary
  - Compelling prostitution
  - Sexual performance by a child
  - Possession or promotion of child pornography

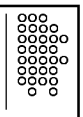
  ( offenses listed in section 411.1471 Government Code)

## CCP 17.47(b)- Submission of DNA Specimen



- Shall order DNA specimens
- When defendant has been **arrested** for:
  - Previously listed 411.1471 offenses; **and**
  - Been previously convicted of or has had deferred adjudication for one of the previously listed offenses

## CCP 17.47(b)- Submission of DNA Specimen



- Shall order DNA specimens
- When a defendant has been convicted of:
  - Public lewdness; or
  - Indecent exposure

## CCP 17.47(a)- Submission of DNA specimen

- Magistrate may require as a condition of release that the Defendant provide DNA sample for purpose of creating a DNA data base
- Does this mean that you can order DNA specimen on condition of release of bond when a person is arrested for any charge?

## CCP 17.47(a)- Submission of DNA specimen

Texas Department of Public Safety
Crime Lab – CODIS MSC 0461
PO Box 4143

- Call CODIS 512-424-2386
- www.txdps.state.tx.us/codis

"Leadership and learning are indispensable to each other"

**John F. Kennedy**

*THANK YOU*

# *CONDITIONS OF BAIL*
# *( IN DRIVING WHILE INTOXICATED CASES AND OTHER OFFENSES)*
## *BY*
## *JUDGE SCOTT E. KURTH*

*INTRODUCTION*

The following article, while certainly not exhaustive, is intended to acquaint Texas Municipal Judges and Justices of the Peace with the constitutional provisions, statutes and case law applicable to:

1. a defendant's right to bail; and
2. setting the conditions of bail, with a particular emphasis on the conditions of
3. bail in cases where the defendant is charged with the offense of Driving While Intoxicated. *See generally Penal Code §49.04.*

*CONSTITUTIONAL RIGHT TO BAIL AND ITS IMPORTANCE*

Articles I § II of the Texas Constitution provides that **all prisoners** are "bailable"[1] pending trial, unless charged with a capital offense.[2] The primary purpose of an appearance bond is to secure the presence of the defendant in court for the trial of the offense charged. Ex parte Rodriguez, 595 S.W.2d 549, 550 (Tex. Crim. App. [Panel Op.] 1980]. The United States Supreme Court in Stack Vs. Boyle, 342 U.S. 1, 96 L. Ed. 3, 72 S. Ct 1 (1951) stated:

> *"The right to release before trial is conditioned upon accused's giving adequate assurance that he will stand trial and submit to sentence if found*

[1] Tex. Code Crim. Proc. Ann. art. 17.01: *"Bail" is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond.*

[2] Article 1, §11 of the Texas Constitution: *All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.*

*guilty. Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of money subject to forfeiture serves as additional assurance of the presence of an accused."*

Standing alone, the importance of bail in preserving the right to a presumption of innocence cannot be overstated. In fact, the Texas Court of Criminal Appeals has stated in *Ex parte Anderer*, 61 S.W. 3d 398 (Tex. Crim. App. 2001):

*"From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, Federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."*

Article 17.15 of the Texas Code Criminal Procedure sets forth the general rules of fixing the amount of bail by a magistrate, to wit:

*"The amount of bail to be required in any case is to be regulated by the court, judge,* ***magistrate [EMPHASIS ADDED]*** *or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:*
*1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.*
*2. The power to require bail is not to be so used as to make it an instrument of oppression.*
*3. The nature of the offense and the circumstances under which it was committed are to be considered.*
*4. The ability to make bail is to be regarded, and proof may be taken upon this point.*
*5. The future safety of a victim of the alleged offense and the community shall be considered."*

To further illustrate the importance attached to bail, in the case where a defendant has posted bond under conditions imposed under Tex. Code Crim. Proc. Ann. art. 17.44 (discussed below) requiring home confinement, electronic monitoring and/or drug testing and the defendant has violated a term and condition of the bond and a warrant is issued

for his arrest, he is nonetheless entitled to a have a new bond set. *Ex parte Marcantoni*, 2003 Tex. App. Lexis 3308 (unpublished). Presumably, the amount of money and conditions of the new bond will reflect the fact that the defendant has violated the conditions of the prior bond and will be more appropriately stringent to fulfill the requirements of Article 17.15 (supra).

In view of the foregoing rules, the Texas Court of Criminal Appeals has held that bail set by a magistrate at a figure higher than an amount reasonably calculated to fulfill the constitutionally mandated purpose of ensuring the defendant's presence at trial is "excessive" under the Eighth Amendment to the United States Constitution and violative of Tex. Code Crim. Proc. Ann. art. 17.15 (2). *Ex parte Anderer*, 61 S.W. 3d 398 (Tex. Crim. App. 2001). *See Article 1, §13 of the Texas Constitution.*[3]

While the ability or inability of a defendant to make bail is a factor to be considered by the magistrate per Tex. Code Crim. Proc. Ann. art. 17.15 (4), it does not, alone, control in determining the amount of bail. Of necessity this must hold true otherwise the defendant himself/herself would, in effect, set for themselves the amount of a bond regardless of the other salient issues of public safety, etc. *Ex parte Welch*, 729 S.W.2d 306 (Tex. App. – Dallas 1987, no pet.).

The Texas Courts of Appeal have interpreted Tex. Code Crim. Proc. Ann. art. 17.15 (5) (i.e. the future safety of a victim and the community) to require a magistrate **setting the terms and conditions of bail** to consider whether a new offense was committed by the defendant while out on bond in determining the bond conditions (i.e. money amount and conditions). *Ex parte Owens*, 1997 Lexis 1593, (Tex. App. – Dallas

[3] Article 1, §13 of the Texas Constitution: *"Excessive bail shall not be required . . ."*

1997).

In addition to the foregoing considerations set forth in Tex. Code Crim. Proc. Ann. art. 17.15, the magistrate may also consider the following additional factors: (1) the accused's work record; (2) the accused's family and community ties; (3) the accused's length of residency; (4) the accused's prior criminal record; (5) the accused's conformity with the conditions of any previous bond; (6) the existence of outstanding bonds, if any; and (7) any alleged aggravating circumstances involved in the offense. *Nguyen Vs. State*, 881 S.W.2d 141, 143 (Tex. App. – Houston [1st Dist.] 1994, no pet.). Further, the amount of bail must also be based upon the nature of the offense and the punishment for the offense. Additionally, in cases involving illegal transportation and sale of drugs, a higher bond may be required because of the nature of the offense. This follows because drug transactions usually require large amounts of cash and the involvement of financial backers willing to forfeit bonds that are not sufficient. *Ex parte Isidro Gallegos, Jr.*, 2003 Tex. App. Lexis 6972. *Ex parte Willman*, 695 S.W.2d 752 (Tex. App. – Houston [1st Dist.] 1985, no pet.).

Texas courts have consistently held that the setting of bail is a matter resting within the sound discretion of the trial court, and there is no precise standard for reviewing its determination. Therefore, each case must be considered based upon its peculiar facts on a case by case basis. *Ex Parte Miller*, 731 S.W.2d 825,827 (Tex. App. – Fort Worth 1982, pet. ref'd). The established standard for appellate review of a magistrate's order setting bond is whether the magistrate *"abused his/her discretion"* in the order for bail. Both the Texas Supreme Court in civil cases and the Texas Court of Criminal Appeals in criminal cases apply the same test and standards to "abuse of

discretion, to wit:

> *"The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Another way of stating the test is whether the act was arbitrary or unreasonable. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred."* Downer V. Aquamarine Operators, Inc. 701 S.W.2d 238, 241-242 (Tex. 1985). Lyles V. State,

850 S.W.2d 497, 502 (Tex. Crim. App. 1993).

*INSTANCES WHEN BAIL IS NOT REQUIRED*

While the general rule is that a Municipal Court Judge and/or a Justice of the Peace must set the conditions of bail in each case coming before their court, there are some notable exceptions, to wit:

1. Warrants issued for parolees under Tex. Govt. Code §508.251 aka "blue warrants" require the return of the parolee to the institution from which he/she was released and no bail is permitted. This follows because §508.254 specifically authorizes the confinement of the parolee until a parol panel makes its determination on whether the parolee is to be returned to prison.[4] Therefore, when the Magistrate is confronted with an arrestee showing a "parole hold" or a "blue warrant" no bond should be set.

2. As stated above, a defendant charged with a capital crime **may or may not** be granted bail because of the obvious flight risk issue and public safety issues. See *Article*

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[4] Texas Government Code §508.254: *(a) A person who is the subject of a warrant may be held in custody pending a determination of all facts surrounding the alleged offense, violation of a rule or condition of release, or dangerous behavior.*
*(b) A warrant authorizes any officer named by the warrant to take custody of the person and detain the person until a parole panel orders the return of the person to the institution from which the person was released.*
*(c) Pending a hearing on a charge of parole violation, ineligible release, or violation of a condition of mandatory supervision, a person returned to custody shall remain confined.*

*1, §11 of the Texas Constitution (supra). See Tex. Code Crim. Proc. Ann. art. 1.07*[5]. Nevertheless, the right to bail should not be denied to a defendant charged with a capital crime because Tex. Const. art. 1, § 11 and Tex. Code Crim. Proc. Ann. art. 1.07 provide that all prisoners are entitled to bail in capital cases except those charged with a capital offense **"when the proof is evident."** For example, where no proof other than the indictment was offered by the State and the prosecutor indicated to the court that there was some question as to whether all the elements of capital murder could have been proven the court was correct in setting bail. *Ex Parte Cevallos*, 537 S.W.2d 744 (Tex. Crim. App. 1976).

3. When confronted with a "capias" warrant, the magistrate shall not set bail because by its very nature the capias warrant acts as a writ of attachment for the body of the defendant and requires any peace officer in Texas to arrest the person named in the capias warrant and immediately bring him/her before the court that issued the capias warrant.[6] Examples of common capias warrants encountered by Municipal Court Judges and Justices of the Peace are:

a. traffic convictions where the Defendant has not paid the fines and costs assessed;

b. child support contempt warrants issued because the defendant failed to appear for trial in response to a show cause order;

c. probation revocation warrants issued upon by the trial court upon the

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[5] Tex. Code Crim. Proc. Ann. art. 1.07: *All prisoners shall be bailable **unless for capital offenses [Emphasis Added]** when the proof is evident. This provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.*

[6] Tex. Code Crim. Proc. Ann. art. 23.01: *A "capias" is a writ issued by the court or clerk, and directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.*

filing of a motion to revoke by the county probation department based upon an alleged failure of a defendant to comply with his/her probation terms.

Generally, magistrates confronted with capias warrants, should perform the magistration required by Tex. Code Crim. Proc. Ann. art. 15.17 and inform the defendant which court issued the capias warrant and generally advise the defendant that he/she will likely be transferred to either the city or county jail where the court issuing the warrant is located.

*CONDITIONS OF BAIL IN DRIVING WHILE INTOXICATED AND OTHER CASES*

Effective September 1, 1995, the Texas Legislature mandated that magistrates not only fulfill the requirements set forth under Tex. Code Crim. Proc. Ann. art. 15.17 (i.e. magistrate's warnings) but require as a condition of bail that Defendants charged with a subsequent intoxication offense (i.e. Driving While intoxicated, Driving While Intoxicated with a Child Passenger, Flying While Intoxicated, and/or Boating While Intoxicated) under Sections 49.04 through 49.06 of the Penal Code have installed within thirty (30) days of their release on bond "a device that uses a deep-lung breath analysis mechanism" aka "interlock device," in to wit:

> *Art. 17.441. Conditions Requiring Motor Vehicle Ignition Interlock.*
> *(a) Except as provided by Subsection (b),* ***a magistrate shall require on release*** *that a defendant charged with* ***a subsequent offense*** *under Sections 49.04-49.06, Penal Code, or an offense under Section 49.07 or 49.08 of that code* ***[Emphasis Added]****:*
> *(1) have installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator; and*
> *(2) not operate any motor vehicle unless the vehicle is equipped with that device.*
> *(b)* ***The magistrate may not require the installation of the device if the magistrate finds that to require the device would not be in the best interest of justice. [Emphasis Added]***

*(c) If the defendant is required to have the device installed, the magistrate shall require that the defendant have the device installed on the appropriate motor vehicle, at the defendant's expense, before the 30th day after the date the defendant is released on bond.*
*(d) The magistrate may designate an appropriate agency to verify the installation of the device and to monitor the device. If the magistrate designates an agency under this subsection, in each month during which the agency verifies the installation of the device or provides a monitoring service the defendant shall pay a fee to the designated agency in the amount set by the magistrate. The defendant shall pay the initial fee at the time the agency verifies the installation of the device. In each subsequent month during which the defendant is required to pay a fee the defendant shall pay the fee on the first occasion in that month that the agency provides a monitoring service. The magistrate shall set the fee in an amount not to exceed $10 as determined by the county auditor, or by the commissioners court of the county if the county does not have a county auditor, to be sufficient to cover the cost incurred by the designated agency in conducting the verification or providing the monitoring service, as applicable in that county.*

However, in order to preserve judicial discretion and thereby avoid a challenge similar to that in *Meshell V. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987) wherein the Speedy Trial Act, Tex. Code Crim. Proc. Ann. art. 32A.02, was declared unconstitutional and void because it violated the separation of powers doctrine embodied within Articles I § II of the Texas Constitution[7] by Legislative branch impinging upon a constitutionally mandated Judicial function of granting bail to defendants as set forth in Articles I § II of the Texas Constitution (supra), the Legislature added the following language to the statute:

*(b) The magistrate **may not require the installation of the device** if the magistrate finds that to require the device would not be in the best interest of justice.* ***[Emphasis Added]***

Thus, Tex. Code Crim. Proc. Ann. art. 17.441 preserves judicial discretion because even

[7] *"The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."*

though the statute seemingly mandates the installation of the interlock device, Article 17.441 (b) permits a judge **not to require its installation** if the magistrate finds that such installation *". . . would not be in the best interest of justice."* Ex Parte Elliott, 950 S.W.2d 714 (Tex. App. – Fort Worth 1997).

When might the installation of an interlock device "not be deemed in the best interest of justice" and be considered an instrument of oppression under Article 17.15(2) (supra) to require the installation of an interlock device? Perhaps, when the underlying prior conviction and the present offense do not involve the consumption of alcohol by the defendant? More specifically, "intoxication" as defined under §49.01 of the Penal Code includes within its penumbra both the taking into the body of alcohol and/or "drugs."[8] Therefore, it is entirely conceivable that an interlock device designed solely to detect the presence of ethyl alcohol might be totally meaningless as a condition of bail for a defendant "drug-user," whose prior conviction and the present offense involve intoxication resulting from the introduction of a legal drug and the defendant simply does not consume alcohol and could thereby be deemed an "oppressive" condition of bail under Tex. Code Crim. Proc. Ann. art. 17.15(2) (supra).

In similar situations, Tex. Code Crim. Proc. Ann. art. 17.44 might be useful as a tool to a magistrate attempting to properly fulfill his/her duty to set bail in accordance with Article 17.15 (i.e. *Rules For Fixing the Amount of Bail*) (supra), to wit:

> *(a) A magistrate may require as a condition of release on bond that the defendant submit to:*
> *(1) home confinement and electronic monitoring under the supervision of an agency designated by the magistrate; or*

[8] Penal Code §40.1(2): *"Intoxicated" means: (A) not having the normal use of mental or physical faculties by reason of the* ***introduction of alcohol, a controlled substance, a drug, a dangerous drug,*** **[Emphasis Added]** *a combination of two or more of those substances, or any other substance into the body;*

*(2)* ***testing on a weekly basis for the presence of a controlled substance in the defendant's body [Emphasis Added].***
*(b) In this article, "controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.*

For purposes of setting bail conditions, Article 17.44 (above) has a broad application to any bail, whereas Article 17.441 seems applicable to only the second intoxication offense of a defendant. Stewart v. State, 1998 Tex. App. Lexis 7337 (unpublished). However, the Houston Court of Appeals in Ex parte Kevin Sells, 2000 Tex. App. Lexis 132 (unpublished), held in part that:

> *"Although article 17.441 mandates installation of the device for repeat offenders,* ***it does not preclude its use in other circumstances [Emphasis Added].*** *The primary purpose of bail is to ensure the defendant's presence in court at all proceedings. Ex parte Elliott, 950 S.W.2d 714, 716 (Tex. App. – Fort Worth 1997, no pet.). In considering whether installation of an ignition interlock was an unreasonable condition of bail, the Elliott court noted it is not necessary that an imposed condition relate directly to securing the defendant's presence in court. It is sufficient if the condition indirectly increases the likelihood that the defendant will appear. The appellant bears the burden of demonstrating that the trial court abused its discretion by imposing an unreasonable condition."*

Additionally, Tex. Code Crim. Proc. Ann. art. 17.40 (a) provides as follows:

*"(a) To secure a defendant's attendance at trial,* ***a magistrate may impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community [emphasis Added].***

Therefore, a defendant charged even for the first time with one of the intoxication offenses (i.e. Driving While intoxicated, Driving While Intoxicated with a Child Passenger, Flying While Intoxicated, and/or Boating While Intoxicated) under Sections 49.04 through 49.06 of the Penal Code might be required to adhere to a curfew, electronic monitoring, required to participate in drug treatment and testing, attend Alcoholics Anonymous and/or Narcotics Anonymous meetings, install an interlock device and report

to a probation officer to show compliance with the conditions of bail. Each condition of bail must be designed to further the reasonable purposes of securing the defendant's presence in court for trial and otherwise reasonably fulfill the rules for setting bail set forth in Article 17.15 (supra). For example, if a defendant is arrested for driving while intoxicated and it appears to the magistrate that the defendant is suffering from tremors and general ill-health resulting from the withdrawals of alcohol or drugs, the magistrate might consider putting reasonable restrictions on the defendant's right to consume alcohol, be outside of his/her home between the hours of 1:00 a.m. and 6:00 a.m., and require that the defendant not drive a motor vehicle until he/she has had installed thereon an interlock device.

Either way, the task of the magistrate setting conditions of bail is to ensure that it can be shown that a bail condition imposed by the magistrate was rationally related to the legitimate state objective of ensuring the defendant's appearance at trial or generally to protect the community. Stewart v. State *(supra). Tex. Code Crim. Proc. Ann. art. 17.40 (a)(supra).*

In line with the prevalent theme in Chapter 17 of the Code of Criminal Procedure of setting bail terms and conditions with a view to protecting the safety of victims and the community at large, Article 17.46 of the Code of Criminal Procedure referring directly to cases of "stalking" under §42.072 of the Penal Code provides:

> *"(a) A magistrate may require as a condition of release on bond that a defendant charged with an offense under Section 42.072, Penal Code, may not:*
> *(1) communicate directly or indirectly with the victim; or*
> *(2) go to or near the residence, place of employment, or business of the victim, or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance.*

*(b) If the magistrate requires the prohibition contained in Subsection (a)(2) of this article as a condition of release on bond, the magistrate* ***shall specifically describe the prohibited locations and the minimum distances, if any****, that the defendant must maintain from the locations."*

It is incumbent upon the magistrate to specifically list the common street addresses and minimum distances (e.g. "not come within 500 feet of the residence located at 111 Bell Street, Dallas, Dallas County, Texas"). Lack of specificity may result in the condition being deemed unenforceable and great shame, humiliation, and embarrassment being heaped upon the magistrate making such an error if a victim is injured or killed. Logically, the magistrate, in the appropriate case, seeking to ensure the safety of a victim of stalking may also impose the other conditions **specifically authorized by statute** (i.e. home confinement, electronic monitoring, curfew) discussed above in Articles 17.40 and 17.44 of the Code of Criminal Procedure. *Ex parte Tucker*, 997 S.W.2d 713 (Tex. App. – Fort Worth, 1998)

CONCLUSION

The right to bail is a significant and valuable right granted to defendants by the Texas Constitution. Magistrates, as guardians of that right, are charged on a case by case basis with the awesome responsibility to balance the all-important presumption of innocence in favor of the defendant against the right of the community and a victim to be safe. Conditions of bail, without more, will generally pass constitutional examination if they can logically be said to be rationally related to the all-important purpose of securing the defendant's presence at trial and providing reasonable protections for the victim and the community at large.

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# ETHICS: THE ROLE OF THE COURT IN IDENTIFYING ATTORNEY MISCONDUCT

By the end of the session, judges will be able to:

- Summarize applicable statutes and case law regarding attorney misconduct;
- Identify attorney misconduct in the courtroom; and,
- Discuss strategies for handling attorney misconduct.

## Ethics: The Role of the Court in Identifying Attorney Misconduct

## Objectives

- Identify Attorney Misconduct
- List Ethical Obligations of Attorneys and Judges
- Summarize the Applicable Law
- Develop Strategies for Dealing with Attorney Misconduct

## Defense attorney fails to come to court with client?

0% 1. Yes
0% 2. No

## Attorney's Ethical Obligations

- Texas Rules of Disciplinary Conduct:

**Rule 1.01 – Neglect**

- A lawyer shall not neglect a legal matter entrusted to him
- Neglect = conscious disregard

**Rule 1.03 – Communication**

- Keep client reasonably informed as to status of the case
- Explain so that client can make informed decisions

## Attorney's Ethical Obligations

- Texas Rules of Disciplinary Conduct:

**Rule 3.02**

- Lawyer shall not unreasonably delay resolution of a matter

**Rule 3.04(d)**

- Lawyer shall not knowingly disobey an obligation under the standing rules of a tribunal

## Does your court have local rules?

0% 1. Yes
0% 2. No

## Judge's Ethical Considerations

- **Canon 3(D)(2)**
  - Judge who receives information clearly establishing that a lawyer has violated his ethical obligation ***should*** take appropriate action.

## Judge's Ethical Considerations

- **Canon 3(D)(2)**
  - If unethical conduct raises substantial questions regarding lawyer's honesty, trustworthiness, or fitness to practice, judge ***shall*** notify SBOT or take other appropriate action.

## Options for handling attorney misconduct

## Does your court require a *letter of representation*?

0% 1. Yes
0% 2. No

## Can a Judge issue FTA for attorney who fails to appear in court?

0% 1. Yes
0% 2. No

## Options for handling misconduct

- Contempt of Court?
  - Best option for handling no-show lawyers
  - No statutory definition of "contempt"
    - Your discretion
    - Case law
  - Two types of contempt:
    - Direct Contempt
    - Indirect Contempt (*aka* "constructive")

## Have you attempted to hold lawyer in contempt of court?

0% 1. Yes

0% 2. No

## Contempt of Court

- Direct Contempt : Occurs in the Court's presence
  - Physical altercation
    *Ex parte Daniel, 722 S.W.2d 707*
  - Disruptive/Abusive behavior
    *Ex parte Aldridge, 334 S.W.2d 161*
  - Refusal to rise
    *Ex parte Krupps, 712 S.W.2d 144*
  - Refusal to answer questions
    *Ex parte Flournoy, 312 S.W.2d488*

## Contempt of Court

- Indirect Contempt: Outside Court's presence
  - Failure to comply with valid Court order
    *Ex parte Gordon, 584 S.W.2d 686*
  - Failure to appear in court
    *Ex parte Cooper, 756 S.W.2d 435*
  - Attorney late for trial
    *Ex parte Hill, 52 S.W.2d 367*
  - Offensive papers filed in court
    *Ex Parte O'Fiel, 246 S.W. 664*

## Indirect Contempt

- Requires Notice to Contemnor
  - Notice of the contemptuous conduct
  - Right to a hearing
  - Right to be represented by counsel

## Indirect Contempt

- Show Cause Order
  - See *TMCEC Forms Book*: Show Cause Notice
    - Form attached to written materials
  - Show Cause Order should include:
    - Alleged contemptuous act
    - When and where the act occurred

## Contempt of Court Statute

- **Gov't Code 22.002(c):**
  - **Contempt of municipal court is punishable by:**
    - **Not more that $100 fine, or**
    - **3 days in jail, or**
    - **Both fine and jail**
    - **Non-compliance with court order: 18 months max, or until contemnor complies**

## Contempt of Court Statute

- **If Attorney contests contempt:**
  - Attorney must file motion for PR bond in offending court
  - Upon filing, *Court must grant PR bond*
  - Presiding Judge of administrative region appoints a judge to hear the contempt contest

## Consider creating local rules...

- Consider local rules:
  - Inherent Powers of the Court (Gov't Code 22.001)
    - Powers needed to exercise jurisdiction & enforce its lawful orders
    - With dignity, orderly & expeditious
  - Require letter of representation
  - One pre-trial, then on the trial docket (CCP 28.01)
  - Require argument on motion for continuance

Bottom Line: Don't take it out on defendant

## Another option...

- **File grievance with State Bar:**
  - Remember attorney's obligations under Rules
  - Ask for initiation of "State Bar Complaint"
  - Provide supporting documentation

## Other Issues…

## Determine the legitimacy of the no-show…

Distinguish *busy* from *neglectful*

- Was there a prior setting?
- Has attorney attempted to contact Court/client?

- Require a valid Motion for Continuance
  - **CCP Article 29 requires:**
    - **Sufficient cause shown**
    - **Must be sworn to**
    - **Judge can require oral argument**

## Have you been asked, "Can I proceed without my lawyer?"

0% 1. Yes
0% 2. No

Do you allow the defendant to proceed *pro se*?

0% 1. Yes
0% 2. No

**What did we cover?**

- Attorney's ethical obligations
- Judge's ethical considerations
- Law & procedure of **Contempt**
- Strategies for handling misconduct

**THE END!**

## Texas Code of Judicial Conduct

### Canon 3

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

## Texas Disciplinary Rules of Professional Conduct

**Rule 1.01(b)(1)** In representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer.

**Rule 1.03(a)** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

**Rule 1.03(b)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Rule 3.02** In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs of other burdens of the case or that unreasonably delays resolution of the matter.

**Rule 3.04(d)** A lawyer shall not knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

§ 21.002. CONTEMPT OF COURT. (a) Except as provided by Subsection (g), a court may punish for contempt.

(b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than $500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

(c) The punishment for contempt of a justice court or municipal court is a fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.

(d) An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. The presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign a judge who is subject to assignment by the presiding judge other than the judge of the offended court to determine the guilt or innocence of the officer of the court.

(e) Except as provided by Subsection (h), this section does not affect a court's power to confine a contemner to compel the contemner to obey a court order.

(f) Article 42.033, Code of Criminal Procedure, and Chapter 157, Family Code, apply when a person is punished by confinement for contempt of court for disobedience of a court order to make periodic payments for the support of a child. Subsection (h) does not apply to that person.

(g) A court may not punish by contempt an employee or an agency or institution of this state for failure to initiate any program or to perform a statutory duty related to that program:

(1) if the legislature has not specifically and adequately funded the program; or

(2) until a reasonable time has passed to allow implementation of a program specifically and adequately funded by the legislature.

(h) Notwithstanding any other law, a person may not be confined for contempt of court longer than:

(1) 18 months, including three or more periods of confinement for contempt arising out of the same matter that equal a cumulative total of 18 months, if the confinement is for criminal contempt; or

(2) the lesser of 18 months or the period from the date of confinement to the date the person complies with the court order that was the basis of the finding of contempt, if the confinement is for civil contempt.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 2, § 8.44(1), eff. Aug. 28, 1989; Acts 1989, 71st Leg., ch. 560, § 1, eff. June 14, 1989; Acts 1989, 71st Leg., ch. 646, § 1, eff. Aug. 28, 1989; Acts 1989, 71st Leg., 1st C.S., ch. 25, § 34, eff. Nov. 1, 1989; Acts 1995, 74th Leg., ch. 262, § 87, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 165, § 7.24, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 1297, § 71(4), eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 425 § 1, eff. June 20, 2003.

**CONTEMPT – ADULT DEFENDANT PLEA**

**CAUSE NUMBER: _____**

| | | |
|---|---|---|
| **STATE OF TEXAS** | § | **IN THE MUNICIPAL COURT** |
| **VS.** | § | **CITY OF _____** |
| _____ | § | _____**COUNTY, TEXAS** |

## CONTEMPT OF COURT—DEFENDANT'S PLEA FORM

I, the accused in this offense, was informed of the accusation against me and my rights including my right to have a hearing, and the right to hire an attorney to represent me in this matter or to request an attorney represent me if I cannot afford one. I understand that a plea of no contest, nolo contendre, or guilty will result in me being found guilty to the offense as charged and the possibility of being sentenced up to three (3) days in the county jail and/or fined from One Dollar to One Hundred Dollars ($100).

I fully understand the proceedings against me and my rights regarding this offense and voluntarily enter a plea of (true)(not true) to the offense.

☐ I waive the right to a hearing before the Court.

☐ I waive my right to have an attorney represent me in a hearing before the Court.

_____ _____

Date Defendant's Signature

**FINDING AND JUDGMENT OF DIRECT CONTEMPT – ADULT**

**CAUSE NUMBER: _____**

| | | |
|---|---|---|
| **STATE OF TEXAS** | § | **IN THE MUNICIPAL COURT** |
| **VS.** | § | **CITY OF _____** |
| _____ | § | _____**COUNTY, TEXAS** |

On this the _____ day of _____, 200___, the Court has exercised its inherent authority and the authority granted by Section 21.002, Government Code, (to require the proceedings be conducted with dignity and in an orderly and expeditious manner)(to compel obedience of Court orders)(to so control the proceedings that justice is done).

The Court finds _____ in direct contempt of Court for *(describe conduct)*:

which occurred before the Court. The Court further finds that the above described actions were in contempt of Court and that the conduct presented sufficient exigent circumstances as to merit a summary finding of contempt in that the actions of the contemptor disrupted proceedings before the Court so that they could not be conducted with dignity and in an orderly and expeditious manner. The Court further finds that imposition of contempt is necessary to control the proceedings so that justice may be done. The Court further finds that the contemptor is not an officer of the Court.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that _____ is in direct contempt of Court and shall be:

☐ Confined in _____ (County)(City) Jail for a period of _____ (not to exceed three days).

☐ Fined the sum of $_____ (not to exceed $100).

_____
Judge, Municipal Court

City of _____

_____County, Texas

**FINDING AND JUDGMENT OF CONTEMPT FOR DISOBEYING A COURT ORDER**

**CAUSE NUMBER: _____**

| | | |
|---|---|---|
| **STATE OF TEXAS** | § | **IN THE MUNICIPAL COURT** |
| **VS.** | § | **CITY OF _____** |
| _____ | § | **_____COUNTY, TEXAS** |

On this the _____ day of _____, 200___, the Court has exercised its inherent authority and the authority granted by Government Code, Section 21.002 to require the proceedings be conducted with dignity and in an orderly and expeditious manner and to compel obedience of Court orders and to so control the proceedings that justice is done.

The Court finds that a notice of contempt was made to _____ on the _____ day of _____, 200__. That _____ (did)(did not) attend a show cause hearing on the _____ day of _____, 200__, as set forth in the notice. The Court finds that Contemptor did not show good cause why he/she should not be held in contempt.

The Court finds that Contemptor violated an order of the Court to wit: _____.

The Court finds that the finding of contempt is necessary to compel obedience of Court orders.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that

_____
is in contempt of Court and shall be:

☐ Confined in _____ (County)(City) Jail for a period of _____ (not to exceed three days).

☐ Fined the sum of $_____ (not to exceed $100).

_____
Judge, Municipal Court

City of _____

_____ County, Texas

# BEFORE THE
# STATE COMMISSION ON JUDICIAL CONDUCT

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## CJC No. 02-0676-MU

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# AMENDED PUBLIC REPRIMAND

### MUNICIPAL COURT JUDGE

During its meeting in Austin, Texas, on December 3-5, 2003, the State Commission on Judicial Conduct concluded a review of allegations against the Honorable Municipal Court Judge for the City of , Comal County, Texas. Judge was advised by letter of the Commission's concerns and provided a written response. Judge appeared with counsel before the Commission on October 9, 2003, and gave testimony. After considering the evidence before it, the Commission entered the following Findings and Conclusions:

### FINDINGS OF FACT

1. At all times relevant hereto, the Honorable was a part-time municipal court judge for the Cities of Marion, Garden Ridge, Universal City, and Cibolo, Texas.

2. In 1998, law partner, James Lebron Champion, was prosecuted for, and later convicted of, the federal offenses of conspiracy to commit mail fraud, conspiracy to commit money laundering, and attempted commission of murder for hire, for which Champion was sentenced to 170 months in federal prison. Judge testified as a witness in that criminal trial in exchange for "use" immunity from criminal prosecution.

3. On April 24, 2001, as a result of the filing of charges against him by the State Bar of Texas, Judge executed an "Agreed Judgment of Fully Probated

Suspension," which was entered on May 9, 2001, in Cause No. 2001-CI-05430, in the 285th Judicial District Court of Bexar County, Texas.

4. The disciplinary action, which is a matter of public record, involved Judge violation, as a lawyer, of Rule 8.03(a) of the Texas Disciplinary Rules of Professional Conduct, which requires ". . . a lawyer having knowledge that another lawyer has committed a violation . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority."

5. As a result of the public nature of the disciplinary action taken against him by the State Bar of Texas, Judge was asked to resign as judge by two of the four municipalities for which he served.

6. In his testimony before the Commission, Judge admitted that, during a time when he held office as a municipal judge, he was aware that lawyers in his firm engaged in the practice of "case running" and splitting professional fees with non-lawyers. The judge also was aware that tax returns prepared for the law firm did not reflect the use of runners and the payment of professional fees to these non-lawyers.

7. Judge further testified that he took no action to report the lawyers in his firm to the State Bar of Texas or to any other appropriate authority for engaging in the conduct described above.

8. Judge further testified that from approximately 1985 through 1995, during a time when he also held office as a municipal judge, he had participated to some extent in the law firm practices described above.

9. Judge further testified that he was aware that the practices described above violated Texas law.

10. Judge has never been charged criminally for his involvement in the activities described above.

## RELEVANT STANDARDS

1. Article V, Section 1-a(6)A of the Texas Constitution provides that any Texas justice or judge may be disciplined for willful or persistent conduct that casts public discredit upon the judiciary.

2. Canon 2A of the Texas Code of Judicial Conduct states, in pertinent part: "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."

3. Canon 3D(2) of the Texas Code of Judicial Conduct states, in pertinent part: "A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action."

## CONCLUSION

The Commission concludes from the facts and evidence presented that by failing to report lawyers who he knew were engaged in unethical, and in some cases, illegal activities, and by participating himself in some of these same unethical and illegal activities while also serving as a member of the judiciary, Judge failed to comply with the law and engaged in willful conduct that cast public discredit upon the judiciary. The Commission concludes that the judge's actions constituted willful or persistent violations of Article V, Section 1-a(6)A of the Texas Constitution, and Canons 2A and 3D(2) of the Texas Code of Judicial Conduct.

**********

In condemnation of the conduct described above that violated Article V, Section 1-a(6) of the Texas Constitution and Canons 2A and 3D(2) of the Texas Code of Judicial Conduct, it is the Commission's decision to issue a **PUBLIC REPRIMAND** to the Honorable , Municipal Judge for the City of Garden Ridge, Comal County, Texas.

Pursuant to the authority contained in Article V, Section 1-a(8) of the Texas Constitution, it is ordered that the conduct described above is made the subject of a **PUBLIC REPRIMAND** by the State Commission on Judicial Conduct.

The Commission has taken this action in a continuing effort to protect public confidence in the judicial system and to assist the state's judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Texas Code of Judicial Conduct.

Issued this 28 day of January, 2004.

ORIGINAL SIGNED BY

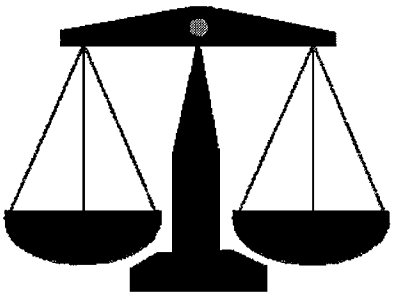
Honorable Joseph B. Morris, Chair
State Commission on Judicial Conduct

# RULES

# OF THE

# MUNICIPAL COURT

# CITY OF AUSTIN



# RULES OF THE MUNICIPAL COURT

BE IT KNOWN that on this day, _____, 2005, the Municipal Court of Austin, Texas has adopted its RULES OF COURT, in order to provide efficiency, uniformity and fairness in conducting the business of this court.

_____
Evelyn J. McKee
Presiding Judge

_____
Ferdinand D. Clervi
Associate Judge

_____
Alfred D. Jenkins, III
Associate Judge

_____
Ronald S. Meyerson
Associate Judge

_____
Mitchell B. Solomon
Associate Judge

_____
John R. Vasquez
Associate Judge

_____
Kenneth J. Vitucci
Associate Judge

Substitute Judges:
Arturo Alvarez
Donna Beckett
Erik Cary
Katherine Benbow Daniels
Kelly Evans
Barbara L. Garcia
David L. Garza
Belinda Herrera
Stanley Kerr
Kirk Kuykendall
Beverly J. Landers
Linda K. VonQuintus

Clerk of the Court:
Rebecca Stark

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## RULE ONE: ENTRY OF A PLEA

1.1 **Written plea**. All pleas shall be in writing, except for pleas entered in open court before a judge. A fine payment shall constitute a plea of nolo contendere as allowed by law.

1.2 **Requests for Assistance**.

a. A request for a language interpreter should be made in writing at the time a plea is entered.

b. Requests for assistance from persons with disabilities should be made at the time the plea is entered.

c. Requests for visual or audio aids should be made at least one (1) week prior to trial so that arrangements can be made for the proper equipment to be available.

1.3 **Court Reporter Request**. A defendant may request, or waive, a court reporter at the initial announcement of the case or at the time of trial.

1.4 **Plea by Mail**. The date of the postmark shall be designated as the date of filing of any plea received by mail.

1.5 **Plea by FAX**. The date of receipt of a FAX by the Clerk's office shall be designated as the date of filing of any plea.

1.6 **Defendant Appearance**. A defendant who is not represented by an attorney must appear at all court settings of his/her case(s).

## RULE TWO: COURTROOM DECORUM

2.1 **Order**. Order shall be maintained at all times. Violation of this rule can result in a reprimand by the judge, expulsion from the courtroom or a contempt citation.

a. Unless an attorney is making an objection, only one person may speak at a time.

b. No one may talk while the judge is talking.

c. Participants will address others respectfully.

d. Courtrooms shall not be used as passageways.

2.2 **Weapons**. Absolutely no illegal weapons shall be brought into the courtroom, with the exception of those intended to be offered as evidence. Commissioned peace officers may

bring weapons into the courtroom. The judge shall have the discretion to have any object removed from the courtroom.

2.3 **Food\Drink**. In order to maintain cleanliness and decorum in the courtroom, no open containers of food or drink shall be consumed in or brought in to the courtroom, except with permission of the judge.

2.4 **Reading Materials**. Reading by non-participants shall not be permitted in the courtroom when it causes noise or other distractions to the participants.

2.5 **Seating**. All persons in the courtroom shall be seated except: when addressing the judge or jury, when a seat is not available, when directed to rise by a court officer, or with permission of the judge.

2.6 **Hats**. No hats shall be worn in the courtroom, except with permission of the judge.

2.7 **Electronic Devices**. All electronic devices must be turned off or in silent mode in the courtroom.

## RULE THREE: NOTICE

3.1 **Responsibility**. It is the responsibility of all persons with business before the court to a) determine the date, time and nature of each setting of case(s): and b) update or notify the court of any change of address.

3.2 **Notice**. Notice of the date, time and nature of each setting shall be given to each party in writing, in person or by mail, to the last known address of a party or counsel. A copy of each notice shall be included in the papers of the case, and marked as to the manner of its delivery.

3.3 **Verbal Representations**. Reliance upon verbal representation from any court personnel concerning any matter shall not be considered grounds for continuance, setting aside of a warrant or any other relief. Reliance upon a police officer's verbal statement(s) regarding disposition of an offense is not binding upon the court.

3.4 **Complaint**. A copy of the complaint will be made available to the defendant or counsel upon request to the clerk of the court.

## RULE FOUR: MOTIONS

4.1 **Motions for Continuance**

4.11 **Code**. Continuances are governed by Chapter 29, Texas Code of Criminal Procedure. These rules augment but do not replace that code.

4.12 **Form**.

A. All motions for continuance shall be in writing (fax acceptable) and shall be filed with the clerk of the court (motions clerk). Such motions shall be filed immediately upon discovering the necessity for a continuance. Motions filed less than two working days prior to the scheduled event will be ruled on at the call of the docket.

B. Each motion shall contain:

1) the cause number;

2) the name of the defendant;

3) the date and time of the setting to be continued;

4) the specific facts justifying the continuance;

4.13 **Emergency Motions**. Motions filed less than two working days prior to the scheduled event will be ruled on at the call of the docket.

4.14 **Factors**. Except in cases where constitutional or statutory continuances are sought, the following factors will be among those considered in determining a motion for continuance:

A. The specific nature of the conflict (illness, higher court schedule including court and case number, out of town, etc.)

B. The time from the date on which the charge was initiated by citation or affidavit.

C. The number of continuances previously granted to each party.

D. The timeliness of the filing of the motion, including the date on which the conflict became known to Movant.

4.15 **Forum**. In all cases the ruling on a motion for continuance shall be at the discretion of the judge to whom it is presented. A subsequent motion for the same setting shall be presented to the judge who denied the original motion, if practicable.

4.16 **Denied Motion**. If a motion is denied, in order to avoid an arrest warrant, a bond in the amount set by the Court may be posted. It is the responsibility of the defendant to determine whether the motion was granted or denied.

4.2 **Motions to Withdraw**. Any attorney who makes an appearance on behalf of the defendant or represents to the court that he or she is the attorney of record shall remain the attorney of record until a motion to withdraw as counsel or substitute other counsel is granted.

4.21 **Without a Hearing**. A motion to withdraw as attorney of record will be granted without a hearing only if the moving attorney:

A. files a certificate stating the last known mailing address of the Defendant, AND

B. files a written consent to the withdrawal signed by the client,

C. or includes in the motion a specific statement: 1) of the circumstances that prevent the moving attorney from obtaining the client's written consent and 2) that the client has been notified of the attorney's intent to withdraw by forwarding a copy of the motion to said client.

4.22 **With a Hearing**. If all requirements of Rule 4.21 are not satisfied, a motion to withdraw must be presented at a hearing after notice to the Defendant and to all other parties, as prescribed by Rule Seven: Pre-Trial Settings.

4.23 **Substitution**. If a motion to substitute another attorney includes an appearance by another attorney, that appearance will satisfy the requirements of Rule 4.21.

## RULE FIVE: UNSCHEDULED APPEARANCES

5.1 **Attorneys**. Attorneys seeking to discuss cases with prosecutors should request the prosecutor have the cases brought from Records. Attorneys seeking to discuss cases with a judge may request the judges' secretaries have the cases brought to the judges' office from Records. Attorneys are not authorized to hold case files unless authorized by a judge. Attorneys intending to see a judge may call ahead and have the case(s) brought from Records. Cases will be held in the judges office no longer than 24 hours.

5.2 **Files**. Defendants and their attorneys have access to defendant files in the presence of

court personnel. Clerks shall not release files to anyone except court personnel. Files shall not be removed from the courtroom except with authorization by the judge.

## RULE SIX: APPEARANCE DOCKET

6.1 Generally, cases in which defendants have pleaded "not guilty" will be set for an appearance docket prior to being set for trial.

6.2 At the appearance docket, the defendant will be given an opportunity to speak with the prosecutor and be made aware of options in lieu of trial.

6.3 The appearance docket can be waived in writing. A waiver may result in the defendant losing any opportunity to negotiate with the prosecutor for an alternate resolution prior to trial

## RULE SEVEN: PRETRIAL SETTINGS

7.1 **Motions**. Pretrial Motions shall be filed in writing in all cases where Defendants claim there are legal issues involving the sufficiency of the criminal complaint or the law from which the complaint is drawn. These issues shall include, but not be limited to, any factual situations that would invalidate the premise upon which a law or ordinance has been promulgated.

7.2 **Hearings**. No more than one pretrial hearing shall be set per case without leave of the Court. Failure to file pretrial motions as indicated herein shall constitute a waiver of having those issues heard before trial.

7.3 **Deadline to File**. Unless leave of Court has been granted, all pretrial motions shall be filed at least 14 days prior to trial. Such motions shall be heard no later than three (3) days prior to trial.

7.4 **Service**. It shall be the responsibility of the party filing any pretrial motion to serve opposing counsel or party with a copy of the motion within three (3) days of the filing of said motion. Service may be made by hand delivery, certified mail, or FAX.

7.5 **Setting the Hearing Date**. It shall be the responsibility of the party filing any pretrial motion to obtain a hearing from the Clerk of the Court.

7.6 **Subpoena/Evidence**. The State is responsible for the appearance of all necessary witnesses in response to a defendant's motion to suppress evidence. In all other cases, each party shall be responsible for subpoenaing its own witnesses and physical evidence.

## RULE EIGHT: TRIAL SETTINGS

8.1 **Docket Order**.

Subject to the discretion of the Judge calling the docket, the order of cases proceeding to trial (both bench and jury) shall be as follows:

1. Preferential settings.
2. Cases according to age, oldest first.

All cases not reached will be noted as the court's reset, with no penalties assessed against either the defendant or the state.

8.2 **Preferential Setting**. To receive a preferential setting, subject to the judges approval, a

party must meet one of the following criteria:
A. Reside more than fifty (50) miles outside of the city.
B. Have a condition, illness, or injury that would necessitate an expedited disposition of the case.
C. Have a non-defendant witness who has appeared on at least two prior trial settings without their case having been reached.

8.3 **Required Appearance**. All interested parties must be present and in the courtroom at the time the docket is called. Interested parties are defined as:
A. Defendants.
B. Defense counsel.
C. State's counsel.

8.4 **Failure to Appear**.
If defendant or defense counsel is not present, a bond must be posted in order to have the case reset, unless waived by a judge for good cause shown.
If state's witness is not present, state shall show good cause for witness's absence, or proceed to trial.

8.5 **Record of the Proceedings**.
A. Request and Availability. A defendant may request a court reporter at the initial announcement of the case or at time of trial. No fee is required to have a court reporter present.
B. Purpose. Austin Municipal Court is a court of record. It is the court reporter's function to record (transcribe) the entire trial proceeding. In order to appeal a finding of guilt to County Court, a defendant should have a written record of the trial proceeding sent to the appellate court either by a court reporter's transcript or by an agreed statement of facts approved by the Assistant City Attorney.

8.6 **Visual/Audio Aids**.
A. A defendant who wishes to use visual or audio aids in their defense must notify the court at least one (1) week prior to trial so that arrangements can be made for the proper equipment to be available.
B. The sitting judge shall make the final decision on what audio or video recordings, if any, are to be admitted into evidence.

8.7 **Media Access**. As a general rule, broadcast media will not be allowed to record any court proceeding. Any exceptions may be made by the judge presiding in each particular case.

## RULE NINE: POST TRIAL

9.1 **Code**. Motions for new trials and appeals are governed by the Texas Government Code, Section 30.00014, et seq.

9.2 **Appellate Information**. The Clerk of the Court shall make available to each defendant a handout summarizing the appeal process.

9.3 **Indigency**. If a defendant is indigent or otherwise too poor to pay either the appeal bond or the transcript, she\he may file an Affidavit of Indigency with the court and a Motion to Waive Costs within the ten (10) day period to file an appeal bond. A hearing on the motion to waive costs shall then be scheduled by the court.

9.4 **Inability to Pay Fine**. If a defendant does not appeal the court's decision, but is unable to pay the fine when due, the defendant must appear at the clerk's office and request their

case be set on the mitigation docket. If the defendant qualifies, the court may allow the defendant to pay the fine in installments or discharge the fine by performing community service.

9.5 **Warrant**. If a defendant does not pay the fine, meet all obligations of an installment payment plan, or discharge the fine by performing community service as ordered by the court, a warrant will be issued which will subject the defendant to arrest.

**Municipal Court Procedures**
**Prepared and Distributed**
**By the**
**Texas Municipal Courts Association**
**And**
**Texas Municipal Courts**
**Education Center**

**Court Appearances**

The law requires that you appear in court on your case. If you were issued a citation, your appearance date is noted on the citation. If you have been released on bond, your appearance date is set on the bond. If you request a continuance (read the specific section on continuances), the court will notify you of your new appearance date. You or your attorney may appear in person in open court, by mail or you may make an appearance in person at the court facility *(Juveniles have a separate set of rules for their appearance. Please read the specific section on juveniles in this pamphlet).*

Your first appearance is to determine your plea. If you waive a jury trial and plead guilty or nolo contendere (no contest), you may talk to the judge about extenuating circumstances that you want the judge to consider when setting your fine, but the judge is not required to reduce your fine. Before pleading guilty or no contest you may want to read the section on plea. If you plead not guilty, the court will schedule a jury trial unless you waive that right. If you do, the trial will be before the judge.

**Driving Safety Courses**

If you are charged with a traffic offense under the Subtitle C, Trans. Code, you may ask the judge before the appearance date on the citation, either orally or in writing, to take a driving safety course. If you were operating a motorcycle and request to take a driving safety course, you must take a motorcycle operator's training course. At the time of the request, you must do the following:

(1) Present proof of financial responsibility (liability insurance);
(2) Plead guilty or nolo contendere; and
(3) Pay court costs and an administration fee.

Prosecution of the traffic offense will be postponed for 90 days to allow you time to complete the course. You are required to attend a driving safety course that has been approved by the Texas Education Agency or a motorcycle operator's course approved by the Department of Public Safety.

You are eligible to request this course if you:

(1) Have not requested and taken a driving safety course for a traffic offense within the last 12 months;
(2) Are not currently taking the course for another traffic violation;
(3) Have not committed the offense of speeding 25 mph over the speed limit; and
(4) Have not committed one of the following offenses;

(a) Failure to give information at accident scene;
(b) Leaving scene of Accident;
(c) Fleeing or attempting to elude police officer;
(d) Reckless driving;
(e) Passing a school bus; or
(f) A serious traffic violation as defined under Chapt 522, Trans. Code, which applies to drivers with commercial driver's licenses.

Prior to the end of the 90-day period, you must present to the court a copy of your driving record from the Department of Public Safety. You are required to take the course within 90 days from the date of the request. You have to show the court a completion certificate issued by the Texas Education Agency or the Texas Department of Public Safety. If you do not, the court will send you a notice requiring you to return to court and explain why you failed to show proof of completion. If you have a good reason why you were unable to present your proof within 90 days, the judge may, but is not required, to grant you an extension. Your failure to be present at that hearing may result in a warrant for your arrest being issued.

**Pleas**

Under our American system of justice, all persons are presumed to be innocent until proven guilty. On a plea of not guilty, a formal trial is held. As in all criminal trials, the State is required to prove the guilt of the defendant "beyond a reasonable doubt" of the offense charged in the complaint before a defendant can be found guilty by a judge or jury.

Your decision concerning which plea to enter is very important. Please consider each plea carefully before making a decision. If you plead guilty or nolo contendere in open court, you should be prepared to pay the fine and court costs. You should contact the court regarding how to make payment.

**Plea of Guilty** - By a plea of guilty, you admit that the act is prohibited by law, that you committed the act charged, and that you have no defense or excuse for your act. Before entering your plea of guilty, however, you should understand the following:

(1) The State has the burden of proving that you violated the law *(the law does not require that you prove you did not violate the law)*;
(2) You have the right to hear the State's evidence and to require the State to prove you violated the law; and
(3) A plea of guilty may be used against you later in a civil suit if there was a traffic accident *(another party can say*
(4) *you were at fault or responsible for the accident because you pled guilty to the traffic charge).*

**Plea of Nolo Contendere** (no contest) – A plea of nolo contendere means that you do not contest the State's charge against you. You will almost certainly be found guilty, unless you are eligible and successfully complete a driving safety course and/or court ordered

probation. Also, a plea of nolo contendere cannot be used against you in a subsequent civil suit for damages.

**Plea of Not Guilty** – A plea of not guilty means that you are informing the Court that you deny guilt or that you have a defense in your case, and that the State must prove what it has charged against you. If you plead not guilty, you will need to decide whether to hire an attorney to represent you. If you represent yourself, the following section on **The Trial** will help you to understand trial procedure.

**The Trial**

A trial in municipal court is a fair, impartial and public trial as in any other court. Under Texas law, you can be brought to trial only after a sworn complaint is filed against you. A Complaint is the document which alleges what act you are supposed to have committed and that the act is unlawful. You can be tried only for what is alleged in the complaint. You have the following rights in court:

(1) The right to inspect the complaint before trial and have it read to you at the trial;
(2) The right to have your case tried before a jury, if you so desire;
(3) The right to hear all testimony introduced against you;
(4) The right to cross-examine any witness who testifies against you;
(5) The right to testify in your behalf;
(6) The right not to testify, if you so desire. If you choose not to testify, your refusal to do so cannot be held against you in determining your innocence or guilt; and
(7) You may call witnesses to testify in your behalf at the trial, and have the court issue a subpoena (a court order) to any witnesses to ensure their appearance at the trial. The request for a subpoena may be oral or in writing.

If you choose to have the case tried before a jury, you have the right to question jurors about their qualifications to hear your case. If you think that a juror will not be fair, impartial or unbiased, you may ask the judge to excuse the juror. The judge will decide whether or not to grant your request. You are also permitted to strike three members of the jury panel for any reason you choose, except an illegal reason (such as a strike based on solely upon a person's race).

**Continuances**

If you need a continuance for your trial, you must put the request in writing and submit it to the court with your reasons prior to trial. The judge will make a decision whether or not to grant the continuance. You may request a continuance for the following reasons:

(1) A religious holy day where the tenets of your religious organization prohibit members from participating in secular activities such as court proceedings (you must file an affidavit with the court stating this information; or
(2) That you feel it is necessary for justice in your case.

**Presenting the Case**

As in all criminal trials, the State will present its case first by calling witnesses to testify against you.

After prosecution witnesses have finished testifying, you have the right to cross examine. In other words, you may ask the witnesses questions about their testimony of any other facts relevant to the case. You cannot, however, argue with the witness. Your cross-examination of the witness must be in the form of questions only. You may not tell your version of the incident at this time, but you will have an opportunity to do so later in the trial.

After the prosecution has presented its case, you may present your case. You have the right to call any witness who knows anything about the incident. The State has the right to cross-examine any witness that you call.

If you so desire, you may testify in your own behalf, but as a defendant, you cannot be compelled to testify. It is your choice, and your silence cannot be used against you. If you do testify, the State has the right to cross-examine you.

After all testimony is concluded, both sides can make a closing argument. This is your opportunity to tell the court why you think that you are not guilty of the offense charged. The State has the right to present the first and last arguments. The closing argument can be based only on the testimony presented during the trial.

**Judgment/Verdict**

If the case is tried by the judge, the judge's decision is called a judgment. If the case is tried by a jury, the jury's decision is called a verdict.

In determining the defendant's guilt or innocence, the judge or jury can consider only the testimony of witnesses and any evidence admitted during the trial.

If you are found guilty by either the judge or jury, the penalty will be announced at that time. Unless you plan to appeal your case, you should be prepared to pay the fine at this time.

**Fines**

The amount of fine the court assesses is determined only by the facts and circumstances of the case. Mitigating circumstances may lower the fine, even if you are guilty. On the other hand, aggravating circumstances may increase the fine. The maximum fine for most municipal court traffic violations is $200; for municipal court penal violations-$500; for certain city ordinance violations $2,000; and for other city ordinance violations-$500.

**Court Costs**

In addition to a fine, court costs mandated by state law will be charged. The costs are different depending on the offense. You need to check with the court for the amount that will be assessed to the violation for which you are charged. If you request a trial, you may have to also pay the costs of overtime paid to a peace officer spent testifying in the trial. If you request a jury trial, an additional $3 jury fee is assessed. If a warrant was served or processed by a peace officer, an additional $50 fee is also assessed.

Court costs are assessed if you are found guilty at trial, if you plead nolo contendere, if your case is deferred for a driving safety course, of if your case is deferred and you are placed on probation. If you are found not guilty, court costs cannot be assessed.

**New Trial**

If you are guilty, you may make an oral or written motion to the court for a new trial. The motion must be made within one day after a judgment of guilty has been rendered against you. The judge may grant a new trial if the judge is persuaded that justice has not been done in the trial of your case. Only one new trial may be granted for each offense.

**Appeal**

If you are found guilty, and are not satisfied with the judgment of the court, you have the right to appeal your case. Click on "appeal" to review the appellate procedures.

**Juveniles**

The municipal court has jurisdiction over juveniles (16 years or younger) charged with Class C misdemeanor offenses except public intoxication. All juveniles are required to appear in open court for all proceedings in their cases. The parent of any juvenile charged in municipal court is required to be present in court with his or her child. Juveniles who fail to appear in court may have an additional charge of failure to appear filed against them. Juveniles who fail to appear or who fail to pay their fine will be reported to the Department of Public Safety who will suspend their driver's license. If they do not have a driver's license, they will not be able to obtain one until they appear in court.

*These procedures have been re-printed with permission from the Texas Municipal Courts Education Center.

# RULES OF THE MUNICIPAL COURT

CITY OF
SAN ANTONIO
BEXAR COUNTY, TX

Pursuant to the authority of the Texas Government Code and Ordinance #61318 of the City of San Antonio, the following Rules of the Municipal Court of the City of San Antonio, Texas, are hereby adopted effective January 1, 2002. Furthermore, all prior Rules of Municipal Court are hereby rescinded effective December 31, 2001.

It is intended that these Rules be construed consistent with Article 45.001 of the Texas Code of Criminal Procedure. Furthermore, these Rules may be amended from time to time so as to be consistent with State and Federal law and the Ordinances of the City of San Antonio.

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## RULE 1
## ARRAIGNMENT SETTINGS

The court appearance date that appears on a citation or summons is an arraignment setting.

## RULE 2
## ARRAIGNMENT DOCKET

A. The purpose of the arraignment setting is to determine the defendant's plea to the offense charged and for the Court to apprise defendants of their Constitutional Rights. At the arraignment setting, the defendant may enter a plea of guilty, not guilty, or nolo contendere (no contest). If the plea is guilty or nolo contendere, the defendant may give an explanation in mitigation of any fine to be assessed prior to the judge assessing a fine. If a not guilty plea is entered, the case will be set for a trial at a later date. If the defendant wishes to have a trial by jury, a jury trial request may be made at the arraignment.

B. Arraignment for those persons detained in the City of San Antonio Detention Facility for criminal offenses within the jurisdiction of the City of San Antonio Municipal Court shall be held each day of the week at times prescribed by the acting Magistrate or by the Presiding Judge.

C. At least one prosecuting attorney shall be present at each arraignment docket to represent the State.

**RULE 3**
**CONTINUANCES**

A. Upon oral or written motion of the State or the defendant or his attorney, the Court may grant a continuance upon a showing of good cause. All motions for continuances should be filed at least ten (10) days prior to the trial date and may be heard at such time as the Court may specify. Any motions for continuance filed less than the ten (10) days may be granted, as deemed necessary by the Court.

B. For the convenience of the public, a form motion is available for the use by the defendant or his attorney at the public service counter.

C. Initial requests for continuances on Department of Public Safety administrative hearings may be requested through the Department of Public Safety Office, located on the first floor of Municipal Court. The maximum length of continuance obtained in this manner shall be 30 days. Only the judge presiding over the Department of Public Safety docket may grant all subsequent requests for a continuance.

**RULE 4**
**TRIAL SETTINGS**

A. A request for a trial may be made prior to or at the scheduled arraignment docket. The request shall specify either a jury or nonjury setting.

B. Upon making a request for trial, the attorney of re-

cord shall provide his name, office address, bar card number, and telephone number. A defendant representing himself and requesting a trial shall provide current work and home address and telephone numbers.

C. Jury cases are set in the Municipal Court at 8:00 a.m. and 1:00 p.m. Monday through Friday and at such other times as the Presiding Judge may designate.

**RULE 5**
**JUVENILES**

A. A person who is considered a juvenile (10-17 years of age), and is charged as a juvenile with an offense within the jurisdiction of the Municipal Court, must be accompanied by a parent or legal guardian at all appearances. No action will be taken unless the juvenile is so accompanied by such parent or legal guardian. However, the Court may hear the case if satisfied that due diligence has been used to obtain the presence of the parent or legal guardian.

B. A minor (under 21 years of age) charged with an alcohol related offense under Chapter 106 of the Alcoholic Beverage Code must be present in open court before a judge to enter a plea of guilty or no contest. Furthermore, no person under 18 years of age may be convicted of an alcohol-related offense without the parent or legal guardian present. However, the court may hear the case if satisfied that due diligence has been used to obtain the presence of the parent or legal guardian.

## RULE 6
## ANCILLARY DOCKETS

The Presiding Judge may create Ancillary Dockets at such times and dates as may be deemed necessary.

## RULE 7
## TRIAL DOCKET

A. All cases set on the trial docket will be called at the time for which they are set, whereupon the State and the defendant are expected to announce ready for trial subject to the hearing on any properly filed pre-trial motions.

B. If the Defendant fails to appear in person and announce ready for trial at the time the case is called for trial without showing good cause, the Court may issue a warrant for the defendant's arrest and may require that the defendant post a bond.

C. If the State fails to appear and announce ready for trial at the time a case is called for trial, without showing good cause, the Court may proceed to trial.

D. The Court may, at the request of either the State or the defendant, or on its own motion, specially set a case for trial on the merits.

## RULE 8
## PRETRIAL MOTIONS

A. All pretrial motions will be heard prior to the commencement of the trial on the merits.

B. At the discretion of the Court, pretrial motions may be set for a hearing upon written request of either party, as governed by Chapters 27 and 28 of the Rules of Criminal Procedure, and all other applicable rules regarding the hearing of pretrial motions. All motions, including motion for continuance, will be filed in the Office of the Court Section, Municipal Court, in triplicate. The motion shall include a certificate of service as provided by Rule 21a of the Texas Rules of Civil Procedure.

## RULE 9
## JURY TRIALS AND REQUIRED FEES

A defendant convicted by a jury in a trial shall pay a jury fee of $3.00 unless released from the obligation by the Court for good cause. (See Texas Code of Criminal Procedure, Articles 45.026 and 102.004)

## RULE 10
## COURTROOM DECORUM

The Court is charged with the responsibility of maintaining proper order and decorum. Accordingly, the Court shall require all litigants, jurors, witnesses, lawyers, and others with

whom the Judge deals in an official capacity, to conduct and dress themselves in a manner deemed fitting and respectable.

## RULE 11
## MOTION FOR NEW TRIAL

A written motion for new trial must be filed by the defendant or the defendant's attorney in the Office of the Court Section, Municipal Court, no later than the tenth ($10^{th}$) day after judgment is rendered, unless such time is extended by the Court for good cause upon proper written motion.

## RULE 12
## APPEAL BOND

An appeal bond is required to perfect an appeal from the Municipal Court. All appeal bonds require the signature and address of the defendant. An appeal bond must be approved by the Court and must be filed not later than the tenth ($10^{th}$) day after the date on which the motion for new trial is overruled. Appeal bonds shall comply with Chapter 45 of the Texas Code of Criminal Procedure.

## RULE 13
## PROCEDURE FOR POSTING BOND

A. When the defendant is in the custody of the City of San Antonio Police Department, bond will be made at the Bexar County Adult Detention Cen-

ter, 200 N. Comal, San Antonio, Texas, which is open twenty-four hours a day. Either cash or surety bonds may be made at the Bexar County Adult Detention Center to secure the release of the defendant from police custody.

B. In all cases where the defendant is in the custody of any other law enforcement agency and there is a "hold order" placed upon said defendant by the City of San Antonio for delinquent charges, the defendant may secure his release as follows:

1. Post a cash bond after the defendant is transferred to the Bexar County Adult Detention Center;

2. Post a surety bond by having the defendant sign a properly executed surety bond and return it to the Bexar County Adult Detention Center; or

3. Post a personal recognizance bond, which is granted only by the magistrate assigned to hear the jail arraignment docket.

4. The defendant must sign all bonds.

5. All bail bonds shall comply with Chapter 17, Texas Code of Criminal Procedure.

## RULE 14
## AMOUNT OF BOND

A. Each Municipal Court Judge shall set the amount of bail in cases under their jurisdiction.

B. In appropriate cases, the amount of bond required might be increased or decreased only by the Presiding Judge or the judge of the court in which the case is docketed.

## RULE 15
## BOND FORFEITURE

A. The purpose of a bail bond is to ensure the appearance of a defendant before the Court to answer a criminal accusation.

B. If the defendant fails to appear in court as scheduled, the Court may issue a Judgment Nisi, a warrant for the defendant's arrest, and may increase the bail in each case. Bonds are forfeited according to the Code of Criminal Procedure and all other applicable laws dealing with the final forfeiture of bail.

## RULE 16
## EXPUNCTION

A. All procedures concerning expunction of criminal records shall conform to the requirements of Chapter 55 of the Texas Code of Criminal Procedure.

B. Copies of Chapter 55 of the Texas Code of Criminal Procedure will be available upon request at no cost to defendants or their attorney at the public service counter.

**RULE 17**
**REVIEW OF COURT DOCUMENTS**

A. The Office of the Court Section shall make court documents available for review under reasonable conditions and safeguards, and as required by law.

B. At no time may a defendant or his attorney remove the original complaint from the court jacket.

**RULE 18**
**CERTIFIED COPIES**

Certified copies of court documents may be obtained from the Municipal Court Office of the Court Section at the fees set forth by the City of San Antonio. Upon request, a defendant is entitled to one (1) free uncertified copy of the complaint of a pending case only.

**RULE 19**
**ADMINISTRATIVE HEARINGS**

A. Hearings involving driver's license suspensions or revocations are administrative rather than criminal proceedings.

B. Continuances for driver's license suspension hearings are governed by Rule 3(C).

C. Parking violations are civil offenses and are heard by an Administrative Hearing Officer.

D. Affirmative findings of the Administrative Hearing Officer may be appealed to a Municipal Court Judge in accordance with Chapter 682 of the Texas Transportation Code.

**RULE 20**
**VACATIONS**

A. Where no trial settings have taken place, each attorney desiring to ensure that they will not be assigned to trial during a vacation period, not to exceed four (4) weeks, shall submit a vacation request in writing to the Office of the Presiding Judge at least 30 days in advance of the scheduled vacation. Such request shall include:

1. The dates of vacation;

2. A list of all attorney's cases set for trial and/or arraignment. The list shall be supplemented by the attorney to include additional cases specified, including defendant's name, cause number, court number, date and time of setting; and

3. The name and address of the person(s) who will receive notice of new court setting date(s).

B. If such vacation letter has not been filed, or if the attorney desires to change their vacation period to one different from the previous request, the attorney must present an individual motion for each case set during the new/different vacation period requested and shall be recorded by the court having jurisdiction of the case(s). Such motions shall be governed by the rules governing continuances as set forth in the Texas Code of Criminal Procedure and Rule 3 herein.

**RULE 21**
**TRANSFER OF CASE**

A. A Municipal Court Judge presiding over any court or docket shall exercise complete judicial authority over judgments, orders, and process of said Judge's court.

B. The Presiding Judge may temporarily assign Judges to exchange benches and to sit and act for each other in a proceeding pending in a court if necessary for the expeditious disposition of business in the courts.

C. A Judge may transfer any case set in his court to another court, provided that the court to which the case is to be transferred accepts the case(s). No specified order of transfer need be entered of record.

D. Except for extreme circumstances, Judges shall not make any disposition or take any action on a case not set on the docket for which that judge is responsible.

**RULE 22**
**SUBSTITUTE JUDGES**

The Part-time Judges of the Municipal Court, when sitting, have the same powers as other Municipal Courts judges, including the powers and duties of a magistrate. They shall serve in such courts and at such times as prescribed by the Presiding Judge.

The Rules of the Municipal Court of the City of San Antonio, Texas, as provided herein shall become effective January 1, 2002.

Signed and Ordered this 30th day of November 2001.

*Alfredo M. Tavera*

Alfredo M. Tavera
Presiding Judge, Municipal Courts
City of San Antonio, Texas

San Antonio Municipal Court
401 S. Frio St.
San Antonio, TX 78207

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# CASE LAW AND ATTORNEY GENERAL OPINION UPDATE

**Presented by**

**Ryan K. Turner**
**General Counsel and Director of Education**
**TMCEC**

By the end of this session, judges will be able to:

- Explain how recent federal and state court decisions affect procedural and substantive legal issues in municipal courts;
- Explain how recent federal and state court decisions affect procedural and substantive legal issues pertaining to state magistrates; and,
- Summarize Texas Attorney General Opinions of interest to municipal courts.

# Case Law & Attorney General Opinion Update
# Academic Year 2006–2007

Ryan Kellus Turner
General Counsel
TMCEC

Elisabeth Gazda
Program Coordinator
TMCEC

*Except where otherwise noted, the following case law and opinions were handed down August 31, 2005 through October 1, 2006.*

## I. Search and Seizure

### A. Search Warrants

**1. May police lawfully conduct a search based on consent given by a person with common authority over an area, when another person with equal authority refuses to consent to the search?**

***Georgia v. Randolph*, 126 S. Ct. 1515 (2006)**

No. A co-tenant has no recognized authority in law or social practice to prevail over the other co-tenant, and one co-tenant's disputed invitation, without more, gives police no better claim to reasonableness in entering than they would have had in the absence of any consent at all. Disputed permission is no match for the central value of the Fourth Amendment, which is freedom from unreasonable searches and seizures.

**2. Is an anticipatory search warrant valid if it fails to state the triggering condition on the actual warrant?**

***U.S. v. Grubbs*, 126 S. Ct. 1494 (2006)**

Yes. When an anticipatory warrant is issued, and the warrant becomes valid upon the triggering event (such as the defendant accepting the package containing contraband), then the triggering event establishes probable cause for the ensuing search. The lack of a triggering condition on the face of the warrant does not violate the Fourth Amendment. The "particularity" requirement of the Fourth Amendment does require that the person or place to be searched be stated with particularity, but does not require that the conditions precedent to the search be stated with particularity (or at all).

**3. May a magistrate issue a warrant based on an officer's affidavit describing the smell of drugs, even though the affidavit did not contain information as to the officer's experience or training?**

***Davis v. State*, 202 S.W.3d 149 (Tex. Crim. App. 2006)**

Yes. A search warrant affidavit must be read with common sense and in a realistic manner. Reasonable facts may be inferred from reading the facts contained in the four corners of the affidavit. In this case, the affiant was a police officer, who detected the smell of methamphetamine production. The magistrate is inferring the officer's ability to discern the smell that methamphetamine production creates is not unreasonable. The court, however, notes that inferences and conclusions should not have to be made in an ideal situation, because the affidavits will be clear enough facially. Including the affiant officer's experience and background in an affidavit for a warrant is highly recommended.

**4. If the signature page on a search warrant uses the same language as the one found on the affidavit in support of the search warrant, does the judge sign both documents only in his capacity as an officer authorized to administer oaths, and thus the search warrant is not signed and dated by a magistrate?**

***Cole v. State*, 200 S.W.3d 762 (Tex. App.—Texarkana 2006)**

No. While a warrant that is not signed and dated by a magistrate is not valid (and the evidence collected as a result of that warrant should be suppressed), there is a good-faith exception to Article 18.04, Code of Criminal Procedure (Contents of a Warrant). The good-faith exception, found in Article 38.23(b), Code of Criminal Procedure, allows evidence seized by officers relying in good-faith on a warrant they believe to be issued based on probable cause and signed and dated by a neutral magistrate. In this case, the officer who prepared the forms witnessed the judge sign both documents and the warrant facially appeared to meet all statutory requirements. Therefore, it can be reasonably concluded that the officers who acted on the search warrant acted in good-faith.

**B. Exceptions to the Warrant Requirement**

**1. Does the Fourth Amendment allow a warrantless search of person who is on parole and subject to a parole search, but not suspected of any criminal wrongdoing?**

***Samson v. California*, 126 S. Ct. 2193 (2006)**

Yes. This case resulted from a California statute that required every prisoner eligible for parole to agree in writing to allow police to search him or her without a warrant or without cause. A prisoner agreed to these terms and was later searched by a police officer who found methamphetamine on his person. The court found that while parolees are still allowed Fourth Amendment protections, their expectation of privacy is lessened because they are on the "continuum" of state-imposed punishment, and must abide by the terms and conditions of parole. Additionally, California's interest in decreasing recidivism and promoting good citizenship among parolees warrants intrusion by police officers into the privacy of parolees. The court reasoned that the concern that such a statute gives officers unbridled discretion to search is counter-balanced by the fact the statute prohibits arbitrary and harassing searches.

**2. May law enforcement officers enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury?**

***Brigham City v. Stuart*, 126 S. Ct. 1943 (2006)**

Yes. The basic rule is that police officers may not enter a home without a warrant based on probable cause, or based on a warrant exception (exigency, *etc.*). One exception to the warrant requirement is the exigency of assisting someone who is in immediate risk of bodily injury. Officers may enter a home without a warrant to render emergency assistance or to protect someone who is in danger of harm. The standard by which the officers' actions will be judged is an objective standard (a reasonableness standard)—the officers' subjective intent is irrelevant. Therefore, if a reasonable person would believe someone in a home was at risk of harm, officers can enter a home to assist without a search warrant.

**3. Is a car in a parking lot, not described in a warrant or within the curtilage of the building, within the automobile warrant exception?**

***Mack v. City of Abilene*, 461 F.3d 547 (5th Cir. 2006)**

No. In this case, the vehicle was in an assigned parking spot at an apartment complex and was not within the curtilage of the complex. Without a search warrant or probable cause, consent, exigency, or fear for officer safety, the search was in violation of the Fourth Amendment. This should be contrasted with defendant's other vehicle in the case: he was stopped shortly after getting into his truck and driving out of the parking lot. A car being driven will fall within the automobile exception to the warrant requirement; therefore, no warrant was needed to search the vehicle if there was probable cause.

**4. Is a Resident Advisor (RA) at a university dormitory acting in concert with police when he enters a dorm room with police officers behind him?**

***Grubbs v. State*, 177 S.W.3d 313 (Tex. App.—Houston [1st Dist.] 2005)**

No. Here, an RA responded to a complaint about the odor of marijuana coming from a dorm room by calling the police. After the police arrived, the RA unlocked the defendant's dorm room door and stepped inside the room while the officers waited in the hall. The RA did not open the door for the police or consent to them searching the dorm room (defendant gave consent to a search).

The Court of Appeals held the RA was not acting in concert with the police, but was acting as a trained resident-hall staff member attempting to maintain order in his dormitory. The Resident Handbook authorized the RA to enter a dorm room upon reasonable suspicion of activities that endangered the community—use of illegal drugs would constitute such a dangerous activity. Once the police arrived, the RA did nothing to assist the police in entering defendant's room. The police did not initiate the search, the RA did. There was ample evidence proving the RA acted on his own initiative, not based on instructions by the police.

**5. Are police officers justified in making an arrest under the suspicious places exception where defendant was occupying a vacant garage apartment four weeks after the crime defendant alleged committed?**

***Buchanan v. State*, 175 S.W.3d 868 (Tex. App.—Texarkana 2005, pet. granted)**

No. Few places are inherently suspicious. A dwelling is not suspicious just because it is dilapidated. While there is no bright-line rule as to what constitutes a suspicious place, the time between the crime and the apprehension of the person in the suspicious place is a very important factor. If the time between the crime and the apprehension is short, the location of the arrest is more likely to be found as a suspicious place, and will fall under the warrant exception.

**6. Can probable cause for an arrest on public intoxication charges exist based on endangerment of self, when defendant's vehicle is so badly injured that it is no longer capable of being driven?**

***Meek v. Tex. Dept. of Pub. Safety*, 175 S.W.3d 925 (Tex. App.—Dallas 2005)**

Yes. The totality of defendant's conduct may be considered when determining whether defendant endangers himself. In this case, defendant was acting in an intoxicated manner and registered a blood alcohol content of over twice the legal limit, and did not appear to understand the dangerousness of his conduct. These factors together gave the arresting officer probable cause to arrest defendant for public intoxication.

## C. Suppression Issues

### 1. Is suppression of evidence an appropriate remedy for failure to provide an alien with information concerning consular notification?

***Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006)**

No. Article 36(1)(b) of the Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this sub-paragraph." There is no judicial remedy contained in the Vienna Convention treaty, and as such, the courts may not create a judicial remedy. Additionally, the exclusionary rule applies to improper searches and seizures; this has nothing to do with a search or seizure. Article 36 does not guarantee detainees any rights at all, but merely requires a consular be informed of the detainee's detention.

### 2. Is suppression of evidence an appropriate remedy for "knock and announce" violations?

***Hudson v. Michigan*, 126 S. Ct. 2159 (2006)**

No. The "knock and announce" rule provides that prior to entering a residence, police should generally knock and announce their presence, and allow the occupants of the house an opportunity to answer the door. The Supreme Court has rejected a broad application of the exclusionary rule, applying it only when the deterrent effects outweigh the "substantial social costs." The knock and announce rule only protects the privacy and dignity of occupants of a home, but it does not protect the occupants from the officers seeing or taking items that are listed on a valid search warrant. And when weighing the deterrent effect of the rule versus social costs, the court found that the social costs—more complicated litigation, the release of more criminals, and increased questioning of violations of the rule—far outweigh the deterrent effect. The court held that civil suits and internal police discipline could work to deter police misconduct.

## II. Substantive Law Issues

## A. Transportation Code

### 1. License Plate Frame Cases

### (a) Did a peace officer have the right to stop the defendant in light of the court's previous decision in *Granado*?

***U.S. v. Contreras-Trevino*, 448 F.3d 821 (5th Cir. 2006)**

Yes. Amendments to the Texas Transportation Code have altered the legal landscape on which the *Granado* decision rested (see, *U.S. v. Granado*, 302 F.3d 421 (5th Cir. 2002)). A plain reading of Section 502.409 of the Texas Transportation Code (as amended in 2003) now proscribes the use of license plate frames that obscure certain protected features of the vehicle's license plate.

### (b) Does violation of the Texas "License Plate Frame" statute give rise to probable cause?

***U.S. v. Flores-Fernandez*, 418 F. Supp. 2d 908 (S.D. Tex. 2006)**

Yes. In denying the defendant's motion to suppress, the trial court ruled that because the license plate frame on defendant's vehicle, viewed objectively, violated both Sections 502.409(a)(6) and 502.409(a)(7)(B) of the Texas Transportation Code, the peace officer had probable cause to stop the vehicle.

**(c) Did the trial court err in finding that an obstructed license plate does not give rise to reasonable suspicion?**

***State v. Johnson*, 198 S.W.3d 795 (Tex. App.—San Antonio 2006)**

Yes. A police officer stopped the vehicle being driven by defendant solely because the license plate on the vehicle was partially obscured by the dealer-installed license plate frame. Defendant was subsequently charged with felony driving while intoxicated. Before trial, defendant moved to suppress all items of evidence and fruits of his arrest and search because the arrest was without warrant and without reasonable suspicion to stop or probable cause to arrest. The trial court granted the motion. On appeal, the court found that it was beyond dispute that the license plate frame on defendant's vehicle entirely covered the phrase "THE LONE STAR STATE" and probably covered the images of the space shuttle and the starry night; the images and phrase were all original design elements of the plate. Accordingly, the officer had reasonable suspicion of a violation of Transportation Code Section 502.409(a)(7) and a valid basis to make the stop. The trial court erred in granting defendant's motion to suppress.

**2. Can a person be convicted of Accident Involving Damage to a Vehicle if he never actually hit the vehicle of the victim?**

***Gillie v. State*, 181 S.W.3d 768 (Tex. App.—Waco 2005)**

Yes. A defendant does not have to actually strike the vehicle of another driver to be convicted of an Accident Involving Damage to a Vehicle (Section 550.022, Transportation Code). If the defendant caused the accident, he can be deemed to have been involved in the accident, and convicted of Accident Involving Damage to a Vehicle. In this case, the defendant pulled in front of the accident victim and immediately slammed on his brakes, causing the victim to lose control of her vehicle. The defendant was found to have caused the accident through his conduct.

**3. Did the complaint accusing the defendant of violation of promise to appear (VPTA) give him sufficient notice of the act he allegedly committed?**

***Azeez v. State*, No. 14-05-00539-CR, 2006 Tex. App. LEXIS 7821 (Tex. App.—Houston [14th Dist.] Aug. 29, 2006)**

Yes. A complaint must be specific enough for the accused to be able to identify the statute under which the State intends to prosecute—the defendant must be provided with notice of his alleged crime. In this case, the court surmised that the defendant was charged with violation of promise to appear (VPTA), a Transportation Code offense that requires willful conduct, but the complaint alleged knowing conduct. Citing Section 6.02(d) of the Penal Code, the court explained that there are four prescribed mental states: intentional, knowing, reckless and criminal negligence. "Willful" is not among the four culpable mental states, but using willful as a culpable mental state does make a statute fundamentally defective. Instead, it must be determined whether the statute clearly dispenses with the mental requirement: factors such as legislative history, whether the crime is done with or without fault, language of the statute, and subject of the statute must be considered. Use of willful as a culpable mental state does not clearly dispense with a culpable mental state to hold the offender strictly liable. Therefore, intent, knowledge or recklessness must be used as a mental state. So since knowing was used as the culpable mental state in the complaint, it was acceptable.

This case is a real doosy and a testament to how confusing the law can become. The opinion states that appellant claimed he was charged with failure to appear (FTA) (Sec. 38.10, Penal Code), the prosecutor claimed that the defendant was charged with a local city ordinance relating to non-appearance. Ultimately, the court concluded that the defendant was charged with VPTA although the complaint alleged the mental state for FTA. Confused? It's OK, as the court explains on page eight of the opinion: "The statutory requirements

do not require the complaint to specifically identify the statute or ordinance with which the defendant is being charged. A charging instrument must, however, contain on its face every element of the offense that must be proven at trial."

**4. Does the Texas Department of Transportation (TxDOT) have authority to place cameras on state highway right-of-ways to enforce compliance with traffic-control signals?**

**Op. Tex. Atty. Gen. No. GA-440 (2006)**

Yes. The Texas Transportation Commission, which has broad authority over the state highway system, governs TxDOT, and pursuant to this authority TxDOT may install cameras on state highway right-of-ways. Local authorities, on the other hand, must seek the permission of TxDOT before placing cameras on state highway right-of-ways to enforce compliance with traffic control signals. Section 221.002, Transportation Code, provides that the Texas Transportation Commission and a municipality may agree to provide for the control and supervision of a state highway in a municipality, and establish responsibilities and liabilities of both the Commission and the municipality.

**B. Penal Code**

**1. Can the movement of a motor vehicle after an order to desist by a peace officer constitute interference with public duties?**

***Barnes v. State*, No. PD-0939-05, 2006 Tex. Crim. App. LEXIS 831 (Tex. Crim. App. Apr. 26, 2006)**

Yes. The defendant's vehicle was pulled over by a police officer. As the officer was speaking with dispatch, defendant began to slowly move her vehicle forward on the shoulder and disrupted his efforts to issue a citation. She drove approximately 70 feet before coming to a halt. At different times during this encounter the appellant refused to roll down her window, refused to exit her automobile, read a book, and when the glass was knocked out of her windows and she was extracted from the vehicle ordered her child to run proclaiming, "They will kill him!" The Court of Criminal Appeals, reversing the Court of Appeals, found that the defendant's actions were inconsistent with the officer's authority to detain her because she ignored his instructions to desist, and created the possibility of flight. The possibility of flight required the officer to take extra safety precautions to prevent the defendant from leaving the scene. Defendant's acts constituted behavior punishable under Section 38.15, Code of Criminal Procedure (Interference with Public Duties).

**2. Is a petition for expunction a "government record" for purposes of committing the offense of Tampering with a Governmental Record?**

***State v. Vasilas*, 187 S.W.3d 486 (Tex. Crim. App. 2006)**

Yes. The court concluded that pleadings filed with a court could be governmental records under Section 37.01(2)(A), which stated that governmental records included court records, defined in Section 37.01(1) as records issued by a court. "Including" is a term of enlargement, so the definition of a governmental record did not exclude a pleading, even though a court did not issue it.

**3. You can pick your friends, you can pick your nose, but you can't pick your friend's nose. Nor can you necessarily pick the offense of your prosecution. Thirsty anyone?**

***Ex parte Smith*, 185 S.W.3d 887 (Tex. Crim. App. 2006)**

As you may recall from last year's update, Mr. Smith was an Alpha Phi Alpha fraternity member at Southern Methodist University (SMU) who was accused of aggravated assault by means of forcing excessive water consumption (A.K.A. "water intoxication"). On appeal, he argued, *in pari materia*, that the more appropriate charge was the offense of hazing as defined in the Education Code. The Court of Criminal Appeals concluded that such an argument could not be advanced via a pretrial writ of *habeas corpus.*

**C. Local Government Code**

**Must local governmental entities require persons who seek to contract with local governmental entities to comply with Chapter 176, Local Government Code (Disclosure of Certain Relationships with Certain Governmental Officials) before entering into a contract with the local government entity?**

**Op. Tex. Atty. Gen. No. GA-446 (2006)**

No. This lengthy AG Opinion is a virtual lexicon of information on Chapter 176. But the question asked above is perhaps the most important one, because its answer takes a lot of the teeth out of Chapter 176. Cities have no affirmative duty to require vendors to comply with Chapter 176. Nor does a local governmental entity have an affirmative responsibility to enforce Chapter 176. Vendors must not even be informed of the requirements of Chapter 176. Failure to comply with Chapter 176 does not void a contract, but local governmental entities may choose to provide for the voidability of a contract that does not comply with Chapter 176 if they so desire.

**III. Procedural Law Issues**

**A. Reasonable Conditions of Bail and Magistrate Issues**

**1. In a child endangerment case, was the bond condition requiring restrictions on defendant's possession and visitation with her other children an unreasonable bond condition set by the magistrate?**

***Burson v. State*, 202 S.W.3d 423 (Tex. App.—Tyler 2006)**

No. Pursuant to Article 17.40 of the Code of Criminal Procedure, a magistrate may impose reasonable bond conditions related to the safety of the victim or the community. The court found that the condition imposed that restricted access to the defendant's children worked to ensure her presence at trial, and continued presence in the community. Though magistrates statutorily have the authority to order any reasonable conditions, the court concluded in this instance that a specific rule applied (Article 17.41(d), Code of Criminal Procedure), and that that restriction on visitation of a child-victim could only be limited to 90 days.

**2. May municipal police officers set reasonable bail for both misdemeanor and felony arrestees?**

**Op. Tex. Atty. Gen. No. GA-457 (2006)**

Yes. Article 17.20, Code of Criminal Procedure, allows municipal police officers to set reasonable bail for misdemeanors, and Article 17.22 allows municipal police officers to set bail for felony arrestees if no prosecution has yet been filed. Article 17.21 provides that the court must fix bail if prosecution is pending in a

felony case. However, a sheriff may but is not required to accept into his county jail a defendant whose bail has been set by municipal police officers. A defendant charged with a misdemeanor whose bail is set by a municipal court officer, but who is detained in jail must be brought before a magistrate within 24 hours of arrest if a magistrate has not determined that probable cause exists to believe the person committed the offense. Likewise, a defendant charged with a felony whose bail has been set by a police officer but who is detained in jail must be brought before a magistrate within 48 hours of arrest if a magistrate has not determined if probable cause exists.

**3. Do all magistrates have an equal mandatory duty to perform magistrate duties under Article 15.17 of the Code of Criminal Procedure, or does only a justice of the peace have a mandatory duty?**

**Op. Tex. Atty. Gen. No. GA-426 (2006)**

Yes, all magistrates have an equal mandatory duty. Article 15.17 of the Code of Criminal Procedure requires magistrates of the county to provide statutory warnings to an arrested person brought before them. Magistrates of the county who have a mandatory duty to provide warnings under Article 15.17 include district judges, county judges, judges of the county courts at law, judges of statutory probate courts, justices of the peace, and mayors, recorders, and judges of the municipal courts of incorporated cities or towns. The frequency with which a particular magistrate of the county performs this duty may depend upon factors such as the magistrate's location and the hours when the magistrate is available to individuals who have an arrested person in custody.

**B. Trial Procedure**

**1. Is a judge disqualified from presiding over a case if he prosecuted the original action?**

***Ex parte Richardson*, 201 S.W.3d 712 (Tex. Crim. App.—2006)**

Generally, yes. Article V, Section 11, provides no judge shall preside in any case when the judge shall have been counsel in the case; Article 30.01, Code of Criminal Procedure, provides that no judge shall sit in any case where he has been counsel for the State or accused. In this case, however, the defendant opted not to ask the judge to recuse himself. He then attempted to use the judge's prior role as a prosecutor in his request for *habeas corpus* relief. The court denied his request because his argument should have been raised in the trial court or on appeal and not through *habeas corpus.*

**2. Did the trial court err by allowing the consolidation of more than one offense on the day of trial despite defendant's objections?**

***White v. State*, 190 S.W.3d 226 (Tex. App.—Houston [1st Dist.] 2006)**

Yes, but such an error is not immune from a harmless error analysis. Citing *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997), the court explained that except for certain federal constitutional errors labeled by the U.S. Supreme Court as structural, no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement is categorically immune. To the extent that the Court of Criminal Appeals stated severance is never subject to harm analysis in *Warmowski v. State*, 853 S.W.2d 575 (Tex. Crim. App. 1993), that language was disavowed in *Llamas v. State*, 12 S.W.3d 469 (Tex. Crim. App. 2000). In this case, no harm was shown.

**3. Did the trial court err in not allowing a peace officer to testify as an expert witness on the difference between assault on a public servant and terroristic threat?**

***Anderson v. State*, 193 S.W.3d 34 (Tex. App.—Houston [1st Dist.] 2006)**

No. Not when the testimony relates exclusively to statutory construction. Such issues are questions of law. Experts are not allowed to testify as to issues that are purely questions of law. They may however testify as to mixed questions of law and fact.

**4. Does the trial court have a duty to appoint a licensed interpreter if the defendant or witness does not understand the English language?**

***Ridge v. State*, No. 10-05-00277-CR, 2006 Tex. App. LEXIS 7921 (Tex. App.—Waco 2006)**

Yes. A trial court has an independent duty to appoint a licensed interpreter if it was made aware that a defendant or witness did not speak or understand the English language. An exception to this rule would be if the defendant or witness waived their right to a licensed interpreter.

Note: Section 57.002(c), Government Code, describes situations in which a court need not appoint a licensed interpreter, but all interpreters must be qualified as experts under the Texas Rules of Evidence.

**5. Did the trial court err by excusing a venire member for economic reasons?**

***Gray v. State*, 174 S.W.3d 794 (Tex. App.—Corpus Christi 2005, pet. granted)**

Yes. It was not harmless error, and was in violation of Section 62.110(c), Government Code, a provision enacted to ensure the right that the venire be composed of a fair cross-section of the community. Relying on *Ford v. State*, 73 S.W.3d 923 (Tex. Crim. App. 2002), the court concluded that the trial judge subverted the process of assembling the venire in a way that made it impossible to state with fair assurance that the error was harmless.

**6. Is a 15-minute per side time limit on *voir dire* unreasonable?**

***Wappler v. State*, 183 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2005)**

Yes, in this case. A court may impose reasonable restrictions on the conducting of *voir dire*, including the amount of time spent on *voir dire*. There is no brightline rule as to how long each side should have to *voir dire*, or when the time limit on *voir dire* is too short, so analysis must be done on a case-by-case basis. In this case, counsel for both sides managed their time appropriately and did not attempt to prolong the jury selection process, and counsel was still questioning a juror who was ultimately seated on the jury when time was called. When counsel requested additional time in *voir dire*, his request was denied. Such conduct by the trial court was not considered a reasonable restriction.

**7. Is the failure to timely elect punishment ineffective assistance of counsel?**

***Ross v. State*, 180 S.W.3d 172 (Tex. App.—Tyler 2005)**

It depends. In this case, trial counsel failed to elect that the jury assess punishment for defendant, and therefore defendant alleged counsel denied him the opportunity to be tried by a jury. The two-pronged test for ineffective assistance of counsel, based on *Strickland v. Washington*, 466 U.S. 668 (1984) is: (1) the defendant must show counsel performance was "deficient" in that counsel was not acting as the counsel guaranteed by the Sixth Amendment, and (2) there must be a reasonable probability that, but for counsel's

deficient conduct, the outcome of the case would have been different. Review of the trial counsel's performance is highly deferential, and the *Strickland* test is historically very difficult to satisfy. Here, trial counsel represented defendant vigorously throughout the trial, and it is unclear what advice the trial counsel gave defendant regarding assessment of punishment. Because the record does not clearly show how trial counsel's performance was deficient, the first prong of the *Strickland* test cannot be met.

**8. The Sixth Amendment: Confrontation Clause Issues**

**(a) Are a defendant's Sixth Amendment Confrontation Clause rights implicated regarding the content of an emergency 911 call; put another way, are statements made during a 911 call "testimonial"?**

***Davis v. Washington*, 126 S. Ct. 2266 (2006)**

It depends. Viewed objectively, it must be determined whether or not a 911 call contains information that can be viewed as testimonial information. In this case, the caller to 911 described present circumstances that required police assistance, and did not describe the details of a past crime (which might be testimonial in nature). The court contrasted the 911 call with the testimony of another witness to the crime, who spoke with police when they arrived at the scene of the crime. The second witness' statements were considered testimonial because they detailed a crime that had already occurred, and her interrogation was part of a police investigation in progress.

***Kearney v. State*, 181 S.W.3d 438 (Tex. App.—Waco 2005)**

It depends. The Sixth Amendment provides "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." Testimony of witnesses who made "testimonial statements" is admissible only if the defendant had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36 (2004). Testimonial statements are those that are similar to in-court testimony, and are formal in nature, usually not spontaneous, and are not merely responses to initial police questioning at a crime scene. Calls made to 911 should be evaluated on a case-by-case basis to see whether the content is testimonial. In this case, the call was made to report a robbery in progress and ask for police assistance—a non-testimonial call for help. Therefore, the defendant did not have a Sixth Amendment right to cross-examine the person who made the 911 call.

**(b) Are a defendant's Sixth Amendment Confrontation Clause rights violated when he is denied the opportunity to cross-examine a confidential informant?**

***Ford v. State*, 179 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2005)**

It depends. *Crawford v. Washington*, 541 U.S. 36 (2004), states that a defendant must be afforded an opportunity to cross-examine a witness who has made testimonial statements before such statements may be admitted into evidence. Here, while the defendant was not allowed to cross-examine the confidential informant, none of the informant's statements were used in executing a search warrant, and therefore, none of the informant's statements were admitted into evidence via the search warrant. There was therefore no violation of defendant's Sixth Amendment rights.

**(c) Is the Sixth Amendment violated when an adult witness is allowed to testify while wearing a disguise?**

***Romero v. State*, 173 S.W.3d 502 (Tex. Crim. App. 2005)**

Yes. The Sixth Amendment Confrontation Clause reflects a strong preference for face-to-face confrontation. By wearing a disguise, a witness can lessen the physical presence effect of confrontation, and also the ability for the demeanor of the witness to be observed. There is no compelling interest that is advanced by permitting a witness to testify in disguise.

**9. Deferred Issues**

**(a) Can a defendant appeal a municipal court's determination to proceed to adjudication when a defendant violates conditions of deferred disposition?**

***Jamshedji v. State*, No. 14-05-0051-CR, 2006 Tex. App. LEXIS 6230 (Houston [14th Dist.] July 20, 2006)**

No. As the court explains: "[W]hen chapter 45 of the Code of Criminal Procedure, governing municipal courts, does not provide a rule of procedure relating to any aspect of a case, the other general provisions of the code are to be applied as necessary. *See* Tex. Code Crim. Proc. Ann. art. 45.002. Article 45.051 allows adjudication to be deferred and defendants placed under supervision in much the same way as Section 5 of Article 42.12 of the Code. *See* Tex. Code Crim. Proc. Ann. arts. 42.12 & 45.051. Texas law does not provide for the direct appeal from a trial court's determination to proceed to adjudication when a defendant violates conditions of community supervision under Article 42.12. *See* Tex. Code Crim. Proc. art. 42.12 § 5(b); *see also Hogans v. State*, 176 S.W.3d 829 (Tex. Crim. App. 2005). We can find no legal authority or rationale to conclude that a greater right of appeal exists with regard to Article 45.051 than Article 42.12. Accordingly, we have no jurisdiction to hear this appeal, and it is dismissed."

Note: TMCEC thanks the Houston City Attorney's Office for requesting that this decision be reconsidered for publication.

**(b) Can the State properly pursue a defendant with a *capias pro fine* if the term of deferred adjudication has expired and no motion to adjudicate has been filed?**

**Op. Tex. Atty. Gen. No. GA-396 (2006)**

No. Article 42.12, Code of Criminal Procedure is the State's community supervision statute. Article 42.12(5)(h) states that a court retains jurisdiction over a defendant beyond the deferred adjudication period if before the expiration of the period, the State files a motion to proceed with the adjudication and a *capias* is issued for the arrest of the defendant. The AG Opinion construed Article 42.12 narrowly to not allow the court to maintain jurisdiction over a defendant whose adjudication period has expired when the State has not filed a motion to adjudicate before the expiration of the period, and the State may not pursue a defendant with a *capias pro fine.*

Note: Once again, it is critical that readers distinguish between "deferred adjudication" and "deferred disposition." GA-396 is limited in scope, as it only addresses deferred adjudication and makes no reference to deferred disposition. It has no application to deferred disposition. While the distinction between the two statutes remains unapparent to many, case law reflects that though they may be similar, they are not exactly the same. *See Jamshedji v. State* and *Houston Police Department v. Berkowitz*, 95 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2002). *See also* Ryan Kellus Turner, *Deferred Disposition is not Deferred Adjudication 11:7* Recorder, 13 (August 2002).

**10. Jury Charges: Is it harmful error for a court to not require a jury to unanimously agree on which of two criminal offenses a defendant is guilty on a jury charge?**

***Dolkart v. State*, 197 S.W.3d 887 (Tex. App.—Dallas 2006, no pet.)**

Yes, it is egregious harm that is so severe, appellant need not have objected at trial in order to preserve error. In this case involving an SMU Law School professor who ran down a cyclist in the street, the jury charge did not require jurors to unanimously decide whether the defendant was guilty of assault by threat or bodily injury—two separate and distinct crimes. The language of the charge never required a unanimous verdict be returned. Since it was impossible to tell from the record if a unanimous verdict had indeed been returned, the court concluded that defendant suffered egregious harm.

**11. Plea Bargains: Does the defendant have the right to withdraw a plea when the State violates terms of a plea bargain?**

***Bitterman v. State*, 180 S.W.3d 139 (Tex. Crim. App. 2005)**

Yes. In this case, the court of appeals erred in concluding that because defendant did not object at the sentencing hearing, defendant had no grounds to appeal. The Court of Criminal Appeals disagreed and held that due process allows the defendant to withdraw a plea once the State violates the plea bargain, and defendant preserves error by bringing the violation to the trial court's attention as soon as error could be cured, in a motion for a new trial.

**12. Appeals**

**(a) May the State appeal an order dismissing prosecution on the grounds that it proceeds upon an unconstitutional ordinance, if the trial court delays its ruling until after both parties have submitted their evidence at a trial on the merits but before the issue of guilt or innocence has been resolved?**

***State v. Stanley*, 201 S.W.3d 754 (Tex. Crim. App. 2006)**

Yes. At least 14 defendants were issued citations pursuant to a city ordinance that prohibited street activity in school zones. The defendants were protesting at a clinic that was located across the street from a school. The cases were consolidated and tried in the Waco Municipal Court where the defendants were found guilty. In a consolidated trial *de novo* in the county court at law, defendants filed a motion to dismiss, contending that the ordinance was unconstitutionally vague and overbroad. The county court-at-law declined to rule on the motion during a pretrial hearing. After the state's case in chief, the judge granted the motion to dismiss. The 10th Court of Appeals dismissed the state's attempted appeal on the grounds that Article 44.01(a)(1), Code of Criminal Procedure, only allows the state to appeal an order dismissing a charging instrument before trial on the merits begins.

Reversing the lower courts, the Court of Criminal Appeals held that such appeals are allowed because a trial judge should not reach the issue of guilt or innocence before first addressing the motion to dismiss. The court also decided that the judge's granting of the motion to dismiss did not amount to an acquittal: no determination of guilt was made, so double jeopardy would not bar an appeal.

**(b) Upon granting a defendant's motion to suppress evidence, must a trial court grant a timely request for findings of fact and conclusions of law?**

***State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006)**

Yes. Because an appellate court's review of a trial court's ruling is restricted by an inadequate record of the basis for the trial court's ruling, the Court of Criminal Appeals, creating a new rule, found it necessary to require trial courts to express its findings of fact and conclusions of law when requested by the losing party.

For trial courts, this is debatably the most significant decisions that the Court of Criminal Appeals handed down during the 2005-2006 term. It is safe to say that most municipal and justice courts are not accustomed to issuing findings of facts and conclusions of law. Nor are most county level courts accustomed to receiving findings of fact and conclusions of law from non-record courts. While some at first may be skeptical that this case has any bearing on suppression issues in municipal and justice court, they shouldn't be. The court was careful to couch its opinion in terms of "trial courts" and "appellate courts." Furthermore, it has only been about a year since the Court of Criminal Appeals discussed the state's right to appeal pre-trial issues from non-record trial courts and related jurisdictional issues. *See State v. Alley*, 158 S.W.3d 485 (Tex. Crim. App. 2005).

**(c) Did the defendant timely appeal her conviction from the municipal court of record?**

***State v. Guevara*, 172 S.W.3d 646 (Tex. App.—San Antonio 2005)**

In an interesting conclusion to a case that began in July 1998 and reached the Court of Criminal Appeals in June 2004, the Court of Appeals concluded that the county court at law lacked jurisdiction to hear the initial appeal of a defendant appealing the constitutionality of the San Antonio "queuing" ordinance. While pertinent provisions of Chapter 30 of the Government Code were amended in 1999, the defendant under then existing law failed to file a notice of appeal and appeal bond within 10 days of being denied a new trial. Furthermore, there was nothing presented on appeal to establish that the defendant sought or was granted an extension to file the appeal.

**13. Consequence of Conviction for Class C Misdemeanor**

**Does Class C assault conviction under Section 22.01(a)(3), Penal Code, constitute a crime of violence or domestic violence for purposes of deportation?**

***Gonzalez-Garcia v. Gonzales*, 166 Fed. Appx. 740 (5th Cir. 2006)**

No. On appeal it was held that the defendant's conviction for assaulting his wife pursuant to Section 22.01(a)(2-3), Penal Code, was not a crime of violence, as defined by 18 U.S.C. § 16 and therefore could not be a crime of domestic violence for purposes of determining eligibility for deportation. The circuit court held that Section 22.01(a)(2-3) could be committed without the intentional use of physical force needed to constitute domestic violence, conduct for which an alien can be deported.

**14. Expunction**

**Can insufficient evidence be a basis for an expunction?**

***In re Expunction of C.V.*, No. 08-05-00243-CV, 2006 Tex. App. LEXIS 7888 (Tex. App.—El Paso Aug. 31, 2006)**

No. The right to an expunction is a statutory privilege and all conditions laid out by Article 55.01, Code of Criminal Procedure, must be met for a record to be expunged. In order for an expunction to remain, evidence must show the decision to indict was based on incorrect facts, mistake of fact, or other reasons indicating a lack of probable cause, but not insufficient evidence.

**15. Extraordinary Remedies**

**(a) Is *habeas corpus* an appropriate remedy to seek the return of currency seized and transferred pursuant to Articles 59.02 and 59.03, Code of Criminal Procedure (Seizure of Contraband)?**

***City of Dallas v. Lopez*, 180 S.W.3d 428 (Tex. App.—Dallas 2005)**

No. A writ of *habeas corpus* is a remedy to be used when an individual's liberty has been restrained in some manner. It is directed at a person, not an object being restrained. Therefore, a trial court cannot grant a writ of *habeas corpus* for the return of money.

**(b) Is *mandamus* relief proper when a minor's underlying case is still pending in municipal court?**

***In re A.F.*, No. 05-05-01435-CV, 2006 Tex. App. LEXIS 5483 (Tex. App.—Dallas June 13, 2006)**

No. *Mandamus* relief is not proper if the defendant still has an adequate remedy at law; such a remedy is only used in extreme cases. If a case is still pending in municipal court, guilt or innocence must still be decided. Once that is done, the defendant may request a trial *de novo* in county court (assuming the court involved is a municipal court and not a municipal court of record). So an adequate remedy exists for defendant.

Additionally, a defendant may not request declaratory relief, claiming a criminal statute is unconstitutional, if a case is still pending in municipal court, without also alleging that the enforcement of the criminal statute would result in irreparable injury. A defendant may argue before his trial date that a law is unconstitutional, but if the court disagrees, the defendant must wait until appeal to argue the same point again.

**IV. Municipal Law Issues**

**A. Ordinances**

**1. Is the Bedford sound ordinance void for vagueness?**

***State v. Holcombe*, 187 S.W.3d 496 (Tex. Crim. App. 2006)**

As you may recall from last year, this case involved a defendant convicted of DWI. The probable cause for his arrest stemmed from his alleged violation of the Bedford sound ordinance that prohibits unreasonable noise. In this instance, the noise emanated from the defendant's automobile sound system. Citing the 14th Amendment, the trial court declared the ordinance unconstitutionally vague. Affirming the reversal of the trial court's decision, the Court of Criminal Appeals found that the ordinance was couched in terms of objective reasonableness and contained criteria that do not permit arbitrary enforcement.

**2. Is the Austin smoking ordinance void for vagueness?**

***RK & Hardee L.P. v. City of Austin*, 394 F. Supp. 2d 911 (W.D. Tex. 2005)**

No. But the trial court did enjoin the City of Austin as to a portion of the ordinance relating to enforcement provisions regarding fines, permits and licenses. In its order, the court enjoined the City from suspending or revoking any required permits without allowing for judicial review. The court also held that under the recently amended language of Section 6.02(f) of the Penal Code that the City could only impose a maximum fine of $500.

**3. Are the City of Waco School Zone and Parade Ordinances constitutional?**

***Knowles v. City of Waco*, 462 F.3d 430 (5th Cir. 2006)**

No. The School Zone Ordinance prohibited activities that could distract drivers while school zones were active. There was a "wingspan exception" to this rule that permitted otherwise "distracting" activity if the people so engaged stood at arm's length. The court found the wingspan exception did not further narrow tailoring, and that the ordinance swept far more broadly than necessary to enhance the safety and welfare of schoolchildren and others using public rights of way. The court also found that the word "reasonable" was within the bounds of the law, but when coupled with "anticipation" of "obstructing the normal flow of traffic," no one could be certain what conduct was covered by the statute (meaning it was overbroad).

The Parade Ordinance defined "parade" and "street activity" in the same, overbroad way as School Zone Ordinance. The Parade Ordinance also required that a permit be obtained for demonstrations by a handful of people; the court found this not to be narrowly tailored. The Parade Ordinance's exemptions, such as funeral processions, did not promote traffic safety.

**4. Is a city ordinance that requires landlords to consent to administrative searches of rental properties in violation of the Fourth Amendment?**

***Dearmore v. City of Garland*, 400 F. Supp. 2d 894 (N.D. Tex. 2005)**

Yes. The Fourth Amendment requires that for property to be searched, a search warrant must be issued or consent of the owner must be given voluntarily. A business owner too has an expectation of privacy in his commercial property, and therefore business owners have the right to be free from unreasonable searches and seizures. Therefore, an ordinance dealing with landlords and administrative searches should allow landlords to choose to permit searches and should contain a warrant procedure for cases when the landlord refuses consent.

**5. Is a challenge to a city's prior signage ordinance mooted by the enactment of a new signage ordinance?**

***Brazos Valley Coalition for Life v. City of Bryan*, 421 F.3d 314 (5th Cir. 2005)**

Yes. In this case, the Brazos Valley Coalition for Life challenged the prior sign ordinance, but did not challenge the new ordinance (which was enacted two weeks after Brazos Valley filed suit, but before summary judgment). The circuit court found that to the extent the new ordinance remedied the problems alleged in the prior ordinance, Brazos Valley's claim was moot. The court also found that, unlike in previous cases, nothing indicated that the City of Bryan intended to reenact the former sign ordinance as soon as litigation had been concluded.

**6. Is coercion/duress to pay a local fire registration fee present when there are no economic or business repercussions for failing to pay the fee, and when the maximum punishment is a $2000 fine in municipal court?**

***City of Dallas v. Lowenberg*, 187 S.W.3d 777 (Tex. App.—Eastland 2006)**

No. A person who pays a government fee or tax voluntarily does not have a claim for repayment even if the fee or tax is later found to be unlawful. In this case, the defendants agreed to pay the City's fire safety registration fee in exchange for the City agreeing to drop fines pending in municipal court. But there was nothing in the record that indicated that the defendants were subjected to any economic or business hardships and the defendants failed to challenge the validity of the ordinance. Additionally, if defendants failed to pay the fee, they would be prosecuted in municipal court and fined not to more than $2000. The court found none of these factors to constitute duress or coercion; therefore, defendants were found not to be entitled to reimbursement.

**7. Should a City be estopped from enforcing an ordinance designed to promote traffic safety through the regulation of exits and entrances leading to businesses?**

***City of White Settlement v. Super Wash*, Inc., 198 S.W.3d 770 (Tex. 2006)**

No. Super Wash, Inc. was seeking to estop the City from enforcing the fence requirement so that it could build a second entrance/exit to assist with traffic flow. Super Wash had been operating for years without this second entrance/exit, and there was no evidence it was necessary for its continued operation. The Supreme Court found that this was not an exceptional case in which justice required estoppel. There were other remedies available to the business, such as seeking a variance or a repeal of the ordinance that it had yet to pursue, and the ordinance was a matter of public record and discoverable by the business before it purchased the lot. Estopping the City from enforcing the ordinance would have prevented it from freely performing at least one of its governmental functions— regulating traffic.

**8. Does a controversy exist when the City fails to give formal notice to the corporation that owns the building (but does give notice to the property manager), and the corporation is not allowed an administrative appeal of the building inspector's finding that the building is substandard?**

***OHBA Corp. v. City of Carrollton*, No. 05-05-00215-CV 2006 Tex. App. LEXIS 7389 (Tex. App.—Dallas Aug. 22, 2006)**

No. No charges were filed against the corporation, only against an agent of the property management corporation. Because the corporation brought suit when it lacked standing, the court sanctioned it by having the case dismissed with prejudice. The City acted properly in only giving notice to the property manager, and was not required to give notice to the corporation.

**9. Can a city charter grant a home-rule city commission the power to amend the charter by ordinance?**

**Op. Tex. Atty. Gen. No. GA-433 (2006)**

No. A home-rule city may adopt or amend its charter in any way it wants, as long as it abides by the Texas Constitution and general laws of the State. Article XI, Section 5 of the Texas Constitution allows home-rule cities to adopt or amend their charters by a majority vote of the qualified voters in the city, at an election held for that purpose. A charter that allows a city to forego submitting amendments to the city charter to the city's qualified voters is not valid. Any amendments made by the city commission are void *ab initio* (from the start).

**10. May a city building official rely on a professional engineer's seal and certification that all code provisions, as adopted by the city, have been met?**

**Op. Tex. Atty. Gen. No. GA-439 (2006)**

No. The thrust of this question is whether or not a building official who relies on a professional engineer's seal and certification is relieved of any responsibility or duty, the violation of which would form the basis for a civil action. Section 1001.402, Occupations Code, does not address this, and the liability upon the violation of a code provision would likely be determined by the facts of an individual case. Section 1001.402 does require a city official to accept a proffered plan or plat from a professional engineer only it if bears the engineer's seal. A seal is evidence that the engineer has complied with all federal, state and local requirements.

**B. Municipal related civil rights lawsuits**

**1. Does a municipality's jail strip search policy violate the Fourth Amendment?**

***Beasley v. City of Sugar Land*, 410 F. Supp. 2d 524 (S.D. Tex. 2005)**

No, when the policy allows for searches based on reasonable suspicion that there may be a *threat* to facility safety. When the policy allows searches out of a generalized interest in facility safety (*i.e.*, when there is no suspicion of a threat), this type of policy has been found to be in violation of the Fourth Amendment prohibition against unreasonable searches. The test for whether a policy is constitutional or not is a reasonableness test.

**2. Can *res ipsa loquitor* be used to establish the liability of a city under 42 U.S.C. Section 1983 [Civil Action for Deprivation of Rights]?**

***Gast v. Singleton*, 402 F. Supp. 2d 794 (S.D. Tex. 2005)**

No. *Res ipsa loquitur* is typically applied to personal injury claims of ambiguous origins, and neither the Supreme Court nor the Fifth Circuit has ever held that this liability theory may be used to prove city liability under Section 1983. A city is not liable for the intentional torts of its employees under Section 1983 unless an official policy, custom or practice led to those torts.

**V. Immunity Issues**

**A. Is a showing of the absence of probable cause an essential element in a retaliatory prosecution case?**

***Hartman v. Moore*, 126 S. Ct. 1695 (2006)**

Yes. In this case, Postal Service investigators investigated a company and its chief executive officer, and charges were brought against both in federal court. The charges were ultimately dismissed for lack of evidence. The CEO alleged the inspectors had violated his First Amendment freedom of speech because he was targeted for prosecution as a result of his lobbying activities, and because the inspectors pressured the federal prosecutor into pressing charges. The defendants claimed immunity. Although it had been previously held that in a retaliatory-prosecution suit, lack of probable cause was not a required element, the court held that to bring a retaliatory-prosecution action, plaintiff must allege and prove a lack of probable cause for the underlying criminal charges.

**B. Did a trial court err by denying a City's plea to jurisdiction (alleging governmental immunity) when the complainant was injured while performing community service in lieu of paying a municipal court fine?**

***City of Pasadena v. Thomas*, No. 01-05-00333-CV, 2006 Tex. App. LEXIS 7685 (Tex. App.—Houston [1st Dist.] Aug. 31, 2006)**

Yes. Cities are generally immune from liability for person injury, except for "personal injury . . . so caused by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Section 101.021(2)l, Civil Practices & Remedies Code. In suits against governmental units, a plaintiff must affirmatively demonstrate the court's subject matter jurisdiction by alleging a valid waiver of governmental immunity. Subject matter jurisdiction is a question of law.

In this case, the complainant alleged the City failed to provide him with protective gloves to shield his hands from the blade of the machete he was using, and failed to supervise him properly. As a result, he alleged, he cut three of his fingers with the machete blade. The Court of Appeals held neither the City's failure to provide protective gear nor its failure to give enough information to complainant on the use of the machete waived the City's immunity—the lack of tangible personal property is not the same as the use of tangible property, and instructions are too abstract a concept to be considered a "use of tangible property."

**C. Is a city attorney necessarily entitled to governmental employee sovereign immunity or common-law official immunity?**

***Welch v. Milton*, 185 S.W.3d 586 (Tex. App.—Dallas 2006)**

No. Not when a genuine issue of material fact exists as to whether the city attorney (1) formed a personal attorney-client relationship with the plaintiff (a former city employee), or (2) was acting in the scope of his authority when he advised the plaintiff.

**D. Is a lawyer acting as prosecuting attorney entitled to immunity despite neither being hired by the local governing body nor having taken an oath of office?**

***Charleston v. Pate*, 194 S.W.3d 89 (Tex. App.—Texarkana 2006)**

Yes. Immunity for prosecutors stems from their functions as lawyers representing the government in filing and presenting criminal cases as well as other acts associated with the judicial process. It is the nature of an attorney's actions, not one's title or qualifications that give rise to prosecutorial immunity. In this instance, the court found that the attorney was acting as a "*de facto* assistant district attorney."

**E. Is a city immune from prosecution when an inmate in a city jail hangs himself with his shoelaces after tying them to the top of his jail bunk bed?**

***Nunez v. City of Sansom Park*, 197 S.W.3d 837 (Tex. App.—Fort Worth 2006)**

Yes. A city's governmental immunity acts to defeat a trial court's subject matter jurisdiction unless the city expressly consents. However, the Texas Torts Claims Act subjects a city to liability for personal injury that results from the city's use of personal and tangible property that would subject the city, if it were a private person, to liability. Here, the city did not "use" the shoestrings or bunk bed by allowing the inmate to use them—"use" does not merely mean, "to make available." The allegations that the city used the bunk bed and shoestrings were too attenuated.

## VI. Juvenile Issues

### A. Is it proper to require a juvenile defendant to produce evidence of a causal connection between the violation of the parental notification requirements and a confession in order to have the confession suppressed?

***Pham v. State*, 175 S.W.3d 767 (Tex. Crim. App. 2005)**

Yes. The burden is on the defendant as the moving party in a motion to suppress evidence obtained in violation of the law to produce evidence demonstrating a causal connection between the wrongful conduct and the confession. The burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal connection was, in fact, broken.

### B. Does the seven-day filing deadline for a student's failure to attend school case require a case to be filed with the court within seven days of the child's tenth absence?

**Op. Tex. Atty. Gen. No. GA-417 (2006)**

Yes. When read in context, Section 25.0951(a) of the Education Code, requiring a school district to file a complaint "within seven school days of the student's *last absence*" (emphasis added), refers to the child's tenth unexcused absence. Accordingly, a school district must file a complaint against a student for failure to attend school within seven school days of the student's tenth unexcused absence within a six month period. Failure to file the complaint within seven school days of the tenth unexcused absence mandates the statutory dismissal of the complaint by the trial court.

If a complaint is dismissed for the school district's failure to timely file, any subsequent refiling of the complaint based upon the same 10 unexcused absences also must be dismissed for untimeliness. While judges may construe the statute to prohibit any of the tainted absences from being used in a subsequent complaint, the Attorney General opined that the statute lends itself to at least one other construction: "If the student has failed to attend school without excuse since the original complaint was filed, ... the statute can be read to require the school district to file a new complaint within seven school days of the latest absence that lists the latest absence as well as some or all of the absences listed in the original complaint." (GA-0417 at 4). While this part of the opinion may not please readers looking for a single construction of the statute, it serves to remind us that the final construction of a statute ultimately depends on the interpretation of judges. For the math phobic, a word of warning: such cases when plotted on a timeline begin to look a lot like story problems from an algebra class.

The guidelines set out by Section 25.0951 of the Education Code are commonly referred to as "permissive filing" (three days or part of days within a four week period) and "mandatory filing" (10 days or part of days within a six-month period in the same school year). The Attorney General opined that a school district is precluded from permissive filing under Section 25.0951(b) once a student has accumulated 10 unexcused absences. Notably, the seven-day filing deadline does not apply to permissive filing, only to mandatory filing.

## VII. First Amendment Cases

### A. Is a government employee's speech made pursuant to official duties and addresses and subject to First Amendment protections a matter of public concern?

***Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)**

No. When a government employee is acting in his official capacity, he is not a citizen for First Amendment purposes. For that reason, a manager may reprimand him for the content of his speech at his place of employment. Exposing government inefficiency and misconduct is an important matter.

### B. Does a trial court's dismissal of a complainant's suit seeking judicial review of a State Commission on Judicial Conduct's denial of his judicial misconduct complaint equate to a denial of complainant's First Amendment right to judicial review?

***Smith v. State Commn. on Judicial Conduct*, 2005 Tex. App. LEXIS 10219 (Tex. App.—Fort Worth Dec. 8, 2005)**

No. There are no statutory or constitutional grounds for a trial court's judicial review of a decision made by the State Commission on Judicial Conduct. There are no core interests implicated by the Commission's grievance procedure, therefore procedural due process does not mandate a review of an administrative decision. Equal protection issues are not raised because the Commission rules do not provide for judicial review of the Commission's decisions; since there is no provision for equal protection, a complainant cannot argue he is being denied the same treatment as anyone else.

FUNDED BY A GRANT FROM THE
TEXAS COURT OF CRIMINAL APPEALS

**TEXAS MUNICIPAL COURTS EDUCATION CENTER**

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# CUSTOM DEFERRED

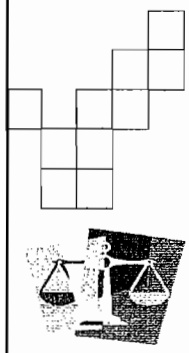
**Presented by**

**John Bull**
**Presiding Judge**
**SanAntonio**

By the end of the session, judges will be able to:

- Distinguish at-risk drivers from simple violators;
- Locate statutory provisions relating to sentencing options for at-risk drivers; and,
- Assess what constitutes a "reasonable condition" of deferred disposition versus an abuse of discretion.

Funded by a grant from the Texas Department of Transportation.



## *Custom Deferred Disposition Orders*

## Chapter 45 - Code of Criminal Procedure

- Section 45.051
  - Deferred Disposition


## Deferred Disposition probation is…

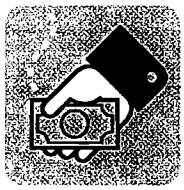
- Discretionary with the Judge
- Requires guilty plea, nolo contendere or on a finding of guilt
  - If defendant is found guilty following trial, Judge has discretion to order deferred disposition probation
- Requires payment of court costs
- May be granted for 1 to 180 days
- Not exclusive to traffic violations

## Deferred Disposition probation does not apply to...

- Offenses committed in a construction maintenance work zone (472.022 Traffic Code)
- Minor Driving Under the Influence and Consumption cases with two prior convictions
- The holder of a CDL for traffic offenses

## Conditions of Deferred Disposition Probation

- The Judge may require the Defendant to:
  - Post bond for amount of fine to secure payment
  - Pay restitution not to exceed fine

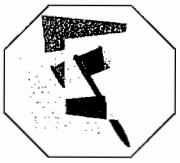


## Other Conditions

- The Judge may require the Defendant to:
  - Professional Counseling
  - Diagnostic Testing
  - Psycho/social Assessment
  - Alcohol and drug abuse treatment/education program
  - Pay costs directly or through court costs
    - Testing, assessment, treatment or education program

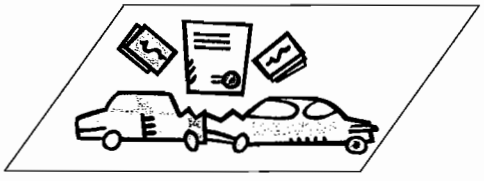
❖ The Judge may require the Defendant to take a Driving Safety Course

❖ The Judge may require the defendant to: Comply with other reasonable conditions(?)



## What are reasonable conditions?

- Maintain insurance for term of probation?
- Get a license?
- Aggressive Driving class?
- Other reasonable conditions?



❖ Questions 

# 12hr Regional Judges Seminar

**Judge John Bull** **Judge Robert Barfield**

## Hypotheticals

1) Edward Haskill III, appears before you in court. His birthday was two months ago and he is 17 years old. Edward is wearing his best suit and tie and appears with his Father and Mother, Dr. and Mrs. Haskill. Edward has received two tickets within two weeks, one for speeding 94 in a 45 and a second 10 days later for speeding 103 in a 60. He was also cited for a provisional license restriction violation and no insurance for the first speeding violation and provisional license restriction violation for the second (dad added him to his insurance after the first ticket). Dr. Haskill explains that Edward is overly excited about his brand new 2006 Ford Mustang GT and was playing around with some of his friends who had a souped up Volkswagen Jetta. They explain to you that Eddie has now been told that if this happens one more time they will take the car away. Dr. Haskill advises you that he is prepared to pay anything to "keep this off Eddie's record." Eddie, with puppy dog eyes, advises you, "Judge, I will do anything you ask me to do to keep this off my record".

2) Miss Mildred Jenkins appears before you in court. She has been cited for speeding in a school zone, 47 in a 20, passing a parked school bus, no insurance, expired registration and expired inspection. She is 82 years old and has never received a speeding ticket. She advises you that she is having problems with her vision and didn't see the school zone sign. When she approached the school bus, she meant to step on the brake but hit the gas. Her only means of support is SSI and although she let her insurance lapse she is now current, she hasn't gotten the money together to get the car inspected because it requires repairs to her muffler. She did correct the registration within 10 days. Her only way to get to her weekly dialysis appointments is by driving herself but she tells you that if the tickets get reported on her driving record her insurance rates will go up higher than they already have and she won't be able to afford it. She also stresses that she hears about these crazy drivers getting things off of their record all of the time and she has never once gotten cited for a traffic violation.

3) Joey Leadfoot, age 52, appears before you in court. Joey has been cited for speeding (90 in a 60), unsafe lane change, following to close and disorderly conducts (obscene gestures). He spent a night in jail for refusing to sign the ticket. He explains to you that he is a pharmaceutical sales rep and can't afford to get anymore "points" on his license. He advises that he has done "deferred adjudification" in another county and defensive driving twice in the last two years. He would like to know if deferred is an option for his tickets. He states that "I'll do anything you ask me to do if I can get deferred adjudification."

Municipal Court *Recorder*, July 2002:

# Deferred Disposition: "Thinking Outside of the Box" versus "Abuse of Discretion"

## By Ryan Kellus Turner, Program Attorney & Deputy Counsel, TMCEC

During this year's "traditional" 12-hour seminar, municipal judges throughout the state have been challenged to consider how and when they utilize their discretionary authority under Article 45.051, Code of Criminal Procedure.[1] Of all the figurative tools in a municipal judge's toolbox, no other statute compares to deferred disposition in terms of its potential to assist the court in correcting the conduct of the defendant. Like any other tool, however, its utility is ultimately only restricted by the scope of vision of those who employ it.

The purpose of this article is to increase judicial awareness of the potential use of deferred disposition.

**Brief History**

Prior to 1982, municipal and justice courts were without statutory authority to impose any form of probation. In fact, in 1979 the Adult Misdemeanor and Probation Law expressly limited probation authority to courts of record. Thus, in effect, denying probation authority to all justice of the peace courts and the vast majority of municipal courts.[2] Acknowledging the evolving role of municipal and justice courts in preserving public safety, protecting the quality of life in Texas communities, and deterring future criminal behavior, the Legislature in 1982 created a specific probation statute for all local trial courts of limited jurisdiction.[3] Implicit in the deferred disposition statute is the notion of rehabilitation. While the deferred disposition statute already contained a lengthy list of optional remedial and rehabilitative conditionsthat could be ordered by the court, within years the Legislature further expanded the rehabilitative/remedial probation options available to the courts.[4]

**Key Features**

Despite "being on the books" for nearly 20 years, feedback from this year's TMCEC academic program suggests that many municipal judges have historically not fully appreciated the options at their disposal under Article 45.051.

**Greater Sentencing Discretion**

At the conclusion of the deferral period, at dismissal, if the defendant presents satisfactory evidence that he or she has complied with the requirements imposed, the judge may impose and collect a special expense not to exceed the original amount of the fine assessed prior. Dependent upon the facts and circumstances at hand, the imposition of the lesser "special expense fee" may be deemed appropriate by the judge when the defendant was accused of an offense with a relatively high mandatory minimum fine (*e.g.*, handicapped parking). Alternatively, in the event

a defendant does not present satisfactory evidence of complying with the terms of the deferral, the court has the option of imposing the fine originally assessed (less any portion already paid) or reducing the fine assessed.

**Informed Decision Making**

Often judges encounter defendants whose criminal behavior is a byproduct of an underlying physical, mental, or sociological condition. Analogous to a pre-sentencing investigation in district court, Article 45.051(b)(5) authorizes a judge to order defendants to submit to a psychosocial assessment (see related article on page 11 in this newsletter). Psychosocial assessments and diagnostic testing are an opportunity for the court to obtain insight into the motives and behaviors of defendants. The information obtained from a psychosocial assessment not only enables a court to custom tailor a deferral order to the needs of the defendant, but the information obtained may prove critical in preventing future harm to the defendant and other members of the public. The law authorizes the court to order the defendant to pay the costs of any diagnostic testing, psychosocial assessment, or participation in a treatment or education program either directly or through the court as court costs.[5]

**Rehabilitation**

Once a judge is informed of information pertinent to the defendant, Article 45.051 authorizes the court to issue various rehabilitation and/or treatment orders that meet the specific needs of the defendant. Such court orders may require professional counseling, alcohol or drug testing, drug abuse treatment, and education programs.

**Therapeutic Jurisprudence**

The authority of a judge to make decisions affecting the lives of defendants is an inherent part of the judicial process. Though the history of local judges influencing the lives of the citizenry dates back to the Bible, the legal system has long lacked a term describing such influence.

Therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent." [6] Since its inception, therapeutic jurisprudence has emerged in popularity amongst legal scholars and judges. If, as a judge, you balk at the appearance of the word "therapeutic" being anywhere in proximity with "jurisprudence," allow me to put you at ease. Neither therapeutic jurisprudence, nor its proponents, suggest or advocate that judges should act as therapists. Let me reiterate, judges are not being asked to give up their robes and benches for the therapy couch.

To the contrary, therapeutic jurisprudence is a perspective that simply acknowledges the potential curative ("therapeutic") and injurious ("antitherapeutic") consequences of the law and legal procedures on the individuals involved (*i.e.*, defendants, victims, lawyers, witnesses, and community). It does not suggest that such "therapeutic" concerns are more important than the rule of law or other guiding principles. Rather, therapeutic jurisprudence seeks to enrich the judicial decision making process by including factors that might otherwise go unnoticed.

While the term "therapeutic jurisprudence" may sound grandiose when spoken, it is a term that all municipal judges should know. Most municipal judges have unwittingly been practicing therapeutic jurisprudence for years. Now they have a formal name for the practice.

**One More Important Provision; Two Very Important Questions**

In addition to the key features previously described, Article 45.051 contains one particular provision that deserves special attention. Specifically, Article 45.051(b)(8) provides that during the deferral period the defendant may be required to "comply with any other reasonable condition." Undoubtedly, this provision provides the greatest opportunity for the judge to custom tailor a deferral order to the specific facts of the cases and the defendant before the court. Such a provision is where creative judges claim it pays to think "outside of the box."

The provision, however, raises two very important questions:

***What is a "reasonable condition?"***

While the Court of Criminal Appeals has yet to examine the question in the context of deferred disposition, it has considered what constitutes a "reasonable condition" under Article 42.12 (deferred adjudication). In such cases, the Court concluded that such conditions should:

1. *Relate to the goal of rehabilitating the offender while not violating the defendant's rights* - Although the trial court has wide discretion in selecting terms and conditions of probation, permissible conditions should "have a reasonable relationship to the treatment of the accused and the protection of the public." They should not however be so broad or sweeping as to infringe upon the probationer's rights under the United States or State Constitution (e.g., freedom from unreasonable searches, free exercise of religion).[7]

2. *Be drafted in an unambiguous manner* - Such conditions should "be fleshed out to avoid vice of vagueness" and "made explicit as an aid to the offender in increasing his understanding of what is expected of him." [8]

3. *Be determined only by the judge* - Only the court having jurisdiction of a case shall determine and fix terms and conditions of probation, and such court may not delegate this authority to a probation officer or anyone else.[9]

4. *Should not require the defendant to contribute to a charity* – While there is no control in case law, the Office of the Attorney General suggests that charitable contributions are not permitted. "This language certainly empowers him to impose nonstatutory conditions on the defendant during the deferral period, but it does not, in our opinion, authorize him to require defendant to contribute money to a charity. … If the legislature had intended 'any other reasonable condition' to include a charitable contribution, we believe it would have imposed the same monetary limit."[10]

***When does a condition constitute an "abuse of discretion?"***

Terms imposed as a reasonable condition are subject to appellate review under an abuse of discretion standard. To date, there is no Texas case law on point addressing such an abuse by either a municipal judge or justice of the peace. The question of such abuse by local trial court judges has, however, been considered by Texas legal scholars. "While broad, the court's discretion is not complete. A condition will be held invalid if it (1) has no relationship to the crime for which the defendant was convicted, (2) relates to conduct that itself is not criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality. A condition of probation is undesirable if it is unrelated to rehabilitation and public protection, difficult to enforce, violates constitutional rights, or arbitrarily imposes punishment."[11]

**Article 45.051, Code of Criminal Procedure - Suspension of Sentence and Deferral of Final Disposition**

(a) On a plea of guilty or nolo contendere by a defendant or on a finding of guilt in a misdemeanor case punishable by fine only and payment of all court costs, the justice may defer further proceedings without entering an adjudication of guilt and place the defendant on probation for a period not to exceed 180 days.

(b) During the deferral period, the justice may require the defendant to:

(1) post a bond in the amount of the fine assessed to secure payment of the fine;

(2) pay restitution to the victim of the offense in an amount not to exceed the fine assessed;

(3) submit to professional counseling;

(4) submit to diagnostic testing for alcohol or a controlled substance or drug;

(5) submit to a psychosocial assessment;

(6) participate in an alcohol or drug abuse treatment or education program;

(7) pay the costs of any diagnostic testing, psychosocial assessment, or participation in a treatment or education program either directly or through the court as court costs; and

(8) comply with any other reasonable condition.

(c) At the conclusion of the deferral period, if the defendant presents satisfactory evidence that he has complied with the requirements imposed, the justice shall dismiss the complaint, and it shall be clearly noted in the docket that the complaint is dismissed and that there is not a final conviction. Otherwise, the justice may proceed with an adjudication of guilt. After an adjudication of guilt, the justice may reduce the fine assessed or may then impose the fine

assessed, less any portion of the assessed fine that has been paid. If the complaint is dismissed, a special expense not to exceed the amount of the fine assessed may be imposed.

(d) If at the conclusion of the deferral period the defendant does not present satisfactory evidence that the defendant complied with the requirements imposed, the justice may impose the fine assessed or impose a lesser fine. The imposition of the fine or lesser fine constitutes a final conviction of the defendant.

(e) Records relating to a complaint dismissed as provided by this article may be expunged under Article 55.01 of this code. If a complaint is dismissed under this article, there is not a final conviction and the complaint may not be used against the person for any purpose.

---

[1] Unless otherwise noted, all statutory references are to the Texas Code of Criminal Procedure.
[2] Thomas E. Baker, Charles P. Bubany, "Probation for Class C Misdemeanors: To Fine or Not to Fine Is Now the Question" 22 *South Texas Law Journal* 2 at 249 (1982).
[3] Originally codified as Article 45.54, Code of Criminal Procedure, the statute was recodified in 1999 as Article 45.051.
[4] See Code of Criminal Procedure, Articles 45.052 (Dismissal of Misdemeanor Charge on Completion of Teen Court Program) and Article 45.053 (Dismissal of Misdemeanor Charge on Commitment of Chemically Dependent Person).
[5] Article 45.051(b)(7), Code of Criminal Procedure.
[6] David B. Wexler & Bruce J. Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence*, xvii (Carolina Academic Press 1996). Professors Wexler and Winick coined the term therapeutic jurisprudence in the late 1980s. For additional information and links pertaining to therapeutic jurisprudence go to www.brucewinick.com.
[7] *Tames v. State*, 534 S.W.2d 686 (Tex.Crim.App. 1976).
[8] *Flores v. State*, 513 S.W.2d 66 (Tex.Crim.App.1974).
[9] *McDonald v. State*, 442 S.W.2d 386 (Tex.Crim.App.1969).
[10] Tex. Atty. Gen. Opp. JM-307 (1985)
[11] Baker & Bubany, *supra* 2 *at 254* (Spring 1982).

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## Judge's Ultimate Punishment: Teens Ride The Bus

POSTED: 7:03 am CDT August 14, 2006

**PORTAGE, Ind.** -- An Indiana judge fed up with teenage traffic violators is kicking them in the seat -- the driver's seat.

Porter Superior Judge Julia Jent is sentencing the ticketed teens to the embarrassment of riding the school bus, if they are found guilty in her courtroom.

Jent got the idea after a girl in her court for a moving traffic violation appeared not to take seriously either the offense or the possible fine.

The judge, who has teenage grandchildren, said she knew she had reached the teen when she ordered her to park her car and ride the school bus and the girl started crying outside her courtroom. With that, she figured she found the right punishment.

RELATED TO STORY

**SURVEY**

**When you were in high school, did you ride the bus?**

- ◯ **Yes, the whole time I was there.**
- ◯ **Yes, until I could drive.**
- ◯ **No, I never rode the school bus in high school.**
- ◯ **I only rode it when I could not find another ride.**

Vote

**Results | Disclaimer**

Teens not complying will be fined and have their licenses suspended.

Jent also warns parents they could be held in contempt of court if they drive their child to school.

Jent said making teenagers ride the bus also makes them take their driving violations seriously.

Jent sent a memo to every law enforcement agency in her jurisdiction, telling them that all moving traffic citations involving drivers age 16 to 18 must be seen by her. She doesn't want their parents to pay a fine or have teens pay the fine and not tell mom and dad.

If the teens violate the order to ride the bus, their driver's license will be suspended, and a fine must be paid. If they follow the order, the matter is dismissed.

Of the dozen or so teens who were given the school-bus orders so far, one was ordered to nine weeks of school-bus riding. Another had total driving restrictions for an entire semester, according to the North West Indiana Times.

"Oh my God, you would have thought I gave her and her mother the death penalty," Jent told the paper.

The punishment is legal. The state statute allows a judge to place any violator on probationary conditions, including license suspensions.

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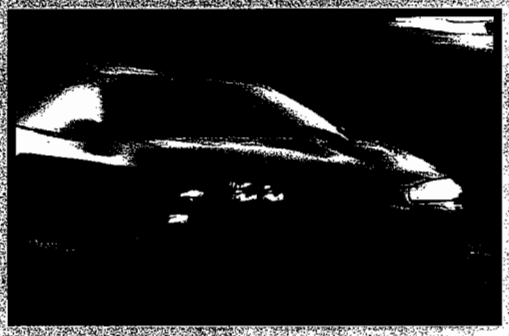

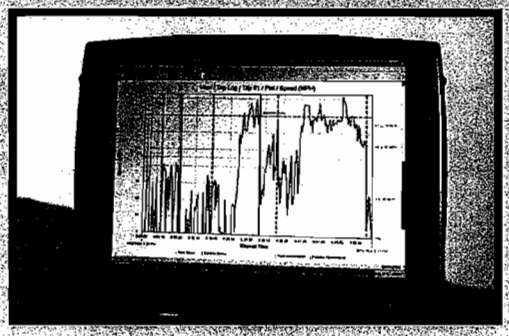

**1. Plug** **2. Drive** **3. Download**

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## CarChip®

- Logs up to 75 hours of trip details. After 75 hours, new trip data records over the oldest data.
- Provides individual trip details and summary reports.
- Displays reports and graphs for individual trips.
- Gives complete trip details, including time and date of each trip, distance traveled, and speed (recorded every 5 seconds).
- Records hard and extreme acceleration and braking. Dotted blue lines show quick acceleration and solid blue lines show extreme acceleration.
- Shows hard and extreme braking in reports and graphs.
- Allows user to set thresholds for speed, acceleration, and braking. The post-drive reports and graphs will show when thresholds were exceeded, how many times, and for how long.

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- Provides all the trip details and summaries of basic CarChip. Software also enables the user to monitor speed as frequently as every second.
- Logs up to 300 hours of trip details, four times the amount of basic CarChip.
- Automatically generates an accident log showing the last, critical 20 seconds of speed if an accident occurs.
- Records any four out of 23 possible engine parameters. Users can select which parameters to record.
- Permits you to assign trips as either commute, personal or business.

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- Includes all the capabilities and features of CarChipE/X.
- Emits an audible alarm when the preset thresholds of speed, acceleration and braking are exceeded. The alarm will continue until the threshold is decreased below preset limits.

## Installation couldn't be easier.

**1. Locate your car's OBDII connector.** You'll find it inside the car, no more than 3 feet from the driver's seat.

**2. Plug in the data logger.** The blinking light tells you it's installed and ready to go.

**3. Start driving.** CarChip will start collecting data immediately. Later, download to your PC for analysis, graphing, and charting.

## Software lets you:

- Review and clear diagnostic trouble codes.
- View summary and detail reports for each trip.
- Copy data to spreadsheets and text documents for further analysis.

## Includes:

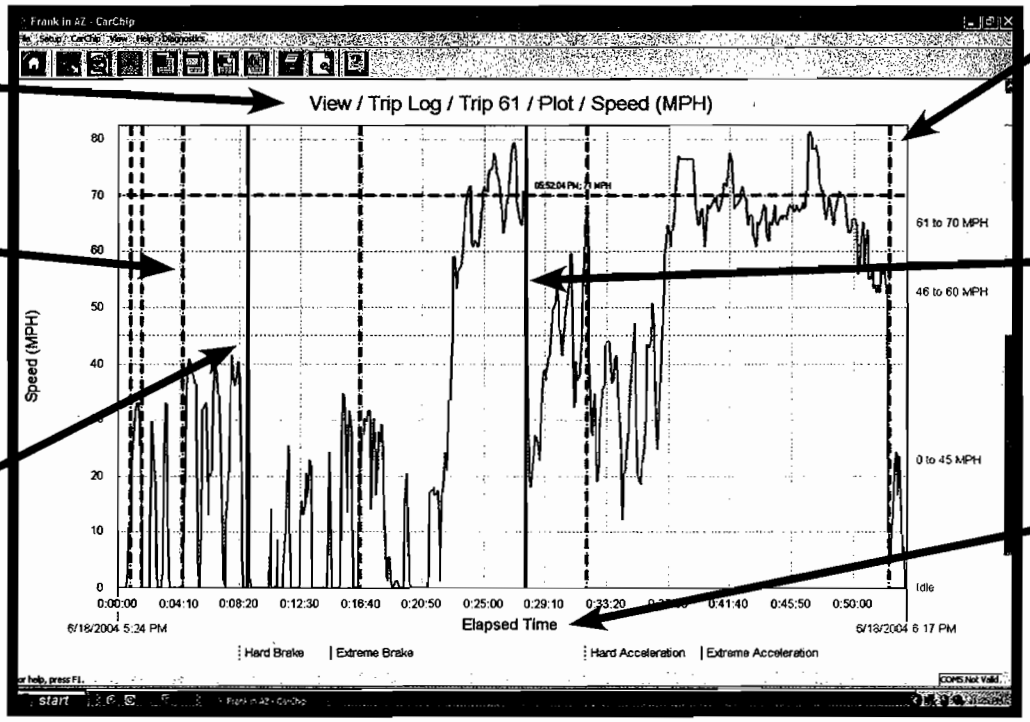
- CarChip data logger.
- Software on CD.
- USB cable for downloading data.

# CarChip's powerful software lets you track driver behavior with detailed reports.

Speed graph gives you an instant visual picture of each and every trip.

Dotted blue lines show quick accelerations.

Solid blue lines call attention to extreme accelerations and "jackrabbit" starts.




Dotted red lines show hard braking.

Solid red lines let you see extreme braking—the driver slamming on the brakes.

CarChipE/X records speed as often as every second, other engine data as often as every 5 seconds.

CarChip begins logging trip data as soon as the ignition is turned on and stops when it is turned off. CarChip also shows when it has been pulled out and installed again.

In addition to providing beginning and end times of trips, CarChip also records the date and duration of each trip.

| | Start Time | Duration | Distance Miles | Maximum Speed MPH | Time in Top Speed Band |
|---|---|---|---|---|---|
| Trip 1 | 6/28/2005 7:17 PM | 0:27:19 | 21.8 | 76 | 0:00:54 |
| Trip 2 | 6/28/2005 8:00 PM | 0:08:53 | 4.0 | 66 | 0:00:00 |
| Trip 3 | 6/28/2005 9:45 PM | 0:01:39 | 0.3 | 25 | 0:00:00 |
| Trip 4 | 6/28/2005 10:27 PM | 0:07:54 | 4.6 | 71 | 0:00:00 |
| Trip 5 | 6/29/2005 9:03 AM | 0:29:18 | 18.0 | 80 | 0:02:58 |
| Trip 6 | 6/29/2005 12:30 PM | 0:07:44 | 3.6 | 58 | 0:00:00 |
| Trip 7 | 6/29/2005 1:04 PM | 0:10:22 | 3.4 | 65 | 0:00:00 |
| Trip 8 | 6/29/2005 6:07 PM | 0:32:28 | 18.0 | 75 | 0:00:04 |
| Trip 9 | 6/29/2005 6:54 PM | 0:10:36 | 6.6 | 78 | 0:00:30 |
| Trip 10 | 6/29/2005 7:21 PM | 0:09:24 | 1.1 | 34 | 0:00:00 |
| Trip 11 | 6/29/2005 7:34 PM | 0:02:15 | 0.4 | 24 | 0:00:00 |
| Trip 12 | 6/29/2005 9:47 PM | 0:09:05 | 4.9 | 63 | 0:00:00 |
| Trip 13 | 6/29/2005 10:10 PM | 0:06:22 | 1.5 | 45 | 0:00:00 |
| Trip 14 | 6/30/2005 12:01 AM | 0:25:33 | 16.2 | 72 | 0:00:00 |
| Trip 15 | 6/30/2005 9:14 AM | 0:27:59 | 18.0 | 74 | 0:00:24 |
| Trip 16 | 6/30/2005 6:50 PM | 0:26:11 | 21.7 | 75 | 0:00:19 |
| Trip 17 | 7/1/2005 8:51 AM | 0:27:52 | 20.8 | 77 | 0:01:39 |

CarChip allows you to set thresholds for speed, acceleration and braking. Highlighted red numbers show that the preset limit for speed was exceeded.

In addition to showing how fast the car went, CarChip also shows how long it exceeded the preset speed thresholds.

A quick look at CarChip's summary report will show the distance traveled in each trip. You can easily tell if a driver is extending his or her driving if he or she is trip restricted.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# FRAUD AND IDENTITY ISSUES IN MUNICIPAL COURT

**Presented by**

**Meichihko Proctor**
**Program Attorney**
**TMCEC**

- Identify strategies for preventing identity theft in court;
- Develop procedures to follow when confronted with identity theft; and,
- Identify case law applicable to the dilemmas presented by identity theft.

# Fraud & Identity Issues in Municipal Court

## Objectives

- Describe Identity Fraud Issues in Municipal Court.
- Discuss Procedures to Address Identity Fraud Issues.
- Discuss Strategies to Reduce Identity Fraud Problems.

## Today's Docket

- Identity Fraud Issues
  - How can you Minimize the Possibility that a Defendant will say, "But it Wasn't Me, Judge!"
  - Strategies for Addressing Identity Fraud Once in Court

## Identity Fraud Issues

- "Arraignments" are not required in misdemeanors punishable by fine only. Neither are they prohibited. CCP 45.021
- A problem can present itself because not all defendants appear in front of a Judge to make a plea.

## Minimizing Identity Problems

- Hold an identity hearing.
- Arraign the Defendant.
- Require a photo identification when the defendant appears in court or at the clerk's office.
- If no DL, require some form of photo identification.
- Juveniles: School issued identification card or parent's driver's license.

## Addressing Identity Problems

When someone walks into court and says: "But it wasn't me!":

Follow an established court procedure. It may look like this:

1. Reset the case.
2. Have your clerk get as much information as possible.
3. Pull the paperwork.

## Addressing Identity Problems

4. Provide the person with information regarding the police department. Inform them that they must file a report so the citation can be investigated.

## But What if It's Too Late?

- 1. Writ of habeas corpus.
- 2. Pardon by the Governor.
- 3. Allow the defendant to withdraw the plea.
  - Involves verifying the conviction and removing a conviction error from a driving record.

## What Does the Law Say?

- Penal Code Sec. 32.51 – Fraudulent Use or Possession of Identifying Information
- Code of Criminal Procedure Secs. 2.28 – Duties Regarding Misused Identity
- and 2.29 – Report Required in Connection with Fraudulent Use or Possession of Identifying Information

## How about Case Law?

- *Hernandez v. State*
  - 885 S.W. 2d 597
- *State v. Ellis*
  - 976 S.W. 2d 789
- *Woodberry v. State*
  - 730 S.W. 2d 72
- *Strickland v. State*
  - Not designated for publication
  - 2000 WL 38812

## Resources

- Federal Trade Commission
- U.S. Department of Justice
- Texas Attorney General's Office
- Local Law Enforcement Agency

## Fraud & Identity Issues in Municipal Court

**Ex Parte William Super.**

**No. 3519**

**COURT OF CRIMINAL APPEALS OF TEXAS**

*76 Tex. Crim. 415; 175 S.W. 697; 1915 Tex. Crim. App. LEXIS 408*

**April 7, 1915, Decided**

**PRIOR HISTORY:** [***1] Appeal from the County Court of Anderson. Tried below before the Hon. E. V. Swift.

Appeal from a habeas corpus proceeding denying relator's discharge on a void judgment before a justice of the peace on a plea of guilty to a gaming case; penalty, a fine of $ 10.

The opinion states the case.

**DISPOSITION:** Relator discharged.

**COUNSEL:** Kay & Seagler, for appellant. -- On question of plea of guilty in misdemeanor cases: Johnson v. State, 48 S.W. 70; Harkins v. Murphy et al., 112 S.W. 136; Ex parte Jones, 80 S.W. 995.

C. C. McDonald, Assistant Attorney General, and Jno. R. Moore. County Attorney, for the State.

**JUDGES:** Davidson, Judge.

**OPINION BY:** DAVIDSON

**OPINION:**

[*415] [**697] DAVIDSON, Judge. -- Relator having been arrested under a commitment issued by the justice of the peace under a judgment convicting him for violation of the gambling laws, resorted to a writ of habeas corpus to obtain his discharge.

The statement of facts, in substance, discloses that Emerson, justice of the peace of precinct No. 4, Anderson County, entered a judgment in favor of the State, on a complaint filed in his court, charging relator with gaming, assessing his punishment at a fine of $ 10. This occurred [***2] in May, 1914. On the 6th day of March, 1915, capias profine was issued to Ellis County. Relator was taken in custody and brought back and placed in jail in Anderson County. The justice of the peace testified that Mollie Super, mother of relator, appeared before him and entered a plea of guilty for relator; and it is upon this plea of guilty that the judgment was founded. The mother of relator testified that he is twenty-three years of age, being twenty-two at [**698] the time he is charged with gaming; that about the 18th day of May, 1914, she went to see the justice of the peace, Emerson, about James Super, another son, against whom there was pending a charge. She says at that time [*416] she did not know they had any charge against relator, and that she never entered any plea of guilty for him, nor for her son James. She further testified relator did not authorize and has never authorized her to plead guilty for him; that he was at the time a grown man with a family, and that she is not an attorney at law. Relator himself testified that he was not arrested on a charge of gaming; that he never gave bond, and did not appear in court about that time nor since, and that he did not authorize [***3] his mother nor anyone else to enter a plea of guilty for him. That he did not know there was a case against him when he left Anderson County and went to Ellis County. That he is of age and married. Under this state of case relator claims he should be discharged from custody in that the judgment was void.

This question came before the court in *Ex parte Jones, 46 Tex. Crim. 433,* and was there decided favorably to relator's contention. The Constitution and the statute authorize the defendant to appear in person or by counsel, either or both, and in finable misdemeanors a plea of guilty may be entered through his counsel. But this seems to be a limitation placed upon pleas of guilty; otherwise the law would seem to require the presence of the defendant in court, and that he enter the plea himself. This matter was discussed in the Jones case, supra, and it is unnecessary to review it further. The relator is ordered discharged from custody.

*Relator discharged.*

**Bobby Ray Woodberry, Appellant v. The State of Texas, Appellee**

**No. 53,645**

**COURT OF CRIMINAL APPEALS OF TEXAS**

*547 S.W.2d 629; 1977 Tex. Crim. App. LEXIS 1007*

**March 9, 1977**

**PRIOR HISTORY:** [**1]

Appeal from Dallas County

**COUNSEL:**

For Appellant: Phil L. Adams - Dallas, TX.

For Appellee: Henry Wade, D.A. - Dallas, TX.

**JUDGES:**

Douglas, Judge. Roberts, Judge, Concurring. Onion, P.J., joins in this opinion.

**OPINION BY:**

DOUGLAS

**OPINION:**

[*630] This is an appeal from a conviction for the offense of aggravated robbery, on a plea of guilty to a jury which assessed punishment at five years.

The sole complaint is that the court erred in not withdrawing the plea of guilty on its own motion after appellant took the stand and testified equivocally about his actions during the robbery, substantially claiming that he made no overt effort to rob the complaining witness.

Charles Chandler testified that on September 20, 1975, appellant and a young woman came walking into his service station located in the Pleasant Grove area of Dallas. After appellant purchased a dollar's worth of gas, he and his companion lingered around the station. After asking for change for a dollar, appellant reached into his back pocket, pulled out a small caliber pistol and said, "Give me your damn money." Chandler said, "Hell no!" and then broke and ran from the station, yelling, "Help, police, robbery." [**2] Appellant yelled, "Stop or I'll shoot", but no shots were fired, as the two robbers then fled the scene without obtaining any money.

Appellant was arrested in the closet of a vacant house several blocks away from the robbery scene. The officers found a small caliber pistol there.

Prior to entering his plea of guilty to the jury, the trial court properly admonished appellant of the consequences of his plea as required by *Article 26.13, V.A.C.C.P.* After the State had rested its case, appellant testified that his girlfriend, Jean, suggested that he help her rob a filling station and that she gave appellant a pistol to accomplish the robbery. Appellant admitted that when he walked up and pulled out a pistol Chandler yelled something and ran away. Appellant denied saying anything to or pointing the pistol at Chandler.

On cross-examination, appellant related that he had difficulty making up his mind as to whether or not he was going to commit the robbery and that his girlfriend, Jean, had to ask him three separate times to do it. He acknowledged receiving the gun from the girlfriend, admitted displaying the pistol to the complaining witness, but stated that the display of the pistol [**3] was only a "reflex action", and that he didn't even know it was loaded. Even though he admitted knowing that his actions were wrong and that he might get in trouble, he testified that he "made no effort of trying to rob the man."

On appeal, appellant argues that his denial of the demand for money and lack of threats, as well as his denial that he pointed a pistol at Chandler, and testimony that he made "no effort" of trying to rob him were sufficient to require the trial court to withdraw the plea of guilty on its own motion. [*631] No effort was made by defense counsel at any time during the trial to withdraw the plea and no objection was made to the court's charge to the jury instructing that a finding of guilty be rendered.

The holding in *Gates v. State, 543 S.W.2d 360 (Tex.Cr.App. 1976),* is controlling. Both *Gates* and the instant case involved pleas of guilty to juries on the charges of aggravated robbery. In both cases the defendants admitted confronting the complaining witnesses with the intent to commit robbery, brandishing pistols, but denied that the robbery was completed as no property or money was obtained from the victims due to extenuating circumstances. [**4] In neither case did the defendant request to withdraw the plea or make an objection to

the court's charge instructing the jury to enter a verdict of guilty.

This Court reversed the conviction in *Gates* holding that, from a review of the totality of circumstances, the appellant was not voluntarily pleading guilty to the offense charged in the indictment. The appellant stated that he "made no effort of trying to rob the man" and further equivocated about his intent and his actions during the alleged robbery. It appearing that the admissions made by the defendant in *Gates* are even stronger than those admissions made in the case at bar, it follows that the same result must occur even though in both cases the testimony of the defendant showed that he was guilty of the offense of aggravated robbery under V.T.C.A., *Penal Code, Sections 29.01(1)* and *29.03(a)(2)*. n1

n1 As the State's brief correctly points out, appellant and his companion went to the robbery scene armed, with the intent to commit theft, brandishing weapons, which forced the complaining witness to flee the scene, screaming for the police. Such testimony is sufficient to support a conviction for aggravated robbery. See *Reese v. State, 531 S.W.2d 638 (Tex.Cr.App. 1976); Lightner v. State, 535 S.W.2d 176 (Tex.Cr.App. 1976); Johnson v. State, 541 S.W.2d 185 (Tex.Cr.App. 1976); Watts v. State, 516 S.W.2d 414 (Tex.Cr.App. 1974).*

The fact that no money or property was ever obtained from the complaining witness is not material in a prosecution for aggravated robbery under the new Penal Code. See *Davis v. State, 532 S.W.2d 626 (Tex.Cr.App. 1976).*

[**5]

Even though appellant's testimony shows him to be guilty of the offense of aggravated robbery, the equivocal nature of his testimony still requires a reversal under the authority of *Gates v. State, supra.* n2

n2 The writer did not agree with the decision in *Gates* but is bound by it.

For the reasons stated, the judgment is reversed and the cause remanded.

**CONCUR BY:**

ROBERTS

**CONCUR:**

Roberts, Judge

The question is not whether the appellant's testimony shows him to be guilty of the offense, but whether his testimony allows the case to be submitted to the jury on a plea of guilty.

If the appellant's testimony raises a fact issue as to whether he was guilty of the offense charged, then it doesn't mean he is not guilty, it just means that the case should not proceed to a final judgment under a plea of guilty. *Gates, supra; Burks v. State, 145 Tex. Crim. 15, 165 S.W.2d 460 (Tex.Cr.App. 1942).*

Irrespective of whether the appellant's testimony shows him to be guilty of the offense charged, the case [**6] should not have proceeded to a final judgment under a plea of guilty because of the fact issue created by appellant's testimony that he "made no effort of trying to rob the man."

I concur in the result.

Onion, P.J., joins in this opinion.

**Emma Jewel Cole, Appellant v. The State of Texas, Appellee**

**No. 59957**

**COURT OF CRIMINAL APPEALS OF TEXAS**

*578 S.W.2d 127; 1979 Tex. Crim. App. LEXIS 1297*

**February 14, 1979**

**SUBSEQUENT HISTORY:** [**1]

Rehearing En Banc Denied March 28, 1979.

**PRIOR HISTORY:** Appeal from DALLAS County

**COUNSEL:**

Melvyn Carson Bruder, Dallas, for appellant.

Henry M. Wade, Dist. Atty. and Stephen J. Wilensky, Asst. Dist. Atty., Dallas, for the State.

**JUDGES:**

Before ONION, P. J., and PHILLIPS and TOM G. DAVIS, JJ.

**OPINION BY:**

DAVIS

**OPINION:**

[*127]

OPINION

Appeal is taken from an order revoking probation.

On March 1, 1974, appellant entered a plea of guilty to the offense of burglary of a habitation. Punishment was assessed at three years, probated.

On September 8, 1975, the State filed a motion to revoke appellant's probation, alleging, inter alia, that the appellant violated a condition of her probation in that she failed to report as directed in July, August, and September, 1975. The appellant pled true to this allegation, but was allowed to present "circumstances" for the court's consideration. The trial court revoked the probation, and reduced punishment to two years.

Appellant contends that the trial court erred in not withdrawing the appellant's plea of true when defensive issues were raised. The appellant also maintains that the evidence was insufficient to support a finding that the appellant [**2] failed to report as alleged.

In *Roberson v. State, 549 S.W.2d 749,* this Court held that the trial court should have withdrawn a plea of true when the probationer took the stand and raised a defensive issue. The Court cited *Gates v. State, Tex.Cr.App., 543 S.W.2d 360,* and *Woodberry v. State, Tex.Cr.App., 547 S.W.2d 629,* in support of this holding. In Roberson, the State alleged that the probationer had committed a burglary, and thus violated a condition of his probation. The probationer pled true to the allegation, but testified that he had no [*128] intent to commit theft when he entered the habitation. Although this Court affirmed the revocation on other grounds, it held that the trial court should have withdrawn the plea and entered a plea of not true.

In *Moon v. State, 572 S.W.2d 681,* this Court was faced with the similar situation of whether a trial court is obligated to withdraw a plea of guilty when the evidence raises defensive issues. This Court held that when the defendant waives a jury trial and pleads guilty to the trial court, the trial court has no duty to withdraw the plea sua sponte even if the evidence raises defensive issues. The Court stated:

> "The 1965 [**3] Code of Criminal Procedure provides that a defendant may waive a jury trial and enter a plea of not guilty before the court in all except capital cases. Articles 1.13 and 1.14, V.A.C.C.P. There now seems no valid reason for the court to withdraw the guilty plea and enter a plea of not guilty for the defendant when the defendant enters a plea of guilty before the court after waiving a jury. It is the duty of the trial court to consider the evidence submitted and as the trier of the facts the court may find the appellant guilty of a lesser offense and assess the appropriate punishment or it may find the defendant not guilty. It would serve no purpose to withdraw the plea of guilty and enter a not guilty plea. Those cases in which this Court has reached a different result are overruled to the extent they con-

> flict with the opinion in this case." *572 S.W.2d at 682.*

Those prior cases reaching a different result included *Gates v. State, supra,* and *Woodberry v. State, supra,* relied on by the Court in Roberson.

A probationer is not entitled to a jury at the hearing to revoke his probation. *Article 42.12, Sec. 8(a), V.A.C.C.P.; Valdez v. State, Tex.Cr.App., 508 S.W.2d 842.* In probation [**4] revocations, just as in guilty pleas after a waiver of jury trial, the trial court is the sole trier of facts. *Battle v. State, Tex.Cr.App., 571 S.W.2d 20; Grant v. State, Tex.Cr.App., 566 S.W.2d 954; Kelley v. State, Tex.Cr.App., 550 S.W.2d 69.* As the Court noted in Moon, the trial court must make its findings after consideration of all evidence presented, including defensive issues. See *Houlihan v. State, Tex.Cr.App., 551 S.W.2d 719; Hulsey v. State, Tex.Cr.App., 447 S.W.2d 165.* Thus, here, as in Moon, there is no reason for the trial court to withdraw the defendant's plea of true even if he later presents defensive issues.

We hold that the trial court did not err in failing to withdraw the plea of true.

*Roberson v. State, supra,* also held that since Roberson's plea of true should have been withdrawn, his challenge to the sufficiency of the evidence would be reviewed notwithstanding the plea of true. *549 S.W.2d at 750-751.* This Court had previously held that the sufficiency of the evidence could not be challenged in the face of a plea of true. *Benoit v. State, Tex.Cr.App., 561 S.W.2d 810; Jiminez v. State, Tex.Cr.App., 552 S.W.2d 469; Guillot v. State, Tex.Cr.App., 543* [**5] *S.W.2d 650; Mitchell v. State, Tex.Cr.App., 482 S.W.2d 221.* In light of our discussion above, we find that appellant's plea of true, standing alone, is sufficient to support the revocation of probation.

We find that the trial court did not abuse its discretion in revoking the appellant's probation. Insofar as our decision in *Roberson v. State, supra,* conflicts with this decision, it is overruled.

The judgment is affirmed.

ONION, P. J., dissents.

**THE STATE OF TEXAS, Appellant v. GERARD JOSEPH ELLIS, Appellee**

**NO. 01-97-00899-CR**

**COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON**

***976 S.W.2d 789; 1998 Tex. App. LEXIS 3250***

**May 28, 1998, Opinion Issued**

**PRIOR HISTORY:** [**1] On Appeal from the 178th District Court. Harris County, Texas. Trial Court Cause No. 728938. William Harmon, Judge.

**DISPOSITION:** State's sole point of error sustained, State's requested relief denied because trial court properly granted appellee's motion to withdraw his plea of guilty. Ordered that judgment be changed from "Motion for New Trial granted" to "Motion to Withdraw Plea of Guilty granted."

**COUNSEL:** John B. Holmes, Houston, Alan Curry, Houston, FOR APPELLANTS.

David Kiatta, Houston, FOR APPELLEES.

**JUDGES:** Tim Taft, Justice. Panel consists of Justices O'Connor, Taft, and Smith. n2

n2 The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

**OPINION BY:** Tim Taft

**OPINION:** [*790] OPINION

Appellee, Gerard Joseph Ellis, pleaded guilty to the offense of aggravated sexual assault of a child pursuant to a plea agreement with the State. The trial court found the evidence substantiated appellee's guilt and assessed nine years deferred adjudication and a $ 500 fine. Appellee filed a motion for new trial, which the trial court granted. The State appeals from that ruling. We address (1) whether a trial court can grant [**2] a motion for new trial to an unadjudicated defendant, and (2) whether the trial court could grant appellee's motion to withdraw his plea of guilty. We affirm.

Facts

On May 21, 1997, the day after receiving deferred adjudication, appellee approached the trial judge at the courthouse, asserted his innocence, and stated that he wished to withdraw his plea of guilty. The trial judge appointed an attorney to inform appellee of the consequences of withdrawing his plea. That attorney filed a motion for new trial alleging only that the trial court's judgment was contrary to the law and evidence in the case. On June 16, 1997, new counsel was appointed to represent appellee at the hearing on his motion for new trial.

[*791] On August 1, 1997, the trial court conducted a hearing on appellee's motion for new trial. During that hearing, the trial judge outlined the circumstances leading up to the hearing. The judge explained that appellee had approached him the day after judgment was entered and expressed his desire to withdraw his plea of guilty because he was innocent. The judge explained that he would have granted appellee's request at that time, but did not because he believed appellee should [**3] speak to another lawyer concerning the consequences of withdrawing his plea. The State opposed the granting of appellee's motion for new trial, claiming that a motion for new trial is not proper after the defendant has been placed on deferred adjudication. The trial court granted appellee's motion for new trial, allowed him to withdraw his plea of guilty, and entered a plea of not guilty on the docket. The State appeals from the trial court's order granting a new trial. *See TEX. CODE CRIM. P. ANN. art. 44.01(a)(3)* (Vernon Supp. 1998) (allowing the State to appeal trial court's granting of a motion for new trial).

**Motion for New Trial**

In a single point of error, the State contends that the trial court had no authority to grant appellee's motion for new trial after appellee was placed on deferred adjudication community supervision. The State refers us to *State v. Davenport*, in which the court held that a defendant placed on deferred adjudication has no right to pursue a motion for new trial. *866 S.W.2d 767, 769-70* (Tex. App.--San Antonio 1993, no pet.). In that case, following Davenport's plea of *not guilty* and a subsequent bench trial, the trial court found Davenport [**4] guilty of assault. *Id. at 769.* Without proceeding to the punishment stage of the required bifurcated trial, the court assessed punishment at six-months deferred adjudication. *Id.* Davenport filed a motion for new trial alleging newly discovered evidence and challenging the sufficiency of the evidence. *Id.* The trial court signed an order granting Davenport's motion for new trial, and the State appealed from the court's order. *Id.* On appeal, the San Antonio court held that, because deferred adjudication is limited to defendants who plead guilty or nolo contendere, and because by its terms such a sentence precludes an adjudication of guilt, the trial court acted without the authority of law by placing Davenport on deferred adjudication. *866 S.W.2d at 769-70.* The court went on to hold that, even though the trial court had improperly placed him on deferred adjudication, Davenport had no right to pursue a motion for new trial. *Id. at 770.* The court relied on *rule 30(a), Texas Rules of Appellate Procedure*, which at that time stated "A new trial is the rehearing after a finding or verdict of guilty has been set aside upon motion of an accused." Former *Tex. R. App. P. 30(a)* [**5] (repealed 1997). n1 The court held that, because in deferred adjudication proceedings there is no adjudication of guilt, rule 30 does not apply and the trial court was without authority to grant a motion for new trial. *Id.* However, the court went on to address the merits of Davenport's motion and held that, even if the court had the authority to order a new trial, it had abused its discretion in granting the motion. *Id. at 772.* Although arguably *dicta* in *Davenport*, we agree with the Fourth Court of Appeals that a motion for new trial contemplates an adjudication. Therefore, the trial court erred in granting appellee's motion for new trial. That action was a nullity. Nevertheless, the trial court's very next action was to allow appellee to withdraw his plea of guilty. It is clear from the trial court's comments at the motion for new trial hearing that his only basis for granting the motion was to allow appellee to change his plea and proceed to trial. It is equally clear that appellee intended the motion, which contained no substantive allegations, to be the vehicle through which he could withdraw his plea of guilty. The effect of granting a motion to withdraw a plea [**6] of guilty is indistinguishable [*792] from granting a motion for new trial. *Dusenberry v. State, 915 S.W.2d 947, 949* (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd).

> n1 Rule 21.1 of the current rules of appellate procedure provides similarly, in pertinent part: "*New trial* means the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt." *TEX. R. APP. P. 21.1* (emphasis in original). Because appellee's motion for new trial was granted on August 1, 1997, it is governed by the former rules of appellate procedure which were repealed effective September 1, 1997.

A liberal practice prevails in this state concerning the withdrawal of a guilty plea. *Jackson v. State, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979).* A defendant may withdraw his guilty plea as a matter of right until judgment has been pronounced or the case has been taken under advisement. *Id.* However, when the defendant decides to withdraw his guilty plea after the trial judge [**7] takes the case under advisement or pronounces judgment, the withdrawal of such plea is within the sound discretion of the trial court. *Id.* In this case, appellee's motion was filed after judgment was entered, and the court's decision to grant the motion was committed to its discretion. *See Washington v. State, 893 S.W.2d 107, 109* (Tex. App.--Dallas 1995, no pet.) (holding that court's decision to grant or deny motion to withdraw guilty plea made one year after defendant placed on deferred adjudication was a matter for the trial court's discretion). We find no evidence in the record showing an abuse of discretion by the trial court in granting appellee's motion.

**Conclusion**

Accordingly, although we sustain the State's sole point of error, we deny the State's requested relief because the trial court properly granted appellee's motion to withdraw his plea of guilty. We order that the judgment be changed from "Motion for New Trial granted" to "Motion to Withdraw Plea of Guilty granted."

Tim Taft

Justice

Panel consists of Justices O'Connor, Taft, and Smith.

**DONALD S. STRICKLAND, Appellant v. THE STATE OF TEXAS, Appellee**

**NO. 14-98-00835-CR**

**COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON**

*2000 Tex. App. LEXIS 432*

**January 20, 2000, Rendered**
**January 20, 2000, Opinion Filed**

**NOTICE:** [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

**PRIOR HISTORY:** On Appeal from the County Criminal Court at Law No. 14. Harris County, Texas. Trial Court Cause No. 5238.

**DISPOSITION:** Affirmed.

**JUDGES:** Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

**OPINION:**

Donald S. Strickland (Appellant) appeals from the trial court's judgment, which affirmed his conviction in the municipal court for disorderly conduct by offensive gesture. n1 Upon his conviction, Appellant was fined $ 175.00 and ordered to pay costs of court. n2 Following his conviction, Appellant sought to withdraw his plea of *nolo contendere* and enter a plea of not guilty. The municipal court treated his request as a motion for new trial and denied same. Appellant appealed to the county criminal court at law. In its order, the county criminal court at law found that "the record on appeal contains no statement of facts or bills of exceptions, and no briefs having been filed assigning error and there appearing no error such as would require review in the interest of justice there is nothing before this Court for review and this cause should be affirmed [*2] . . . ." We will affirm.

n1 Appellant appears before this Court as he did in the courts below, *pro se.*

n2 *Article 4.03 of the Code of Criminal Procedure* vests this Court with jurisdiction over cases which were appealed to the county criminal court from an inferior court where the fine imposed exceeds $ 100. *See TEX. CODE CRIM. PROC. ANN. art. 4.03* (Vernon Supp. 1999).

The record before this Court for review is sparse. Initially, however, we note that while Appellant characterizes his plea in the municipal court as a "guilty plea," the record shows that Appellant pleaded *nolo contendere*. We also observe that Appellant's desire to withdraw his *nolo contendere* plea came to fruition following the conclusion of his trial and judgment in the municipal court.

A liberal practice prevails in this State concerning the withdrawal of a guilty plea. *See State v. Ellis, 976 S.W.2d 789, 792* (Tex.App.-Houston [1st Dist.] 1998, no pet.). A defendant may withdraw [*3] his guilty plea as a matter of right until judgment has been pronounced or the case has been taken under advisement. *See id.* However, when the defendant decides to withdraw his guilty plea after the trial judge takes the case under advisement or pronounces judgment, the withdrawal of such plea is within the sound discretion of the trial court. *See id.* In this case, Appellant's desire to withdraw his plea came after judgment was entered, and the court's decision to deny the request was committed to its discretion. *See id.* We find no evidence in the record showing an abuse of discretion by the trial court in not granting Appellant's post-trial request to withdraw his plea of *nolo contendere.*

Accordingly, we affirm the judgment of the trial court.

PER CURIAM

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

## PROTECTING AGAINST IDENTITY THEFT

**ARRAIGNMENT/PLEADINGS CCP 45.021:** An arraignment takes place for the purpose of fixing his identity and hearing his plea.

Arraignment and pleadings are when the Court shall identify the person charged and verify that the person appearing at the Court is the correct person charged. A problem presents itself because not all defendants appear in front of a Judge or Magistrate to process the plea or make payment. This leaves the clerks to use the resources available to verify that the information collected by the officer was correct and the person entering the plea is the proper defendant.

**Appearance:** Photo Identification Required - When a defendant appears in court or at the clerk's office, the court requires the defendant to present his valid driver's license. If he does not have a driver's license, he must present some form of photo identification. This procedure is designed to prevent identify fraud and ensure proper reporting to the Department of Public Safety of criminal convictions that may impact your driving privileges.

If the defendant does not have a driver's license or picture identification card, explain that he/she may go to the Department of Public Safety to have them issue a new temporary. If the Department of Public Safety will provide them with the temporary card the court will accept it as proof.

Juveniles: If a juvenile does not have a driver's license or picture identification card, the Judge will accept a school issued identification card and/or the parent's driver's license or picture identification card.

Clerk will follow these guidelines to process customers and help protect against identity theft and improper reporting:

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**PREVENTING IDENTITY THEFT:**

☐ Customer appears at court or window wanting to take some action on the citation.
☐ Clerk/Judge will ask customer for his/her driver's license or picture identification card.
☐ Clerk will look up case in computer using DL or ID.
☐ Clerk will verify that the Driver's license # or Identification # matches the information the officer provided. (This is an important step for reporting the conviction to DPS.)
☐ The Clerk/Judge will then process the defendant's citation.

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**POSSIBLE IDENTITY THEFT:**

☐ If a person contacts the court and states that someone used his/her identity when receiving a citation, try to get as much information as possible. Ask:

- ☐ Who do you believe used your name and information? (normally a family member or friend)
- ☐ Is your driver's license missing? If yes, have you reported it to DPS?

☐ Pull paperwork.
☐ Make copy of person's picture identification.
☐ Provide person the issuing officer's name and the citation number and explain that he/she must contact the officer to file a report so the citation can be investigated.
☐ Set case to a trial docket (this will allow officer time to investigate) and have person sign for court date.
☐ E-mail a copy of all paperwork and the citation to the issuing officer to assist in the investigation.

☐ If identity theft occurred, have the officer send a memo requesting dismissal of charges for the prosecutor and judge to approve.
☐ If no identity theft occurred, leave the case for set for trial, so the person appears with the officer present.

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**VERIFYING A CONVICTION AND REMOVING A CONVICTION ERROR FROM A DRIVING RECORD:**

If you are contacted by a person stating that there is a conviction on his/her driving record from your court that was not a conviction or no such charge existed for that person, the reporting court is the only court that can correct the error (even if the court did not make the error causing it to go on the record). The court should be diligent in correcting any errors accidentally made to a person's record:

☐ Get person's information: Name, DOB, DL#, and a telephone number.
☐ Look at case history to see if the person calling was correctly convicted of the charge.
☐ If there should be NO conviction, ask the person to bring in or fax the driving record showing the conviction.
☐ If no driving record is available, contact the police dept. to have them check the driving record history for the conviction.
☐ If the reported conviction is questionable as to being incorrectly reported, investigate further.
☐ If conviction is an error, contact Austin DPS Ticket Verification at (512) 424-7120 or (512) 424-2031 to verify the information. Check docket #, date of offense, and conviction date to verify that the conviction was not supposed to be for this person.
☐ If a person has paid a surcharge that he should not have paid, notify the person you are speaking with so the refund process can begin. (takes approx. 6 weeks)
☐ If the conviction needs to be removed, complete the "DPS Correction Form" and attach supporting documentation of the case so the conviction can be removed. Fax paperwork to: (512) 424-5809.
☐ If the conviction needs to be added to the correct person complete another "DPS Correction Form" and attach supporting documentation that reflects the correct information for the person that the conviction was against.

**TEXAS DEPARTMENT OF PUBLIC SAFETY**
**5805 N LAMAR BLVD - BOX 4087 - AUSTIN TEXAS 78773-0360**
**512/424-2031 Fax 512/424-5809**
**Driver Records Bureau**

# DPS CORRECTION FORM

**Please provide a cover sheet on your court letterhead with a point of contact name and telephone number when returning the DPS Correction Form to us. Failure to return requested cover sheet on court letterhead will result in an unprocessed correction.**

| | | |
|---|---|---|
| **Court Name:** | | |
| **Court Representative:** | **Phone:** | **Fax:** |

| | | |
|---|---|---|
| **Defendant Information:** | | |
| Name: | Race: | Sex: |
| Driver's License State/Number: | | |
| Date of Birth: | Social Security Number: | |

| | |
|---|---|
| **Incorrect Conviction Information:** | |
| Cause (Docket) Number: | |
| Offense Date: | Conviction Date: |
| Offense: | |

| | |
|---|---|
| **Correct Information:** | |
| Cause (Docket) Number: | |
| Arrest (Offense) Date: | Conviction Date: |
| Reason for Dismissal or Change: | |
| Course Completion Date: | |

# Federal Trade Commission

# Identity Theft Affidavit

# Instructions for Completing the ID Theft Affidavit

To make certain that you do not become responsible for any debts incurred by an identity thief, you must prove to each of the companies where accounts were opened or used in your name that you didn't create the debt.

A group of credit grantors, consumer advocates, and attorneys at the Federal Trade Commission (FTC) developed an ID Theft Affidavit to make it easier for fraud victims to report information. While many companies accept this affidavit, others require that you submit more or different forms. Before you send the affidavit, contact each company to find out if they accept it.

It will be necessary to provide the information in this affidavit anywhere a **new** account was opened in your name. The information will enable the companies to investigate the fraud and decide the outcome of your claim. If someone made unauthorized charges to an **existing** account, call the company for instructions.

This affidavit has two parts:

- **Part One** — the ID Theft Affidavit — is where you report general information about yourself and the theft.
- **Part Two** — the Fraudulent Account Statement — is where you describe the fraudulent account(s) opened in your name. Use a separate Fraudulent Account Statement for each company you need to write to.

When you send the affidavit to the companies, attach copies (NOT originals) of any supporting documents (for example, driver's license or police report). Before submitting your affidavit, review the disputed account(s) with family members or friends who may have information about the account(s) or access to them.

Complete this affidavit as soon as possible. Many creditors ask that you send it within two weeks. Delays on your part could slow the investigation.

Be as accurate and complete as possible. You may choose not to provide some of the information requested. However, incorrect or incomplete information will slow the process of investigating your claim and absolving the debt. Print clearly.

When you have finished completing the affidavit, mail a copy to each creditor, bank, or company that provided the thief with the unauthorized credit, goods, or services you describe. Attach a copy of the Fraudulent Account Statement with information only on accounts opened at the institution to which you are sending the packet, as well as any other supporting documentation you are able to provide.

Send the appropriate documents to each company by certified mail, return receipt requested, so you can prove that it was received. The companies will review your claim and send you a written response telling you the outcome of their investigation. Keep a copy of everything you submit.

If you are unable to complete the affidavit, a legal guardian or someone with power of attorney may complete it for you. Except as noted, the information you provide will be used only by the company to process your affidavit, investigate the events you report, and help stop further fraud. If this affidavit is requested in a lawsuit, the company might have to provide it to the requesting party. Completing this affidavit does not guarantee that the identity thief will be prosecuted or that the debt will be cleared.

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

If you haven't already done so, report the fraud to the following organizations:

1. Any one of the nationwide consumer reporting companies to place a fraud alert on your credit report. Fraud alerts can help prevent an identity thief from opening any more accounts in your name. The company you call is required to contact the other two, which will place an alert on their versions of your report, too.

    - **Equifax:** 1-800-525-6285; www.equifax.com
    - **Experian:** 1-888-EXPERIAN (397-3742); www.experian.com
    - **TransUnion:** 1-800-680-7289; www.transunion.com

    In addition to placing the fraud alert, the three consumer reporting companies will send you free copies of your credit reports, and, if you ask, they will display only the last four digits of your Social Security number on your credit reports.

2. The security or fraud department of each company where you know, or believe, accounts have been tampered with or opened fraudulently. Close the accounts. Follow up in writing, and include copies (NOT originals) of supporting documents. *It's important to notify credit card companies and banks in writing.* Send your letters by certified mail, return receipt requested, so you can document what the company received and when. Keep a file of your correspondence and enclosures.

    When you open new accounts, use new Personal Identification Numbers (PINs) and passwords. Avoid using easily available information like your mother's maiden name, your birth date, the last four digits of your Social Security number or your phone number, or a series of consecutive numbers.

3. Your local police or the police in the community where the identity theft took place to file a report. Get a copy of the police report or, at the very least, the number of the report. It can help you deal with creditors who need proof of the crime. If the police are reluctant to take your report, ask to file a "Miscellaneous Incidents" report, or try another jurisdiction, like your state police. You also can check with your state Attorney General's office to find out if state law requires the police to take reports for identity theft. Check the Blue Pages of your telephone directory for the phone number or check www.naag.org for a list of state Attorneys General.

4. The Federal Trade Commission. By sharing your identity theft complaint with the FTC, you will provide important information that can help law enforcement officials across the nation track down identity thieves and stop them. The FTC also can refer victims' complaints to other government agencies and companies for further action, as well as investigate companies for violations of laws that the FTC enforces.

    You can file a complaint online at **www.consumer.gov/idtheft**. If you don't have Internet access, call the FTC's Identity Theft Hotline, toll-free: 1-877-IDTHEFT (438-4338); TTY: 1-866-653-4261; or write: Identity Theft Clearinghouse, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

# ID Theft Affidavit

## Victim Information

(1) My full legal name is _____
(First) (Middle) (Last) (Jr., Sr., III)

(2) (If different from above) When the events described in this affidavit took place, I was known as

_____
(First) (Middle) (Last) (Jr., Sr., III)

(3) My date of birth is _____
(day/month/year)

(4) My Social Security number is _____

(5) My driver's license or identification card state and number are _____

(6) My current address is _____

City _____ State _____ Zip Code _____

(7) I have lived at this address since _____
(month/year)

(8) (If different from above) When the events described in this affidavit took place, my address was

_____

City _____ State _____ Zip Code _____

(9) I lived at the address in Item 8 from _____ until _____
(month/year) (month/year)

(10) My daytime telephone number is (____)_____

My evening telephone number is (____)_____

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

## How the Fraud Occurred

**Check all that apply for items 11 - 17:**

(11) ❑ I did not authorize anyone to use my name or personal information to seek the money, credit, loans, goods or services described in this report.

(12) ❑ I did not receive any benefit, money, goods or services as a result of the events described in this report.

(13) ❑ My identification documents (for example, credit cards; birth certificate; driver's license; Social Security card; etc.) were ❑ stolen ❑ lost on or about _____.
(day/month/year)

(14) ❑ To the best of my knowledge and belief, the following person(s) used my information (for example, my name, address, date of birth, existing account numbers, Social Security number, mother's maiden name, etc.) or identification documents to get money, credit, loans, goods or services without my knowledge or authorization:

| | |
|---|---|
| Name (if known) | Name (if known) |
| Address (if known) | Address (if known) |
| Phone number(s) (if known) | Phone number(s) (if known) |
| Additional information (if known) | Additional information (if known) |

(15) ❑ I do NOT know who used my information or identification documents to get money, credit, loans, goods or services without my knowledge or authorization.

(16) ❑ Additional comments: (For example, description of the fraud, which documents or information were used or how the identity thief gained access to your information.)

_____

_____

_____

_____

_____

(Attach additional pages as necessary.)

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

## Victim's Law Enforcement Actions

(17) (check one) I ❑ am ❑ am not willing to assist in the prosecution of the person(s) who committed this fraud.

(18) (check one) I ❑ am ❑ am not authorizing the release of this information to law enforcement for the purpose of assisting them in the investigation and prosecution of the person(s) who committed this fraud.

(19) (check all that apply) I ❑ have ❑ have not reported the events described in this affidavit to the police or other law enforcement agency. The police ❑ did ❑ did not write a report. *In the event you have contacted the police or other law enforcement agency, please complete the following:*

| | |
|---|---|
| **(Agency #1)** | (Officer/Agency personnel taking report) |
| (Date of report) | (Report number, if any) |
| (Phone number) | (email address, if any) |
| **(Agency #2)** | (Officer/Agency personnel taking report) |
| (Date of report) | (Report number, if any) |
| (Phone number) | (email address, if any) |

## Documentation Checklist

Please indicate the supporting documentation you are able to provide to the companies you plan to notify. Attach copies (NOT originals) to the affidavit before sending it to the companies.

(20) ❑ A copy of a valid government-issued photo-identification card (for example, your driver's license, state-issued ID card or your passport). If you are under 16 and don't have a photo-ID, you may submit a copy of your birth certificate or a copy of your official school records showing your enrollment and place of residence.

(21) ❑ Proof of residency during the time the disputed bill occurred, the loan was made or the other event took place (for example, a rental/lease agreement in your name, a copy of a utility bill or a copy of an insurance bill).

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

(22) ❑ A copy of the report you filed with the police or sheriff's department. If you are unable to obtain a report or report number from the police, please indicate that in Item 19. Some companies only need the report number, not a copy of the report. You may want to check with each company.

## Signature

I certify that, to the best of my knowledge and belief, all the information on and attached to this affidavit is true, correct, and complete and made in good faith. I also understand that is affidavit or the information it contains may be made available to federal, state, and/or local law enforcement agencies for such action within their jurisdiction as they deem appropriate. I understand that knowingly making any false or fraudulent statement or representation to the government may constitute a violation of 18 U.S.C. §1001 or other federal, state, or local criminal statutes, and may result in imposition of a fine or imprisonment or both.

_____ _____

(signature) (date signed)

_____

(Notary)

*[Check with each company. Creditors sometimes require notarization. If they do not, please have one witness (non-relative) sign below that you completed and signed this affidavit.]*

**Witness:**

_____ _____

(signature) (printed name)

_____ _____

(date) (telephone number)

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

# Fraudulent Account Statement

**Completing this Statement**

- Make as many copies of this page as you need. **Complete a separate page for each company you're notifying and only send it to that company.** Include a copy of your signed affidavit.
- List only the account(s) you're disputing with the company receiving this form. **See the example below.**
- If a collection agency sent you a statement, letter or notice about the fraudulent account, attach a copy of that document (**NOT** the original).

**I declare (check all that apply):**

❑ As a result of the event(s) described in the ID Theft Affidavit, the following account(s) was/were opened at your company in my name without my knowledge, permission or authorization using my personal information or identifying documents:

| **Creditor Name/Address** *(the company that opened the account or provided the goods or services)* | **Account Number** | **Type of unauthorized credit/goods/services provided by creditor** *(if known)* | **Date issued or opened** *(if known)* | **Amount/Value provided** *(the amount charged or the cost of the goods/services)* |
|---|---|---|---|---|
| Example<br>Example National Bank<br>22 Main Street<br>Columbus, Ohio 22722 | 01234567-89 | auto loan | 01/05/2002 | $25,500.00 |
| | | | | |
| | | | | |

❑ During the time of the accounts described above, I had the following account open with your company:

Billing name _____

Billing address _____

Account number _____

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

FUNDED BY A GRANT FROM THE
TEXAS COURT OF CRIMINAL APPEALS

**TEXAS MUNICIPAL COURTS EDUCATION CENTER**

1609 SHOAL CREEK BOULEVARD, SUITE 302 AUSTIN, TEXAS 78701
TELEPHONE (512) 320-8274
1-800-252-3718
FAX (512) 320-0996

# JURY CHARGES

**Presented by**

**Linda Frank**
**Municipal Judge – Plano**
**Chief Municipal Prosecutor - Arlington**

By the end of the course, judges will be able to:

- Define and identify the importance of a proper jury charge;
- Identify the statutory authority for jury charges and the person responsible for drafting them;
- Determine whether and when a defendant's defenses should be included in the charge; and,
- Prepare a proper jury charge.

# JURY CHARGES

**The Why, What, Who and How**

## What you will learn:

- **Why jury charges are important**
- **What is a jury charge**
- **Who is responsible for a jury charge and the statutory authority**
- **How to prepare a jury charge**

## The Pledge of Allegiance

I pledge allegiance to the flag of the United States of America

and to the Republic for which it stands,

One nation under God, indivisible,

with Liberty and Justice for all.

## The Why

Two scenarios.

## Scenario No. 1 - Speeding

- Speed limit in Your Town, TX, is 30 mph
- Signs are posted everywhere
- Violation occurred within the city limits

- Abbott is stopped by a peace officer for speeding in Your Town and is issued a citation for speeding, traveling 55 mph in a 30 mph zone
- Abbott requested a jury trial, and the testimony in the trial has just concluded

## The Testimony

- The peace officer testified that he saw a vehicle traveling on Main Street and visually observed that it was going faster than the 30 mph speed limit.
- The officer testified that he then checked the speed with his radar unit and it showed the speed to be 55 mph.

- The officer pulled the vehicle over, identified the driver, and issued the citation
- Abbott testified and admitted that he was going over the posted speed limit
- Abbott testified that he was a voluntary fireman and was on his way to the fire station because there was a fire

- You have prepared the following charge and read it to the jury

CAUSE NO. 11111111

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF YOUR TOWN |
| CLAY ABBOTT | § | NEW COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, CLAY ABBOTT stands charged by complaint with the offense of speeding, it being alleged that said offense was committed in the corporate limits of the City of Your Town, New County, Texas, on or about the 1st day of April, 2006, to which charge the defendant pled "Not Guilty."

An operator of a vehicle may not drive at a speed greater than reasonable and prudent under the circumstances then existing. A speed in excess of the limits established is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful.

"Operator" means a person who drives or has physical control of a vehicle.

"Prima facie" means evidence that stands proved until rebutted by the evidence.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe from the evidence beyond a reasonable doubt that on the 1st day of April, 2006, the defendant, Clay Abbott did then and there operate a motor vehicle on a public street or highway, to-wit: 100 Main , which is within the incorporated limits of the City of Your Town, New County, Texas at a speed greater than was reasonable and prudent under the circumstances, to-wit: 55 miles per hour, at which time and place the maximum prima facie reasonable and prudent speed limit applicable was 30 miles per hour, you shall find the defendant guilty as charged and assess a penalty at a fine not less than $1.00 nor more than $200.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before

you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

MUNICIPAL COURT JUDGE
City of Your Town, New County, Texas

## The Verdict

**Based solely on the testimony and the charge you have just read, what was the jury's verdict?**

**Why?**

**Now, let's look at the basically same charge, but with an added paragraph:**

Prima facie" means evidence that stands proved until rebutted by the evidence.

**The regulation of the speed of a vehicle does not apply to an authorized emergency vehicle responding to a call, a police patrol; or a physician or ambulance responding to an emergency call.**

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

**What is the jury's verdict now?**

**Does this additional paragraph make a difference?**

**How?**

## Scenario No. 2 - Assault

- Johnny Appleseed and Yosemite Sam lived next door to each other and did NOT get along at all
- In fact, their relationship was more like the "Hatfields" and the "McCoys"

- Johnny had an apple tree very close to the property line between his and Sam's property
- As the tree grew, some of the branches hung over Sam's property, and as a result, some of the apples fell onto Sam's property

- Because Sam hated apples (and because he wasn't crazy about Johnny), Sam took a chainsaw and cut off all of the branches and limbs of the apple tree that were hanging onto his (Sam's) side of the property line
- Johnny, a conservationist ("tree hugger") was appalled and confronted Sam

- Johnny alleged to Sam that Sam had destroyed his tree and that Sam should pay Johnny for a full grown apple tree as a replacement
- As a result of the accusation, Johnny and Sam argued, yelled, screamed, hollered, shouted, and cursed each other

- Then Sam clenched his hand into a fist, raised his fist to his chest, and Johnny, seeing this, immediately hit Sam
- Sam then filed a charge of assault by contact against Johnny
- Johnny pled not guilty, and asked for a jury trial

## The Testimony

- Sam testified that he did cut down the limbs and branches, and that he did get into a verbal argument with Johnny, but that was all.
- Sam testified that he did not hit Johnny, and that he was not going to, because he had been in trouble with the law before

- Johnny testified that he did hit Sam, but that it was in self-defense
- Johnny testified that he knew about Sam's temper and reputation, and when Sam clenched his hand into a fist and was raising his fist up to his chest, Johnny was afraid that Sam was going to hit him

- You have prepared the charge and read it to the jury
- The charge is the one you have in front of you
- The jury has deliberated and knocked on the door with its verdict

CAUSE NO. 11111111

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF YOUR TOWN |
| JOHNNY APPLESEED | § | NEW COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, JOHNNY APPLESEED stands charged by complaint with the offense of assault by contact, it being alleged that said offense was committed in the corporate limits of the City of Your Town, New County, Texas, on or about the 1st day of April, 2006, to which charge the defendant pled "Not Guilty."

Section 22.01(a)(3) of the Texas Penal Code provides that a person commits an offense if the person intentionally or knowingly causes physical contact with another when the person knows or should have reasonably believe that the other will regard the contact as offensive or provocative.

"Intentionally" means a person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective

"Knowingly" as defined in the Texas Penal Code, §6.03(b) means a person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowing, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his

innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the 1st day of April, 2006, the defendant Johnny Appleseed did then and there knowingly cause physical contact with another, to-wit: Yosemite Sam when the defendant should have reason to believe that Yosemite Sam would regard the contact as offensive or provocative, and said violation occurred at 100 Main Street, which is within the incorporated limits of the City of Your Town, New County, Texas, you will find the defendant "guilty" and assess the penalty at a fine of not less than $1.00 nor more than $500.00.

In the event you have a reasonable doubt as to the defendant's guilt after considering all of the evidence before you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

_____
MUNICIPAL COURT JUDGE
City of Your Town, New County, Texas

Based solely on the testimony and the charge you have in front of you, what was the jury's verdict?

Why?

- Let's look at the charge again, but with some added paragraphs regarding self-defense.

Now, let's look at the basically same charge, but with an added paragraph:

**A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. Except, the use of force against another is not justified in response to verbal provocation alone.**

**Therefore, if you find beyond a reasonable doubt that the defendant, Johnny Appleseed, did hit Yosemite Sam, but you further find, or have a reasonable doubt thereof, that the defendant was justified in using force against Yosemite Sam when and to the degree he reasonably believed the force was immediately necessary to protect himself against Yosemite Sam's use or attempted use of unlawful force, you will find the defendant not guilty.**

What is the jury's verdict now?

Does this additional paragraph make a difference?

How?

Why?

Answer:

The What

## Definition

- A direction or guideline that a judge gives a jury concerning the law of the case

## The Who

## Statutory authority

- Art. 45.033 of the Texas Code of Criminal Procedure states "that a judge SHALL charge the jury. The charge may be made orally or in writing, except that the charge shall be made in writing if required by law."

## What is "if required by law"?

- This phrase refers to any court of record, including municipal courts of record.
- If your court is a court of record, then you MUST have a written jury charge.

## The How

## Basic Components

- **Introduction**
- **Law**
- **Standardized paragraphs**
- **Elements of the charge; charging language**
- **Defenses, if any**
- **Standardized concluding paragraphs**
- **Judge's signature block**

## Introduction

## Law

- What are your sources of law?

## Sources

State Statutes
- Texas Transportation Code
- Penal Code
- Alcohol & Beverage Code
- Education Code

City Ordinances

## Standardized paragraphs

## Elements

## Conjunctive v. Disjunctive

- Conjunctive – joins together sentences, clauses, or words; usually with the word "and"
- Disjunctive – expresses something in the alternative; usually with the word "or"
- Dolkart v. The State of Texas 2006 SW3d (LWC 5832, July 26, 2006)

## Defenses

- What is a defense?

- A defendant's stated reason why the State has no valid case
- An affirmative defense is defendant's assertion raising new facts and arguments that, if true, will defeat the State's case.

## What are some defenses?

## Defenses

- 1. Self-defense
- 2. Insanity
- 3. Emergency
- 4. Provocation
- 5. Consent

## Standardized Concluding Paragraphs

## Special Charges

## Allen Charge

- An Allen charge is a supplemental jury instruction given by the court to encourage a dead-locked jury, after prolonged deliberations, to reach a verdict.
- Case: Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

# HELP!

- Future website on TMCEC
- All judges, clerks, prosecutors can submit jury charges, but most of all so we don't have to reinvent the wheel

# JURY CHARGES—
# THE WHY, WHAT, WHO AND HOW?

## 1. THE WHY.

a. List some of the reasons why a jury charge is necessary.

_____

_____

_____

b. Which court or courts see do the most people come into contact with?

_____

c. A judge is to be _____ and _____.

## 2. THE WHAT.

A jury charge is a _____ or _____ that a judge gives a jury concerning the law of the case.

## 3. THE WHO.

_____ of the Texas Code of Criminal Procedure states "the judge _____ charge the jury. The charge may be made _____ or _____, except that the

charge shall be made in writing if required by law. If required by law refers to _____.

b. If your court is a court of record, then you _____ have a written jury charge.

c. If your court is not a court of record, then you may give the charge _____ or _____.

d. Whose ultimate responsibility is it to prepare the jury charge?

_____

e. A jury _____ get a copy of the charge to take into the jury room with them.

## 4. THE HOW.

a. Basic components.

(1). Introduction.
(2). _____
(3). Standardized paragraphs.
(4). _____
(5). Defenses, if any.
(6). Standardized concluding paragraphs.
(7). Judge's signature block (sign after reading to jury)

b. Defenses.

(1). _____
(2). _____
(3). _____
(4). _____

c. Conjunctive v. Disjunctive. *Dolkart v. State*

(1). _____ joins clauses or words.

(2). The word "or" is a _____ word.

(3). Jury charges are to be _____.

d. Special charge.

*Allen* charge.

A _____ jury instruction given by the court to encourage a _____ , after prolonged deliberations, to reach a verdict. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

# JURY CHARGES

# INDEX OF SAMPLE JURY CHARGES

# MOVING VIOLATIONS

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, _____ stands charged by complaint with the offense of speeding, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the ____ day of _____, 200___, to which charge the defendant pled "Not Guilty."

An operator of a vehicle may not drive at a speed greater than reasonable and prudent under the circumstances then existing. A speed in excess of the limits established is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful.

"Operator" means a person who drives or has physical control of a vehicle.

"Prima facie" means evidence that stands proved until rebutted by the evidence.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no interference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe from the evidence beyond a reasonable doubt that on the _____ day of _____, 200___, the defendant, _____ did then and there operate a motor vehicle on a public street or highway, to-wit: _____, which is within the incorporated limits of the City of _____, _____ County, Texas at a speed greater than was reasonable and prudent under the circumstances, to-wit: _____ miles per hour, at which time and place the maximum prima facie reasonable and prudent speed limit applicable was _____ miles per hour, you shall find the defendant guilty as charged and assess a penalty at a fine not less than $1.00 nor more than $200.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

_____
MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, _____ stands charged by complaint with the offense of speeding in a construction or work zone, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200___, to which charge the defendant has pled "Not Guilty."

An operator of a vehicle may not drive at a speed greater than reasonable and prudent under the circumstances then existing. A speed in excess of the limits established is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful.

"Construction or maintenance work zone means a portion of a highway or street: (A) where highway construction or maintenance is being undertaken other than mobile operations as defined by the Texas Manual on Uniform Traffic Control Devices; and (B) that is marked by signs indicating that it is a construction or maintenance work zone indicating where the zone begins and ends and stating 'fines double when workers present.'"

"Mobile operation" means a temporary office of the contractor, Texas Department of Transportation, or any other political subdivision that is adjacent to or near a construction or maintenance work zone.

"Operator" means a person who drives or has physical control of a vehicle.

"Prima facie" means evidence that stands proved until rebutted by the evidence.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $2.00 nor more than $400.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no interference of guilt at his/her trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied

beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe from the evidence beyond a reasonable doubt that on the _____ day of _____, 200___, the defendant, _____ did then and there operate a motor vehicle upon a public street and highway within the incorporated limits of the City of _____, _____ County, Texas, to-wit: _____, at the unreasonable, imprudent and unlawful speed of _____ miles per hour which was then and there a speed greater than was reasonable and prudent under the circumstances existing and said location was marked by appropriate signs as a construction or maintenance work zone, indicating where the zone begins and ends and stating that "fines double when workers present" at which time and place said maximum prima facie reasonable and prudent speed limit applicable was _____ miles per hour, that being the maximum speed limit applicable when workers were present and said defendant was not following the directions of a police officer, defendant was not an employee of the department, a political subdivision, contractor or subcontractor of the constructing and maintaining the street and highway, defendant was not operating an authorized emergency vehicle responding to a call nor an ambulance responding to an emergency call, said defendant was not part of a police patrol nor was defendant a physician responding to an emergency call , you shall find the defendant guilty as charged and assess a penalty at a fine not less than $2.00 nor more than $400.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, _____ stands charged by complaint with the offense of speeding in a school zone, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200___, to which charge the defendant pled "Not Guilty."

An operator of a vehicle may not drive at a speed greater than reasonable and prudent under the circumstances then existing. A speed in excess of the limits established is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful.

"Operator" means a person who drives or has physical control of a vehicle.

"Prima facie" means evidence that stands proved until rebutted by the evidence.

USE YOUR CITY'S CODE AND SET IT OUT: example below

The City of _____'s Code of Ordinances, Sec. xxx-xxx. Speed Zones provides that speed limit on school days is twenty (20) miles per hour and thirty (30) miles per hour at other times.

Paragraphs (b) and (c) of said section state:

(b) No person shall drive any vehicle on the following streets within the areas designated in this subsection between the hours of 7:30 a.m. and 9:30 a.m. and between 3:00 p.m. and 5:00 p.m. on each school day during every authorized school term, in excess of 20 miles per hour; and 30 miles per hour at every other time: *Fredericksburg Road between Wood Road and Oakcrest Drive.*

(c) Any person who shall violate any provision of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine not to exceed $200.00.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no interference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe from the evidence beyond a reasonable doubt that on the _____ day of _____, 200____, the defendant, _____ did then and there operate a motor vehicle on a public street or highway, within the incorporated limits of the City of _____, _____ County, Texas, to-wit: ___ block of _____ at the unreasonable, imprudent and unlawful speed of _____ miles per hour which was then and there a speed greater than was reasonable and prudent under the circumstances existing as said location was zoned and marked by appropriate signs as a school zone and at which time and place the maximum prima facie reasonable and prudent speed limit applicable was ____ miles per hour that being the maximum speed limit applicable on an official school day during the hours of _____ to _____, said violation occurring between the aforesaid hours, and said vehicle was not then and there an authorized emergency vehicle responding to a call, nor an ambulance responding to an emergency call, said defendant was not part of a police patrol, nor was defendant a physician responding to an emergency call , you shall find the defendant guilty as charged and assess a penalty at a fine not less than $1.00 nor more than $200.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

_____
MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, _____ stands charged by complaint with the offense of disregarding a red light, commonly referred to as "running a red light," it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the ___ day of _____, 200____, to which charge the defendant has pled Not Guilty.

The Texas Transportation Code, §544.007(d) provides that an operator of a vehicle facing only a steady red signal shall stop at a clearly marked stop line. In the absence of a stop line, the operator shall stop before entering the crosswalk on the near side of the intersection. A vehicle that is not turning shall remain standing until an indication to proceed is shown. After stopping, standing until the intersection may be entered safely, and yielding the right-of-way to pedestrians lawfully in an adjacent crosswalk and other traffic lawfully using the intersection, the operator may (1) turn right or (2) turn left, if the intersecting streets are both one-way streets and a left turn is permissible.

"Stop" or "stopping" means to completely cease movement.

"Stand" or "standing" means to halt an occupied or unoccupied vehicle, other than temporarily while receiving or discharging passengers.

"Crosswalk" means: (1) the portion of a roadway, including an intersection, designated as a pedestrian crossing by surface markings, including lines; or (2) the portion of a roadway at an intersection that is within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with the offense gives rise to no interference of guilt at his/her trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied

beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200___, the defendant, _____, did then and there operate a motor vehicle upon a public street and highway within the incorporated limits of the City of _____, _____ County, Texas, to-wit: ____ block of _____ at its intersection with _____ block of _____, another public street within the incorporated limits of the City of _____, _____ County, Texas, where traffic is controlled by a traffic control signal exhibiting different colored lights successively one at a time using the colors green, yellow and red, such traffic control signal having been there placed by authority of the traffic engineer for _____ (either the State of Texas or the City of _____), and at a time when such traffic control signal was exhibiting a steady red signal and while Defendant was facing such steady red signal, Defendant did fail to stop said vehicle at _____ (chose 1 -- a clearly marked stop line OR before entering the crosswalk on the near side of the intersection) and Defendant did fail to remain standing there at until an indication to proceed was shown, Defendant not having then and there been otherwise directed by a traffic or police officer to so proceed and Defendant not then and there operating an authorized emergency vehicle and Defendant not then and there lawfully turning after stopping, you will find the defendant guilty and assess the penalty at a fine of not less than $1.00 nor more than $200.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

CAUSE NO. _____

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

MEMBERS OF THE JURY:

The defendant, _____, stands charged by complaint with the offense of failing to stop at a stop sign alleged to have occurred in the corporate limits of the City of _____, ____ County, Texas, on or about the ___ day of _____, 200_, to which charge the defendant pled "Not Guilty."

The Texas Transportation Code, Section 544.010 states that unless directed to proceed by a police officer or traffic-control signal, the operator of a vehicle approaching an intersection with a stop sign shall stop as provided by subsection (c). Subsection (c) provides that an operator required to stop shall stop before entering the crosswalk on the near side of the intersection. In the absence of a crosswalk, the operator shall stop at a clearly marked stop line. In the absence of a stop line, the operator shall stop at the place nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway.

"Stop or stopping" means, when required, to completely cease movement; and when prohibited, to halt, including momentarily halting, an occupied or unoccupied vehicle, unless necessary to avoid conflict with other traffic or to comply with the directions of a police officer or a traffic-control sign or signal.

"Crosswalk" means: (1) the portion of a roadway, including an intersection, designated as a pedestrian crossing surface markings, including lines; or (2) the portion of a roadway at an intersection that is within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway.

"Highway or street" means the width between the boundary lines of a publicly maintained way or any part of which is open to the public for vehicular traffic.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no interference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of

innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the ____ day of _____, 200___, the defendant, _____ did then and there operate a motor vehicle upon a public street and highway within the incorporated limits of the City of _____, _____ County, Texas, to-wit: ___ block of _____ at its intersection with _____, another public street within the incorporated limits of the City of _____, _____ County, Texas, where traffic is controlled by a stop sign and such traffic control device having been there placed by authority of the traffic engineer of the City of _____, and while defendant was approaching the stop sign at said intersection, defendant did fail to stop the vehicle at a clearly marked stop line, before entering the crosswalk on the near side of the intersection, or at the place nearest the intersecting roadway, to-wit: _____ (choose 1—stop line, crosswalk, or at the place nearest the intersecting roadway where the defendant had a view of approaching traffic on the intersecting roadway) and defendant not having then and there been otherwise directed by a traffic or police officer to so proceed and defendant not then and there operating an authorized emergency vehicle, you will find the defendant guilty and assess the penalty at a fine of not less than $1.00 nor more than $200.00.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

CAUSE NO. _____

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

MEMBERS OF THE JURY:

The defendant, _____, stands charged by complaint with the offense of failing to yield the right of way at an intersection, alleged to have occurred in the corporate limits of the City of _____, ____ County, Texas, on or about the ___ day of _____, 200___, to which charge the defendant pled "Not Guilty."

The Texas Transportation Code, Section 545.151(a) states an operator approaching an intersection: (1) shall stop, yield, and grant immediate use of the intersection: (A) in obedience to an official traffic-control device, including a stop sign or yield right-of-way sign; or (B) if a traffic-control signal is present but does not display an indication in any of the signal heads; and (2) after stopping, may proceed when the intersection can be safely entered without interference or collision with traffic using a different street or roadway.

Subsection (f) provides that an operator who is required by this section to stop and yield the right-of-way at an intersection to another vehicle and who is involved in a collision or interferes with other traffic at the intersection to whom right-of-way is to be given is presumed not to have yielded the right-of-way.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $200.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no interference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the ____ day of _____, 200___, the defendant, _____ did then and there operate a motor vehicle upon a public street and highway within the incorporated limits of the City of _____, _____ County, Texas, to-wit: ___ block of _____ at its intersection with _____, another public street within the incorporated limits of the City of _____, _____ County, Texas, where traffic is controlled by an official traffic control device, to-wit: _____, and after stopping, failed to proceed when the intersection could be safety entered without colliding with traffic on _____, and defendant not having then and there been otherwise directed by a traffic or police officer to so proceed and defendant was not then and there operating an authorized emergency vehicle, you will find the defendant guilty and assess the penalty at a fine of not less than $1.00 nor more than $200.00.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

_____

MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

# NON-MOVING VIOLATIONS

CAUSE NO. _____

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The Defendant, _____ stands charged by complaint with the offense of failing to be secured by a safety belt when he was riding in the front seat of a passenger vehicle while the vehicle was being operated, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas on or about the _____ day of _____, 20____, to which charge the defendant has pled "Not Guilty."

The Texas Transportation Code, §545.413(a) provides that a person commits an offense if the person: (1) is at least 15 years of age; (2) is riding in the front seat of a passenger vehicle while the vehicle is being operated; (3) is occupying a seat that is equipped with a safety belt; and (4) is not secured by a safety belt.

It is a misdemeanor for a person to violate the above provision of the Texas Transportation Code, and any person convicted or such violation shall be punished by a fine of not less than $25.00 nor more than $50.00.

In all criminal cases, the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now, therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 20____, the defendant, _____, was at least 15 years of age on this date, did then and there operate a motor vehicle on a public roadway, to-wit: _____, which is located within the

incorporated limits of the City of _____, _____ County, Texas, and while said vehicle was being operated, did occupy a seat that was equipped with a safety belt and Defendant was not secured by a safety belt, you will find the defendant guilty and assess the penalty at a fine of not less than $25.00 nor more than $50.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit her and say by your verdict not guilty.

In deliberating upon this case, you must nor refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreman. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision, you will so indicate by knocking on the door to inform the Bailiff and return to the Court Room.

_____
Municipal Court Judge
City of _____, _____ County, Texas

CAUSE NO. _____

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The Defendant, _____ stands charged by complaint with the offense of parking in a handicap space, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas on or about the _____ day of _____, 20____, to which charge the defendant has pled "Not Guilty."

The Texas Transportation Code, §681.011(b)(1) states that a person commits an offense if the person stands a vehicle on which disabled license plates or a disabled parking placard is not displayed in a parking space or area designated specifically for individuals with disabilities. Further, a person commits an offense if the person stands a vehicle so that the vehicle blocks an architectural improvement designed to aid persons with disabilities, including an access aisle or curb ramp.

It is presumed that the registered owner of the motor vehicle is the person who left the vehicle standing at the time and place the offense occurred. Section 681.011(e), TRC.

"Stand" or "standing" means to halt an occupied or unoccupied vehicle, other than temporarily while receiving or discharging passengers. Section 681.001(7), TRC.

It is a misdemeanor for a person to violate the above provision of the Texas Transportation Code, and any person convicted or such violation shall be punished by a fine of not less than $250.00 nor more than $500.00.

In all criminal cases, the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now, therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 20____, the defendant, _____, did then and there stand a motor vehicle in a designated disabled parking space and area located at _____, which is located within the incorporated limits of the City of _____, _____ County, Texas, and there was not displaced on said vehicle disabled license plates or a disabled parking placard, you will find the defendant guilty and assess the penalty at a fine of not less than $250.00 nor more than $500.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit her and say by your verdict not guilty.

In deliberating upon this case, you must nor refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreman. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision, you will so indicate by knocking on the door to inform the Bailiff and return to the Court Room.

_____
Municipal Court Judge
City of _____, _____ County, Texas

# CRIMINAL

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, _____ stands charged by complaint with the offense of assault by contact, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200____, to which charge the defendant pled "Not Guilty."

Section 22.01(a)(3) of the Texas Penal Code provides that a person commits an offense if the person intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

"Intentionally" means that a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Texas Penal Code §6.03(a).

"Knowingly" as defined in the Texas Penal Code, §6.03(b) means a person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowing, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00.

In all criminal cases the burden of proof is on the state.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200____, the defendant, _____ did then and there _____ (chose one: {1} intentionally; {2} knowingly; or {3} intentionally and knowingly) cause physical contact with another, to-wit: _____(victim's name) when the person should have reason to believe _____(victim's name) would regard the contact as offensive or provocative, and said violation occurred at _____, which is within the incorporated limits of the City of _____, _____ County, Texas, you will find the defendant "Guilty" and assess the penalty at a fine of not less than $1.00 nor more than $500.00.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict "Not Guilty."

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

_____
MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The defendant, _____ stands charged by complaint with the offense of theft under $50.00, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200____, to which charge the defendant pled "Not Guilty."

Section 31.03(a) of the Texas Penal Code states that a person commits an offense if the person appropriates property with intent to deprive the owner of the property and subsection (b) provides that appropriation of property is unlawful if it is without the owner's effective consent.

"Appropriate" means to acquire or otherwise exercise control over property and property means tangible or intangible personal property.

"Owner" means a person who has title to the property or a greater right to possession of the property than the accused.

"Possession" means actual care, custody, control, or management.

"Steal" means to acquire property by theft.

Effective consent includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion.

"Intentionally" means that a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Texas Penal Code §6.03(a).

"Knowingly" as defined in the Texas Penal Code, §6.03(b) means a person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowing, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00.

In all criminal cases the burden of proof is on the state.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200____, the defendant, _____ did then and there _____ (chose one: {1} intentionally; {2} knowingly; or {3} intentionally and knowingly) appropriate property, to-wit: _____ (describe property; i.e., one 12-pack of beer, two shirts, a gameboy player, etc.), from the owner, to-wit: _____ (owner's name, i.e. Wal-Mart, HEB, etc.), at _____, which is within the incorporated limits of the City of _____, _____ County, Texas, without the effective consent of the owner, and the value of said property is less than $50.00, you will find the defendant "Guilty" and assess the penalty at a fine of not less than $1.00 nor more than $500.00.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict "Not Guilty."

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the jury room and select a foreperson. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the courtroom.

# ALCOHOL

# Minors

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The Defendant, _____ stands charged by complaint with the offense of minor in possession of alcohol, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200___, to which charge the defendant has pled "Not Guilty."

Section 106.05(a) of the Texas Alcoholic Beverage Code states that a minor commits an offense if he possesses an alcoholic beverage. Paragraph (b) provides that a minor may possess an alcoholic beverage: (1) while in the course and scope of his employment if the minor is an employee of a licensee or permittee and the employment is not prohibited by the Texas Alcoholic Beverage Code; (2) if the minor is in the visible presence of his adult parent, guardian, or spouse, or other adult to whom the minor has been committed by a court; or (3) if the minor is under the immediate supervision of a commissioned peace officer engaged in enforcing the provisions of the Texas Alcoholic Beverage Code.

A "minor" means a person under 21 years of age.

"Possession" means actual care, custody, control, or management.

It is a misdemeanor for a person to violate the above provision, and any minor convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00 and not less than 8 hours or more than 12 hours of community service if the minor has not been previously convicted of an offense or not less than 20 hours or more than 20 hours of community service if the minor has been previously convicted of an alcohol offense. A prior order of deferred disposition or deferred adjudication is considered a conviction.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a Defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the Defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the Defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200___, the Defendant, _____ did then and there possess an alcoholic beverage when he was under the age of 21 years of age within the incorporated limits of the City of _____, _____ County, Texas, you will find the Defendant guilty and assess the penalty at a fine of not less than $1.00 nor more than $500.00 and community service of not less than 8 hours nor more than 12 hours for a first alcohol offense or not less than 20 hours nor more than 40 hours for a subsequent alcohol offense. In the event you have a reasonable doubt as to the Defendant's guilt after considering all the evidence before you and these instructions, you will acquit him and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the Defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreman. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the Court Room.

_____

MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The Defendant, _____ stands charged by complaint with the offense of consumption of alcohol by a minor, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200___, to which charge the defendant has pled "Not Guilty."

Section 106.04 of the Texas Alcoholic Beverage Code states that a minor commits an offense if he consumes an alcoholic beverage.

A "minor" means a person under 21 years of age.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00 and not less than 8 or more than 12 hours of community service.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, indicted for or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a Defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the Defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the Defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200___, the Defendant, _____ did then and there consume an alcoholic beverage when he was under the age of 21 years of age within the incorporated limits of the City of _____, _____ County, Texas, you will find the Defendant guilty and assess the penalty at a fine of not less than $1.00 nor more

than $500.00 and community service of not less than 8 nor more than 12 (20 or 40) hours. In the event you have a reasonable doubt as to the Defendant's guilt after considering all the evidence before you and these instructions, you will acquit him and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the Defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreman. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the Court Room.

_____

MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

# Adults

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The Defendant, _____ stands charged by complaint with the offense of public intoxication, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the ____ day of _____, 200____, to which charge the defendant has pled "Not Guilty."

Section 49.02(a) of the Texas Penal Code states that a person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger himself or another.

Intoxication means not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body. Texas Penal Code, §49.01(2)(A).

Further, Section 49.11 of the Texas Penal Code provides that proof of a culpable mental state is not required for conviction of a public intoxication offense.

"Public place" as defined in the Texas Penal Code, §1.07(40) means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for or otherwise charged with the offense gives no inference of guilt at his trial. The law does not require a Defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the Defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the Defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200___, the Defendant, _____ did then and there appear in a public place, to-wit: _____, which is located within the incorporated limits of the City of _____, _____ County, Texas while intoxicated to the degree that the defendant may have endangered himself or another, you will find the Defendant guilty and assess the penalty at a fine of not less than $1.00 nor more than $500.00. In the event you have a reasonable doubt as to the Defendant's guilt after considering all the evidence before you and these instructions, you will acquit him and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the Defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreman. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the Court Room.

_____

MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

JURY CHARGE

MEMBERS OF THE JURY:

The Defendant, _____ stands charged by complaint with the offense of possessing an open container in the passenger area of a motor vehicle, it being alleged that said offense was committed in the corporate limits of the City of _____, _____ County, Texas, on or about the _____ day of _____, 200___, to which charge the defendant has pled "Not Guilty."

Section 49.031 of the Texas Penal Code states that a person commits an offense if the person knowingly possesses an open container in a passenger area of a motor vehicle that is located on a public highway, regardless of whether the vehicle is being operated or is stopped or parked.

The Texas Penal Code defines the culpable mental state of "knowingly" as a person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

"Passenger area of a motor vehicle" means the area of a motor vehicle designed for the seating of the operator and passengers of the vehicle.

It is a misdemeanor for a person to violate the above provision, and any person convicted of such violation shall be punished by a fine of not less than $1.00 nor more than $500.00.

In all criminal cases the burden of proof is on the State.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, indicted for, or otherwise charged with the offense, gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied

beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all doubt. It is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.

Now therefore, if you believe beyond a reasonable doubt that on the _____ day of _____, 200_____, the defendant, _____ did then and there knowing possess a bottle, can, or other receptacle, to-wit: a _____ (choose one: bottle, can, or other receptacle) that contained any amount of an alcoholic beverage and that was open, that had been opened, that had a broken seal, or the contents of which were partially removed, to-wit: (choose one: opened, that had a broken seal, or the contents of which were partially removed) in the passenger area of a motor vehicle that was located on a public highway, to-wit: _____ _____, which is located within the incorporated limits of the City of _____, _____ County, Texas, you will find the Defendant guilty and assess the penalty at a fine of not less than $1.00 nor more than $500.00. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you and these instructions, you will acquit him and say by your verdict not guilty.

In deliberating upon this case, you must not refer to nor discuss any matters not in evidence before you.

If you find the defendant guilty, you must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures and doing any dividing.

You will retire to the Jury room and select a foreman. Your verdict must be unanimous. You are to render your verdict on the enclosed sheet of paper after reaching your decision.

When you have reached your decision you will so indicate by knocking on the door to inform the Bailiff and return to the Court Room.

_____

MUNICIPAL COURT JUDGE
City of _____, _____ County, Texas

# AFFIRMATIVE DEFENSES

**Provocation.** **Defense to Disorderly Conduct Under § 42.01(a)(4) abusing or threatening a person in a public place in an obviously offensive manner**

It is a defense to this prosecution for disorderly conduct that the actor had significant provocation for his [abusive **or** threatening] conduct.

Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that the defendant committed the offense of disorderly conduct as alleged in the [complaint] but you further find, or have a reasonable doubt that the defendant had significant provocation for his [abusive **or** threatening] conduct, to-wit: **[describe provocation]**, then you will find the defendant not guilty.

**Section 9.31. Self-Defense (not deadly force).** **[Editor's note: Select the following defense only if requested by the defendant and "evidence is admitted supporting the defense." Tex. Pen. Code § 2.03(c). Where a choice is indicated, select the circumstances alleged in the complaint or that are supported by the evidence. ]**

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. Except, the use of force against another is not justified *[in response to verbal provocation alone]*; **OR** *[if the actor consented to the exact force used or attempted by the other]*; **OR** *[if the actor provoked the other's use or attempted use of unlawful force, unless the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and the other nevertheless continues or attempts to use unlawful force against the actor]*

Therefore, if you find beyond a reasonable doubt that the defendant, _____, did [track the complaint], but you further find, or have a reasonable doubt thereof, that the defendant was justified in using force against [name of victim alleged in the complaint] when and to the degree he reasonably believed the force was immediately necessary to protect himself against [name of victim alleged in the complaint]'s use or attempted use of unlawful force, you will find the defendant not guilty.

**Emergency in a speeding case:**

The regulation of the speed of a vehicle does not apply to an authorized emergency vehicle responding to a call, a police patrol; or a physician or ambulance responding to an emergency call.

# VERDICT FORMS

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

VERDICT FORM

We, the jury, find the above named Defendant not guilty as charged in the complaint.

_____
JURY FOREPERSON

_____
Date

********** **OR** **********

We, the jury, find the above named Defendant guilty as charged in the complaint and assess the punishment at a fine in the amount of $_____.

_____
JURY FOREPERSON

_____
Date

CAUSE NO. _____

| | | |
|---|---|---|
| STATE OF TEXAS | § | IN THE MUNICIPAL COURT |
| v. | § | CITY OF _____ |
| _____ | § | _____ COUNTY, T E X A S |

VERDICT FORM

We, the jury, find the above named Defendant not guilty as charged in the complaint.

_____
JURY FOREPERSON

_____
Date

********** **OR** **********

We, the jury, find the above named Defendant guilty as charged in the complaint and assess punishment at a fine in the amount of $_____ and _____ hours of community service.

_____
JURY FOREPERSON

_____
Date

# SPECIAL CHARGE:

# *Allen* Charge

## Traditional *Allen* Charge

You are instructed that in a large proportion of cases, absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of other jurors, each juror should show a proper regard to the opinion of the other jurors.

You should listen, with a disposition to be convinced, to the arguments of the other jurors. If a larger number of jurors are for deciding the case one way, those in the minority should consider whether they are basing their opinion on speculation or surmise and not on the evidence in the case, keeping in mind the impression the evidence has made on a majority of the other jurors, who are as equally honest and intelligent as those in the minority.

Also bear in mind that if you do not reach a verdict in this case, a mistrial will be granted. The case can be tried again to a different jury, but the next jury will be in no better position to decide the case than you are.

Therefore, you are instructed that it is your duty to decide the case if you can conscientiously do so. You will now retire and continue your deliberations.

**Annotations:**

The charge is a slightly modified version of that found in 8 Michael J. McCormick, *et al.,* Texas Practice: Texas Criminal Forms and Trial Manual § 99.33 (2005).

*Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896) (authorizing paragraphs one and two of the foregoing instructions); *Arrevalo v. State*, 489 S.W.2d 569, 571-572 (Tex. Crim. App. 1985) (authorizing the foregoing instructions regarding mistrial and retrial).

## Modified or "mild" *Allen* Charge

You have heard a substantial amount of testimony in this case, and a considerable amount of time and effort has been expended in bringing this evidence before you. Careful consideration of all such evidence might take quite a bit of your time. When you enter the jury room it is your duty to consult with one another, to consider each other's views, and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to individual judgment. Each of you must decide the case for yourself but only after discussion and impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your own views and to change your opinion if you are wrong, but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

With these additional instructions, you are requested to deliberate in an effort to arrive at a verdict that is acceptable to all members of the jury if you can do so without doing violence to your conscience. Do not violate your conscience but continue to deliberate.

## Annotations:

This charge is taken from *Howard v. State*, 941 S.W.2d 102, 123-124 (Tex. Crim. App. 1996) and is a modified copy of the charge cited in *Lowenfield v. Phelps*, 484 U.S. 231, 235, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

# HELP

**(or why reinvent the wheel when you can "beg, borrow, or steal")**

TMCEC's website link coming for all judges to contribute and use

Texas District & County Attorneys' website: www.tdcaa.com

E-mail other judges, especially those of courts of record and request help

# JANE LYNN DOLKART v. THE STATE OF TEXAS

2006 SW3d (LWC-5832), July 26, 2006

In The Court of Appeals Fifth District of Texas at Dallas

2006 SW3d (LWC-5832)

**JANE LYNN DOLKART, Appellant v. THE STATE OF TEXAS, Appellee**

July 26, 2006

In The Court of Appeals Fifth District of Texas at Dallas

No. 05-05-00934-CR

On Appeal from the 292nd Judicial District Court Dallas County, Texas

Trial Court Cause No. F04-51594-TV

OPINION

Before Justices Wright, Lang-Miers, and Mazzant

Opinion By Justice Wright

Jane Lynn Dolkart appeals her conviction for aggravated assault. After the jury found her guilty, it assessed punishment at two years' confinement, probated for five years, and a $1000 fine. In eight issues, appellant contends: (1) the evidence is legally and factually insufficient to support her conviction; (2) her right to a unanimous verdict was violated under both the United States and Texas Constitutions; (3) the trial court erred by allowing certain expert witness testimony; (4) the trial court erred by precluding defense counsel from questioning appellant about her criminal history; (5) the trial court erred by allowing the State to amend its indictment; and (6) the cumulative harm of these errors denied appellant a fair trial. We conclude the evidence is legally sufficient to support appellant's conviction but agree with appellant that the jury charge violated her right to a unanimous verdict. Thus, we reverse the trial court's judgment and remand for further proceedings.

Background

Tom Thomas, II testified that he was scheduled to meet some friends at White Rock Lake for a bicycle ride. Thomas and Paul Schoenberg were the first of the group to arrive. While waiting for the others, Thomas and Schoenberg decided to go for a short ride and warm up their legs. As they were riding their bicycles down the street, Thomas heard a "loud horn blast right behind me." Thomas turned and saw appellant driving a green sedan about three or four feet behind him. She was so close it made him "very" uncomfortable. As Thomas looked at her, she raised her hand and shook it. Thomas interpreted appellant's gesture to mean that appellant did not "like the fact that he was on a bike on her street." Thomas and Schoenberg kept cycling, hoping appellant would go around them. Although there was plenty of room for appellant to pass on the right, she did not do so. Instead, appellant followed them, "screaming at us through the car." When Thomas and Schoenberg reached the end of the median in the street, they made

a U-turn. Appellant also made a U-turn and stayed about three or four feet behind them. Thomas slowed to a "rolling stop" to allow appellant to pass. As Thomas did so, appellant "went into a rage," screaming "extremely nasty and extremely loud" and then Thomas heard her "hit the accelerator." The next thing Thomas knew, he "slammed down to the ground under her bumper." Thomas's feet were locked onto the pedals, so he put both his hands onto the bumper and held himself up from the concrete. Appellant's car pushed him along with his bicycle for three feet, leaving a gouge in the street. After the car stopped, appellant backed the car off of Thomas's bicycle and stared at Thomas. Eventually she rolled down her window. When Thomas told appellant not to leave because he was calling 911, she told him, "Oh, I didn't even hit you," and drove away. Schoenberg testified to substantially the same version of the incident, although he described appellant as following from "ten feet or so" behind them.

While Thomas was calling 911, a police car drove by and he flagged it down. Thomas and Schoenberg told the police what had happened. As they were doing so, a man walked up and told the police he had the license number of appellant's car and had seen appellant drive into a nearby parking lot. The officers found appellant's car and were verifying the license number when appellant walked up and said, "I believe you are looking for me." Officer Craig Bennight asked appellant about the incident and she "unleashed a torrent of . . . anger." Appellant told Bennight that Thomas was intentionally blocking her and would not allow her to pass. Appellant became angry whenever they talked about the incident. When Bennight told appellant that Thomas said she intentionally hit him, appellant claimed that was "absurd" and said, "I only meant to tap him." Appellant was then arrested.

Later that afternoon, Thomas went to a Primacare near his home because his shoulder was hurting and he was concerned it had been broken when he fell. The wait was long, so Thomas made an appointment for the next day. At that time, Dr. Joseph Park x-rayed Thomas's shoulder and determined it was not broken. Park diagnosed Thomas with contusions and abrasions of the left shoulder and elbow, gave him a sling to immoblize his shoulder, and prescribed pain medicine.

Appellant's version of the incident is considerably different. Appellant testified that she also was on her way to meet friends for a bicycle ride around White Rock Lake. Thomas and Schoenberg were riding bicycles next to each other, talking. They were going so slowly appellant stopped her car. Thinking the men had not seen her, she tapped her horn. They continued at the same pace so she waited until they had gone a sufficient distance and "very, very slowly followed them." Appellant was not sure how far she was from the cyclists, but it was a "reasonable" distance. Appellant explained that she did not go around them because there was not room to pass them and still make her turn at the median. Appellant denied being angry, yelling, or making gestures at the men. After she followed the men around the median, Thomas slowed his speed and then came to a stop in front of her. Appellant did not realize Thomas was stopping at first, but once she did she "slammed on the brake" and "bumped his back tire." Appellant explained that she did not get out of the car to check on him because she was "upset" and "scared." Thomas looked fine, so she drove a short way to the parking lot where she was to meet her friends. The police came almost immediately. According to

appellant, she was upset and a little angry when she spoke with the police because she "felt as though Mr. Thomas had precipitated the accident." Appellant admitted that she was "somewhat agitated" and "upset" but claimed she did not tell the police that she intended to "tap" Thomas's back tire.

After hearing this and other evidence, the jury found appellant guilty of aggravated assault with a deadly weapon. This appeal followed.

Legal Sufficiency

Because a determination that the evidence is legally insufficient would result in an acquittal, we begin with appellant's third issue. Under this point, appellant contends we must render such a verdict because the State failed to show (1) she intended to threaten or injure Thomas, (2) her actions were reckless, and (3) her car was a deadly weapon. After reviewing the record, we cannot agree.

When reviewing a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). To support appellant's conviction in this case, the State was required to prove beyond a reasonable doubt that appellant (1) intentionally or knowingly threatened Thomas with imminent bodily injury and used or exhibited a deadly weapon during the commission of the assault or (2) intentionally, knowingly, or recklessly caused Thomas bodily injury and used or exhibited a deadly weapon during the commission of the offense. See Tex. Pen. Code Ann. §§ 22.01, 22.02 (Vernon Supp. 2005). To obtain a deadly weapon finding in this case, the State had to show that appellant operated her car during the commission of the offense in a manner capable of causing death or serious bodily injury. See Tex. Pen. Code Ann. § 1.07(a)(17)(B) (Vernon Supp. 2005).

Viewed in the light most favorable to the verdict, the evidence shows that appellant became angry and agitated with Thomas for blocking her way. She followed behind him for some period of time at an unsafe distance, making Thomas very "uncomfortable" and "concerned." After Thomas made a U-turn and came to a stop, appellant began screaming at him, accelerated her car, hit his rear tire, and knocked him to the ground. When Thomas fell, appellant's car pushed him and the bicycle along the street for a few feet, leaving a gouge in the concrete. Appellant told the police that Thomas provoked the incident by intentionally blocking her way, and claimed she only "meant to tap him." When he fell, Thomas injured his left shoulder and elbow.

From this evidence, a rational jury could find appellant (1) intentionally or knowingly threatened Thomas with imminent bodily injury; (2) intentionally, knowingly, or recklessly caused Thomas bodily injury; and (3) used her car in a manner capable of causing death or serious bodily injury. See Tex. Transp. Code Ann. § 545.401(a) (Vernon 1999) (person commits offense of reckless driving by driving vehicle in willful or wanton disregard for safety of persons or property); *Cleburn v. State*, 138 S.W.3d 542, 545 (Tex. App.-Houston 14th Dist. 2004, pet. ref'd) (appellant acted recklessly by using

pick-up truck to move small Toyota Tercel with visible car seat and adult occupants); *Noyola v. State*, 25 S.W.3d 18, 20 (Tex. App.-El Paso 1999, no pet.) (appellant used vehicle in manner capable of causing death or bodily injury by accelerating vehicle in reverse, dragging complainant behind him); *Green v. State*, 831 S.W.2d 89, 93 (Tex. App.-Corpus Christi 1992, no pet.) (appellant's sudden acceleration toward complainant in open parking lot forcing him to run inside store sufficient to show appellant intentionally threatened complainant with imminent bodily injury by use of motor vehicle). Thus, we conclude the evidence is legally sufficient to support appellant's conviction. We overrule appellant's third issue.

Unanimous Verdict

In her first issue, appellant contends her right to a unanimous verdict was violated. Appellant maintains she was charged in a two-paragraph indictment with two separate offenses-aggravated assault by threat and aggravated assault causing bodily injury-and because the jury was charged in the disjunctive, appellant is not ensured that the jury unanimously agreed that appellant committed an illegal act. After reviewing the record and the applicable law, we agree with appellant.

The trial court's charge stated: Now, if you find from the evidence beyond a reasonable doubt that on or about the 2nd day of May, 2004, in Dallas County, Texas, the defendant, JANE LYNN DOLKART, did unlawfully then and there intentionally or knowingly threaten TOMMY THOMAS, hereinafter called complainant, with imminent bodily injury, to-wit:

by operating a motor vehicle on a roadway on which said complainant was then and there operating a bicycle and causing the said motor vehicle to strike with or against said bicycle, causing said complainant to strike against the ground, and said defendant did use or exhibit a deadly weapon, to-wit: a motor vehicle, during the commission of the assault

OR

if you find from the evidence beyond a reasonable doubt that the defendant, JANE LYNN DOLKART, did unlawfully then and there intentionally, knowingly or recklessly cause bodily injury to TOMMY THOMAS, hereinafter called complainant, to-wit: by operating or driving a motor vehicle, a deadly weapon, on a roadway at a distance from a bicycle operated then and there by said complainant which was unsafe under the existing circumstances, or by failing to take proper evasive action to avoid striking a bicycle, thereby causing said motor vehicle to strike or collide with the bicycle operated by said complainant, and thereby causing said complainant to strike against the ground, and said defendant did use or exhibit a deadly weapon, to-wit: a motor vehicle, during the commission of the assault, then you will find the defendant guilty of aggravated assault as charged in the indictment.

The trial court also charged the jury on the lesser included offenses of deadly conduct, assault, and reckless driving.

The Texas Constitution guarantees a criminal defendant the right to a unanimous jury verdict in felony cases. Tex. Const. art. V, § 13; *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005). A unanimous verdict ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense. *Jefferson v. State*, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006). When the statute in question establishes different modes or means by which the offense may be committed, unanimity is generally not required on the alternate means of commission. Id. But, when the indictment alleges in a single count two separate offenses arising under the same penal code provision, the jury must agree on which offense it finds the defendant committed. See id.

Recently, in *Jefferson*, the court of criminal appeals explained that the first step in a unanimity challenge is an examination of the statute to determine the legislature's intent. See id. We begin our analysis then, by determining whether the legislature intended section 22.01(a) to create multiple, separate offenses, or a single offense capable of being committed in different ways. See id. In making this determination, we must decide whether the legislature intended to make assault by threat and assault by injury separate offenses, or underlying "brute facts or means that make up a particular element." See id. at 312 (citing *Richardson v. United States*, 526 U.S. 813, 817-18 (1999)).

Section 22.02 provides that a person commits aggravated assault if the person commits assault as defined in section 22.01 and the person either causes serious bodily injury to another or uses or exhibits a deadly weapon during the assault. See Tex. Pen. Code Ann. § 22.02(a). Section 22.01(a) provides a person commits assault if the person (1) intentionally, knowingly, or recklessly causes bodily injury to another, or (2) intentionally or knowingly threatens another with imminent bodily injury. See Tex. Pen. Code Ann. § 22.01(a).

Bodily injury assault is a "result of conduct" offense that can be committed intentionally, knowingly, or recklessly. *Marinos v. State*, 186 S.W.3d 167, 174 (Tex. App.-Austin 2006, pet. filed) (citing *Fuller v. State*, 819 S.W.2d 254, 255-56 (Tex. App.-Austin 1991, pet. ref'd)). The essential focus of a result of conduct statute is to punish the defendant for causing a specified result, here causing bodily injury. See *Jefferson*, 189 S.W.3d at 312; *Alvarado v. State*, 704 S.W.2d 36, 38-39 (Tex. Crim. App. 1985). In contrast, assault by threat is a "nature of conduct" offense that can only be committed intentionally or knowingly. *Marionos*, 186 S.W.3d at 174. (citing *Guzman v. State*, 988 S.W.2d 884, 887 (Tex. App.-Corpus Christi 1999, no pet.)). The focus of a nature of conduct statute is the intent to punish a specified conduct, here threatening others. See *Alvarado*, 704 S.W.2d at 38-39. Assault by threat requires only fear of imminent bodily injury and does not require a finding of actual bodily injury. Thus, assault by threat and assault by injury differ in the conduct element, the culpability element, and the required result.(fn1) Therefore, we cannot conclude that assault by threat and assault by injury are merely underlying "brute facts" or means that make up a particular element of a single assault. Rather, we conclude that the legislature created separate offenses. See *Gonzales v. State*, 2006 WL 869946, at *5 (Tex. App.-Waco April 5, 2006, no pet. h.); *Marionos*, 186 S.W.3d at 174.

We find support for this conclusion in the fact that the different types of conduct proscribed by section 22.01(a) are found in different subsections, and are separated by "or," which is some indication that any one of the proscribed conduct provisions constitutes an offense. See *Vick v. State*, 991 S.W.2d 830, 832-33 (Tex. 1999). Further, the focus of the two subsections is different: one is intended to punish the defendant for causing bodily injury; the other is intended to punish a defendant for engaging in threatening behavior. Finally, we find support for this determination because the legislature assigned different punishment ranges to the two offenses. See Tex. Pen. Code Ann. § 22.01(b), (c). Unless committed against certain people, bodily injury assault is a Class A misdemeanor punishable by confinement in jail, while assault by threat is a Class C misdemeanor punishable by a fine only. See Tex. Pen. Code Ann. §§ 12.21, 12.23, 22.01(b), (c) (Vernon 2003 & Supp. 2005).

After reviewing the language of the statute and applicable law, we conclude assault by threat and assault by injury are different statutory offenses, not just two manner and means of committing a single offense of aggravated assault. See *Gonzales*, 2006 WL 869946 at *5; *Marinos*, 186 S.W.3d at 175. Consequently, even though the State sought only a single aggravated assault conviction, the trial court's charge allowed the jury to convict appellant without requiring the jury to unanimously agree on whether appellant committed aggravated bodily injury assault or aggravated assault by threat. Therefore, we conclude the charge was erroneous.

Because appellant did not object to the jury charge, we now turn to the question of whether appellant suffered egregious harm as a result of the error. *Ngo*, 175 S.W.3d at 749; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Under the *Almanza* standard, the record must show that a defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Ngo*, 175 S.W.3d at 750. Errors that result in egregious harm are those that affect "the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory." Id. When determining whether appellant suffered egregious harm, we consider the record as a whole, including the entire jury charge, the contested issues and weight of the probative evidence, and the arguments of counsel. *Almanza*, 686 S.W.2d at 171.

We begin our harm analysis by noting that, like the jury charge in *Ngo*, this is not a case in which the jury charge is simply missing an important word-"unanimously." As in *Ngo*, the State told the jury in closing argument that it did not have to agree whether appellant committed assault by threat or bodily injury assault. Further, the evidence in this case was contested. Appellant testified and denied the offenses. She claimed she did not intend to hit Thomas but rather it was an accident. Some jurors could have believed appellant and determined that she did not intend to threaten or injure Thomas, but concluded her conduct in driving so close to Thomas was reckless and resulted in his injury. Other jurors could have disbelieved appellant and determined that she intentionally and knowingly followed Thomas too closely to threaten him, resulting only in his fear of imminent bodily injury. See *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991) (fact finder is free to accept or reject any or all of witness's testimony). Finally, the record reflects the jury had some confusion regarding the unanimity requirement as evidenced by the note it sent out asking, "Does an acquittal of a charge

need to be unanimous in order to proceed to a lesser (next charge)?" In response, the trial court instructed the jury to refer to the charge-a charge that does not contain a unanimity instruction with regard to the two aggravated assault offenses. While we do not know the source of the jury's confusion, the charge itself did not require a unanimous verdict as to one or the other of the aggravated assault offenses, and the jury could have quite reasonably returned a non-unanimous verdict.

After reviewing the record in this case, we cannot conclude the jury returned a unanimous verdict. In fact, the record shows the jury was confused about unanimity. In light of this record, we conclude appellant suffered egregious harm. See *Ngo*, 175 S.W.3d at 752. We sustain appellant's first issue.

Due to our disposition of appellant's first issue, we need not address appellant's remaining issues. Tex. R. App. P. 47.1

We reverse the trial court's judgment and remand for further proceedings.

CAROLYN WRIGHT JUSTICE

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Footnotes:

1. The elements of a criminal offense are (1) the forbidden conduct; (2) the required culpability; (3) any required result; and (4) the negation of any exception to the offense. Tex. Pen. Code Ann. § 1.07(a)(22).

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# WHAT EVERY JUDGE MUST KNOW ABOUT EXTRATERRITORIAL JURISDICTION

**Presented by**

**Lawrence G. Provins**
**Assistant City Attorney**
**Pearland**

By the end of the session, judges will be able to:

- Determine the extraterritorial limits of their respective cities;
- Discuss jurisdiction and venue in relation to an area's extraterritorial jurisdiction; and,
- Discuss strategies for resolving dispositive motions based on extraterritorial jurisdiction.

# EXTRATERRITORIAL JURISDICTION

## What is it?

- Area contiguous to the corporate boundaries of municipality, and

## Extent of ETJ

- within one-half mile, muni. with fewer than 5,000 inhabitants;
- within one mile, muni. with 5,000 inhabitants to 24,999 inhabitants;
- within two miles, muni. with 25,000 to 49,999 inhabitants;
- within 3 ½ miles, muni. with 50,000 to 99,999 inhabitants; or
- within five miles, muni. with 100,000 or more inhabitants
- L.G.C. 42.021

## **Purpose** of ETJ

To promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.

L.G.C. 42.001

## L.G.C. 51.001

Governing body of mun. may adopt, …an ord. , rule, or police regulation that:

(1) is for the good gov't, peace, or order of the mun. or for the trade and commerce

(2) is nec. or proper for carrying out a power granted by law

## Common Areas of Regulation

- Industrial Districts
- Planned Unit Development Districts
- Nuisance Regulations
- Subdivision Regulations
- Development Plat Regulations
- Sign Regulations
- Impact Fees
- Municipal Drainage Utility Systems

THE STATE OF TEXAS
VS.
_____

IN THE MUNICIPAL COURT

CITY OF _____, TX

COMPLAINT

I, the undersigned affiant, do solemnly swear that I have good reason to believe and do believe that one -_____ on or about the _____ day of _____, 20____, and before the making and filing of this complaint, within the territorial limits of the city of -_____, Texas,

Did then and there knowingly continue to further develop a site, located at _____, at a time when a stop work order based on a failed inspection had been posted on the site, contrary to the Land Development Code of the City of _____,

Against the peace and dignity of the state.

## **Factors used by appellate courts to determine if a city can enforce an ordinance in the ETJ:**

- The type of municipality
- Jurisdiction
- Subject matter of ordinance
- Venue

## Types of Municipalities

- Type A General-Law
- Type B General-Law
- Type C General-Law
  - Home-Rule,
  - Special-Law

- L.G.C.5.001-5.005

## Jurisdiction

The authority or power conferred upon a court by the constitution and laws of the State that allow a court to hear and try a case.

State v. Riewe, 13 S.W. 3d 408 (Tex. Crim. App. 2000) .

## General rule

- City's powers extend only within the city's corporate limits unless the power is expressly or impliedly extended by the Texas Constitution or by statute

- Davis v. City of Taylor, 67 S.W. 2d 1033 (1934)

## Authority Granted

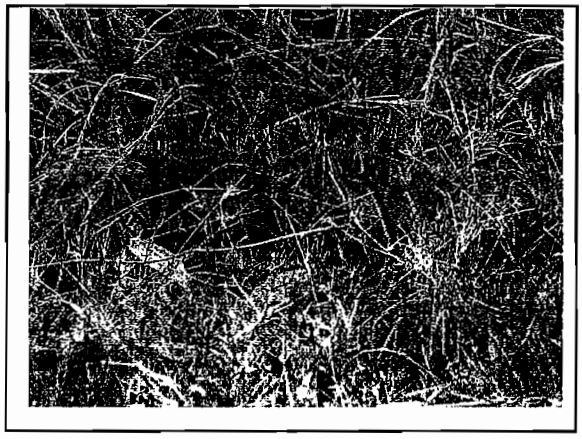
- Texas Constitution, Article 5, Section 1
- L.G.C. 54.001
  governing body may enforce each rule,...
- G. C., Section 29.003 (all mun. cts)
  (a) Exclusive: within terr limits and prop owned in etj that arise under ord. of mun, or airport board
  (b) Concurrent w/ JP w/in terr. limits for cases under state law

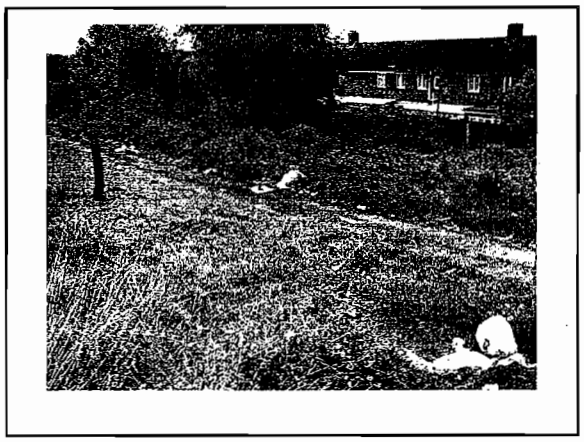
G.C. 30.00005 (courts of record)
same as general law courts and additional cases arising under:
215.072 of the L.G.C.,
217.042 of the L.G.C.,
341.903 of the L.G.C., and
401.002 of the L.G.C.

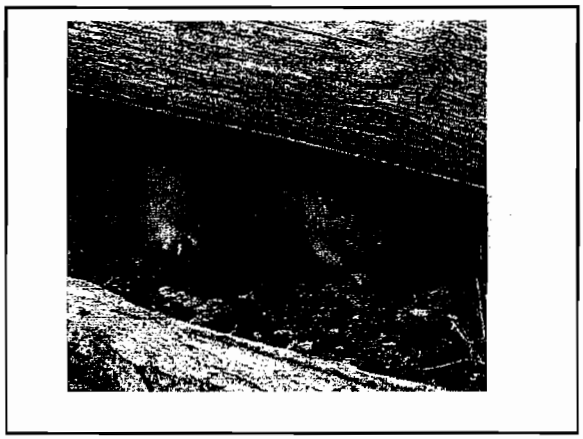
- concurrent juris with a district or a county court at law under Subchapter B, Ch. 54, L.G.C., within the mun's terr. limits and prop owned by the mun. in the mun's etj for the purpose of enforcing health and safety and nuisance abatement ords;

L.G.C. 215.072

The municipality may inspect dairies, slaughterhouses, or slaughter pens, in or outside the mun. limits, from which milk or meat is furnished to the residents of the mun.

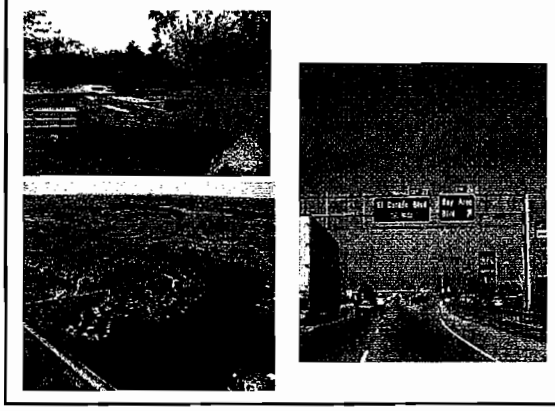




L.G.C. Section 217.042

(a) The municipality may define and prohibit any nuisance within the limits of the municipality and with 5,000 feet outside the limits.

(b) The municipality may enforce all ordinances necessary to prevent and summarily abate and remove a nuisance.



## L.G.C. Section 341.903

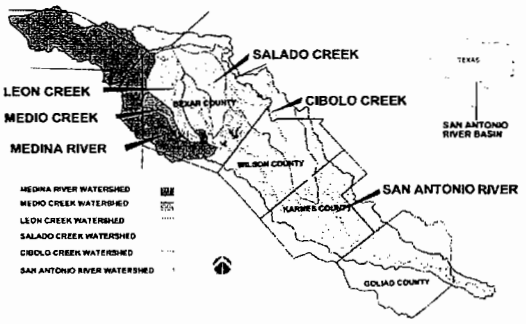
A home-rule municipality may police the following areas owned by and located outside the municipality:

(1) parks and grounds;

(2) lakes and land contiguous to and used in connection with a lake; and

(3) speedways and boulevards.

SAN ANTONIO RIVER BASIN WATERSHEDS




## L.G.C. Section 401.002

(a) A home-rule municipality may prohibit the pollution or degradation of and may police a stream, drain, recharge feature, recharge area, or tributary that may constitute or recharge the source of water supply of any municipality.

(b) A home-rule municipality may provide for the protection of and may police any watersheds.

(c) The authority granted by this section may be exercised inside the municipality's boundaries or inside the municipality's extraterritorial jurisdiction or outside the municipality's extraterritorial jurisdiction only if required to meet other state or federal requirements. The authority granted by this section for the protection of recharge, recharge areas, or recharge features of groundwater aquifers may be exercised outside the municipality's boundaries and within the extraterritorial jurisdiction provided the municipality exercising such authority has a population greater than 750,000 and the groundwater constitutes more than 75 percent of the municipality's source of water supply

## Procedure

- C.C.P. section 45.019(c) Complaint must allege the offense was committed in the territorial limits of the mun. in which the complaint was made
- Tex. Code Crim. Proc. Ann. art. 45.019(f): If the defendant does not object to a defect, error, or irregularity of form or substance in a charging instrument before the date on which the trial on the merits commences, the defendant waives and forfeits the right to object to the defect, error, or irregularity.

## Venue

- The place where the case may be tried. Soliz v. State, 97 S.W. 3d 137 (Tex Crim. App. 1964)
- Not a constituent element of the offense charged, therefore proved by a preponderance of ev. Fairfield v. State, 610 S.W.2d 771 (Tex. Crim. App. 1981)
- If the issue is timely raised, reversible error may result from the failure to prove as laid in the charging document. Black v. State, 645 S.W. 2d 789, 791 (Tex. Crim. App. 1983).

## Opinions

- Treadgill v. State
- AG Opinion JC-0025
- Parker v. City of Ft. Worth
- City of West Lake Hills v. Westwood Legal Defense Fund
- City of Austin v. Jamail
- State v. Blankenship

## Treadgill v. State

- Legislature impliedly conferred upon corporation court of city jurisdiction of prosecution for offenses committed outside corporate limits.
- Right to prohibit nuisances carries with it right to do all things necessary to the end, and this extends to prosecution and punishment in courts having jurisdiction of such offenses.
- There is no constitutional inhibition against trying an accused outside the county where the offense is committed or outside his county of residence.

## JC-0025

- Whether municipal court has jurisdiction over cases arising under nuisance ordinance prohibiting outdoor burning within 5,000 feet outside city limit?
- Where a municipality is authorized to adopt a nuisance ordinance applicable to conduct occurring outside city limits and where the municipality has adopted such an ordinance, a municipal court has implied jurisdiction over cases arising from violations of the ordinance that occur outside the city limits.

## Parker v. City of Ft. Worth

- A city cannot by ordinance make that a nuisance which is not one in fact.
- A nuisance per se is generally defined as an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.

## City of West Lake Hills v. Westwood Legal Defense Fund

The city could not enforce by criminal action an ordinance requiring licensing of private sewage facilities located with the city's etj because such an ordinance would be inconsistent with a state law that granted such powers to the Water Commission and the Texas Dept. of Water Resources.

## City of Austin v. Jamail

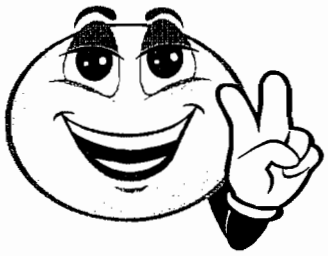
- A city must have express (or implied when such power is reasonably incident to those expressly granted) statutory authority to exercise its extraterritorial power.
- Under Water Code section requiring certain cities to develop and execute plans for controlling generalized waste discharges, city had authority to enforce, within its five mile ETJ, its watershed site development ordinance.

## State v. Blankenship

- Venue is not an element of the offense.
- Failure to prove venue as alleged is a non-constitutional error.
- Before a case will be overturned for failure to prove venue as alleged in the complaint, a harm analysis is required.

## Harm Analysis Factors:

- Article 45.019(c) of the CCP mandates that the prosecution allege the offense occurred with the territorial limits of the city.
- The nature of the error is that venue can not be proved as alleged.
- Exclusive original jurisdiction for city ordinance violations is in the municipal court.
- Does the complaint provide the defendant with sufficient notice that the violation occurred outside the territorial limits of the city?
- Did the State emphasize the error?
- Did the defendant have an opportunity to present a defense?



# EXTRATERRITORIAL JURISDICTION: WHAT IS IT

L.G.C. § 42.021. EXTENT OF EXTRATERRITORIAL JURISDICTION.

The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located:

(1) within one-half mile of those boundaries, in the case of a municipality with fewer than 5,000 inhabitants;

(2) within one mile of those boundaries, in the case of a municipality with 5,000 to 24,999 inhabitants;

(3) within two miles of those boundaries, in the case of a municipality with 25,000 to 49,999 inhabitants;

(4) within 3-1/2 miles of those boundaries, in the case of a municipality with 50,000 to 99,999 inhabitants; or

(5) within five miles of those boundaries, in the case of a municipality with 100,000 or more inhabitants.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C. § 42.022. EXPANSION OF EXTRATERRITORIAL JURISDICTION.

(a) When a municipality annexes an area, the extraterritorial jurisdiction of the municipality expands with the annexation to comprise, consistent with Section 42.021, the area around the new municipal boundaries.

(b) The extraterritorial jurisdiction of a municipality may expand beyond the distance limitations imposed by Section 42.021 to include an area contiguous to the otherwise existing extraterritorial jurisdiction of the municipality if the owners of the area request the expansion.

(c) The expansion of the extraterritorial jurisdiction of a municipality through annexation, request, or increase in the number of inhabitants may not include any area in the existing extraterritorial jurisdiction of another municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C. § 42.0225. EXTRATERRITORIAL JURISDICTION AROUND CERTAIN MUNICIPALLY OWNED PROPERTY.

(a) This section applies only to an area owned by a municipality that is:

(1) annexed by the municipality; and

(2) not contiguous to other territory of the municipality.

(b) Notwithstanding Section 42.021, the annexation of an area described by Subsection (a) does not expand the extraterritorial jurisdiction of the municipality.

Added by Acts 1999, 76th Leg., ch. 1167, § 1, eff. Sept. 1, 1999.

L.G.C. § 54.001. GENERAL ENFORCEMENT AUTHORITY OF MUNICIPALITIES; PENALTY.

(a) The governing body of a municipality may enforce each rule, ordinance, or police regulation of the municipality and may punish a violation of a rule, ordinance, or police regulation.

(b) A fine or penalty for the violation of a rule, ordinance or police regulation may not exceed $500. However, a fine or penalty for the violation of a rule, ordinance, or police regulation that governs fire safety, zoning, or public health and sanitation, including dumping of refuse, may not exceed $2,000.

(c) This section applies to a municipality regardless of any contrary provision in a municipal charter.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, § 7(a), 87(e), eff. Aug. 28, 1989

L.G.C. § 42.001. PURPOSE OF EXTRATERRITORIAL JURISDICTION.

The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

# JURISDICTION

5 types of Municipalities:

1) Type A general-law municipality: L.G.C. § 5.001
2) Type B general-law municipality: L.G.C. § 5.002
3) Type C general-law municipality: L.G.C. § 5.003
4) Home-rule municipality: L.G.C. § 5.004
5) Special-law municipality: L.G.C. § 5.005

L.G.C. § 51.001. ORDINANCE, RULE, OR REGULATION NECESSARY TO CARRY OUT OTHER POWERS.

The governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that:

(1) is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality; and
(2) is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C. § 54.001. GENERAL ENFORCEMENT AUTHORITY OF MUNICIPALITIES; PENALTY.

(a) The governing body of a municipality may enforce each rule, ordinance, or police regulation of the municipality and may punish a violation of a rule, ordinance, or police regulation.
(b) A fine or penalty for the violation of a rule, ordinance, or police regulation may not exceed $500. However, a fine or penalty for the violation of a rule, ordinance, or police regulation that governs fire safety, zoning, or public health and sanitation, including dumping of refuse, may not exceed $2,000.
(c) This section applies to a municipality regardless of any contrary provision in a municipal charter.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, § 7(a), 87(e), eff. Aug. 28, 1989.

A city can exercise only those powers that are expressly or impliedly conferred by law, and a power will be implied only when such power is reasonably incident to those expressly granted or is essential to the object and purposes of the corporation. Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39 (1934); Anderson v. City of San Antonio, 67 S.W.2d 1036, 123 Tex. 163 (1934); Foster v. City of Waco, 255 S.W. 1104, 113 Tex. 352 (1923).

Jurisdiction is the authority or power conferred upon a court by the constitution and laws of the State that allows a court to hear and try a case. *State v. Riewe*, 13 S.W.3d 408, 411 (Tex. Crim. App. 2000).

C.C.P Art. 4.14. JURISDICTION OF MUNICIPAL COURT.

(a) A municipal court, including a municipal court of record, shall have exclusive original jurisdiction within the territorial limits of the municipality in all criminal cases that:
    (1) arise under the ordinances of the municipality; or
    (2) are punishable by a fine not to exceed:
        (A) $2,000 in all cases arising under municipal ordinances or resolutions, rules, or orders of a joint board that govern fire safety, zoning, or public health and sanitation, including dumping of refuse; or
        (B) $500 in all other cases arising under a municipal ordinance or a resolution, rule, or order of a joint board.

(b) The municipal court has concurrent jurisdiction with the justice court of a precinct in which the municipality is located in all criminal cases arising under state law that:
    (1) arise within the territorial limits the municipality and are punishable by fine only, as defined in Subsection (c) of this article; or

G.C. § 29.003. JURISDICTION.

(a) A municipal court, including a municipal court of record, shall have exclusive original jurisdiction within the municipality's territorial limits and property owned by the municipality located in the municipality's extraterritorial jurisdiction in all criminal cases that:
    (1) arise under:
        (A) the ordinances of the municipality; or
        (B) a resolution, rule, or order of a joint board operating an airport under Section 22.074, Transportation Code; and
    (2) are punishable by a fine not to exceed:
        (A) $2,000 in all cases arising under municipal ordinances or resolutions, rules, or orders of a joint board that govern fire safety, zoning, or public health and sanitation, including dumping of refuse; or
        (B) $500 in all other cases arising under a municipal ordinance or a resolution, rule, or order of a joint board.

(b) The municipal court has concurrent jurisdiction with the justice court of a precinct in which the municipality is located in all criminal cases arising under state law that arise within the municipality's territorial limits or property owned by the municipality located in the municipality's extraterritorial jurisdiction and that:
    (1) are punishable only by a fine, as defined in Subsection (c); or ...

(c) In this section, an offense which is punishable by "fine only" is defined as an offense that is punishable by fine and such sanctions, if any, as authorized by statute not consisting of confinement in jail or imprisonment.

G.C. § 30.00005. JURISDICTION.

(a) A municipal court of record has the jurisdiction provided by general law for municipal courts.

(b) The court has jurisdiction over criminal cases arising under ordinances authorized by Sections 215.072, 217.042, 341.903, and 401.002, Local Government Code.

(c) The governing body may by ordinance provide that the court has concurrent jurisdiction with a justice court in any precinct in which the municipality is located in criminal cases that arise within the territorial limits of the municipality and are punishable only by fine.

(d) The governing body of a municipality by ordinance may provide that the court has:
    (1) civil jurisdiction for the purpose of enforcing municipal ordinances enacted under Subchapter A, Chapter 214, Local Government Code, or Subchapter E, Chapter 683, Transportation Code;
    (2) concurrent jurisdiction with a district court or a county court at law under Subchapter B, Chapter 54, Local Government Code, within the municipality's

territorial limits and property owned by the municipality located in the municipality's extraterritorial jurisdiction for the purpose of enforcing health and safety and nuisance abatement ordinances; and ...

LGC § 215.072. DAIRIES; SLAUGHTERHOUSES.
The municipality may inspect dairies, slaughterhouses, or slaughter pens, in or outside the municipal limits, from which milk or meat is furnished to the residents of the municipality.
Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C. § 217.042. NUISANCE.
(a) The municipality may define and prohibit any nuisance within the limits of the municipality and within 5,000 feet outside the limits.
(b) The municipality may enforce all ordinances necessary to prevent and summarily abate and remove a nuisance.
Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

A public nuisance is anything that works injury, harm, or prejudice to an individual or the public or that obstructs, impairs, or destroys the reasonable, peaceful, and comfortable use of property. Alpha Enterprises, Inc. v. Houston, 411 S.W.2d 417, 1967 Tex. App. LEXIS 2866 (Tex. App., January 26, 1967) PPC Enters. v. Texas City, 76 F. Supp. 2d 750, 1999 U.S. Dist. LEXIS 18830 (D. Tex., December 1, 1999, Decided)

L.G.C. § 341.903. AUTHORITY OF HOME-RULE MUNICIPALITY TO POLICE MUNICIPALLY OWNED PROPERTY OUTSIDE MUNICIPALITY.
A home-rule municipality may police the following areas owned by and located outside the municipality:
(1) parks and grounds;
(2) lakes and land contiguous to and used in connection with a lake; and
(3) speedways and boulevards.
Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.,

L.G.C § 401.002. PROTECTION OF STREAMS AND WATERSHEDS BY HOME-RULE MUNICIPALITY.
(a) A home-rule municipality may prohibit the pollution or degradation of and may police a stream, drain, recharge feature, recharge area, or tributary that may constitute or recharge the source of water supply of any municipality.
(b) A home-rule municipality may provide for the protection of and may police any watersheds.
(c) The authority granted by this section may be exercised inside the municipality's boundaries or inside the extraterritorial jurisdiction or outside the municipality's extraterritorial jurisdiction only if required to meet other state or federal requirements. The authority granted by this section for the protection of recharge, recharge areas, or recharge features of groundwater aquifers may be exercised outside the municipality's boundaries and within the extraterritorial jurisdiction provided the municipality exercising such authority has a population greater than 750,000 and the groundwater constitutes more than 75 percent of the municipality's source of water supply.
Acts 1987, 70th Leg., ch.149, § 1, eff. Sept.1,1987. Amended by Acts 1997,75th Leg., ch.1010,§ 4.47,eff.Sept. 1, 1997.

It would be idle to say that, in the exercise of its police power, a city may prohibit the operation of a nuisance within the corporate limits but could not do so if the nuisance was beyond the limits of the city but so situated as to constitute the same nuisance or hazard to the public health and safety as if within the city limits. To so limit and circumscribe the power of the

city in such an instance could defeat the power of the city to prohibit the maintenance of the nuisance. Treadgill v. State, 275 S.W. 2d 658 (Tex. Crim. App. 1954)

# CHAPTER 214. MUNICIPAL REGULATION OF HOUSING AND OTHER STRUCTURES
# SUBCHAPTER A. DANGEROUS STRUCTURES

L.G.C.§ 214.001. AUTHORITY REGARDING SUBSTANDARD BUILDING.

(a) A municipality may, by ordinance, require the vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is:
  (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare;
  (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or
  (3) boarded up, fenced, or otherwise secured in any manner if:
    (A) the building constitutes a danger to the public even though secured from entry; or
    (B) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subdivision (2).

(b) The ordinance must:
  (1) establish minimum standards for the continued use and occupancy of all buildings regardless of the date of their construction;
  (2) provide for giving proper notice to the owner of a building; and
  (3) provide for a public hearing to determine whether a building complies with the standards set out in the ordinance.

(c) A notice of a hearing sent to an owner, lienholder, or mortgagee under this section must include a statement that the owner, lienholder, or mortgagee will be required to submit at the hearing proof of the scope of any work that may be required to comply with the ordinance and the time it will take to reasonably perform the work.

(d) After the public hearing, if a building is found in violation of standards set out in the ordinance, the municipality may order that the building be vacated, secured, repaired, removed, or demolished by the owner within a reasonable time as provided by this section. The municipality also may order that the occupants be relocated within a reasonable time. If the owner does not take the ordered action within the allotted time, the municipality shall make a diligent effort to discover each mortgagee and lienholder having an interest in the building or in the property on which the building is located. The municipality shall personally deliver or send by certified mail, return receipt requested, to each identified mortgagee and lienholder a notice containing:
  (1) an identification, which is not required to be a legal description, of the building and the property on which it is located;
  (2) a description of the violation of municipal standards that is present at the building; and
  (3) a statement that the municipality will vacate, secure, remove, or demolish the building or relocate the occupants of the building if the ordered action is not taken within a reasonable time.

(e) As an alternative to the procedure prescribed by Subsection (d), the municipality may make a diligent effort to discover each mortgagee and lienholder before conducting the public hearing and may give them a notice of and an opportunity to comment at the

hearing. In addition, the municipality may file notice of the hearing in the Official Public Records of Real Property in the county in which the property is located. The notice must contain the name and address of the owner of the affected property if that information can be determined, a legal description of the affected property, and a description of the hearing. The filing of the notice is binding on subsequent grantees, lienholders, or other transferees of an interest in the property who acquire such interest after the filing of the notice, and constitutes notice of the hearing on any subsequent recipient of any interest in the property who acquires such interest after the filing of the notice. If the municipality operates under this subsection, the order issued by the municipality may specify a reasonable time as provided by this section for the building to be vacated, secured, repaired, removed, or demolished by the owner or for the occupants to be relocated by the owner and an additional reasonable time as provided by this section for the ordered action to be taken by any of the mortgagees or lienholders in the event the owner fails to comply with the order within the time provided for action by the owner. Under this subsection, the municipality is not required to furnish any notice to a mortgagee or lienholder other than a copy of the order in the event the owner fails to timely take the ordered action.

(f) Within 10 days after the date that the order is issued, the municipality shall:
  (1) file a copy of the order in the office of the municipal secretary or clerk, if the municipality has a population of 1.9 million or less; and
  (2) publish in a newspaper of general circulation in the municipality in which the building is located a notice containing:
    (A) the street address or legal description of the property;
    (B) the date of the hearing;
    (C) a brief statement indicating the results of the order; and
    (D) instructions stating where a complete copy of the order may be obtained.

(g) After the hearing, the municipality shall promptly mail by certified mail, return receipt requested, or personally deliver a copy of the order to the owner of the building and to any lienholder or mortgagee of the building. The municipality shall use its best efforts to determine the identity and address of any owner, lienholder, or mortgagee of the building.

(h) In conducting a hearing authorized under this section, the municipality shall require the owner, lienholder, or mortgagee of the building to within 30 days:
  (1) secure the building from unauthorized entry; or
  (2) repair, remove, or demolish the building, unless the owner or lienholder establishes at the hearing that the work cannot reasonably be performed within 30 days.

(i) If the municipality allows the owner, lienholder, or mortgagee more than 30 days to repair, remove, or demolish the building, the municipality shall establish specific time schedules for the commencement and performance of the work and shall require the owner, lienholder, or mortgagee to secure the property in a reasonable manner from unauthorized entry while the work is being performed, as determined by the hearing official.

(j) A municipality may not allow the owner, lienholder, or mortgagee more than 90 days to repair, remove, or demolish the building or fully perform all work required to comply with the order unless the owner, lienholder, or mortgagee:
  (1) submits a detailed plan and time schedule for the work at the hearing; and
  (2) establishes at the hearing that the work cannot reasonably be completed within 90 days because of the scope and complexity of the work.

(k) If the municipality allows the owner, lienholder, or mortgagee more than 90 days to complete any part of the work required to repair, remove, or demolish the building, the municipality shall require the owner, lienholder, or mortgagee to regularly submit progress reports to the municipality to demonstrate compliance with the time schedules established for commencement and performance of the work. The order may require that the owner, lienholder, or mortgagee appear before the hearing official or the

hearing official's designee to demonstrate compliance with the time schedules. If the owner, lienholder, or mortgagee owns property, including structures or improvements on property, within the municipal boundaries that exceeds $100,000 in total value, the municipality may require the owner, lienholder, or mortgagee to post a cash or surety bond in an amount adequate to cover the cost of repairing, removing, or demolishing a building under this subsection. In lieu of a bond, the municipality may require the owner, lienholder, or mortgagee to provide a letter of credit from a financial institution or a guaranty from a third party approved by the municipality. The bond must be posted, or the letter of credit or third party guaranty provided, not later than the 30th day after the date the municipality issues the order.

(l) In a public hearing to determine whether a building complies with the standards set out in an ordinance adopted under this section, the owner, lienholder, or mortgagee has the burden of proof to demonstrate the scope of any work that may be required to comply with the ordinance and the time it will take to reasonably perform the work.

(m) If the building is not vacated, secured, repaired, removed, or demolished, or the occupants are not relocated within the allotted time, the municipality may vacate, secure, remove, or demolish the building or relocate the occupants at its own expense. This subsection does not limit the ability of a municipality to collect on a bond or other financial guaranty that may be required by Subsection (k).

(n) If a municipality incurs expenses under Subsection (m), the municipality may assess the expenses on, and the municipality has a lien against, unless it is a homestead as protected by the Texas Constitution, the property on which the building was located. The lien is extinguished if the property owner or another person having an interest in the legal title to the property reimburses the municipality for the expenses. The lien arises and attaches to the property at the time the notice of the lien is recorded and indexed in the office of the county clerk in the county in which the property is located. The notice must contain the name and address of the owner if that information can be determined with a reasonable effort, a legal description of the real property on which the building was located, the amount of expenses incurred by the municipality, and the balance due.

(o) If the notice is given and the opportunity to relocate the tenants of the building or to repair, remove, or demolish the building is afforded to each mortgagee and lienholder as authorized by Subsection (d), (e), or (g), the lien is a privileged lien subordinate only to tax liens.

(p) A hearing under this section may be held by a civil municipal court.

(q) A municipality satisfies the requirements of this section to make a diligent effort, to use its best efforts, or to make a reasonable effort to determine the identity and address of an owner, a lienholder, or a mortgagee if the municipality searches the following records:

(1) county real property records of the county in which the building is located;
(2) appraisal district records of the appraisal district in which the building is located;
(3) records of the secretary of state;
(4) assumed name records of the county in which the building is located;
(5) tax records of the municipality; and
(6) utility records of the municipality.

(r) When a municipality mails a notice in accordance with this section to a property owner, lienholder, or mortgagee and the United States Postal Service returns the notice as "refused" or "unclaimed," the validity of the notice is not affected, and the notice is considered delivered.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, § 87(j), eff. Aug. 28, 1989; Acts 1989, 71st Leg., ch. 743, § 1, eff. Aug. 28, 1989; Acts 1993, 73rd Leg., ch. 836, § 10, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 359, § 1, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 362, § 1, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 357, § 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 413, § 10, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 701, § 2, eff. Sept. 1, 2003.

L.G.C.§ 214.0011. ADDITIONAL AUTHORITY TO SECURE SUBSTANDARD BUILDING.

(a) A municipality by ordinance may establish minimum standards for the use and occupancy of buildings in the municipality regardless of the date of their construction and may adopt other ordinances as necessary to carry out this section.

(b) The municipality may secure a building the municipality determines:
  (1) violates the minimum standards; and
  (2) is unoccupied or is occupied only by persons who do not have a right of possession to the building.

(c) Before the 11th day after the date the building is secured, the municipality shall give notice to the owner by:
  (1) personally serving the owner with written notice;
  (2) depositing the notice in the United States mail addressed to the owner at the owner's post office address;
  (3) publishing the notice at least twice within a 10-day period in a newspaper of general circulation in the county in which the building is located if personal service cannot be obtained and the owner's post office address is unknown; or
  (4) posting the notice on or near the front door of the building if personal service cannot be obtained and the owner's post office address is unknown.

(d) The notice must contain:
  (1) an identification, which is not required to be a legal description, of the building and the property on which it is located;
  (2) a description of the violation of the municipal standards that is present at the building;
  (3) a statement that the municipality will secure or has secured, as the case may be, the building; and
  (4) an explanation of the owner's entitlement to request a hearing about any matter relating to the municipality's securing of the building.

(e) The municipality shall conduct a hearing at which the owner may testify or present witnesses or written information about any matter relating to the municipality's securing of the building if, within 30 days after the date the municipality secures the building, the owner files with the municipality a written request for the hearing. The municipality shall conduct the hearing within 20 days after the date the request is filed.

(f) A municipality has the same authority to assess expenses under this section as it has to assess expenses under Section 214.001(n). A lien is created under this section in the same manner that a lien is created under Section 214.001(n) and is subject to the same conditions as a lien created under that section.

(g) The authority granted by this section is in addition to that granted by Section 214.001.

Added by Acts 1991, 72nd Leg., ch. 13, § 1, eff. April 2, 1991. Amended by Acts 2001, 77th Leg., ch. 1420, § 12.104, eff. Sept. 1, 2001.

L.G.C.§ 214.00111. ADDITIONAL AUTHORITY TO PRESERVE SUBSTANDARD BUILDING AS HISTORIC PROPERTY.

(a) This section applies only to a municipality that is designated as a certified local government by the state historic preservation officer as provided by 16 U.S.C.A. Section 470 et seq.

(b) This section does not apply to an owner-occupied, single-family dwelling.

(c) Before a notice is sent or a hearing is conducted under Section 214.001, the historic preservation board of a municipality may review a building described by Section 214.001(a) to determine whether the building can be rehabilitated and designated:
  (1) on the National Register of Historic Places;
  (2) as a Recorded Texas Historic Landmark; or
  (3) as historic property through a municipal historic designation.

(d) If a municipal historic preservation board reviews a building, the board shall submit a written report to the municipality indicating the results of the review conducted under this

section before a public hearing is conducted under Section 214.001.

(e) If the municipal historic preservation board report determines that the building may not be rehabilitated and designated as historic property, the municipality may proceed as provided by Section 214.001.

(f) If the municipal historic preservation board report determines that the building may be rehabilitated and designated as historic property, the municipality may not permit the building to be demolished for at least 90 days after the date the report is submitted. During this 90-day period, the municipality shall notify the owner and attempt to identify a feasible alternative use for the building or locate an alternative purchaser to rehabilitate and maintain the building. If the municipality is not able to locate the owner or if the owner does not respond within the 90-day period, the municipality may appoint a receiver as provided by Section 214.003.

(g) The municipality may require the building to be demolished as provided by Section 214.001 after the expiration of the 90-day period if the municipality is not able to:
(1) identify a feasible alternative use for the building
(2) locate an alternative purchaser to rehabilitate and maintain the building; or
(3) appoint a receiver for the building as provided by Section 214.003.

(h) An owner of a building described by Section 214.001(a) is not liable for penalties related to the building that accrue during the 90-day period provided for disposition of historic property under this section.

Added by Acts 1995, 74th Leg., ch. 158, § 1, eff. Aug. 28, 1995.

L.G.C.§ 214.0012. JUDICIAL REVIEW.

(a) Any owner, lienholder, or mortgagee of record of property jointly or severally aggrieved by an order of a municipality issued under Section 214.001 may file in district court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be filed by an owner, lienholder, or mortgagee within 30 calendar days after the respective dates a copy of the final decision of the municipality is personally delivered or mailed to them by first class mail, certified return receipt requested, or such decision shall become final as to each of them upon the expiration of each such 30 calendar day period.

(b) On the filing of the petition, the court may issue a writ of certiorari directed to the municipality to review the order of the municipality and shall prescribe in the writ the time within which a return on the writ must be made, which must be longer than 10 days, and served on the relator or the relator's attorney.

(c) The municipality may not be required to return the original papers acted on by it, but it is sufficient for the municipality to return certified or sworn copies of the papers or of parts of the papers as may be called for by the writ.

(d) The return must concisely set forth other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(e) The issuance of the writ does not stay proceedings on the decision appealed from.

(f) Appeal in the district court shall be limited to a hearing under the substantial evidence rule. The court may reverse or affirm, in whole or in part, or may modify the decision brought up for review.

(g) Costs may not be allowed against the municipality.

(h) If the decision of the municipality is affirmed or not substantially reversed but only modified, the district court shall allow to the municipality all attorney's fees and other costs and expenses incurred by it and shall enter a judgment for those items, which may be entered against the property owners, lienholders, or mortgagees as well as all persons subject to the proceedings before the municipality.

Added by Acts 1993, 73rd Leg., ch. 836, § 11, eff. Sept. 1, 1993.
Amended by Acts 2001, 77th Leg., ch. 413, § 12, eff. Sept. 1, 2001.

L.G.C.§ 214.0015. ADDITIONAL AUTHORITY REGARDING SUBSTANDARD BUILDING.

(a) This section applies only to a municipality that has adopted an ordinance under Section 214.001.

(b) In addition to the authority granted to the municipality by Section 214.001, after the expiration of the time allotted under Section 214.001(d) or (e) for the repair, removal, or demolition of a building, the municipality may:

(1) repair the building at the expense of the municipality and assess the expenses on the land on which the building stands or to which it is attached and may provide for that assessment, the mode and manner of giving notice, and the means of recovering the repair expenses; or

(2) assess a civil penalty against the property owner for failure to repair, remove, or demolish the building and provide for that assessment, the mode and manner of giving notice, and the means of recovering the assessment.

(c) The municipality may repair a building under Subsection (b) only to the extent necessary to bring the building into compliance with the minimum standards and only if the building is a residential building with 10 or fewer dwelling units. The repairs may not improve the building to the extent that the building exceeds minimum housing standards.

(d) The municipality shall impose a lien against the land on which the building stands or stood, unless it is a homestead as protected by the Texas Constitution, to secure the payment of the repair, removal, or demolition expenses or the civil penalty. Promptly after the imposition of the lien, the municipality must file for record, in recordable form in the office of the county clerk of the county in which the land is located, a written notice of the imposition of the lien. The notice must contain a legal description of the land.

(e) Except as provided by Section 214.001, the municipality's lien to secure the payment of a civil penalty or the costs of repairs, removal, or demolition is inferior to any previously recorded bona fide mortgage lien attached to the real property to which the municipality's lien attaches if the mortgage lien was filed for record in the office of the county clerk of the county in which the real property is located before the date the civil penalty is assessed or the repair, removal, or demolition is begun by the municipality. The municipality's lien is superior to all other previously recorded judgment liens.

(f) Any civil penalty or other assessment imposed under this section accrues interest at the rate of 10 percent a year from the date of the assessment until paid in full.

(g) The municipality's right to the assessment lien may not be transferred to third parties.

(h) In any judicial proceeding regarding enforcement of municipal rights under this section, the prevailing party is entitled to recover reasonable attorney's fees from the nonprevailing party.

(i) A lien acquired under this section by a municipality for repair expenses may not be foreclosed if the property on which the repairs were made is occupied as a residential homestead by a person 65 years of age or older.

(j) The municipality by order may assess and recover a civil penalty against a property owner at the time of an administrative hearing on violations of an ordinance, in an amount not to exceed $1,000 a day for each violation or, if the owner shows that the property is the owner's lawful homestead, in an amount not to exceed $10 a day for each violation, if the municipality proves:

(1) the property owner was notified of the requirements of the ordinance and the owner's need to comply with the requirements; and

(2) after notification, the property owner committed an act in violation of the ordinance or failed to take an action necessary for compliance with the ordinance.

(k) An assessment of a civil penalty under Subsection (j) is final and binding and constitutes prima facie evidence of the penalty in any suit brought by a municipality in a court of competent jurisdiction for a final judgment in accordance with the assessed penalty.

(l) To enforce a civil penalty under this subchapter, the clerk or secretary of the

municipality must file with the district clerk of the county in which the municipality is located a certified copy of an order issued under Subsection (j) stating the amount and duration of the penalty. No other proof is required for a district court to enter a final judgment on the penalty.

Added by Acts 1989, 71st Leg., ch. 1, § 49(a), eff. Aug. 28, 1989. Amended by Acts 1989, 71st Leg., ch. 743, § 2, 3, eff. Aug. 28, 1989; Acts 1995, 74th Leg., ch. 359, § 2, eff. Aug. 28, 1995; Acts 2001, 77th Leg., ch. 1420, § 12.105, eff. Sept. 1, 2001.

L.G.C.§ 214.002. REQUIRING REPAIR, REMOVAL, OR DEMOLITION OF BUILDING OR OTHER STRUCTURE.

(a) If the governing body of a municipality finds that a building, bulkhead or other method of shoreline protection, fence, shed, awning, or other structure, or part of a structure, is likely to endanger persons or property, the governing body may:
  (1) order the owner of the structure, the owner's agent, or the owner or occupant of the property on which the structure is located to repair, remove, or demolish the structure, or the part of the structure, within a specified time; or
  (2) repair, remove, or demolish the structure, or the part of the structure, at the expense of the municipality, on behalf of the owner of the structure or the owner of the property on which the structure is located, and assess the repair, removal, or demolition expenses on the property on which the structure was located.

(b) The governing body shall provide by ordinance for:
  (1) the assessment of repair, removal, or demolition expenses incurred under Subsection (a)(2);
  (2) a method of giving notice of the assessment; and
  (3) a method of recovering the expenses.

(c) The governing body may punish by a fine, confinement in jail, or both a person who does not comply with an order issued under Subsection (a)(1).

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 743, § 4, eff. Aug. 28, 1989; Acts 1993, 73rd Leg., ch. 219, § 1, eff. Aug. 30, 1993. Added by Acts 2001, 77th Leg., ch. 413, § 11, eff. Sept. 1, 2001.

# L.G.C. CHAPTER 54
# SUBCHAPTER B. MUNICIPAL HEALTH AND SAFETY ORDINANCES

L.G.C.§ 54.012. CIVIL ACTION.

A municipality may bring a civil action for the enforcement of an ordinance:
  (1) for the preservation of public safety, relating to the materials or methods used to construct a building or other structure or improvement, including the foundation, structural elements, electrical wiring or apparatus, plumbing and fixtures, entrances, or exits;
  (2) relating to the preservation of public health or to the fire safety of a building or other structure or improvement, including provisions relating to materials, types of construction or design, interior configuration, illumination, warning devices, sprinklers or other fire suppression devices, availability of water supply for extinguishing fires, or location, design, or width of entrances or exits;
  (3) for zoning that provides for the use of land or classifies a parcel of land according to the municipality's district classification scheme;
  (4) establishing criteria for land subdivision or construction of buildings, including

provisions relating to street width and design, lot size, building width or elevation setback requirements, or utility service specifications or requirements;

(5) implementing civil penalties under this subchapter for conduct classified by statute as a Class C misdemeanor;

(6) relating to dangerously damaged or deteriorated structures or improvements;

(7) relating to conditions caused by accumulations of refuse, vegetation, or other matter that creates breeding and living places for insects and rodents;

(8) relating to the interior configuration, design, illumination, or visibility of business premises exhibiting for viewing by customers while on the premises live or mechanically or electronically displayed entertainment intended to provide sexual stimulation or sexual gratification; or

(9) relating to point source effluent limitations or the discharge of a pollutant, other than from a non-point source, into a sewer system, including a sanitary or storm water sewer system, owned or controlled by the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 343, § 1, eff. June 14, 1989; Acts 1991, 72nd Leg., ch. 753, § 3, eff. June 16, 1991; Acts 1993, 73rd Leg., ch. 472, § 1, eff. Sept. 1, 1993.

L.G.C.§ 54.013. JURISDICTION; VENUE.

Jurisdiction and venue of an action under this subchapter are in the district court or the county court at law of the county in which the municipality bringing the action is located.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C.§ 54.014. PREFERENTIAL SETTING.

If the municipality submits to the court a verified motion that includes facts that demonstrate that a delay will unreasonably endanger persons or property, the court shall give a preference to the action brought by the municipality when setting cases filed under this subchapter.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C.§ 54.015. PROCEDURE.

(a) The only allegations required to be pleaded in an action brought under this subchapter are:

(1) the identification of the real property involved in the violation;

(2) the relationship of the defendant to the real property or activity involved in the violation;

(3) a citation to the applicable ordinance;

(4) a description of the violation; and

(5) a statement that this subchapter applies to the ordinance.

(b) The standard of proof is the same as for other suits for extraordinary relief.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C.§ 54.016. INJUNCTION.

(a) On a showing of substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant, the municipality may obtain against the owner or owner's representative with control over the premises an injunction that:

(1) prohibits specific conduct that violates the ordinance; and

(2) requires specific conduct that is necessary for compliance with the ordinance.

(b) It is not necessary for the municipality to prove that another adequate remedy or penalty for a violation does not exist or to show that prosecution in a criminal action has occurred or has been attempted.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C.§ 54.017. CIVIL PENALTY.

(a) In a suit against the owner or the owner's representative with control over the premises, the municipality may recover a civil penalty if it proves that:
  (1) the defendant was actually notified of the provisions of the ordinance; and
  (2) after the defendant received notice of the ordinance provisions, the defendant committed acts in violation of the ordinance or failed to take action necessary for compliance with the ordinance.

(b)A civil penalty under this section may not exceed $1,000 a day for a violation of an ordinance, except that a civil penalty under this section may not exceed $5,000 a day for a violation of an ordinance relating to point source effluent limitations or the discharge of a pollutant, other than from a non-point source, into a sewer system, including a sanitary or storm water sewer system, owned or controlled by the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 472, § 2, eff. Sept. 1, 1993.

L.G.C.§ 54.018. ACTION FOR REPAIR OR DEMOLITION OF STRUCTURE.

(a) The municipality may bring an action to compel the repair or demolition of a structure or to obtain approval to remove the structure and recover removal costs.

(b) In an action under this section, the municipality may also bring a claim for civil penalties under Section 54.017.

(c) The municipality may file a notice of lis pendens in the office of the county clerk. If the municipality files the notice, a subsequent purchaser or mortgagee who acquires an interest in the property takes the property subject to the enforcement proceeding and subsequent orders of the court.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

L.G.C.§ 54.019. IMPRISONMENT; CONTEMPT.

(a) A person is not subject to personal attachment or imprisonment for the failure to pay a civil penalty assessed under this subchapter.

(b) This subchapter does not affect the power of a court to imprison a person for contempt of valid court orders or the availability of remedies or procedures for the collection of a judgment assessing civil penalties. The remedies under Section 31.002, Civil Practice and Remedies Code, are preserved.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987 .

## MISCELLANEOUS REGULATIONS

L.G.C. § 212.002. RULES.

After a public hearing on the matter the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

LGC § 212.0025. CHAPTER-WIDE PROVISION RELATING TO REGULATION OF PLATS AND SUBDIVISIONS IN EXTRATERRITORIAL JURISDICTION.

The authority of a municipality under this chapter relating to the regulation of plats or subdivisions in the municipality's extraterritorial jurisdiction is subject to any applicable

limitation prescribed by an agreement under Section 242.001.
Added by Acts 2003, 78th Leg., ch. 523, § 6, eff. June 20, 2003.

LGC § 212.003. EXTENSION OF RULES TO EXTRATERRITORIAL JURISDICTION.

(a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads or the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:
  (1) the use of any building or property for business, industrial, residential, or other purposes;
  (2) the bulk, height, or number of buildings constructed on a particular tract of land;
  (3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage;
  (4) the number of residential units that can be built per acre of land; or
  (5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land if:
    (A) the facility meets the minimum standards established for water or wastewater facilities by state and federal regulatory entities; and
    (B) the developed tract of land is:
      (i) located in a county with a population of 2.8 million or more; and
      (ii) served by:
        (a) on-site septic systems constructed before September 1, 2001, that fail to provide adequate services; or
        (b) on-site water wells constructed before September 1, 2001, that fail to provide an adequate supply of safe drinking water.

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.

(c) The municipality is entitled to appropriate injunctive relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch.1, § 46(b), eff. Aug. 28, 1989; Acts 1989, 71st Leg., ch. 822, § 6, eff. Sept. 1, 1989; Acts 2001,77th Leg., ch. 68, § 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 731, § 3, eff. Sept. 1, 2003.

L.G.C. § 242.001. REGULATION OF SUBDIVISIONS IN EXTRATERRITORIAL JURISDICTION GENERALLY.

(a) This section applies only to a county operating under Sections 232.001-232.005 or Subchapter B, C, or E, Chapter 232, and a municipality that has extraterritorial jurisdiction in that county. Subsections (b)-(g) do not apply
  (1) within a county that contains extraterritorial jurisdiction of a municipality with a population of 1.9 million or more;
  (2) within a county within 50 miles of an international border, or to which Subchapter C, Chapter 232, applies; or
  (3) to a tract of land subject to a development agreement under Subchapter G, Chapter 212, or other provisions of this code.

(b) For an area in a municipality's extraterritorial jurisdiction, as defined by Section 212.001, a plat may not be filed with the county clerk without the approval of the governmental entity authorized under Subsection (c) or (d) to regulate subdivisions in

the area.

(c) Except as provided by Subsections (d)(3) and (4), a municipality and a county may not both regulate subdivisions and approve related permits in the extraterritorial jurisdiction of a municipality after an agreement under Subsection (d) is executed. The municipality and the county shall enter into a written agreement that identifies the governmental entity authorized to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction. For a municipality in existence on September 1, 2001, the municipality and county shall enter into a written agreement under this subsection on or before April 1, 2002. For a municipality incorporated after September 1, 2001, the municipality and county shall enter into a written agreement under this subsection not later than the 120th day after the date the municipality incorporates. On reaching an agreement, the municipality and county shall certify that the agreement complies with the requirements of this chapter. The municipality and the county shall adopt the agreement by order, ordinance, or resolution. The agreement must be amended by the municipality and the county if necessary to take into account an expansion or reduction in the extraterritorial jurisdiction of the municipality. The municipality shall notify the county of any expansion or reduction in the municipality's extraterritorial jurisdiction. Any expansion or reduction in the municipality's extraterritorial jurisdiction that affects property that is subject to a preliminary or final plat, a plat application, or an application for a related permit filed with the municipality or the county or that was previously approved under Section 212.009 or Chapter 232 does not affect any rights accrued under Chapter 245. The approval of the plat, any permit, a plat application, or an application for a related permit remains effective as provided by Chapter 245 regardless of the change in designation as extraterritorial jurisdiction of the municipality.

(d) An agreement under Subsection (c) may grant the authority to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction of a municipality as follows:

(1) the municipality may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Subchapter A of Chapter 212 and other statutes applicable to municipalities;

(2) the county may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Sections 232.001-232.005, Subchapter B or C, Chapter 232, and other statutes applicable to counties;

(3) the municipality and the county may apportion the area within the extraterritorial jurisdiction of the municipality with the municipality regulating subdivision plats and approving related permits in the area assigned to the municipality and the county regulating subdivision plats and approving related permits in the area assigned to the county; or

(4) the municipality and the county may enter into an interlocal agreement that:

(A) establishes one office that is authorized to:

(i) accept plat applications for tracts of land located in the extraterritorial jurisdiction;

(ii) collect municipal and county plat application fees in a lump-sum amount and

(iii) provide applicants one response indicating approval or denial of the plat application; and

(B) establishes a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land as authorized by Chapter 212, Sections 232.001-232.005, Subchapters B and C, Chapter 232, and other statutes applicable to municipalities and counties that will be enforced in the extraterritorial jurisdiction.

(e) In an unincorporated area outside the extraterritorial jurisdiction of a municipality, the municipality may not regulate subdivisions or approve the filing of plats, except as provided by The Interlocal Cooperation Act, Chapter 791, Government Code.

(f) If a certified agreement between a county and municipality as required by Subsection (c) is not in effect on or before the applicable date prescribed by Section 242.0015(a), the municipality and the county must enter into arbitration as provided by Section 242.0015. If the arbitrator or arbitration panel, as applicable, has not reached a decision in the 60-day period as provided by Section 242.0015, the arbitrator or arbitration panel, as applicable, shall issue an interim decision regarding the regulation of plats and subdivisions and approval of related permits in the extraterritorial jurisdiction of the municipality. The interim decision shall provide for a single set of regulations and authorize a single entity to regulate plats and subdivisions. The interim decision remains in effect only until the arbitrator or arbitration panel reaches a final decision.

(g) If a regulation or agreement adopted under this section relating to plats and subdivisions of land or subdivision development establishes a plan for future roads that conflicts with a proposal or plan for future roads adopted by a metropolitan planning organization, the proposal or plan of the metropolitan planning organization prevails.

(h) This subsection applies only to a county to which Subsections (b)-(g) do not apply, except that this subsection does not apply to a county subject to Section 242.002. For an area in a municipality's extraterritorial jurisdiction, as defined by Section 212.001, a plat may not be filed with the county clerk without the approval of both the municipality and the county. If a municipal regulation and a county regulation relating to plats and subdivisions of land conflict, the more stringent regulation prevails. However, if one governmental entity requires a plat to be filed for the subdivision of a particular tract of land in the extraterritorial jurisdiction of the municipality and the other governmental entity does not require the filing of a plat for that subdivision, the authority responsible for approving plats for the governmental entity that does not require the filing shall issue on request of the subdivider a written certification stating that a plat is not required to be filed for that subdivision of the land. The certification must be attached to a plat required to be filed under this subsection.

(i) Property subject to pending approval of a preliminary or final plat application filed after September 1, 2002, that is released from the extraterritorial jurisdiction of a municipality shall be subject only to county approval of the plat application and subsection does not apply to the simultaneous exchange of extraterritorial jurisdiction between two or more municipalities or an exchange of extraterritorial jurisdiction that is contingent on the subsequent approval by the releasing municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, § 46(c), 87(n), eff. Aug. 28, 1989; Acts 1997, 75th Leg., ch. 1428, § 1, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 404, § 26, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 736, § 2, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1028, § 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 523, § 1, 3(a), 4, eff. June 20, 2003.

L.G.C. § 245.003. ISSUANCE OF LOCAL PERMITS: APPLICABILITY OF CHAPTER.

This chapter applies only to a project in progress on or commenced after September 1, 1997. For purposes of this chapter a project was in progress on September 1, 1997, if:

(1) before September 1, 1997:

(A) a regulatory agency approved or issued one or more permits for the project; or

(B) an application for a permit for the project was filed with a regulatory agency; and

(3) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:

(A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;

(B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the project before September 1, 1997; or

(C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.

Added by Acts 1999, 76th Leg., ch. 73, § 2, eff. May 11, 1999.

L.G.C.§ 245.006. ENFORCEMENT OF CHAPTER.

(a) This chapter may be enforced only through mandamus or declaratory or injunctive relief.

(b) A political subdivision's immunity from suit is waived in regard to an action under this chapter.

Added by Acts 1999, 76th Leg., ch. 73, § 2, eff. May 11, 1999.
Amended by Acts 2005, 79th Leg., ch. 31, § 1, eff. Sept. 1, 2005.

T.W.C. § 26.177. WATER POLLUTION CONTROL DUTIES OF CITIES.

(a) A city may establish a water pollution control and abatement program for the city. If the watershed water quality assessment reports required by Section 26.0135 or other commission assessments or studies identify water pollution that is attributable to non-permitted sources in a city that has a population of 10,000 or more, the commission, after providing the city a reasonable time to correct the problem and after holding a public hearing, may require the city to establish a water pollution control and abatement program. The city shall employ or retain an adequate number of personnel on either a part-time or full-time basis as the needs and circumstances of the city may require, who by virtue of their training or experience are qualified to perform the water pollution control and abatement functions required to enable the city to carry out its duties and responsibilities under this section.

(b) The water pollution control and abatement program of a city shall encompass the entire city and, subject to Section 26.179 of this code, may include areas within its extraterritorial jurisdiction which in the judgment of the city should be included to enable the city to achieve the objectives of the city for the area within its territorial jurisdiction.

T.W.C. § 26.179. DESIGNATION OF WATER QUALITY PROTECTION ZONES IN CERTAIN AREAS.

## PROCEDURE AND VENUE

Tex. Code Crim. Proc. Ann. art. 45.019(c): A complaint filed in municipal court *must* allege that the offense was committed in the territorial limits of the municipality in which the complaint was made.

Tex. Code Crim. Proc. Ann. art. 45.019(f): If the defendant does not object to a defect, error, or irregularity of form or substance in a charging instrument before the date on which the trial on the merits commences, the defendant waives and forfeits the right to object to the defect, error, or irregularity. Nothing in this article prohibits a trial court from requiring that an objection to a charging instrument be made at an earlier time.

Venue means the place where the case may be tried. *Soliz v. State*, 97 S.W.3d 137, (Tex. Crim. App 1964).

Venue is not a constituent element of the offense charged. *Fairfield v. State, 610 S.W.2d 771, (Tex. Crim. App-1981), Skillern*, 890 S.W.2d at 860 (Tex. App-Austin, 1994, pet. Ref'd);

Venue is not a "criminative fact" and thus, not a constituent element of the offense, therefore it need not be proved beyond a reasonable doubt, but rather, by a preponderance of the evidence. *Fairfield v. State, 610 S.W.2d 771,(Tex. Crim. App-1981).*

Art. 13.17. [210] [257] [245] PROOF OF VENUE.
In all cases mentioned in this Chapter, the indictment or information, or any pleading in the case, may allege that the offense was committed in the county where the prosecution is carried on. To sustain the allegation of venue, it shall only be necessary to prove by the preponderance of the evidence that by reason of the facts in the case, the county where such prosecution is carried on has venue
Amended by Acts 1973, 63rd Leg., p. 978, ch. 399, Sec. 2(C), eff. Jan. 1, 1974.

If the issue of venue is timely raised, reversible error may result from the failure to prove venue as laid in the charging instrument. Black v. State, 645 S.W. 2d 789, 791 (Tex. Crim. App. 1983);. *Sander v. State*, 52 S.W.3d 909, 917 (Tex. App.--Beaumont 2001, pet. ref'd). *BUT*
Except for certain federal constitutional errors labeled by the United States Supreme Court as "structural," no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. . . . Appellate courts should not automatically foreclose the application of the harmless error test to certain categories of error. Where an error is shown to be harmless, it is not a ground for reversal, regardless of the category or label attached to that particular error. Cain v. State, 947 S.W. 2d 262 (Tex. Crim. App. 1997), *State v.Toney,979 S.W.2d 642,*(Tex. Crim. App.-1998)

## ETJ OPINIONS

*Treadgill v. State*, 160 Tex.Crim. 658, 275 S.W.2d 658 (Tex.Crim.App. 1954)

On June 5, 1953, there was a fire and explosion on the premises of the Alco Fireworks and Specialty Company. As a result of that fire, four people were killed, including two children and ninety-six people were injured. On June 24, 1953, the City of Houston passed Ordinance No. 8941 pursuant to what is now Section 217.042 of the Local Government Code and declared fireworks to be a nuisance and prohibited the presence of any fireworks within the city and within 5,000 feet of the city limits. In 1955, the Texas Court of Criminal Appeals held that when a state statute granted a municipality express authority to prohibit nuisances outside the city limits, the legislature impliedly granted jurisdiction upon the municipal court for the prosecution of those offenses. In this case[1] the court stated that "[i]t would be idle to say that, in the exercise of its police power, a city may prohibit the operation of a nuisance within the corporate limits but could not do so if the nuisance was beyond the limits of the city but so situated as to constitute the same nuisance or hazard to the public health and safety as if within the city limits. To so limit and circumscribe the power of the city in such an instance could defeat the power of the city or prohibit the maintenance of the nuisance." Id at 665

In regards to venue, the Court stated "...we have no constitutional inhibition against trying an accused outside the county where the offense is committed or outside the county of his residence. The only inhibition we have is statutory." Id at 666[1] "Such being true, it would follow that the legislature was authorized to confer upon corporation courts like power and authority to try cases coming within its jurisdiction but where the offense was committed outside the corporate limits." Id at 666

AG Opinion JC-0025 (1999).

Texas Attorney General John Cornyn extended the analysis of the *Treadgill* case to a City of Wylie ordinance that declared outdoor burning a nuisance and prohibited it within 5,000 feet of the city limits.[1]

*Parker v. City of Ft. Worth*, 281 S.W.2d 721, 723 (Tex.Civ.App.—Ft. Forth 1955, no writ)

A "nuisance" is anything that works injury, harm or prejudice to an individual or public, or which causes a well-founded apprehension of danger. A nuisance obstructs, impairs, or destroys the reasonable, peaceful and comfortable use of property.

City of West Lake Hills v. Westwood Legal Defense Fund, 598 S.W.2d 681, (Tex. Civ. App. Waco 1980, no writ).

The City of West Lake Hills was a general law city with a population of less than 5,000 people. In 1977, the City of Westlake Hills City Council passed an ordinance attempting to control pollution flowing from private sewage facilities. The ordinance required inspection and licensing of all such facilities existing with the city's limits or within the city's ETJ. The Westwood Legal Defense Fund was a coalition of homeowners that lived in a subdivision known as Westwood, which was located entirely outside the city limits but within the ETJ. In this case, the Westwood Legal Defense Fund applied for an injunction preventing the city from enforcing the application of the ordinance in the ETJ through criminal action. The Court ruled that the City could not enforce by criminal action an ordinance requiring licensing of private sewage facilities located with the city's ETJ because such an ordinance would be inconsistent with a state law that granted such powers to the Water Commission and the Texas Department of Water Resources.

*City of Austin v. Jamail, 662 S.w.2d 779, 782 (Tex. App.—Austin, 1983, writ dism'd w.o.j.)*

The City of Austin passed the Lake Austin Watershed Site Development Ordinance which required anyone building a structure to obtain a permit before construction or clearing of the land begins. The purpose of the ordinance was to minimize the amount of urban runoff by specifying the amount and slope of impervious surfaces, the amount of pre-construction clearing so as not to affect natural ground cover, the depth of fill material allowed, building foundation standards, and erosion control requirements. Mr. Jamail filed an injunctive action in the District Court in an attempt to prevent the city from enforcing this ordinance within its five-mile extraterritorial jurisdiction. The District Court relied on the City of West Lake Hills v. Westwood Legal Defense Fund and granted the injunction. The City of Austin appealed the Court of Appeals held that the city had the authority to enforce, within its five-mile extraterritorial jurisdiction, its watershed site development ordinance. The Court distinguished this case from Westwood by explaining how the court in the Westwood case mischaracterized the applicable Water Code provisions and that the city's enforcement of such laws were not inconsistent with state law.

*State v. Blankenship, 170 S.W.3d 676 (Tex.Crim.App.—Austin 2005, rehearing overruled).*

Mr. Blackenship was convicted in the Austin Municipal Court of Record for eight city ordinance offenses that occurred in the City's ETJ. The ordinance he was alleged to have been violating was adopted pursuant to Section 401.002(a) of the Texas Local Government Code.

In compliance with Article 45.019(c) of the Code of Criminal Procedure, each of the underlying complaints alleged that the offense occurred in the territorial limits of the City of Austin. On the day of trial, Blankenship attempted to file pretrial motions to quash each complaint on the basis that the complaints alleged that the offenses occurred in the territorial limits of the city when in fact the offenses occurred outside the city's territorial limits but in its ETJ. The motions were not accepted as they were untimely filed pursuant to the court's local rules. After the state rested its case, Blankenship moved for an instructed judgment of acquittal in each case on the basis that the State failed to prove, without dispute, that the offenses had occurred outside the territorial limits, but within the ETJ of the city, as stated in the complaint.

The county court reversed the eight convictions on Blankenship's asserted point of error that the State failed to prove requisite jurisdictional facts, and found that the State failed to plead or prove a necessary element of the offense and of the trial court's jurisdiction. The county court recognized the requirement of Article 45.019(c) but concluded it was "nonsense" to argue the complaint must allege the offense occurred within the territorial limits of a city when "the truth of the matter is that the offense, if any, occurred in the ETJ of the city." The County Court asserted that "because the prosecution did not prove an essential element of its case, this prosecution must fail."

In this case, the Court of Appeals asserted that the issue was not whether each complaint properly charged an offense or the proper manner of pleading each offense; but was the consequence of the failure of the prosecution to prove venue as laid under the particular circumstances of the case.

The court noted the venue is different from jurisdiction and that the terms are not synonymous. Jurisdiction is the authority or power conferred upon a court by the constitution and laws of the State that allows a court to hear and try a case. Venue denotes locality, and its prevailing meaning is the place of trial, the geographical location in which an action or proceeding should be brought to trial.

The court further noted that venue is not a constituent element of the offense charged. Venue must be proved only by a preponderance of the evidence. The failure of proof of venue by the prosecution does not negate the guilt of the accused. It must be remembered, however, that if the issue of venue is timely raised, reversible error may result from the failure to prove venue as laid in the charging instrument.

The State argued that the *Gollihar* standard, see Gollihar v. State, 46 S.W.3d 243 (Tex.Crim.App. 2001), applied and that the error was harmless because there was only an immaterial variance that did not prejudice Blankenship's substantial rights; therefore the convictions stand. The court rejected this argument asserting that the *Gollihar* standard applies to elements of the offense and venue is not an element of the offense. Blankenship asserted the long-standing rule that when venue is made an issue in the trial court, the failure to prove venue constitutes reversible error. The court rejected this rule as it was decided before the adoption of the Texas Rules of Appellate Procedure and its harmless error analysis provisions.

The court asserted that the failure to prove venue when the issue is raised at trial is subject to a harm analysis rather than an automatic reversal of the conviction and found that the error was non-constitutional. It then asserted that the non-constitutional error did not affect Blankenship's substantial rights as there was no showing that Blankenship was prevented from presenting a defense and that the error did not influence the trial judge.

Herman Treadgill v. State

No. 27,061

Court of Criminal Appeals of Texas

160 Tex. Crim. 658; 275 S.W.2d 658; 1955 Tex. Crim. App. LEXIS 1137

January 12, 1955

## CASE SUMMARY

**PROCEDURAL POSTURE:** The State of Texas filed a motion for rehearing after it was determined that a city did not have jurisdiction to try defendant for the violation of an ordinance that made it unlawful to sell fireworks beyond the city limits, but within 5000 feet of the city limits.

**OVERVIEW:** The State's motion for rehearing was granted after the court held that the city did not have jurisdiction to try defendant for the violation of a city ordinance that prohibited the sale of fireworks beyond the city limits, but within 5000 of said limits. The court determined that the city, in the exercise of its police power, had the authority to prohibit the sale of fireworks and to declare them a nuisance because of the danger to the public health and safety. Under Tex. Rev. Civ. Stat. art. 1175, § 19, the city was expressly authorized to define all nuisances and prohibit nuisances within the city and outside the city limits for a distance of 5000 feet. The court concluded that the corporation court of the city was the proper court for the prosecution of defendant for the violation of the nuisance ordinance. However, the court held that defendant's conviction could not stand because the fine assessed was not authorized by the ordinance since it was less than the fixed amount of punishment assessable.

**OUTCOME:** The court granted the State's motion for rehearing in part, overruled in part, reversed defendant's conviction, and remanded the case.

**CORE TERMS:** ordinance, nuisance, feet, fireworks, home rule, city limits, fine, territorial, distance, venue, public health and safety, expressly authorized, act charged, village, confer, police power, municipality, adjacent, judgment of conviction, jurisdiction to try, power to prohibit, original opinion, proper forum, unauthorized, inhibition, promulgate, prosecuted, disposed, peace, hear

### LexisNexis(R) Headnotes

HN1 Under Tex. Rev. Civ. Stat. art. 1175, § 19, the city of Houston is expressly authorized to define all nuisances and prohibit the same within the city and outside the city limits for a distance of 5000 feet.

HN2 Fireworks constitute such danger to the public health and safety as to constitute them a nuisance, and the sale thereof may be prohibited by municipalities in the exercise of their police power.

HN3 The legislature is authorized to confer upon the city of Houston the power to prohibit the sale of fireworks and the maintenance of the nuisance beyond its corporate limits for a

distance of 5,000 feet. Tex. Rev. Civ. Stat. art. 1175, § 19 furnishes the authority for such power.

HN4 The legislature is authorized to confer upon the city of Houston the right to prohibit the maintenance of the nuisance beyond the city limits as a necessary attribute of the power, in the first instance, to prohibit nuisances dangerous to the public health and safety of the city.

HN5 The corporation court of the city of Houston possesses jurisdiction "within the territorial limits" of that city in all criminal cases arising under the ordinances of that city and concurrent jurisdiction with the justice of the peace in all criminal cases arising under the criminal laws of the state in which punishment is by fine only and where the maximum fine may not exceed $ 200. Tex. Rev. Civ. Stat. arts. 1195, 12000c; and Tex. Code Crim. Proc. Ann. art. 62.

HN6 Under Tex. Code Crim. Proc. Ann. art. 190, any offense may be prosecuted in a county other than that in which the crime was committed if within 400 yards of the boundary.

HN7 In the State of Texas there is no constitutional inhibition against trying an accused outside the county where the offense is committed or outside the county of his residence. The only inhibition is statutory under Tex. Code Crim. Proc. Ann. art. 211.

HN8 The legislature of the state possesses the power to authorize one to be tried in a county or a jurisdiction other than that in which the offense is committed.

HN9 The right of a city to prohibit nuisances carries with it the right to do all things necessary to that end, which extends to prosecution and punishment in the courts having jurisdiction of such offense.

**HEADNOTES:**
**Ordinance -- Fireworks -- Sale -- Outside City Limits -- Valid.**

An ordinance, prohibiting the sale of fireworks, outside, but within five thousand feet of the limits of a home rule city, is valid.

**Corporation Courts -- Offenses -- Outside City -- May Try.**

Corporation courts may be authorized to try offenses originating outside the city limits.

**Ordinance Violation -- Punishment Less Than Fixed -- Unauthorized.**

Where the ordinance fixed the punishment for its violation at a fine of $ 200, a fine of $ 105 was unauthorized.

**JUDGES:** Davidson, Judge. Woodley, Judge, dissenting.

**OPINIONBY:** DAVIDSON

**OPINION: [*663] [**662]** ON STATE'S MOTION FOR REHEARING

Our original disposition of this case was based upon the proposition that the corporation court of the city of Houston was without jurisdiction to try appellant for a violation of the ordinance making it unlawful to sell fireworks beyond the city limits of the city of Houston but within 5,000 feet of said limits.

In reaching that conclusion, we expressly refrained from approving **[***2]** the validity of such an ordinance or the power of the city of Houston to enact and promulgate the same.

Appellee recognizes that under such holding and in order for a different conclusion to be reached by us, it must establish the validity of the ordinance and, in addition, the corporation court as a proper forum in which the ordinance might be enforced and violations thereof punished.

Under Sec. 19, Art. 1175, V.A.C.S., HN1 the city of Houston was expressly authorized to "define all nuisances and prohibit the same within the city and outside the city limits for a distance of five thousand feet."

**[*664]** It appears that it is now definitely settled by the courts of this and other jurisdictions that HN2 fireworks constitute such danger to the public health and safety as to constitute them a nuisance, and the sale thereof may be prohibited by municipalities in the exercise of their police power. Ex parte Clark, 139 Texas Cr. Rep. 385, 140 S.W. 2d 854; Cannon v. City of Dallas, et al, 263 S.W. 2d 288, and authorities there cited.

It is apparent, therefore, that the city of Houston had the power to prohibit the sale of fireworks within its corporate limits.

The next question arising **[***3]** is whether HN3 the legislature was authorized to confer upon the city of Houston the power to prohibit such sale and the maintenance of the nuisance beyond its corporate limits for a distance of 5,000 feet.

Here, again, Sec. 19 of Art. 1175, V.A.C.S., furnishes the authority for such power.

It would be idle to say that, in the exercise of its police power, a city may prohibit the operation of a nuisance within the corporate limits but could not do so if the nuisance was beyond the limits of the city but so situated as to constitute the same nuisance or hazard to the public health and safety as if within the city limits. To so limit and circumscribe the power of the city in such an instance could defeat the power of the city to prohibit the maintenance of the nuisance.

The conclusion is expressed that HN4 the legislature was authorized to confer upon the **[**663]** city of Houston the right to prohibit the maintenance of the nuisance beyond the city limits as a necessary attribute of the power, in the first instance, to prohibit nuisances dangerous to the public health and safety of the city.

This conclusion appears to be authorized, in principle at least, by 62 C.J.S., Municipal Corporations, **[***4]** Sec. 141, p. 283; O'Brien v. Amerman, et al, 247 S.W. 270; City of Rockford v. Hey, 9 N.E. 2d 317; City Transportation Company, Inc., v. Pharr, et al, 209 S.W. 2d 15.

In so far as it prohibited the sale of fireworks beyond the limits of the city of Houston but within 5,000 feet thereof, the ordinance is valid and warranted by express authority delegated by the legislature of this state.

**[*665]** The question remaining, then, is whether the corporation court of the city of Houston was a forum in which violations of that ordinance might be prosecuted.

We disposed of this question, originally, in the negative, because of our conclusion of a lack of jurisdiction in said corporation court.

Appellee earnestly challenges the correctness of that conclusion.

We now conclude that we were in error in so holding, basing such conclusion upon the proposition that the question as to the power of the corporation court to act was not one of jurisdiction but, rather, of venue.

HN5 The corporation court of the city of Houston possesses jurisdiction "within the territorial limits" of that city in all criminal cases arising under the ordinances of that city and concurrent jurisdiction with the **[***5]** justice of the peace in all criminal cases arising under the criminal laws of this state in which punishment is by fine only and where the maximum fine may not exceed two hundred dollars. Art. 1195, R.C.S.; Art. 12000c, V.A. C.S.; and Art. 62, V.A.C.C.P.

The right to prosecute for violations of the laws in a county other than that in which the crime was committed is not new in this state. Chapter Two of Title 4 of the Code of Criminal Procedure, Arts. 186-211, is especially devoted to that subject. Special attention is called to Art. 187, C.C.P., where prosecutions of land titles is expressly authorized to be maintained in Travis County, without regard to the county where the offense is committed. So, also, may one be tried for the crime of rape in various counties other than that in which the offense was committed, Art. 207, C.C.P. Indeed, by Art. 190, C.C.P., HN6 any offense may be prosecuted in a county other than that in which the crime was committed if within four hundred yards of the boundary.

The validity of these venue statutes has never been seriously questioned, nor has the right of the legislature to promulgate the same been denied. In this connection, attention should **[***6]** be called to the fact that HN7 in this state we have no constitutional inhibition against trying an accused outside the county where the offense is committed or outside the county of his residence. The only inhibition we have is statutory. Art. 211, C.C.P.

**[*666]** There is no escape, then, from the conclusion that HN8 the legislature of this state possessed the power to authorize one to be tried in a county or a jurisdiction other than that in which the offense is committed.

Such being true, it would follow that the legislature was also authorized to confer upon corporation courts like power and authority to try cases coming within its jurisdiction but where the offense was committed outside the corporate limits.

The question, then, is whether the legislature has so provided.

While it is true that the legislature of this state has not expressly so provided, no other conclusion but that it has done so may be drawn from that part of Sec. 19 of Art. 1175, V.A. C.S., by which the city of Houston is expressly authorized to prohibit nuisances outside the city limits for a distance of five thousand feet. **[**664]**

HN9 The right to prohibit such nuisances carries with it the right to **[***7]** do all things necessary to that end, which extends to prosecution and punishment in the courts having jurisdiction of such offense.

The ordinance making it unlawful to sell fireworks within five thousand feet of the boundary line of the city of Houston being valid, the corporation court of the city of Houston was a proper court in which a prosecution for a violation of that ordinance might be maintained.

From what has been said, it is apparent that the ordinance here involved is valid and the

corporation court of the city of Houston is a proper forum in which violations of that ordinance might be determined.

To the extent expressed, the state's motion for rehearing is granted.

It appearing, however, that the ordinance fixed no graduated punishment for a violation thereof but fixed a fine of $ 200 as the only punishment assessible thereunder, the punishment of a fine of $ 105, as here fixed, was not authorized by the ordinance, as suggested in our original opinion.

For this reason, the judgment of conviction cannot stand.

**[*667]** The state's motion for rehearing is granted in part, and in part overruled; and the judgment of conviction is reversed and the cause is remanded.

**DISSENTBY: [***8]**

WOODLEY

**DISSENT:** WOODLEY, Judge, dissenting.

My brethren have reached the conclusion that the ordinance is valid; that the corporation court had the authority to hear and decide the case, and that it should be remanded for another trial rather than be dismissed.

I am unable to agree with the majority opinion on rehearing and believe that the case was properly disposed of on original submission.

The distinguished and capable city attorney of Houston and his able assistants submit as the controlling point in this appeal: "Whether the Corporation Court of a Home Rule City has jurisdiction of offenses created by ordinance enacted under the authority of Art. 1175, Subd. 19, R.C.S., when the offense occurs outside of but within 5,000 feet of the corporate limits of such city." The theory that the question is one of venue is not advanced by counsel for either side, and does not appeal to the writer as sound.

Upon original submission it was urged with much force and logic that Subdivision 19 of Art. 1175, R.C.S., "extends the corporate limits of each Home Rule City for a distance of 5,000 feet for the limited purposes named in the statute." It was pointed out that "no other forum is **[***9]** available to try such cases" and contended that "if the statute in question does not so extend the corporate limits so as to vest jurisdiction in the corporation court to try persons maintaining nuisances in violation of an ordinance prohibiting nuisances in the adjacent area the statute is rendered meaningless."

This contention was overruled in our original opinion, and I do not understand the opinion on rehearing as holding otherwise. The corporate limits then were not extended by Art. 1175, Subd. 19, R.C.S., or by the ordinance.

Upon rehearing, as well as on original submission, it was further reasoned and urged by able counsel for the city of Houston that by Art. 1175, Subd. 19, R.C.S., enacted in 1913, jurisdiction **[*668]** has been given Home Rule Cities over the 5,000 foot adjacent area, though outside the corporate limits, and that said statute authorized the passage of the ordinance defining the offense here charged, and extended the jurisdiction of the corporation court to try the offender.

Art. 62 C.C.P. was enacted in 1899; Art. 1195 R.C.S. the same year. Each provides that the corporation court shall have jurisdiction within the territorial or corporate limits **[***10]** in all criminal cases arising **[**665]** under the ordinances of the said city, town or village.

(Jurisdiction of state cases concurrent with justice of the peace courts is not here involved, the act charged not being prohibited by state law.)

Arts. 62 C.C.P. and 1195 R.C.S. are general laws and apply to all corporation courts, whether the municipality be a Home Rule City or a city, town or village incorporated under the general laws.

Art. 1175 R.C.S. was enacted long after the foregoing statutes, Arts. 62 C.C.P. and 1195 R.C.S. It enumerates certain powers which are to be exercised by Home Rule Cities, but has no application to other cities, towns or villages. It contains no specific provision as to jurisdiction of corporation courts.

As stated, the jurisdiction of corporation courts under the general laws as to cases involving violation of the penal ordinances of the city is confined to the territorial or corporate limits of the city. See Arts. 62 C.C.P. and 1195 R.C.S.

Art. 1200(c) V.A.C.S., enacted in 1949, provides in terms that the corporation courts therein mentioned (admittedly the corporation courts of the city of Houston are included in the act) shall have the **[***11]** same jurisdiction as conferred by general laws on all corporation courts. Laws in conflict are specifically repealed. This excludes the theory that the jurisdiction of such corporation courts extends beyond that of cities or towns incorporated under the general laws, to which Art. 1175 R.C.S. has no application.

I concur in the reversal but respectfully dissent from that part of the opinion on rehearing which holds that the question is one of venue rather than jurisdiction, and upholds the validity of the ordinance and the power of the corporation court to hear and determine the case. The act charged was not committed within the territorial or corporate limits of Houston and was not a violation of state law. The corporation court had no jurisdiction to try appellant for the act charged and the prosecution should be dismissed.

*598 S.W.2d 681, *; 1980 Tex. App. LEXIS 3327, ***

The City of West Lake Hills, Texas, Appellant v. Westwood Legal Defense Fund, Appellee

No. 6157

Court of Civil Appeals of Texas, Tenth District, Waco

598 S.W.2d 681; 1980 Tex. App. LEXIS 3327

April 17, 1980

**PRIOR HISTORY: [**1]**

From 126th Judicial District Court, Travis County, Texas

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant, the city of West Lake Hills, challenged a judgment by the 126th District Court of Travis County (Texas) permanently enjoining appellant from enforcing by criminal action an ordinance that required the licensing of private sewage facilities located within the city's extraterritorial jurisdiction.

**OVERVIEW:** The city council of appellant, the city of West Lake Hills, passed an ordinance, on the city's sole initiative, that attempted to control pollution flowing from private sewage facilities by requiring inspection and licensing of all such facilities existing within the city's limits or within the city's extraterritorial jurisdiction. Enforcement of the ordinance was by criminal action brought in the city's municipal court. Appellee coalition filed suit to enjoin enforcement of the ordinance as to facilities located outside the city's corporate limits. The trial court granted a permanent injunction against enforcement of the ordinance outside city limits. Appellant argued that Tex. Water Code Ann. § 26.177 was a broad, general grant of power to cities to formulate plans to control pollution, including licensing of private facilities and criminal enforcement. The court held that § 26.177 was not intended to authorize cities on their own initiative to regulate sewage facilities outside their city limits by licensing, and the municipal court had no jurisdiction to try violations of the ordinance that might occur in the extraterritorial jurisdiction.

**OUTCOME:** The court affirmed the judgment of the trial court, which enjoined appellant city from enforcing an ordinance for the licensing of private sewage facilities located within the city's extraterritorial jurisdiction, holding that appellant did not have independent authority to license facilities outside city limits nor did its courts have jurisdiction to enforce the ordinance as to violations occurring within the extraterritorial jurisdiction.

**CORE TERMS:** sewage, ordinance, licensing, pollution, extraterritorial, license, regulation, water, municipal, pollution control, public health, waste, jurisdiction to try, criminal action, inspection, enforcing, abatement, disposal, powers granted, state law, local government, injuring, injure, abate, fine, legislative scheme, located outside, general rule, regulating, occurring

**LexisNexis(R) Headnotes**

HN1 A city can exercise only those powers that are expressly or impliedly conferred by law, and a power will be implied only when such power is reasonably incident to those

expressly granted or is essential to the object and purposes of the corporation. Furthermore, any fair, reasonable, or substantial doubt as to the existence of a power will be resolved against the municipality.

HN2 See Tex. Water Code Ann. § 26.177.

HN3 In construing a statute, it is the court's duty to examine the entire act and construe it as a whole. One provision of a statute will not be given a meaning out of harmony or inconsistent with other provisions, even though it might be susceptible to such construction if standing alone.

HN4 Tex. Water Code Ann. § 26.177 is only one provision in a much more complex and comprehensive legislative scheme. When Chapter 26 is viewed in its entirety, regardless of the broad, general language of § 26.177, it is clear that the section was not intended to authorize cities on their own initiative to regulate private sewage facilities by licensing such facilities.

HN5 See Tex. Water Code Ann. § 26.031.

HN6 See Tex. Water Code Ann. § 26.032.

HN7 Tex. Water Code Ann. §§ 26.031 and 26.032 specifically grant the power to license private sewage facilities to the Texas Water Commission and to the Commissioners Courts of Texas counties. On the other hand, Tex. Water Code Ann. § 26.177, granting the power to "control and abate water pollution," does not specifically grant the power to license such facilities nor does the language of § 26.177 in any way track or resemble the language of §§ 26.031 or 26.032. Furthermore, § 26.031 expressly states that the power to license may be delegated to a city by the commission.

HN8 As a general rule, in the construction of statutes a general clause is limited or controlled by a special provision.

HN9 The specific assignment of the power to license private sewage facilities, Tex. Water Code Ann. §§ 26.031 and 26.032, limits the more general grant of power to the cities. Even though the counties have express authority to develop licensing requirements, such requirements must be approved by the state. Tex. Water Code Ann. § 26.032(c). Even though the cities may assist in obtaining compliance with pollution standards, these efforts must be in cooperation with the Texas Department of Water Resources. Tex. Water Code Ann. § 26.177(b)(4).

HN10 Tex. Water Code Ann. § 26.177 lists five specific functions and services that are or may be assigned to the cities. None of these functions and services specifically requires passage of rules and regulations for controlling pollution. Instead, the functions and services listed in § 26.177 are in the nature of "information gathering" functions which would ultimately be very valuable to assist the state in designing and in enforcing its rules and regulations.

HN11 A municipal court only has jurisdiction to enforce violations occurring within the corporate limits of the city. Tex. Rev. Civ. Stat. art. 1195. A municipal court may, however, have jurisdiction to try offenses occurring outside the corporate limits if the offenses constitute violations of city ordinances which validly apply to the area in which the offense occurred.

**COUNSEL:** John McAllen Scanlan, Scanlan & Buckle, Austin, for appellant.

David H. Walter, Bender, Walter & Wahlberg, Austin, for appellee.

**OPINIONBY:** JAMES

**OPINION: [*682]**

OPINION

This is an appeal from a judgment permanently enjoining the Appellant, City of West Lake Hills, from enforcing by criminal action an ordinance which requires the licensing of private sewage facilities located within the city's extraterritorial jurisdiction. We affirm the judgment.

The Appellant, City of West Lake Hills, is a general law city having a population of less than 5000 people. On or about October 12, 1977, the City Council passed an ordinance, 108-B, attempting to control pollution flowing from private sewage facilities. Ordinance 108-B, among other things, sets forth standards for the operation and construction of private sewage facilities n1 and required inspection and licensing of all such facilities existing within the city's limits or within the city's extraterritorial jurisdiction. Inspections were to be made by the city for a fee of $ 25 unless an owner hired his own engineer or registered sanitarian to inspect the facility, **[**2]** in which case a fee of $ 15 would be levied to cover the cost of processing reports required to be submitted by a private inspector. If the facility met the express standards of the ordinance, a license immediately issued; if not, the city was required to specify the reasons for rejecting the application for license and the city was authorized to issue interim licenses while the facility was modified to comply with the standards. Most licenses were to be issued for a 5-year period, but a license could be revoked at any time for non-compliance. Enforcement of the ordinance was by criminal action brought in the city's municipal court. Offenses proscribed by the ordinance included, inter alia: 1) using or permitting the use of an unlicensed private sewage facility on property owned or possessed by the offender; and 2) failure of an owner to make application for a license for an existing private sewage facility on property within 90 days after notice by the city. Convictions were punishable by a fine of not more than $ 200 for each separate offense.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1. "Private sewage facility" was defined as "any septic system, or other facility, system, or method for the storage, treatment, or disposal of sewage other than an organized disposal system." (An "organized disposal system" being "any public or private system for the collection, treatment, and disposal of sewage operated in accordance with the terms and conditions of a permit from the Water Quality Board.")

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**3]**

The evidence establishes that the ordinance in question was passed solely upon **[*683]** the city's initiative and not as a joint effort between the city and any state or county authority.

The Appellee, Westwood Legal Defense Fund, is a coalition of homeowners, all of which reside in a subdivision known as Westwood, which is located entirely outside the corporate limits but within the extraterritorial jurisdiction of the City of West Lake Hills. The Appellee filed this suit to enjoin West Lake Hills from enforcing its Ordinance 108-B insofar as it applied to facilities located outside the city's corporate limits, pleading that the city lacks express or implied legislative authority to regulate by licensing any private sewage facilities located outside the city's corporate limits; that the ordinance is hopelessly in conflict with state law since the Legislature has granted exclusive authority for the regulation of private sewage facilities to the Texas Water Commission and the commissioners court of any county, citing Secs. 26.031 and 26.032 of the Texas Water Code; that the ordinance imposes a fine not to exceed $ 200 for any violation thereof, that such a fine is penal in nature **[**4]** and is prohibited by state law, citing Art. 970a, Sec. 4; that the penalty further conflicts with state law since Sec. 26.214 of the Texas Water Code provides the exclusive remedy as well as proper venue for violations of private sewage facility orders; that the scheme of the ordinance is arbitrary, capricious and unreasonable; that the ordinance represents a violation of the constitutional prohibition against the enactment of retroactive or ex post facto laws; and that the ordinance constitutes an unconstitutional taking of property without due process.

The case was submitted to the trial court on stipulated facts and written briefs and the court rendered judgment granting a permanent injunction prohibiting the City of West Lake Hills from enforcing by criminal action that provision of Ordinance 108-B which requires the licensing of private sewage facilities located within the city's extraterritorial jurisdiction. The trial court's judgment recited that "the CITY OF WEST LAKE HILLS, TEXAS, Ordinance 108-B is a valid exercise of legislatively granted powers to the CITY OF WEST LAKE HILLS, TEXAS, and that such Ordinance is in all respects valid and enforceable except as hereinafter **[**5]** set out:

"a. That DEFENDANT CITY OF WEST LAKE HILLS, TEXAS, Ordinance 108-B exceeds the authority granted to the DEFENDANT CITY OF WEST LAKE HILLS by the State of Texas only in its attempt to require the licensing of private sewage facilities in the DEFENDANT'S extraterritorial jurisdiction.

"b. That the Municipal Court of the CITY OF WEST LAKE HILLS, TEXAS, has no jurisdiction to try violations of Ordinance 108-B alleged to have occurred in the DEFENDANT CITY'S extraterritorial jurisdiction."

Further the judgment expressly recited that "Nothing contained herein should be interpreted as expressing any opinion over any of the provisions of Ordinance 108-B as they apply within the city limits of the CITY OF WEST LAKE HILLS, TEXAS."

The City appeals claiming simply that the court erred in finding its Ordinance 108-B invalid in the two respects set forth above. We overrule the City's contentions.

HN1 A city can exercise only those powers that are expressly or impliedly conferred by law, and a power will be implied only when such power is reasonably incident to those expressly granted or is essential to the object and purposes of the corporation. Davis v. City of Taylor, 67 S.W.2d **[**6]** 1033, 123 Tex. 39 (1934); Anderson v. City of San Antonio, 67 S.W.2d 1036, 123 Tex. 163 (1934); Foster v. City of Waco, 255 S.W. 1104, 113 Tex. 352 (1923). Furthermore, any fair, reasonable, or substantial doubt as to the existence of a power will be resolved against the municipality. Foster v. City of Waco, cited supra. The City argues that the power exercised in Ordinance 108-B is in fact expressly or at least impliedly conferred by Sec. 26.177 of the Texas Water Code, which in its pertinent parts provides:

HN2 **[*684]** "(a) Every city in this state having a population of 5,000 or more inhabitants shall, and any city of this state may, establish a water pollution control and abatement program for the city.

"(b) The water pollution control and abatement program of a city shall encompass the entire city and may include areas within its extraterritorial jurisdiction which in the judgment of the city should be included to enable the city to achieve the objectives of the city for the area within its territorial jurisdiction. The city shall include in the program the services and functions which, in the judgment of the city or as may be reasonably required by the commission, will provide **[**7]** effective water pollution control and abatement for the city, including the following services and functions:

"(1) the development and maintenance of an inventory of all significant waste discharges into or adjacent to the water within the city and, where the city so elects, within the extraterritorial jurisdiction of the city, without regard to whether or not the discharges are authorized by the department;

"(2) the regular monitoring of all significant waste discharges included in the inventory prepared pursuant to Subdivision (1) of this subsection;

"(3) the collecting of samples and the conducting of periodic inspections and tests of the waste discharges being monitored to determine whether the discharges are being conducted in compliance with this chapter and any applicable permits, orders or rules of the department, and whether they should be covered by a permit from the commission;

"(4) in cooperation with the department, a procedure for obtaining compliance by the waste discharges being monitored, including where necessary the use of legal enforcement proceedings; and

"(5) the development and execution of reasonable and realistic plans for controlling and abating pollution **[**8]** or potential pollution resulting from generalized discharges of waste which are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater."

The city contends that this statute constitutes a broad, general grant of power to cities to formulate plans for the control of pollution and that such plans can reasonably include licensing of private sewage facilities and enforcement by criminal action. The city supports its argument by citing Attorney General's Opinion No. H-304 (1974), wherein the Attorney General concludes that:

"A city has broad powers to establish water pollution control programs under (Sec. 26.177), Texas Water Code. These powers can include regulation of private sewage facilities in the city and in its extraterritorial jurisdiction."

HN3 In construing a statute, it is our duty to examine the entire act and construe it as a whole. One provision of a statute will not be given a meaning out of harmony or inconsistent with other provisions, even though it might be susceptible to such construction if standing alone. Merchants Fast Motor Lines, Inc. v. Railroad Commission of Texas, 573 S.W.2d 502 (Tex.1978); Barr v. Bernhard, **[**9]** 562 S.W.2d 844 (Tex.1978); Gerst v. Oak Cliff Savings & Loan Assn., 432 S.W.2d 702 (Tex.1968). For this reason we cannot accept the City's argument, nor can we agree with the Attorney General's Opinion to the extent that it may support the City's position in this case. If Sec. 26.177 of the Texas Water Code were the only statutory provision relating to the control and abatement of pollution, there might be some merit to the argument. However, HN4 Sec. 26.177 is only one provision in a much more complex and comprehensive legislative scheme. When Chapter 26 is viewed in its entirety, regardless of the broad, general language of Sec. 26.177, it is clear that the section was not intended to authorize cities on their own initiative to regulate private sewage facilities by licensing such

facilities. For example, Sec. 26.031 of the Texas Water Code, relating to "private sewage facilities," provides that:

HN5 **[*685]** "(b) Whenever it appears that the use of private sewage facilities in an area is causing or may cause pollution or is injuring or may injure the public health, the commission may hold a public hearing in or near the area to determine whether an order should be entered controlling **[**10]** or prohibiting the installation or use of private sewage facilities in the area.

"(d) If the commission finds after the hearing that the use of private sewage facilities in an area is causing or may cause pollution or is injuring or may injure the public health, the commission may enter an order as it may consider appropriate to abate or prevent pollution or injury to public health.

"(f) The commission may provide in the order for a system of licensing of private sewage facilities in the area, including procedures for cancellation of a license for violation of this section, the license, or the orders or rules of the department. The commission may also provide in the system of licensing for periodic renewal of the licenses, but this may not be required more frequently than once a year.

"(g) The commission may delegate the licensing function and the administration of the licensing system to the executive director or to any local government whose boundaries include the area or which has been designated by the commission under Sections 26.081 through 26.086 of this code as the agency to develop a regional waste disposal system . . .

"(h) The board also may prescribe and require the **[**11]** payment of reasonable license fees. . . .

"(i) If the commission or the executive director has the responsibility for performing the licensing function, the license fees shall be paid to the department. . . .

"(j) If a local government has the responsibility for performing the licensing function, the fees shall be paid to the local government." (emphasis ours)

Sec. 26.032 of the Texas Water Code further provides that:

HN6 "(a) Whenever it appears to the commissioners court of any county that the use of private sewage facilities in an area within the county is causing or may cause pollution or is injuring or may injure the public health, the county may proceed in the same manner and in accordance with the same procedures as the commission to hold a public hearing and enter an order, resolution, or other rule as it may consider appropriate to abate or prevent pollution or injury to public health.

"(b) The order, resolution, or other rule may provide the same restrictions and requirements as are authorized for an order of the commission entered under this section.

"(c) Before the order, resolution, or other rule becomes effective, the county shall submit it to the commission and obtain **[**12]** the commission's written approval.

"(e) Where a system of licensing has been ordered by the commission or the commissioners court of a county, no person may install or use private sewage facilities required to be licensed without obtaining a license."

HN7

These two sections of the Water Code (Secs. 26.031 and 26.032) specifically grant the power to license private sewage facilities to the Texas Water Commission and to the Commissioners Courts of Texas counties. On the other hand, Sec. 26.177, granting the power to "control and abate water pollution," does not specifically grant the power to license such facilities nor does

the language of Sec. 26.177 in any way track or resemble the language of Secs. 26.031 or 26.032. Furthermore, Sec. 26.031 expressly states that the power to license may be delegated to a city by the commission. In order to give any effect to this specific provision, we would have to conclude that the power granted to the cities by Sec. 26.177 does not include the power that can be delegated by the Water Commission under Sec. 26.031.

**[*686]** The city contends that Secs. 26.031 and 26.032 cannot be construed to limit the powers granted under Sec. 26.177 since **[**13]** neither 26.031 nor 26.032 expressly prohibits regulation of private sewage facilities by cities. HN8 As a general rule, however, in the construction of statutes a general clause is limited or controlled by a special provision. It is said that this rule is based upon the principle that a specific clause or statute more clearly evidences the intention of the Legislature. City of Baytown v. Angel (Houston 14th CA 1971) 469 S.W.2d 923, NRE.

In the instant case HN9 the specific assignment of the power to license private sewage facilities (Secs. 26.031 and 26.032) limits the more general grant of power to the cities. In our opinion it is clear that the Legislature intended to reserve to the State the ultimate power to regulate in the area of pollution control. Even though the counties have express authority to develop licensing requirements, such requirements must be approved by the state. Sec. 26.032(c). Even though the cities may assist in obtaining compliance with pollution standards, these efforts must be in cooperation with the Texas Department of Water Resources. Sec. 26.177(b)(4). Although the Legislature recognized the importance of cooperative efforts between state and local governmental **[**14]** bodies, the state is assigned responsibility for promulgating rules and regulations to control pollution problems. HN10 Sec. 26.177 lists five specific functions and services that are or may be assigned to the cities. None of these functions and services specifically requires passage of rules and regulations for controlling pollution. Instead, the functions and services listed in Sec. 26.177 are in the nature of "information gathering" functions which would ultimately be very valuable to assist the state in designing and in enforcing its rules and regulations. Sec. 26.177(b)(3), for example, expressly states that the city's inspection and collection services are designed to determine whether the discharges are meeting applicable permits, rules, or orders of the state department and whether they should be covered by a permit from the state commission. In our opinion, Sec. 26.177 requires (in the case of cities over 5000) or allows (in the case of cities less than 5000) cities to monitor pollution levels both in their corporate limits and in their extraterritorial jurisdictions. The information gathered in this monitoring could (or should) be used by cities in developing plans for growth **[**15]** and expansion, which may of course include consideration of problems in the extraterritorial jurisdiction. The information would further be vital to the initiation of action by the state under Sec. 26.031(b), or by the county under Sec. 26.032(a), if pollution problems were detected by the city in regard to private or public sewage facilities within or surrounding the city. However, the legislative scheme simply does not contemplate independent regulatory action by a city.

The city argues alternatively that Ordinance 108-B is a valid exercise of powers granted to it under Art. 1076 and Art. 1015(39), R.C.S. Art. 1076
directs that "Every city in this State, however organized, having underground sewers or cesspools, shall pass ordinances regulating the tapping of said sewers and cesspools, regulating house draining and plumbing"; and Art. 1015(39) is a general grant of the power to license. All powers granted to a city can only be exercised within the corporate limits of a city unless the power is expressly extended to apply to areas outside these limits. City of Sweetwater v. Hamner (Ft. Worth CA 1924) 259 S.W. 191, writ dismissed; Ex parte Ernest, 138 Tex.Cr.R. 441, 136 S.W.2d 595 **[**16]** (1940). The Appellees in this case only challenge the power of the city to regulate private sewage facilities located wholly within the city's extraterritorial jurisdiction rather than within the city's corporate limits. Neither Art. 1076 nor Art. 1015(39) expressly authorizes regulations applying outside the corporate limits and cannot therefore be relied on in this case. The question of the validity of Ordinance 108-B as it applies to facilities located within the city limits of City of West Lake Hills is not raised by this case and

we do not decide that issue.

**[*687]** The Appellant City assigns as a separate point of error the conclusion of the trial court that the municipal court has no jurisdiction to try violations of Ordinance 108-B alleged to have occurred in the extraterritorial jurisdiction of the city. As a general rule, HN11 a municipal court only has jurisdiction to enforce violations occurring within the corporate limits of the city. Art. 1195, R.C.S. A municipal court may, however, have jurisdiction to try offenses occurring outside the corporate limits if the offenses constitute violations of city ordinances which validly apply to the area in which the offense occurred. **[**17]** Treadgill v. State, 160 Tex.Cr.R. 658, 275 S.W.2d 658 (1955); Parker v. City of Ft. Worth (Ft. Worth CA 1955) 281 S.W.2d 721, no writ. Having found that the city had no authority to apply its licensing regulations in the extraterritorial jurisdiction, we must also hold that the municipal court has no jurisdiction to try violations of the ordinance which may occur in the extraterritorial jurisdiction.

Judgment of the trial court is affirmed.

AFFIRMED.

CITY OF AUSTIN, APPELLANT v. EMILE JAMAIL, APPELLEE

No. 13,789

COURT OF APPEALS OF TEXAS, Third District, Austin

662 S.W.2d 779; 1983 Tex. App. LEXIS 5462

December 7, 1983

**SUBSEQUENT HISTORY: [**1]**

Rehearing Denied January 11, 1984.

**PRIOR HISTORY:**

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 167TH JUDICIAL DISTRICT NO. 315,007, HONORABLE JERRY DELLANA, JUDGE.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant city challenged the dissolution of a temporary injunction and the denial of a permanent injunction enjoining appellee developer from developing his property by the District Court of Travis County, 167th Judicial District (Texas).

**OVERVIEW:** Appellant city sought to exercise its extraterritorial jurisdiction and require appellee developer to comply with a city ordinance designed to minimize the amount of urban runoff from the property. The court held that Tex. Water Code Ann. § 26.177(b)(5), which required cities with more than 5,000 people to develop and execute plans for controlling generalized waste discharges, also gave the cities the authority to enforce the plans within a city proper and within its extraterritorial jurisdiction. Because appellant had express authority to enforce its ordinance, the court reversed the judgment denying appellant a permanent injunction but did not render judgment permanently enjoining appellee from developing his land in violation of the ordinance because the ordinance might be inapplicable to appellee for other reasons. The cause was remanded for a new trial.

**OUTCOME:** The court reversed the judgment denying appellant city a permanent injunction enjoining appellee developer from developing his property. The court did not permanently enjoin appellee from his land in violation of appellant's ordinance because other circumstance might make the ordinance inapplicable to appellee. The court remanded the cause for a new trial.

**CORE TERMS:** runoff, extraterritorial, urban, ordinance, sewage, license, pollution, regulation, waste, watershed, pollution control, point source, water, generalized, pollutant, authorize, street, city limits, statutory provision, particularized, precipitation, fertilizers, industrial, monitoring, everywhere, gathering, enforcing, possessed, rainwater, discrete

**LexisNexis(R) Headnotes** Hide Headnotes

HN1 Tex. Water Code Ann. § 26.177(b)(5), requires cities with more than 5,000 people to develop and execute plans for controlling generalized waste discharges not traceable to a

specific source, such as storm sewer discharges and urban runoff from rainwater. These plans must include the city proper and may include a city's extraterritorial jurisdiction. More Like This Headnote | *Shepardize:* Restrict By Headnote

HN2 A city must have express (or implied when such power is reasonably incident to those expressly granted) statutory authority to exercise its extraterritorial power. More Like This Headnote | *Shepardize:* Restrict By Headnote

**COUNSEL:** Albert De La Rosa, City Atty., James M. Nias, Asst. City Atty., Austin, for Appellant.

John C. Meinrath, Austin, for Appellee.

**JUDGES:** Jim Brady, Justice.

**OPINIONBY:** BRADY

**OPINION: [*780]** After hearing, the district court of Travis County dissolved the City of Austin's temporary injunction, enjoining appellee from developing his land on the Lake Austin watershed within the City of Austin's extraterritorial jurisdiction. The court also denied appellant City of Austin a permanent injunction, which would have required appellee to comply with City of Austin Ordinance No. 800103-N before further developing his land. The trial court held, in effect, that the City of Austin has no authority to enforce this ordinance within its five-mile extraterritorial jurisdiction. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 We note that no statement of facts was included in the record of this case; however, the transcript is sufficient for this Court to decide the issue of extraterritorial jurisdiction. A brief summary of the proceedings at the trial court is as follows: On December 2, 1980, the City of Austin obtained a temporary restraining order preventing appellee from further developing his multi-family building project. An "Agreed Order of Temporary Injunction" was issued December 9, 1980. After a final hearing on November 18, 1981, the trial court concluded that the City of Austin had no authority to enforce Ordinance No. 800103-N outside its city limits, as set forth in its judgment signed June 1, 1982.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**2]**

Appellant's point of error asserts that the City of Austin has the statutory authority to enforce Austin City Ordinance No. 800103-N, the "Lake Austin Watershed Site Development Ordinance," n2 within its extraterritorial jurisdiction. We agree that the city does possess such authority and accordingly, we reverse the judgment of the trial court.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 This ordinance requires anyone building a structure (provided there is only one structure per legal lot other than a single-family dwelling or a duplex) to obtain a "Site Development Permit" before construction or clearing of the land begins. In order to minimize the amount of urban runoff on a lot, the ordinance specifies the amount and slope of impervious surfaces, the amount of pre-construction clearing so as not to affect natural ground cover, the depth of fill material allowed, building foundation standards, and erosion control requirements. The building plan must comply with these requirements set out in the ordinance and must be approved by

the city before the permit will be issued. To insure compliance with the terms of the permit and the approved construction plans, the ordinance prohibits the connection of city utilities to the construction site until the city department of engineering has issued a certificate of occupancy when the development is completed pursuant to the requirements of the ordinance.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**3]**

Appellee relies on ***City of West Lake Hills v. Westwood, Etc.*, 598 S.W.2d 681** (Tex. Civ. App. 1980, no writ), as authority for the proposition that a city has no power to enforce any provision of Tex. Water Code Ann. § 26.177 (Supp. 1982) in its extraterritorial jurisdiction. The facts in *West Lake*, however, are distinguishable from the case at bar, and do not control the disposition of this appeal.

In ***West Lake, supra***, the Waco court reviewed an ordinance of the City of West Lake Hills which prohibited the use of private sewage facilities within the city limits and extraterritorial jurisdiction of the city without a license issued by the city. Violation was made a criminal offense. To obtain a license, the owner had to apply for a license, and the private sewage facilities were required to satisfy certain operational and construction standards. The Court affirmed the judgment of the district court which enjoined the city from enforcing the ordinance against owners of private sewage facilities located outside the city limits. The Court held that § 26.177 did not authorize **[*781]** cities to require licenses for the operation of private sewage facilities in **[**4]** their extraterritorial jurisdictions, or to enforce such requirements by penal sanctions. The Court noted that there might be some merit to the argument that the city possessed such authority had § 26.177 been the only statutory provision relating to pollution control. However, the Court noted that Tex. Water Code Ann. § 26.031 and § 26.032 authorized the *Texas Water Commission* to license private sewage facilities, to delegate this authority to cities, and authorized the county commissioners courts to license such facilities, with the proviso that county rules must be approved by the Commission and that Commission rules were to govern in the event of a conflict. The Court noted that § 26.177, if construed to authorize cities to license private sewage facilities, would conflict with these statutes which give the Commission control over these matters. The Court further noted that the Commission's authority to delegate the licensing power to cities under § 26.031 would be superfluous if cities already possessed such power under § 26.177. The Court held that it was required to give effect to the § 26.031 authorization because § 26.031 was more specific than § 26.177, and **[**5]** to do this the court was required to hold that § 26.177 did not confer this authority. The Court continued:

In our opinion it is clear that the Legislature intended to reserve to the State the ultimate power to regulate in the area of pollution control . . . . Even though the cities may assist in obtaining compliance with pollution standards, these efforts must be in cooperation with the Texas Department of Water Resources. Sec. 26.177(b)(4). Although the Legislature recognized the importance of cooperative efforts between state and local governmental bodies, the state is assigned responsibility for promulgating rules and regulations to control pollution problems. Sec. 26.177 lists five specific functions and services that are or may be assigned to the cities. None of these functions and services specifically requires passage of rules and regulations for controlling pollution. Instead, the functions and services listed in § 26.177 are in the nature of 'information gathering' functions which would ultimately be very valuable to assist the state in designing and in enforcing its rules and regulations . . . . However, the legislative scheme simply does not contemplate **[**6]** independent regulatory action by a city. **598 S.W.2d at 686.**

This language characterizes the functions of cities under § 26.177 as mere "information gathering" functions, and denies that § 26.177 creates *any regulatory* authority in the city. This language is broad enough to embrace subsection five, since the opinion refers to the "five specific functions" listed in § 26.177. However, this language is quite clearly dictum to the extent that it purports to define the scope of city authority under subsection five because only

subsections one through four could possibly have conferred the authority on the City of West Lake Hills to license private sewage facilities outside its city limits.

The City of Austin bases its authority to regulate development of the Lake Austin watershed within its five-mile extraterritorial jurisdiction on Tex. Water Code Ann. § 26.177(b)(5) (Supp. 1982) (hereinafter referred to as subsection 5). HN1 Subsection 5, unlike subsections 1-4, requires cities with more than 5,000 people to develop and *execute* plans for controlling generalized waste discharges "not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater." **[**7]** These plans must include the city proper and may include a city's extraterritorial jurisdiction.

Developing and *executing* plans for *controlling* urban runoff under subsection 5 involves more than performing the functions set out in subsections 1-4, which include inventorying discharge points, monitoring waste, collecting water samples, and cooperating with the Department of Water Resources regarding enforcement. Only in subsection 5 does the word "execute" appear. This word means "to make; to perform; to do; to follow out." *Glover v. American Mortgage Corp.*, 94 S.W.2d 1235, 1236 (Tex. Civ. App. 1936, no writ). Formulating **[*782]** a plan to control urban runoff on the Lake Austin watershed would be meaningless without any enforcement powers to insure compliance. The legislature left the execution of plans to control urban runoff to the cities since subsection 5 is the *only* statutory provision pertaining to the control of urban runoff, and construction of this provision to authorize cities to regulate development in their extraterritorial jurisdiction *would not*, as in *West Lake Hills*, conflict with any other statutory provisions, dealing more *specifically* **[**8]** with control of urban runoff or the regulation of development in areas outside city limits, or deprive them of their effect. Local governments are in a better position to address the problem of urban runoff for they are most familiar with local growth patterns, local terrain, and their master plans of development. Urban runoff is a result of the interaction of local terrain and urban development patterns.

The term "urban runoff," as used in § 26.177(b)(5) (Supp. 1982), is not defined in the Water Code. The term "runoff," however, is defined by Tex. Water Code Ann. § 46.013, Sec. 3.01(n) (Supp. 1982) as "both the portion of precipitation which runs off the surface of a drainage area and that portion of the precipitation that enters the streams after passing through the portions of the earth." n3 This type of generalized discharge should be compared with particularized discharge from a specific point source, such as a private sewage facility. A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, **[**9]** or vessel or other floating craft, from which pollutants or wastes are or may be discharged into or adjacent to any water in the state." Tex. Water Code Ann. § 226.002(21) (Supp. 1982). *Accord* 40 C.F.R. § 401.11 (1983) (federal definition of point source is essentially the same as Texas'). Rainwater flowing down a watershed is anything but particularized, as it flows everywhere. The monitoring of this type of pollution (e.g., dust and dirt, street refuse, construction wastes, industrial and vehicle emissions, asbestos from brake linings, petroleum emulsions sprayed on unpaved roads, household trash, plant litter, animal fecal material, fertilizers, pesticides, and herbicides) carried by this type of generalized flow and tracing it to a particular source is obviously impossible, for these pollutants are everywhere. These are the by-products of urbanization. n4

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 This definition of runoff is found in the Red River Compact, an agreement among the States of Texas, Louisiana, Arkansas, and Oklahoma. While Chapter 46, the River Compact Chapter, does not deal exclusively with water quality, as does Chapter 26, it is helpful in defining runoff. The Supreme Court of Georgia has discussed the effect of urban runoff, but without defining it. "Siltation and urban runoff threaten[] [the] water supplies." *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241, 244 (1977). *Accord* *Estuary Properties, Inc. v. Askew*, 381 So.2d 1126 (Fla.

Dist. Ct. App. 1979); *Pedersen v. Washington State Dept. of Transportation*, 25 Wash. App. 781, 611 P.2d 1293 (1980). **[**10]**

n4 *See* S. Grava, Urban Planning Aspects of Water Pollution Control (1969).
"Distinctions have to be made among domestic sewage, various industrial effluents, and a number of other pollutant sources which have become critical recently, such as *street wash-off*, inorganic fertilizers, and thermal discharges." *Id.* at 31 (emphasis added).
"Recent tests have shown that run-off which has washed city streets, especially after a long dry spell, can be just as offensive as sanitary sewage." *Id.* at 44.

*See also* Wall, *The Lake That Austin Built*, Third Coast, October 1983, at 54 for an informative discussion of the history of Lake Austin in general and the problem of urban runoff pollution of Lake Austin in particular.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

HN2 A city must have express (or implied when such power is reasonably incident to those expressly granted) statutory authority to exercise its extraterritorial power. *City of Sweetwater v. Hamner*, 259 S.W. 191 (Tex. Civ. App. 1924, error dism'd). The City of Austin's extraterritorial jurisdiction extends for five miles. Tex. Rev. Civ. Stat. Ann. **[**11]** art. 970a § 3(5) (1963). This Court views Texas Water Code **[*783]** Ann. § 26.177(b) as expressly providing the City of Austin with authority to execute its Lake Austin Watershed Site Development Ordinance, to wit: "The water pollution control and abatement program *of a city* shall encompass the entire city and *may include areas within its extraterritorial jurisdiction* which in the judgment of the city should be included to enable the city to achieve the objectives of the city for the area within its territorial jurisdiction." (emphasis added).

The judgment of the district court is reversed. We may not render judgment permanently enjoining appellee from developing his land in violation of the ordinance, because the requirements of the ordinance may be inapplicable to appellee for a reason *other* than that stated in the district court's judgment. We therefore remand to the district court for a new trial.

*170 S.W.3d 676, *; 2005 Tex. App. LEXIS 5083, ***

The State of Texas, Appellant v. Robert Blankenship, Appellee

NO. 03-03-00287-CR, NO. 03-03-00288-CR, NO. 03-03-00289-CR, NO. 03-03-00290-CR, NO. 03-03-00291-CR, NO. 03-03-00292-CR, NO. 03-03-00293-CR, NO. 03-03-00294-CR

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

170 S.W.3d 676; 2005 Tex. App. LEXIS 5083

June 29, 2005, Filed

**SUBSEQUENT HISTORY: [**1]** Released for Publication September 30, 2005. Rehearing overruled by State v. Blankenship, 2005 Tex. App. LEXIS 8180 (Tex. App. Austin, Sept. 30, 2005)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 61 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 62 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 63 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 64 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 65 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 66 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 67 (Tex. Crim. App., Jan. 18, 2006)
Petition for discretionary review refused by In re Blankenship, 2006 Tex. Crim. App. LEXIS 69 (Tex. Crim. App., Jan. 18, 2006)

**PRIOR HISTORY:** FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY. NOS. 624903, 624904, 624905, 624906, 624907, 624908, 624909 & 624910. HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING. State v. Blankenship, 146 S.W.3d 218, 2004 Tex. Crim. App. LEXIS 1651 (Tex. Crim. App., 2004)

**DISPOSITION:** Reversed and Remanded.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** The State challenged the judgment of the County Court at Law No. 1 of Travis County, Texas, reversing defendant's judgments of conviction in the municipal court of record of the City of Austin.

**OVERVIEW:** Thirteen complaints were filed against defendant in the municipal court alleging violations of certain city ordinances, and each complaint alleged that the offense occurred in the territorial limits of the City of Austin as required by Tex. Code Crim. Proc. Ann. art. 45.019(c) (Supp. 2004-2005). Defendant was found guilty of five offenses of developing or changing the use of property without first obtaining a site plan approval and release by the City, and found guilty of three offenses of failing to observe a stop-work order posted at the site of the property involved. The issue on appeal was the consequence of the failure of the

prosecution to prove venue as laid under the particular circumstances of the cases. The appellate court ruled that there was error in the failure to prove venue as laid, but the non-constitutional error was harmless, Tex. R. App. P. 44.2(b). There was no showing that defendant was prevented from presenting a defense. The description placed the property outside the City limits but within the extraterritorial area of the City over which geographical area the municipal court had sole criminal jurisdiction to try violations of certain city ordinances.

**OUTCOME:** The judgment was reversed and remanded.

**CORE TERMS:** venue, territorial, municipal, county attorney, ordinance, reversal, prosecuting attorney, notice of appeal, extraterritorial, city limits, non-constitutional, variance, notice, criminal jurisdiction, municipality, proven, city attorney, motions to quash, reversible error, harmless error, vicinage, geographical area, harmless, harmless error analysis, district attorney, legal description, criminal case, general law, preponderance, constituent

**LexisNexis(R) Headnotes**

HN1 Tex. Code Crim. Proc. Ann. art. 44.01 was amended to grant the State an extremely limited right of appeal in certain designated circumstances, including when a court order "arrests or modifies a judgment." Tex. Code Crim. Proc. Ann. art. 44.01(a)(2) (Supp. 2004-05). The statute provides that the "prosecuting attorney" may not "make" an appeal later than the 15th day after the date on which the court's order, ruling, or sentence is entered. Tex. Code Crim. Proc. Ann. art. 44.01(d).

HN2 See Tex. Code Crim. Proc. Ann. art. 44.01(i) (Supp. 2004-05).

HN3 It is clear from Tex. Code Crim. Proc. Ann. art. 44.01 (Supp. 2004-05) that a duly authorized subordinate of the "prosecuting attorney" may not "make" an appeal. In order for a State's notice of appeal to invoke the court of appeals' jurisdiction, it must be timely, it must be in writing, and it must be "made" by the elected prosecuting attorney.

HN4 See Tex. Code Crim. Proc. Ann. art. 45.201 (Supp. 2004-05).

HN5 Tex. Code Crim. Proc. Ann. art. 45.201(c) (Supp. 2004-05) permits the city attorney to prosecute appeals from municipal court only "with the consent of the county attorney." The statute has no time limitations and does not require the request or consent to be in writing. It appears to apply to appeals that have been perfected.

HN6 See Tex. Code Crim. Proc. Ann. art. 45.019(c) (Supp. 2004-05).

HN7 Venue is distinct from jurisdiction. The terms are not synonymous. Jurisdiction is the authority or power conferred upon a court by the constitution and laws of the State that allows a court to hear and try a case. Venue means the place where the case may be tried. At common law, venue meant the neighborhood, place, or county in which the injury is declared to have been done or in fact declared to have happened. Venue denotes locality, and its prevailing meaning is the place of trial, the geographical location in which an action or proceeding should be brought to trial.

HN8 When venue is not a constituent element of the offense charged, venue must be proved only by a preponderance of the evidence. Tex. Code Crim. Proc. Ann. art. 13.17 (2005). The failure of proof of venue by the prosecution does not negate the guilt of the accused. It is presumed that venue is proved at trial unless disputed at trial or the record affirmatively shows the contrary. Tex. R. App. 44.2(c)(1). It must be remembered, however, that if the issue of venue is timely raised, reversible error may result from the

failure to prove venue as laid in the charging instrument.

HN9 Normally, venue variance claims are treated as sufficiency of the evidence problems. A state review of the sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct charge for the case. This test is also applicable to non-jury or bench trials.

HN10 When venue is not a constituent element of the offense, it need only be proved by the preponderance of the evidence, and the failure to prove venue does not negate the guilt of the defendant.

HN11 See Tex. R. App. P. 44.2(a) and (b).

HN12 Except for certain federal constitutional errors labeled by the United States Supreme Court as "structural," no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. Appellate courts should not automatically foreclose the application of the harmless error test to certain categories of error. Where an error is shown to be harmless, it is not a ground for reversal, regardless of the category or label attached to that particular error.

HN13 It is clear that the failure to prove venue when the issue is raised at trial is now subject to a harm analysis rather than an automatic reversal of the conviction.

HN14 The "vicinage" provision of the Sixth Amendment stipulates that in all criminal prosecutions, the accused shall be tried by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. U. S. Const. amend. VI. Neither federal nor state authorities, however, currently require application of this clause to state prosecutions.

HN15 "Vicinage" means vicinity, proximity. The place where the crime is committed, or a trial is held; the place from which jurors are to be drawn for trial use, the locale from which the accused is entitled to have jurors selected.

HN16 The appellate court must determine the harm of the non-constitutional error on the basis of whether it affects a defendant's substantial rights. Tex. R. App. P. 44.2(b). A substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict or the fact-finder's decision. A criminal conviction should not be overturned for non-constitutional error if the reviewing court, after examining the record as a whole, has a fair assurance that the error did not influence the fact-finder, or had slight effect.

HN17 The issue of venue falls outside the protection of the Double Jeopardy Clause. If there is a reversal for the failure to prove venue as alleged, no prohibition exists against reprosecution.

**COUNSEL:** For APPELLANT: Ms. Gaye Lynn Brewer, Austin, TX.

For APPELLEE: Mr. Terrence L, Irion, Ms. Anatole R. Barnstone, THE LAW OFFICE of TERRENCE L. IRION, Austin, TX.

**JUDGES:** Before Chief Justice Law, Justices Puryear and Onion *.

* Before John F. Onion, Jr., Presiding Judge (retired), Court of Criminal Appeals, sitting by assignment. See Tex. Gov't Code Ann. § 74.003(b) (West 1998).

**OPINIONBY:** John F. Onion, Jr.

**OPINION:**

**[*678] ON REMAND**

This appeal by the State of Texas involves eight judgments, nos. 624903 through 624910, entered in the County Court at Law No. 1 of Travis County, each of which reversed a judgment of conviction in the municipal court of record of the City of Austin.

On original submission, this Court concluded that it was confronted with a jurisdictional question in light of the amended notice of appeal filed by an assistant city attorney. Prior to November 1987, there was a traditional prohibition against the State's right to appeal in a criminal case. *See* Pittman v. State, 829 S.W.2d 897, 898 **[**2]** (Tex. App.--Austin 1992, no pet.). In 1987, the citizens of Texas voted to amend the State Constitution to read: "The State is entitled to appeal in criminal cases as authorized by general law." Tex. Const. art. V, § 26. HN1 Article 44.01 of the Code of Criminal Procedure was amended to grant the State an extremely limited right of appeal in certain designated circumstances, including when a court order "arrests or modifies a judgment." Tex. Code Crim. Proc. Ann. art. 44.01(a)(2) (West Supp. 2004-05). The statute provided that the "prosecuting attorney" may not "make" an appeal later than the 15th day after the date on which the court's order, ruling, or sentence was entered. Art. 44.01(d).

The statute further provides:

HN2 (i) In this article, "prosecuting attorney" means the county attorney, district attorney, or criminal district attorney who has the primary responsibility of prosecuting cases in the court hearing the case and does not include an assistant prosecuting attorney.

Tex. Code Crim. Proc. Ann. art. 44.01(i) (West Supp. 2004-05).

HN3 It is clear from the statute **[**3]** that a duly authorized subordinate of the "prosecuting attorney" may not "make" an appeal. And we know that "in order for a State's notice of appeal to invoke the Court of Appeals' jurisdiction, it must be timely, **n1** it must be in writing, **n2** and it must be 'made' by the elected prosecuting attorney.**n3** *State v. Rieiue*, 13 S.W.3d 408, 411 (Tex. Crim. App. 2000).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
**n1** *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996).
**n2** *Shute v. State*, 744 S.W.2d 96, 97 (Tex. Crim. App. 1988).
**n3** *State v. Muller*, 829 S.W.2d 805, 811-12 (Tex. Crim. App. 1992).
- - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The notice of appeal in the instant case was signed and executed by an assistant city attorney and contained the following:

IV.

The County Attorney has consented to the City Attorney prosecuting this **[*679]** appeal under article 45.201 of the Code of Criminal Procedure. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

**n4** Article 45.201 provides:

HN4 (a) All prosecutions in a municipal court shall be conducted by the city attorney of the municipality or by a deputy city attorney.

(b) The county attorney of the county in which the municipality is situated may, if the county attorney so desires, also represent the state in such prosecutions. In such cases, the county attorney is not entitled to receive any fees or other compensation for those services.

(c) With the consent of the county attorney, appeals from municipal court to a county court, county court at law, or any appellate court may be prosecuted by the city attorney or a deputy city attorney.

(d) It is the primary duty of a municipal prosecutor not to convict, but to see that justice is done.

Tex. Code Crim. Proc. Ann. art. 45.201 (West Supp. 2004-05).

---------- End Footnotes- ---------- **[**4]**

The State's brief acknowledges that the foregoing sentence is "ambiguous." The notice was signed by a person not connected to the county attorney's office. It did not reflect the name of the county attorney or the county and made express reference to article 45.201 but not to article 44.01, which governs the "making" of the State's notice of appeal. HN5 Article 45.201(c) permits the city attorney to prosecute appeals from municipal court only "with the consent of the county attorney." The statute has no time limitations and does not require the request or consent to be in writing. It would appear to apply to appeals that have been perfected.

For the reasons set forth in *State v. Blankenship*, 123 S.W.3d 99 (Tex. App.--Austin 2003), this Court found that the notice was not "made" by the county attorney and that this Court lacked jurisdiction to entertain the appeal. The State's petition for discretionary review was granted. Our judgment was reversed and the cause remanded for further proceedings. *State v. Blankenship*, 146 S.W.3d 218, 220 (Tex. Crim. App. 2004). The Court of Criminal Appeals found the city's assertion in the notice of appeal was a written **[**5]** express personal authorization by the county attorney and found the assertion simultaneously complied with article 44.01 as to the notice of appeal and with article 45.201(c) as to authorizing the city attorney to prosecute the appeal. *Id.* at 218-20. Since the Court of Criminal Appeals found that this Court had jurisdiction to hear the State's appeal, we turn to the only point of error before this Court.

**Background**

On April 24, 2002, thirteen complaints were filed against Blankenship in the Austin Municipal Court of Record charging him with violations of certain city ordinances. Each complaint alleged that the offense occurred in the territorial limits of the city of Austin as required by article 45.019(c) of the Code of **Criminal** Procedure. **n5** Trial by jury was waived and **Blankenship** entered a plea of not guilty in each case. The cases were heard on July 17, 2002. Blankenship filed pretrial motions to quash each complaint on the basis that the complaints alleged all the offenses occurred in the territorial limits of the city when in fact the offenses occurred outside the city or its territorial limits. The motions were **[**6]** called to the trial court's attention on the day of trial. After some discussion as to the date of filing, the motions were overruled as being untimely "under **[*680]** local rules." *See also* Tex. Code Crim. Proc. Ann. art. 45.019(f) (West Supp. 2004-05); *cf.* Tex. Code Crim. Proc. Ann. art. 4.14(b)
(West 2005) (relating to indictments and informations). The motions to quash are not in the appellate record.

---------- Footnotes ----------

**n5** Article 45.019(c) (Requisites of Complaint) provides:
HN6 A complaint filed in municipal court *must* allege that the offense was committed in the territorial limits of the municipality in which the complaint was made.
Tex. Code Crim. Proc. Ann. art. 45.019(c) (West Supp. 2004-05) (emphasis added). Act of May 30, 1999, 76th Leg., R.S., vol. 5, ch. 1545, § 16, 1999 Tex. Gen. Laws 5314, 5317.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After the State rested its case, Blankenship moved for an instructed judgment of acquittal in **[**7]** each case, *inter alia*, on the basis that the State had failed to prove the allegation that the offenses occurred in the territorial limits of the city but in fact had proved without dispute that the offenses had occurred outside the territorial limits of the city. The trial court asked for "written arguments." We find no ruling on the motions for instructed judgments of acquittal. Blankenship testified and presented his defense. The municipal court acquitted Blankenship of five of the thirteen charges and took the other cases under advisement. On August 22, 2002, the municipal court found Blankenship guilty of five offenses of developing or changing the use of property without first obtaining a site plan approval and release by the city of Austin. Blankenship was also found guilty of three offenses of failing to observe a stop-work order posted at the site of the property involved. The trial court assessed a $ 1,000 fine in each of the eight cases.

Blankenship filed a motion for new trial setting forth, *inter alia*, a "point of error" **n6** complaining the State failed to prove venue as alleged in each complaint. The motion was overruled. Notice of appeal was given to County **[**8]** Court at Law No. 1 of Travis County. In his appellate brief in county court, Blankenship again raised the contention that venue had not been proven as alleged. On appeal, the County Court at Law No. 1 of Travis County considered only one of Blankenship's points of error--that being the failure of the State to prove its allegation in each complaint that the offenses occurred in the territorial limits of the city of Austin. The county court in its opinion sustained Blankenship's contention, reversed the eight convictions, and did not reach Blankenship's other points of error.

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**n6** In order to perfect an appeal from a municipal court of record, an appellant must file a motion for new trial setting forth "the points of error of which he complains." *See* Tex. Gov't Code Ann. § 30.00014(c) (West 2004).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The county court found that the evidence showed and the parties agreed that the actions giving rise to the alleged offense occurred outside the territorial limits of the city of Austin **[**9]** but inside the city of Austin's extraterritorial jurisdiction as provided in Chapter 42 of the Texas Local Government Code. *See* Tex. Loc. Gov't Code Ann. §§ 42.001, .021(5) (West 1999).

It is clear that the Austin Municipal Court of Record had original exclusive criminal jurisdiction to try violations of certain city ordinances both within the territorial limits of the city and outside those limits but within a geographical area located within the extraterritorial jurisdiction of the city. **n7** The issue is not one of jurisdiction, but failure to prove venue as laid.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

**n7** A municipal court of record has criminal jurisdiction over misdemeanors punishable by a fine only. *See* Tex. Code Crim. Proc. Ann. arts. 4.01, 4.14 (West 2005); Tex. Gov't Code Ann. §§ 29.003(a), 30.00005(a), (b) (West 2004). It is observed that said section 30.00005(a), (b) provides a municipal court of record the jurisdiction provided by general law for a regular, non-record municipal court and jurisdiction over criminal cases arising under ordinance authorized by sections 215.072, 217.042, 341.903, and 401.002 of the Texas Local Government Code. *See generally Treadgill v. State*, 160 Tex. Crim. 658, 275 S.W.2d 658 (Tex. Crim. App. 1954).

---------- End Footnotes- ---------- **[**10]**

The county court recognized the requirement of article 45.019(c) but concluded **[*681]** it was "nonsense" to argue the complaint must allege the offense occurred within the territorial limits of a city when "the truth of the matter is that the offense, if any, occurred in ETJ [extra territorial jurisdiction] of the city." The county court's opinion discussed how in its opinion each complaint should have alleged venue as being in the extraterritorial jurisdiction and the basis for extending the court's reach beyond the territorial limits of the city such as referencing section 401.002(a) of the Texas Local Government Code or other applicable law. The county court concluded that "because the prosecution did not prove an essential element of its case, this prosecution must fail."

In light of Blankenship's point of error, the issue was not whether each complaint properly charged an offense. Each complaint did charge an offense and was sufficient on its face to invoke the jurisdiction of the Austin Municipal Court of Record. Further, the issue was not the proper manner of pleading each offense. The sole issue is the consequence of the failure of the prosecution **[**11]** to prove venue as laid under the particular circumstances of these cases.

The State has appealed the judgments of reversal to this Court. The State concedes the failure to prove the venue allegation but contends that the error was harmless and the convictions must stand.

**Venue**

HN7 Venue is distinct from jurisdiction. *Skillern v. State*, 890 S.W.2d 849, 859 (Tex. App.--Austin, 1994, pet. ref'd). The terms are not synonymous. *Martin v. State*, 385 S.W.2d 260, 261 (Tex. Crim. App. 1964). Jurisdiction is the authority or power conferred upon a court by the constitution and laws of the State that allows a court to hear and try a case. *Riewe*, 13 S.W.3d at 410; *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996); *Ex parte Watson*, 601 S.W.2d 350, 351; *Skillern*, 890 S.W.2d at 859. Venue means the place where the case may be tried. *Soliz v. State*, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003); *Thomas v. State*, 699 S.W.2d 845, 854 (Tex. Crim. App. 1975); *Skillern*, 890 S.W.2d at 859. At common law, venue meant the neighborhood, place, **[**12]** or county in which the injury is declared to have been done or in fact declared to have happened. Black's Law Dictionary 1557 (6th ed. 1991); *Soliz*, 97 S.W.3d at 141. Venue denotes locality, and its prevailing meaning is the place of trial, the geographical location in which an action or proceeding should be brought to trial. 92 C.J.S. *Venue* § 2.

HN8 Venue is not a constituent element of the offense charged. *Skillern*, 890 S.W.2d at 860; *see also Henley v. State*, 98 S.W.3d 732, 734 (Tex. App.--Waco 2003, pet. ref'd); 40 Dix § 2.82 (citing *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981)). Venue must be proved only by a preponderance of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 13.17 (West 2005); *Banks v. State*, 530 S.W.2d 940, 943 (Tex. Crim. App. 1975); *Gonzales v. State*, 784 S.W.2d 140, 142 (Tex. App.--Austin 1990, no pet.). The failure of proof of venue by the prosecution does not negate the guilt of the accused. *Fairfield*, 610 S.W.2d at 779. It is presumed that venue was proved at trial unless disputed **[**13]** at trial or the record

affirmatively shows the contrary. *See* Tex. R. App. 44.2(c)(1). **n8** It must be remembered, however, that if the issue of venue is timely raised, reversible error may result from the failure to prove venue as laid in the charging instrument. *See* Black v. State, 645 S.W.2d 789, 791 (Tex. Crim. App. 1983); *cf.* Sander v. State, 52 S.W.3d 909, 917 (Tex. App.--Beaumont 2001, pet. ref'd).

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

**n8** The presumption is clearly not applicable in the instant case.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

**[*682]** With this background, we turn to the variance between the venue alleged and the venue proven. The failure to prove venue as laid in each complaint was error. Was it harmless error or reversible error? The State relies upon Gollihar v. State, 46 S.W.3d 243 (Tex. Crim. App. 2001), claiming that there was only an immaterial variance that did not prejudice Blankenship's substantial rights. *Id.* at 248. The State acknowledges that the venue actually **[**14]** proved was outside the city limits but in a geographical area within the extraterritorial jurisdiction of the city in Travis County, State of Texas, and over which the Austin Municipal Court of Record had exclusive criminal jurisdiction to try violations of certain city ordinances. Hence, the variance between the venue alleged and the venue proven was immaterial regarding Blankenship's substantial rights.

HN9 Normally, variance claims are treated as sufficiency of the evidence problems. *Id.* at 247. A state review **n9** of the sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct charge for the case. *Id.* at 253 (citing Malik v. State, 953 S.W.2d 234 (Tex. Crim. App. 1987)). The *Malik* test is also applicable to non-jury or bench trials. *Malik*, 953 S.W.2d at 240.

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

**n9** In Gollihar v. State, 46 S.W.3d 243 (Tex. Crim. App. 2001), the court created a dichotomy between federal and state review. *See* Smith v. State, 135 S.W.3d 259, 262 (Tex. App.--Texarkana 2004, no pet.). In Fuller v. State, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002), the Court of Criminal Appeals recognized that the *Gollihar* standard was clearly not the same as the Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) standard of measuring evidence sufficiency against the substantive elements of the criminal offense as defined by state law.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**15]**

As observed earlier, HN10 venue is not a constituent element of the offense. It need only be proved by the preponderance of the evidence, and the failure to prove venue does not negate the guilt of the defendant. The *Gollihar* construct does not apply to the issue here presented. We reject the State's argument that it does.

Blankenship relies upon Black v. State, 645 S.W.2d 789, 791 (Tex. Crim. App. 1983) for the proposition that when venue is made an issue in the trial court, the failure to prove venue constitutes reversible error. The failure to prove venue in Smith County as laid in the *Black* indictment resulted in a summary reversal of the conviction. *Black* has been repeatedly cited with approval, *e.g.*, Edwards v. State, 97 S.W.3d 279, 285 (Tex. App.--Houston [14th Dist.] 2003, pet. ref'd); Sander v. State, 52 S.W.3d 909, 917 (Tex. App.--Beaumont 2001, pet. ref'd);

*Williams v. State*, 924 S.W.2d 189, 191 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd); *Sixta v. State*, 875 S.W.2d 17, 18 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd); *O'Hara v. State*, 837 S.W.2d 139, 142-43 **[**16]** (Tex. App.--Austin 1992, pet. ref'd). In most cases citing *Black*, however, venue was proven as alleged by direct or circumstantial evidence or venue was presumed under Rule 44.2(c)(1) of the Texas Rules of Appellate Procedure. We have not found in recent cases a discussion of *Black's* summary reversal approach.

*Black* was decided before the adoption of the Texas Rules of Appellate Procedure and its harmless error analysis provisions. Rule 44.2(a), (b) provide:

HN11 (a) *Constitutional Error*. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

**[*683]** (b) *Other Errors*. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Tex. R. App. P. 44.2(a), (b).

In *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997), the Court of Criminal Appeals wrote:

HN12 Except for certain federal constitutional **[**17]** errors labeled by the United States Supreme Court as "structural," no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. . . . Appellate courts should not automatically foreclose the application of the harmless error test to certain categories of error. Where an error is shown to be harmless, it is not a ground for reversal, regardless of the category or label attached to that particular error.

*Id.* at 264.

HN13 It is clear that the failure to prove venue when the issue is raised at trial is now subject to a harm analysis rather than an automatic reversal of the conviction. Is the error in failing to prove venue in the instant case a constitutional or non-constitutional error for harm analysis purposes? We believe that *Bath v. State*, 951 S.W.2d 11 (Tex. App.--Corpus Christi 1997, pet. ref'd) answers the question:

HN14 The "vicinage" **n10** provision of the Sixth Amendment stipulates that in all criminal prosecutions, the accused shall be tried by an impartial jury of the State "and district wherein the crime shall have been committed, which **[**18]** district shall have been previously ascertained by law. . . ." U. S. Const., amend. VI. Neither federal nor state authorities, however, currently require application of this clause to state prosecutions. *See Cook v. Morrill*, 783 F.2d 593, 595 (5th Cir. 1986); *Martin v. Beto*, 397 F.2d 741, 748 (5th Cir. 1968), *cert. denied*, 394 U.S. 906, 89 S. Ct. 1008, 22 L. Ed. 2d 216 (1969); *State v. Paiz*, 817 S.W.2d 84, 85 (Tex. Crim. App. 1991); *but see Paiz*, 817 S.W.2d at 86 (assuming, *arguendo*, that it did apply). We therefore hold that no error in relation to the vicinage provision of the Sixth Amendment was committed in the transfer of appellant's case from Webb to Nueces County. Point of error ten is overruled.

*Id.* at 19. *See also* *Garza v. State*, 974 S.W.2d 251, 259 (Tex. App.--San Antonio 1998, pet. ref'd).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

**n10** HN15 "Vicinage" means "1. vicinity; proximity. 2. The place where the crime is committed, or a trial is held; the place from which jurors are to be drawn for trial use, the locale from which the accused is entitled to have jurors selected." Black's Law Dictionary 7th ed. at 1561.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**19]**

HN16 We must determine the harm of the non-constitutional error on the basis of whether it affected Blankenship's substantial rights. *See* Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict or the fact-finder's decision. *See* *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *Rankin v. State*, 995 S.W.2d 210, 215 (Tex. App.--Houston [14th Dist.] 1999, pet. ref'd). A criminal conviction should not be overturned for non-constitutional error if the reviewing court, after examining the record as a whole, has a fair assurance that the error did not influence the fact-finder, or had slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *Lemmons v. State*, 75 S.W.3d 513, 525 (Tex. App.--San Antonio 2002, pet. ref'd).

In our harm analysis, we examine certain factors which are not exclusive. *See* **[*684]** *Orona v. State*, 791 S.W.2d 125, 130 (Tex. Crim. App. 1990). The source of the error was article 45.019(c) which mandatorily required the prosecution to allege **[**20]** the offense occurred within the territorial limits of the municipality. The nature of the error was the failure to prove venue as laid. Each complaint expressly referred to the State of Texas, Travis County, and the City of Austin. Each complaint contained a legal description of the property involved. The description placed the property outside the city limits but within the extraterritorial area of the city of Austin over which geographical area in Travis County the Austin Municipal Court of Record had sole **criminal** jurisdiction to try violations of certain city ordinances. Such legal description should have alerted **Blankenship** and given notice that the offenses concerning the property occurred outside the city. Blankenship's counsel filed motions to quash the complaints on the basis of misallegation of venue. Counsel argued that if any witness testified the property was within the city limits, the witness would be guilty of perjury. The motions were overruled as being untimely filed. It does not appear Blankenship was misled by the improper venue allegation. The State's witnesses and Blankenship all testified the property was outside the city limits. The State did not emphasize the **[**21]** error.

There is no showing that Blankenship was prevented from presenting a defense, including his own designated "1704" defense that the property had been "grandfathered in" by earlier law and was exempt from the application of city ordinances.

Further, holding the error harmless will not encourage the State to repeat with impunity. The State is burdened with article 45.019(c) until a legislative revision occurs. HN17 The issue of venue is not an element of the offenses alleged and falls outside the protection of the Double Jeopardy Clause. If there was a reversal here for the failure to prove venue as alleged, no prohibition exists against reprosecution. *See* *Martin*, 385 S.W.2d at 261; *O'Hara*, 837 S.W.2d at 143; 40 Dix § 2.83. A reversal would not accord Blankenship protection from a retrial.

An examination of the record as a whole in this bench trial gives us fair assurance that the error did not influence the trial judge. *See* *Scaggs v. State*, 18 S.W.3d 277, 290 (Tex. App.--Austin 2000, pet. ref'd).

Like the County Court at Law No. 1 of Travis County, we find that there was error in the failure to prove venue as laid, but unlike **[**22]** that court, we have performed a harm analysis and have concluded that the non-constitutional error is harmless. *See* Tex. R. App. P. 44.2(b).

The judgments of the County Court at Law No. 1 of Travis County are reversed and the causes are remanded to that court for consideration of Blankenship's other points of error.

John F. Onion, Jr., Justice

The State of Texas
Vs.
Putative Propertyholder

In the Municipal Court

City of _____, TX

Complaint

The State of Texas
County of _____
City of _____

In the Name and
By the Authority of
The State of Texas

I, the undersigned affiant, do solemnly swear that I have good reason to believe and do believe that one Putative Propertyholder, on or about the _____ day of _____, 20____, and before the making and filing of this complaint, within the territorial limits of the city of _____, Texas,

Did then and there knowingly continue to further develop a site, located at 1000 Property Site, at a time when a stop work order based on a failed inspection had been posted on the site, contrary to the ordinances of the City of _____,

Against the peace and dignity of the state.

_____
Affiant

Sworn to and subscribed before me by affiant on this day.

_____
Deputy clerk, for and on behalf of
the clerk of the municipal court,
City of _____ in _____ County, Texas

The case went to trial on the attached complaint. The State proved that the Defendant did knowingly continue to further develop the alleged site after the stop work order had been posted, but that the site is located in the ETJ of the city. You, the Judge, have taken judicial notice of the relevant sections of the municipality's ordinances. Defendant moves for a directed verdict of not guilty. What further information do you need, if any, issues should you consider, and how do you rule?

## Enforcing Municipal Ordinance Violations in the ETJ

The purpose of having an ETJ is to promote and protect the _____,

_____, and _____ of persons residing _____ and

_____ to the municipalities.

What are the most common factors appellate courts traditionally examine to determine if a city has the ability to enforce its ordinance in its ETJ?

1. _____

2. _____

3. _____

4. _____

What are the 5 different types of municipalities in the State of Texas?

1. _____

2. _____

3. _____

4. _____

5. _____

Jurisdiction is

_____.

Venue is _____.

Venue is an element of the offense. ____ True ____ False.

The burden of proof for venue is _____.

If venue is not proven, the error is: ____ Constitutional ____ Non-Constitutional

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1-800-252-3718
FAX (512) 320-0996

# OLDER DRIVERS

**Presented by**

**Meichihko Proctor**
**Program Attorney & Deputy Counsel**
**TMCEC**

By the end of the session, judges will be able to:

- Identify trends in the adjudication of criminal cases in municipal courts regarding older drivers; and,
- Locate statutory provisions applicable to common scenarios encountered by older drivers in municipal courts.

Funded by a grant from the Texas Department of Transportation.

# The Older Driver


**Sponsored by the AAA Foundation for Traffic Safety**

**Prepared by:**
**Dr. Lindsay Griffin, Center for Transportation Safety, Texas Transportation Institute**

## Why Is This Important?

**The Number of Older Drivers Is Increasing and the Number of Accidents Involving Older Drivers Is Increasing.**

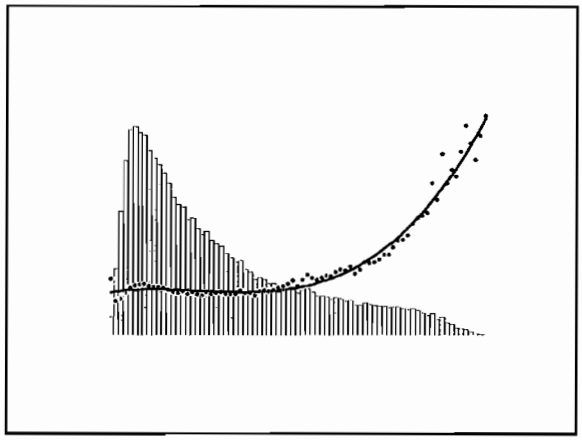
**65+ year olds are 1.78 times as likely to die**
**75+ year olds are 2.59 times as likely to die**
**85+ year olds are 3.72 times as likely to die**

## Older Driver Issues

- **Fragility**
- **Illness**
- **Perceptual Lapses**
- **Left Turns**

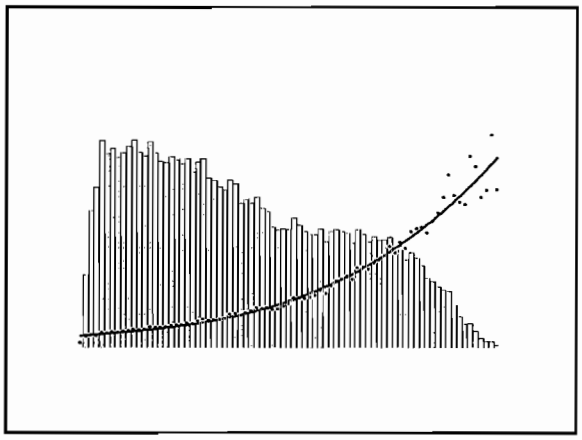
## Older Driver Issues

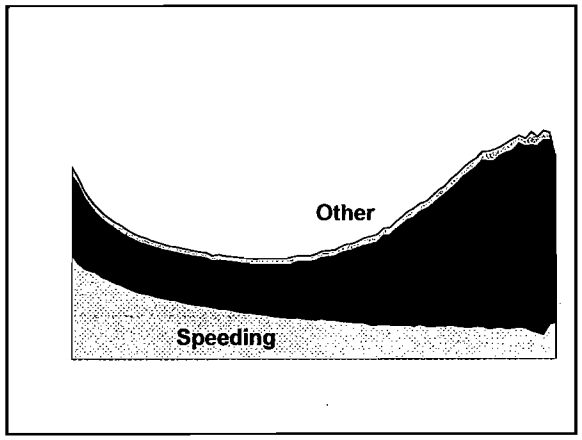
- Slowdown in Response Time
- Loss of Clarity in Vision and Hearing
- Loss of Muscle Strength and Flexibility
- Possible Drowsiness
- Reduction in Ability to Concentrate
- Lower Tolerance for Alcohol

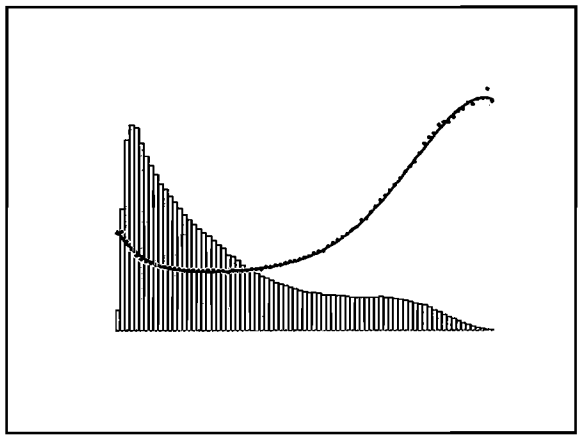


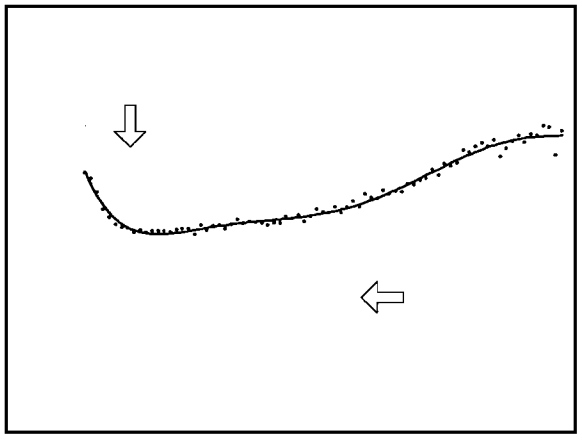
**Likelihood of Older Drivers Dying When Compared to a 55-64 Year Old Reference Group and Controlling for:**

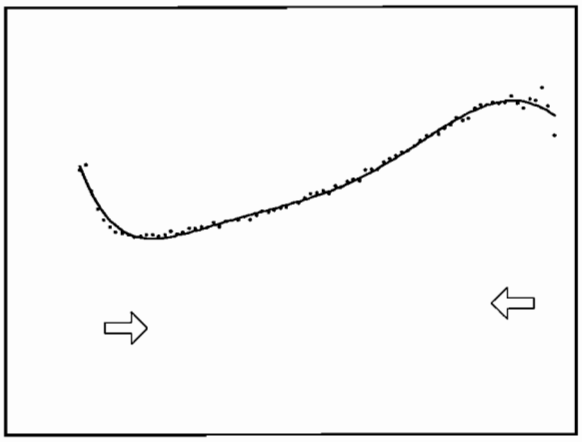
- Crash Type (SVA vs. MVA)
- Population (Rural vs. Urban)
- Driver Sex (Male vs. Female)
- Light Condition (Daylight vs. Dark)
- Intersection Related (Yes vs. No)




Other
Speeding







## What Can You Do?

## American Bar Association

Capacity is task specific, not global.
Capacity is contextual.
Capacity is situational.

## American Bar Association

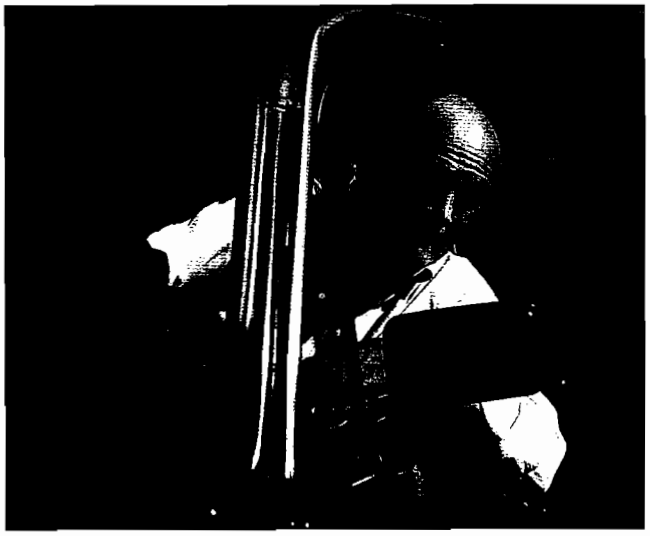
- Six Pillars of Capacity Assessment
  - Medical Condition
  - Cognition
  - Everyday Functioning
  - Values and Preferences
  - Risk and Level of Supervision
  - Means to Enhance Capacity

Send a letter to the Texas Department of Health Medical Advisory Board outlining your concerns. This can be done anonymously.

The Texas Department of Public Safety can then send a notice to a driver to visit a DPS trooper.


Questions?

## The Older Driver



# Older driver involvement in injury crashes in Texas • 1975-1999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# FOREWORD

This study was funded by the AAA Foundation for Traffic Safety. Founded in 1947, the AAA Foundation is a not-for-profit, publicly supported charitable research and educational organization dedicated to saving lives and reducing injuries by preventing traffic crashes.

Funding for this research was provided by voluntary contributions from the American Automobile Association and its affiliated motor clubs, the Canadian Automobile Association and its affiliated motor clubs, individual AAA members, and AAA Club-affiliated insurance companies.

# Executive Summary

According to the National Highway Traffic Safety Administration, older drivers are more likely than drivers in their thirties, forties, or fifties to be involved in traffic crashes, and they are more likely to be killed in traffic crashes. The number of Americans 65 years of age and older is expected to double between 2000 and 2030. Americans are living longer and driving longer. Together these trends suggest that the number of older drivers killed on U.S. streets and highways will grow.

The literature suggests that older drivers are more fragile than younger drivers—that is, in crashes of comparable severity, older drivers are more likely than younger drivers to be seriously injured or killed. Medical conditions and use of medications have also been associated with the involvement of older drivers in crashes. With advancing age, sensory and motor capabilities decline and perceptual/cognitive and attentional impairment become more common, and the relative likelihood of traffic crashes increases. Although many older drivers may attempt to adjust to functional difficulties by driving less and avoiding difficult driving

conditions, such as driving at night, in rainy weather, or in heavy traffic, older drivers still have a heightened risk of being involved in traffic crashes.

In this study, 25 years of police-level crash data from nearly 4 million injury crashes in the state of Texas were analyzed to determine the association between driver age and four factors: *fragility*—the likelihood of death among drivers involved in injury crashes; *illness*—the likelihood that drivers were ill or suffering from some other physical defect at the time of their crashes; *perceptual lapses*—the likelihood that drivers involved in crashes failed to yield the right of way or disregarded traffic signs or signals; and *left turns*—the likelihood that left turns were involved in injury crashes. The purpose of the study was to further understand these four factors and other variables and to portray in graphical format their association with crashes involving older drivers.

The control variables used in the analyses included whether drivers were involved in single-vehicle or multiple-vehicle crashes; whether the crash occurred in an urban or a rural setting; the driver's sex; the light conditions at the time of the crash (daylight or darkness); and whether or not the crash was related to an intersection. Additional analyses examined two-vehicle, intersection-related crashes in which the vehicles approached one another from opposite directions or approached one another at an angle.

Because older drivers do not constitute a homogeneous population, three different age thresholds were used in defining this group: 65 and older, 75 and older, and 85 and older. Drivers aged 55 to 64, those nearing traditional retirement age, constituted the comparison group in the analyses.

When the analyses controlled for crash type (single-vehicle vs. multiple-vehicle), population density (rural vs. urban), driver sex (male vs. female), light condition (daylight vs. darkness), and intersection relatedness, drivers in the three older age categories, compared with drivers aged 55–64, were found to be more likely to die in injury crashes:

- Drivers 65+ years of age were 1.78 times as likely to die

- Drivers 75+ years of age were 2.59 times as likely to die

- Drivers 85+ years of age were 3.72 times as likely to die

Other analyses that controlled for crash type, population density, driver sex, light condition, and intersection relatedness showed that when compared to 55-64 year old drivers, the three older age groups became progressively more likely to (1) have been ill or suffering some other physical defect at the time of their crashes, (2) have suffered perceptual lapses that contributed to their crashes (such as failure to yield the right of way or disregarding signs or signals), and (3) have been involved in left-turn crashes.

# Introduction

According to the National Highway Traffic Safety Administration (NHTSA), on a per-mile basis, older drivers are relatively more likely to be involved in traffic crashes than drivers in their thirties, forties, or fifties. Furthermore, older drivers are more likely to be killed in traffic crashes than drivers in their thirties, forties, or fifties, both on a per-mile and a per-licensed-driver basis (NHTSA, 1993, figures 6, 7, and 8).

The number of persons in the United States 65 years of age and older will increase from about 35 million in 2000 (12.4 percent of the population) to an estimated 71 million by 2030 (19.6 percent of the population) (CDC, 2003). Moreover, Americans are living longer and driving longer. The implications of a growing population of older citizens—and older drivers—are profound. If older drivers are more likely to be involved in traffic crashes and more likely to die as a result of those crashes, then, other things being equal, the number of older drivers killed on U.S. streets and highways is destined to grow.

In Texas, from which the data for this study were drawn, between 1975 and 1999, the number of licensed drivers increased from 7,743,779 to 13,902,660—a factor of 1.79—and the median age of licensed drivers increased from 36 to 40 years (Figure 1). Furthermore, as the following chart shows, the numbers of drivers in the older age categories increased more dramatically than those in the younger age categories.

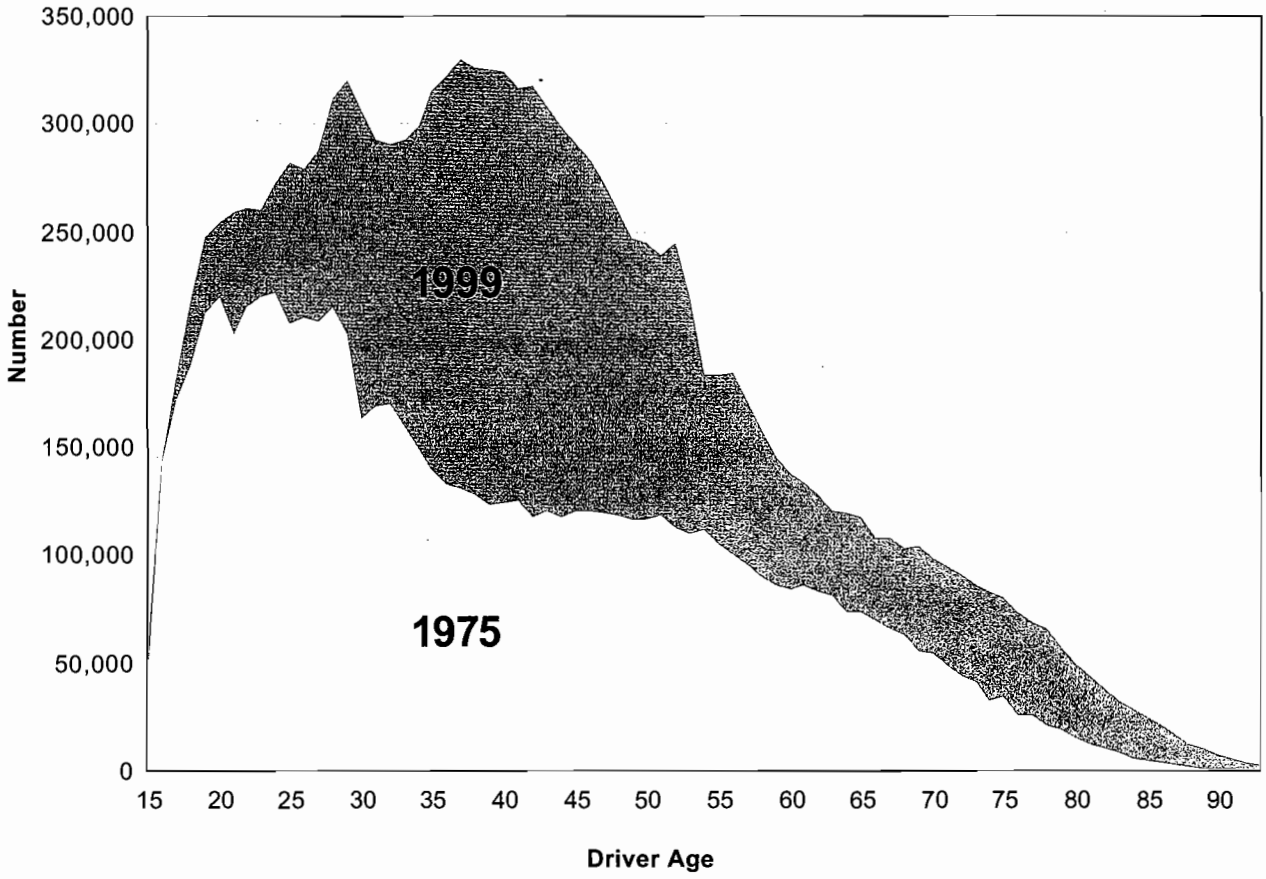
| Texas Drivers | 1975 | | 1999 | | Increase in Licensed Drivers |
|---|---|---|---|---|---|
| All Ages | 7,743,779 | *(100.00%)* | 13,902,660 | *(100.00%)* | 1.79 |
| Under 65 | 6,998,929 | *(90.38%)* | 12,261,588 | *(88.20%)* | 1.75 |
| 65 and Older | 744,850 | *(9.62%)* | 1,641,072 | *(11.80%)* | 2.20 |
| 75 and Older | 195,298 | *(2.52%)* | 646,905 | *(4.65%)* | 3.31 |
| 85 and Older | 16,386 | *(0.21%)* | 109,430 | *(0.79%)* | 6.68 |

By 2030, nearly 22,100,000 Texans will be licensed to drive. This estimate assumes conservatively that the same proportion of the state's population (stratified by age categories) will receive licenses in 2030 as in 1999.[1]

| Texas Drivers | Projection for 2030 | |
|---|---|---|
| All Ages | 22,091,144 | *(100.00%)* |
| Under 65 | 17,938,480 | *(81.20%)* |
| 65 and Older | 4,152,664 | *(18.80%)* |
| 75 and Older | 1,545,427 | *(7.00%)* |
| 85 and Older | 228,153 | *(1.03%)* |

[1]Projections of the Texas population to 2030 were provided by the Office of the State Demographer, Department of Rural Sociology, Texas A&M University.

**Figure 1.** Number of Licensed Texas Drivers, by Age and Year (1975 vs. 1999)




The literature suggests that older drivers are more fragile than younger drivers—that is, in traffic crashes of comparable severity, older drivers are more likely than younger drivers to be seriously injured or killed (Barancik et al., 1986; Zhang et al., 2000; Evans, 1988; 2001; Li, Braver, and Chen, 2003). There is also a large and growing literature related to medical conditions (Drachman and Swearer, 1993; Koepsell, et al., 1994; Gresset and Meyer, 1994; Foley, Wallace, and Eberhard, 1995) and medications (Ray et al., 1992; Foley, Wallace, and Eberhard, 1995; Sims et al., 1998; McGwin et al., 2000) associated with older drivers and the increased likelihood of involvement in traffic crashes.

With increasing age, sensory and motor capabilities decline, perceptual/cognitive and attentional impairment become more common, driving becomes more difficult, and, other things being equal, traffic crashes become relatively

more likely (Fell, 1976; Owsley et al., 1991; Stelmach and Nahom, 1992; Ball et al., 1993; Lundberg et al., 1998; Stutts, Stewart, and Martell, 1998). There is evidence that many older drivers attempt to compensate for these functional difficulties by driving less and avoiding certain kinds of driving, such as driving at night, in rainy weather, or in heavy traffic (Ball et al., 1998; Gallo, Rebok, and Lesikar, 1999). Nevertheless, older drivers have a heightened risk of being involved in traffic crashes.

Perhaps because of the diminishing of functional capabilities with age, intersection-related crashes are relatively more common for older drivers, and left turns are particularly problematic (Matthias, Nicholas, and Thomas, 1996; Preusser et al., 1998; Staplin, et al., 1998; Finison and Dubrow, 2002).

In this study, 25 years of police-level crash data from the state of Texas were analyzed to determine the association between driver age and four factors: *fragility*—the likelihood of death among drivers involved in injury crashes; *illness*—the likelihood that drivers were ill or suffering from some other physical defect at the time of their crashes; *perceptual lapses*—the likelihood that drivers involved in crashes failed to yield the right of way or disregarded traffic signs or signals; and *left turns*—the likelihood that left turns were involved in injury crashes. The purpose of the study was to further document the role of these four factors, along with variables related to crash conditions and circumstances, and to portray in graphical format their association with crashes involving older drivers.

# Methods

Data on more than 7 million drivers involved in injury crashes in Texas during a 25-year period were analyzed to determine how fragility (defined as the likelihood of death among drivers), illness (the likelihood that driver has an illness or a physical defect), perceptual lapses (the likelihood that the driver failed to yield the right of way or disregarded traffic signs or signals), and left turns (the likelihood that the driver was making a left turn) vary with driver age.

For the first three factors—fragility, illness, and perceptual lapses—the relationship with driver age was further subdivided to evaluate differences between single-vehicle and multiple-vehicles crashes (variable name, "crash type"), rural and urban settings ("population density"), male and female drivers ("driver sex"), daylight and darkness ("light condition"), and intersection-related or non-intersection-related crash site ("intersection relatedness"). These five variables are also used to control for differences in crash circumstances between the comparison group and the three older driver categories and, thereby, to more accurately portray the effect of driver age on fragility, perceptual lapses, and illness.

For the fourth factor, left turns, the effects of driver age are depicted by population density, driver sex, and light condition. Finally, for two-vehicle, intersection-related crashes in which one vehicle is going straight and the other is turning left, the relative likelihood that a driver is making a left turn is depicted by driver age.

Analyses were carried out to compare drivers 55–64 years old with drivers in three age categories—65 and older, 75 and older, and 85 and older—while controlling for crash type, population density, driver sex, light condition, and intersection relatedness. There is no universally accepted definition of an "older driver," and the three thresholds for older drivers used here demonstrate that where the line is drawn in defining "older drivers" may have a considerable effect on the results of these analyses. Drivers in their sixties, seventies, eighties, and nineties are by no means homogeneous in fragility, likelihood of suffering an illness or physical impairment, or susceptibility to perceptual lapses.

When working with small data sets, it may be necessary to define the threshold for older drivers at a younger age to garner a larger sample and achieve greater statistical stability. Doing so, however, may obscure an outcome that would have resulted if the sample had been large enough to allow a higher threshold. The database in this study, comprising 25 years of crash data collected in a large state, is sufficiently large in most cases to allow us to set the threshold for an older drivers at 85 years and still have a fairly stable sample with which to work.

The age range for the comparison group used in this study (55–64 years) is conservative. Had a younger comparison group been used, for example, all drivers under age 65 or all drivers between the ages of 35 and 64, the findings might have been more dramatic. On balance, however, it seemed more appropriate to compare the older driver age groups with a comparison group that was not far removed from the traditional retirement age.

None of the analyses conducted in this study employ "exposure" data. No crash rates (e.g., crashes per 100,000 licensed drivers) or fatality rates (e.g., fatalities per 100 million vehicle miles of travel) are provided. All of the analyses are

**Table 1.** Injury Crashes, Severity of Injuries Sustained by Drivers in Injury Crashes, and Severity of Injuries Sustained by All Persons Injured in Crashes, by Year (Texas, 1975–1999)

| | Driver Injury Severity* | | | | | | Drivers in | Severity of All Injuries Recorded* | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Year | Injury Crashes | Not Injured | C-Level Injury | B-Level Injury | A-Level Injury | Fatal Injury | Injury Crashes | C-Level Injury | B-Level Injury | A-Level Injury | Fatal Injury |
| 1975 | 95,455 | 73,655 | 32,062 | 36,811 | 10,752 | 1,898 | 155,178 | 57,323 | 63,309 | 18,330 | 3,429 |
| 1976 | 99,128 | 76,353 | 35,572 | 38,145 | 10,962 | 1,784 | 162,816 | 62,308 | 64,402 | 18,572 | 3,230 |
| 1977 | 110,153 | 83,506 | 39,786 | 43,024 | 12,461 | 2,066 | 180,843 | 68,700 | 71,878 | 21,057 | 3,698 |
| 1978 | 121,466 | 92,169 | 45,318 | 48,033 | 13,225 | 2,262 | 201,007 | 77,229 | 79,159 | 21,840 | 3,980 |
| 1979 | 126,478 | 96,611 | 48,137 | 50,196 | 13,453 | 2,375 | 210,772 | 80,236 | 81,868 | 22,446 | 4,229 |
| 1980 | 127,440 | 95,848 | 46,361 | 52,392 | 14,292 | 2,524 | 211,417 | 76,924 | 85,312 | 23,728 | 4,424 |
| 1981 | 140,533 | 106,995 | 52,548 | 57,478 | 16,010 | 2,738 | 235,769 | 86,901 | 92,838 | 26,457 | 4,701 |
| 1982 | 139,611 | 106,524 | 52,991 | 56,374 | 15,502 | 2,407 | 233,798 | 87,847 | 91,426 | 25,393 | 4,271 |
| 1983 | 141,023 | 107,200 | 56,612 | 56,376 | 15,500 | 2,173 | 237,861 | 91,493 | 91,308 | 25,356 | 3,823 |
| 1984 | 149,009 | 113,971 | 62,948 | 58,089 | 15,821 | 2,277 | 253,106 | 101,468 | 93,416 | 25,836 | 3,913 |
| 1985 | 154,927 | 119,595 | 69,929 | 57,348 | 16,103 | 2,151 | 265,126 | 111,396 | 93,232 | 26,381 | 3,682 |
| 1986 | 157,635 | 125,451 | 76,583 | 50,789 | 15,838 | 2,004 | 270,665 | 123,548 | 84,385 | 26,187 | 3,568 |
| 1987 | 149,794 | 118,571 | 76,921 | 45,523 | 15,182 | 1,780 | 257,977 | 125,498 | 76,217 | 25,180 | 3,261 |
| 1988 | 155,008 | 133,978 | 83,714 | 45,810 | 15,399 | 1,919 | 280,820 | 136,622 | 76,867 | 25,356 | 3,395 |
| 1989 | 156,282 | 135,262 | 87,540 | 45,562 | 14,898 | 1,881 | 285,143 | 142,234 | 75,914 | 24,882 | 3,361 |
| 1990 | 165,306 | 143,860 | 97,272 | 46,374 | 15,034 | 1,842 | 304,382 | 159,613 | 77,847 | 25,116 | 3,243 |
| 1991 | 164,166 | 143,757 | 101,497 | 43,388 | 13,950 | 1,640 | 304,232 | 167,353 | 72,716 | 23,361 | 3,079 |
| 1992 | 173,203 | 154,221 | 112,385 | 42,633 | 13,591 | 1,652 | 324,482 | 186,733 | 72,517 | 22,775 | 3,057 |
| 1993 | 180,884 | 162,104 | 121,213 | 42,779 | 13,774 | 1,709 | 341,579 | 203,132 | 72,541 | 23,218 | 3,037 |
| 1994 | 194,724 | 173,741 | 133,853 | 45,462 | 14,731 | 1,803 | 369,590 | 226,310 | 75,911 | 24,616 | 3,142 |
| 1995 | 198,883 | 177,264 | 136,550 | 47,421 | 14,812 | 1,782 | 377,829 | 230,949 | 78,748 | 24,562 | 3,172 |
| 1996 | 207,882 | 180,869 | 143,883 | 51,696 | 15,587 | 2,129 | 394,164 | 239,646 | 84,990 | 25,761 | 3,738 |
| 1997 | 208,674 | 183,977 | 144,123 | 51,980 | 15,130 | 2,015 | 397,225 | 238,460 | 84,518 | 24,833 | 3,508 |
| 1998 | 205,383 | 180,869 | 141,708 | 52,127 | 14,334 | 2,078 | 391,116 | 232,083 | 83,148 | 23,430 | 3,576 |
| 1999 | 206,326 | 182,295 | 142,166 | 53,210 | 14,115 | 2,089 | 393,875 | 231,452 | 85,208 | 22,788 | 3,519 |
| Total | 3,929,373 | 3,268,646 | 2,141,672 | 1,219,020 | 360,456 | 50,978 | 7,040,772 | 3,545,458 | 2,009,675 | 597,461 | 90,036 |

*The definitions of injuries, from the *Manual on Classification of Motor Vehicle Traffic Accidents in Texas* (ST-102) (various years) and *Motor Vehicle Traffic Accidents in Texas* (various years), Texas Department of Public Safety, Austin, are as follows:

> "**Fatal Injury** is any injury that results in death within thirty days of the motor vehicle traffic accident." This definition was in effect from 1983 to 1999. From 1978 to 1982, a fatal injury was defined as having occurred within 90 days of the accident, and before 1978, the time until death was not specified in the definition.
>
> "**Incapacitating** (A-level) **Injury** is any injury, other than a fatal injury, which prevents the injured person from walking, driving or normally continuing the activities he was capable of performing before the injury occurred."
>
> "**Nonincapacitating Evident** (B-level) **Injury** is any injury, other than a fatal injury or an incapacitating injury, which is evident to observers at the scene of the accident in which the injury occurred."
>
> "**Possible** (C-level) **Injury** is any injury reported or claimed which is not a fatal injury, incapacitating injury or nonincapacitating evident injury."

expressed in terms of frequencies, proportions (percentages), and relative proportions (relative likelihoods).

## TEXAS CRASH DATA

Table 1 provides an overview of the injury crash data available for use in this study. Between 1975 and 1999, the Texas Department of Public Safety recorded 3,929,373 injury crashes on streets and highways in the state, collectively involving a total of 7,040,772 drivers. Of the 90,036 fatalities recorded for those crashes, 50,978 (56.62 percent) were drivers. Drivers also accounted for 360,456 (60.33 percent) of the 597,461 A-level injuries recorded in this period (see table footnote). For B-level and C-level injuries, drivers constituted 60.66 percent (1,219,020) and 60.41 percent (2,141,672) of all injured persons, respectively.

Although the Department of Public Safety database includes data on crashes that do not involve injuries, on July 1, 1995, the department ceased coding crashes that involved only property damage unless one or more vehicles were towed from the scene. After that date, with less severe crashes no longer being recorded, the database is systematically skewed toward more severe crashes. Therefore, in order to use a consistent data set, this study includes only data for crashes in which someone was injured.

When working with data generated from field reports such as the police-level data used here, we should bear in mind that the data are often subjective and are open to interpretation. Consider a hypothetical example: A vehicle leaves the highway at a shallow angle at 2:00 A.M. and strikes a tree. The driver is killed. No one else is in the vehicle, and no one saw the crash. The road is straight and dry, and the vehicle has no obvious tire or brake defects, and there are no skid marks on the road. The driver had not been drinking. The investigating officer records that the driver was "asleep or fatigued" in response to the question "Did the driver exhibit some defect?" This response may be correct. Alternatively, the driver may have strayed from the highway while tuning the radio or retrieving a dropped cigarette; his crash may have had nothing to do with sleepiness or fatigue.

Officers' subjective impressions may be influenced any number of factors, including driver age. In the absence of other information, a 75-year-old man involved in a crash will more likely be assumed to be suffering from an illness or some other physical defect than a 25-year-old man. Similarly, officers may assume that older drivers are more likely to fail to yield the right of way and may select this option in their reports more frequently than is warranted. Thus the Texas crash database may contain age-related coding biases, and this possibility should be borne in mind in evaluating the results.

### Fragility

Fragility may be thought of as the likelihood that an injury of a given severity will result from an insult of a given intensity. If we assume that older drivers are more fragile than younger drivers, we would expect older drivers to be more likely than younger drivers to suffer an injury of a given severity when involved in crashes of comparable severity. In this study, fragility is defined as the likelihood of death for drivers of a given age group when involved in crashes in which one or more persons are injured.

Although drivers in the older age groups are more likely to be killed in injury crashes than drivers in younger age groups, it does not necessarily follow that the observed differences in the proportions killed in the different age groups are due solely to the greater fragility of older drivers. The types of vehicles that people drive, the conditions under which those vehicles are driven, and the circumstances of the crash vary with driver age—as does the level of trauma experienced by the drivers.

- Younger drivers may be involved in systematically more severe crashes than older drivers. If so, older drivers may be even more fragile than the crash fatality data suggest.

- If older drivers are indeed more fragile than younger drivers, then a minor crash that produces a reportable injury in an older driver might produce none in a younger driver. Thus, minor collisions involving older drivers

may be more likely to be included in the database than minor collisions involving younger drivers. Therefore, the percentage of older drivers killed in injury crashes may be artificially low, when compared to younger drivers.

### Illness

For each driver included in the Texas crash database, "driver defect" information was collected. Eight substantive driver defect codes are available to investigating officers. For 6,923,316 (98.33 percent) of the drivers in the data set, none of the codes applied. For the remaining 1.67 percent of the drivers, the codes were distributed as follows:

| | |
|---|---|
| Eyesight defective | 2,434 |
| Hearing defective | 190 |
| Limbs missing | 149 |
| Other physical defects | 1,379 |
| Ill | 25,822 |
| Fatigue or asleep | 86,503 |
| Mentally defective | 286 |
| Other handicap | 693 |

The most frequent driver defect cited, "fatigue" or "asleep", is more commonly reported in younger drivers. For older drivers, "illness" and "other physical defects" are relatively more common. Unfortunately, the nature of the illnesses observed by the investigating officers is unknown. Any number of medical problems—nausea, vertigo, heart attack—might be classified under this heading. Similarly, the nature of "other physical defects" is unknown—except that they were probably not a visual or hearing defect or a missing limb, since these codes were explicitly available for officers to use.

In the analyses in this study, data on drivers who were recorded as having an illness and those recorded as suffering from some other physical defect were combined. No effort was made to analyze these groups of drivers separately.

### Perceptual Lapses

The Texas crash database contains a variable referred to as "first contributing factor." This variable is coded into 11 substantive categories for all drivers involved in crashes, as shown in the chart below along with the number of cases in each category. If none of these categories apply, the variable is coded "not applicable" (4,288,099 cases). Each of the 11 substantive categories refers to a driver action or condition that may have contributed to the crash. For the analyses in this study, the 11 categories were compressed into the three factors shown on the left side of the chart.

| | | |
|---|---|---|
| **Perceptual Lapse** | Disregarded stop sign or light | 120,333 |
| | Disregarded stop and go signal | 260,785 |
| | Disregarded yellow light | 182 |
| | Failed to yield right of way | 877,369 |
| **Speeding** | Speeding, over the limit | 210,822 |
| | Speeding, unsafe for conditions | 1,142,550 |
| **Other** | Wrong way on one-way road | 9,738 |
| | Wrong side, not passing | 67,777 |
| | Improper turn, wide right | 15,873 |
| | Improper turn, cut corner on left | 5,943 |
| | Improper turn wrong lane | 41,301 |

In this scheme, failing to yield the right of way or disregarding a sign or signal are simply categorized as perceptual lapses. However, a driver who disregards a sign or signal or fails to yield the right of way has not necessarily suffered a perceptual lapse just before the crash. For example, a driver may fail to yield the

right of way when his or her foot slips off the brake. Likewise, a driver who speeds, makes an improper turn, or drives on the wrong side of the road may in fact have been "inattentive" or "distracted" in the seconds leading up to the crash. Nevertheless, the elements of the definition provide a reasonable surrogate for perceptual lapses. The definition implies that a driver who fails to yield the right of way or disregards a sign or signal has very likely had some sensory, perceptual, attentional, or cognitive lapse that was contributory to the crash.

### Left Turns

Each crash in the Texas database is coded to indicate "vehicle movement and manner of collision." There are 42 substantive categories for this variable, 14 of which indicate that one or more vehicles were turning left. Of the 7,040,772 drivers considered, 1,438,908 (20.44 percent) were involved in some sort of left-turn crash, as shown below.

| | |
|---|---|
| Single motor vehicle turning left | 49,798 |
| Two motor vehicles approaching at an angle: #1 straight, #2 left turn | 427,868 |
| Two motor vehicles approaching at an angle: #1 right turn, #2 left turn | 4,078 |
| Two motor vehicles approaching at an angle: both turning left | 6,979 |
| Two motor vehicles approaching at an angle: #1 left turn, #2 stopped | 8,678 |
| Two motor vehicles going in same direction: #1 straight, #2 left turn | 204,942 |
| Two motor vehicles going in same direction: #1 right turn, #2 left turn | 474 |
| Two motor vehicles going in same direction: both turning left | 10,507 |
| Two motor vehicles going in same direction: #1 left turn, #2 stopped | 1,465 |
| Two motor vehicles going in opposite directions: #1 straight, #2 left turn | 716,081 |
| Two motor vehicles going in opposite directions: #1 right turn, #2 left turn | 3,515 |
| Two motor vehicles going in opposite directions: both turning left | 3,048 |
| Two motor vehicles going in opposite directions: #1 left turn, #2 stopped | 941 |
| Two motor vehicles—other: #1 left turn, #2 parked | 534 |

## GRAPHICAL AND STATISTICAL ANALYSES

Most of the graphs provided in this report depict driver age (ranging from 15 to 93 years) along the abscissa and other measures, expressed as percentages, along the ordinate. The data points in the graphs are fitted with ordinary least squares polynomial regression equations. Many of the figures depict two functions to represent two subgroups, such as male and female drivers by age. Such figures are intended to provide "fine-grain" snapshots of the variation in selected measures by driver age.

## RELATIVE LIKELIHOODS[2]

For many of the analyses, the degree to which older drivers, whether defined as 65 and older, 75 and older, or 85 and older, are overrepresented in the data is shown relative to a standard comparison group, namely, drivers in the 55–64 age group. These analyses seek to show "recent" changes in the older driver age categories, that is, changes in older drivers relative to drivers within a decade of the traditional retirement age.

Consider the following example.

| Driver | DRIVERS IN INJURY CRASHES (TEXAS, 1975–1999) | | | | | |
|---|---|---|---|---|---|---|
| Age | | | | Relative | 95% Confidence Interval | |
| Category | Killed | Total | Probability | Likelihood | Low | High |
| 55–64 | 3,899 | 424,522 | 0.0092 | - | - | - |
| 65+ | 5,871 | 415,415 | 0.0141 | 1.54 | 1.48 | 1.60 |
| 75+ | 2,889 | 151,242 | 0.0191 | 2.08 | 1.98 | 2.18 |
| 85+ | 589 | 22,089 | 0.0267 | 2.90 | 2.67 | 3.16 |

In this example, the probability of death for drivers in the 65+ age category (p1 in the formula below) is estimated as the number of drivers killed divided by

[2]The statistical procedures in this section are explained in more detail in Sahai and Khurshid (1996).

the number of drivers at risk, that is, the total number of drivers. The probability of death for the comparison group of drivers aged 55–64 (p2) is calculated in the same fashion. The *relative likelihood* (RL) of death for drivers aged 65 and over is 1.54. In other words, other things being equal, drivers 65 and older are 1.54 times as likely as drivers aged 55 to 64 to die in injury crashes. In mathematical terms, the relative likelihood of death for drivers in the 65+ age category can be expressed as follows:

$$RL_{65+} = \frac{p_1}{p_2} = \frac{\left[\frac{5{,}871}{415{,}415}\right]}{\left[\frac{3{,}899}{424{,}522}\right]} = \frac{0.0141}{0.0092} = 1.54$$

To estimate the standard error (SE) about the natural logarithm of the RL [i.e., ln(RL) = 0.4310], we may use the following equation:

$$SE_{1n(RL)} = \sqrt{\frac{1 - p_1}{n_1\,(p_1)} + \frac{1 - p_2}{n_2\,(p_2)}} = 0.0205$$

where p1 and p2 are as previously defined and n1 and n2 represent the number of drivers at risk in the older age category and the comparison group, respectively.

Under the null hypothesis that there is no difference between drivers in an older age category and the comparison group, the sampling distribution for the natural logarithm of the RL [i.e., ln(RL)] is asymptotically normal with a mean of zero and the standard error shown above. Thus, a standard normal (z) test can be defined as:

$$z = \frac{1n(RL)}{SE_{1n(RL)}} = 20.98$$

The 95 percent confidence interval (CI95) about the ln(RL) may be expressed as follows:

$$CI_{95} = 1n(RL) \pm 1.96\ (SE_{1n(RL)}) = 0.3907 \text{ (lower) and } 0.4713 \text{ (upper)}$$

Thus, the 95 percent confidence interval about the RL is simply achieved through exponentiation:

$$CI_{95} = e^{1n(RL) \pm 1.96\ (SE_{1n(RL)})} = 1.4781 \text{ (lower) and } 1.6020 \text{ (upper)}$$

In this example, and in many of the analyses carried out in this study, the samples are very large. Under these circumstances, large z's and small 95 percent confidence intervals are to be expected.

Note that when the 95 percent confidence interval about the estimated relative likelihood (RL) does not contain 1.00, the result is significant at an _ level of 0.05 (assuming a two-tailed test). In this particular example, the RL is estimated to be 1.54. The 95 percent confidence interval about this estimate is 1.48 to 1.60. Since 1.00 is not included within the confidence interval, we can say that 1.54 is significantly different from 1.00 at an _ level of 0.05, that is, that death is significantly more likely among drivers in the 65+ age category than in the comparison group.

## AD HOC ADJUSTMENTS OF THE DATA

Consider the following hypothetical example:

| Driver Age Group | Driver Sex | Driver Deaths | Drivers at Risk | Percent Dead |
|---|---|---|---|---|
| 85+ | Male | 400 | 800 | 50.0 |
| | Female | 50 | 200 | 25.0 |
| | **Total** | **450** | **1,000** | **45.0** |
| 55–64 | Male | 700 | 1,400 | 50.0 |
| | Female | 350 | 1,400 | 25.0 |
| | **Total** | **1,050** | **2,800** | **37.5** |

Now imagine that we do not know the sex of the 1,000 drivers who are 85 years of age and older, and we do not know the sex of the 2,800 drivers who are between 55 and 64 years of age—that is, we have only the data from the bold rows. Under these circumstances, we might divide 45.0 percent by 37.5 percent and conclude that drivers 85 and older are 1.20 times as likely as drivers in the 55–64 age group to die in crashes.

Turning now to the unbolded rows in the chart, note that 50 percent of the males in the 85+ age group died, and 50 percent of the males in the 55–64 age group died. Furthermore, 25 percent of the females in the 85+ age group died, and 25 percent of the females in the 55–64 age group died. In other words, when sex is taken into account, the likelihood of death is comparable for the two age groups. Thus, the calculated relative likelihood of 1.20 reflects only a difference in the proportions of men and women involved in crashes in the two age groups—not differential fragility. In the 85+ age group, 80 percent of the drivers are male, and in the 55–64 age group, 50 percent are male. This difference in proportions must be taken into account in our analysis.

The next chart is based on the previous one but includes both observed and expected deaths for the 85+ age group. If 50 percent of the males in the 55–64 age group died, we would expect that 50 percent of the males in the 85+ age group (400 of 800 at risk) would have died had they been equally fragile. Similarly, if 25 percent of the females in the 55–64 age group died, we would expect that 25 percent of the females in the 85+ age group (50 of 200 at risk) would have died had they been equally fragile.

| | 55–64 Age Group | | | 85+ Age Group | | |
|---|---|---|---|---|---|---|
| Driver Sex | Driver Deaths | Drivers at Risk | Percent Dead | Drivers at Risk | Observed Deaths | Expected Deaths |
| Male | 700 | 1,400 | 50.0 | 800 | 400 | 400 |
| Female | 350 | 1,400 | 25.0 | 200 | 50 | 50 |
| **Total** | **1,050** | **2,800** | **45.0** | **1,000** | **450** | **450** |

If we divide the sum of the observed deaths by the sum of the expected deaths (450/450), the resultant relative likelihood is 1.00. Thus, when driver sex is taken into account in this hypothetical example, drivers in the 85+ age group are as likely to die as those in the 55–64 age group—not 1.20 times as likely.

In Appendix A, the five variables depicted in Figures 3 through 7—crash type, population density, driver sex, light condition, and intersection relatedness—are used simultaneously to adjust the data and account for the fact that the circumstances and conditions surrounding the injury crashes of drivers in different age groups differ. In making these adjustments, the fragility of the drivers in the older age categories may be more appropriately compared with the fragility of drivers in the 55–64 age group.

Appendices B and C provide estimates of the degree to which drivers in the older age categories are more likely than those in the comparison group to be "ill" or to suffer a "perceptual lapse," respectively, at the time of their crashes. The arithmetic used in Appendices B and C is identical to that used in Appendix A.

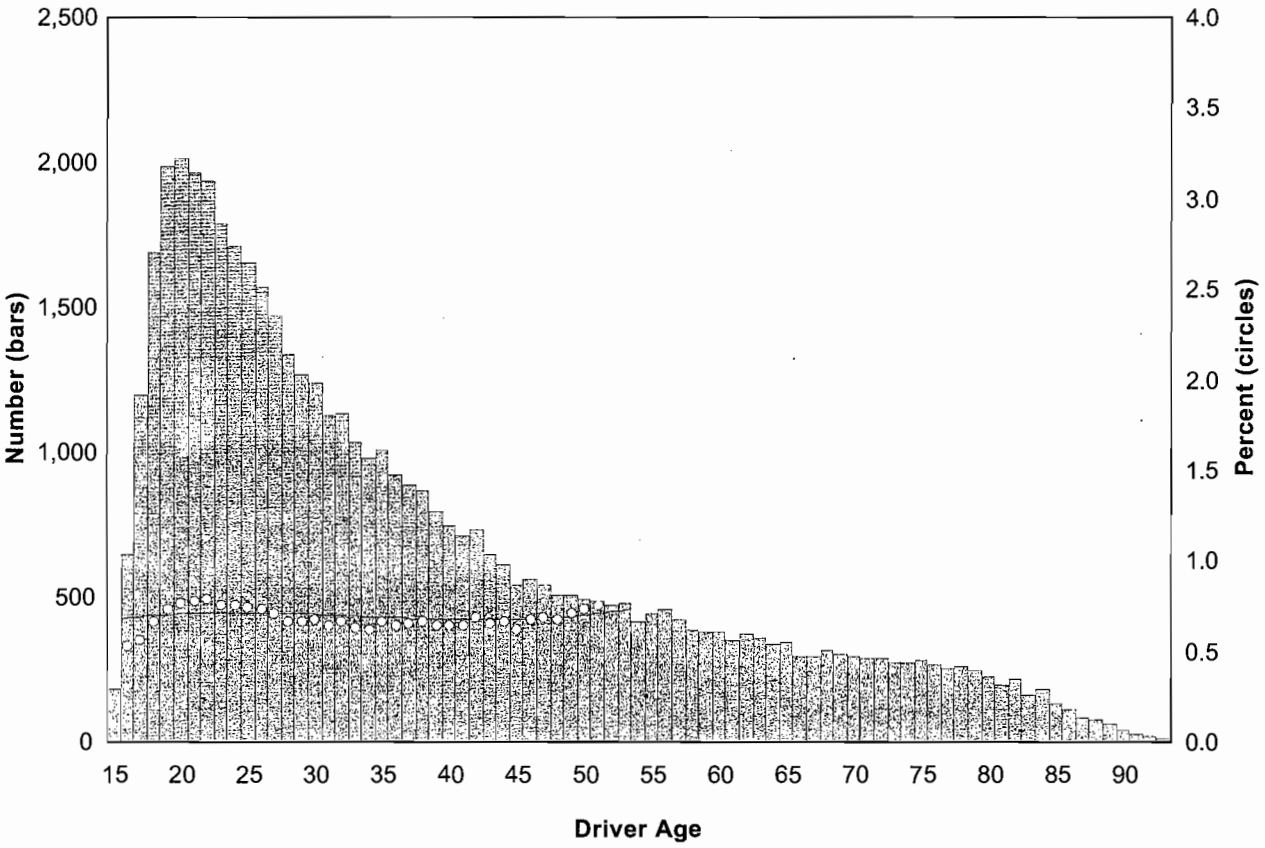
# Results

## FRAGILITY

Figure 2 shows the number and percentage of drivers killed in injury crashes by age. The number of drivers killed, represented by vertical bars, is measured along the left axis; the percentage of drivers killed, represented by dots, is measured along the right axis. The figure shows that, generally speaking, the likelihood of driver death in an injury crash is a positively accelerated, increasing function of age.

It is estimated that drivers in the 65+ age category are 1.54 times as likely to be killed as drivers in the comparison group (the 55–64 age group, in all analyses). The 95 percent confidence interval about this estimate is 1.48 to 1.60 (see chart below). For drivers in the 75+ and 85+ age categories, death is 2.08 and 2.90 times as likely, respectively.

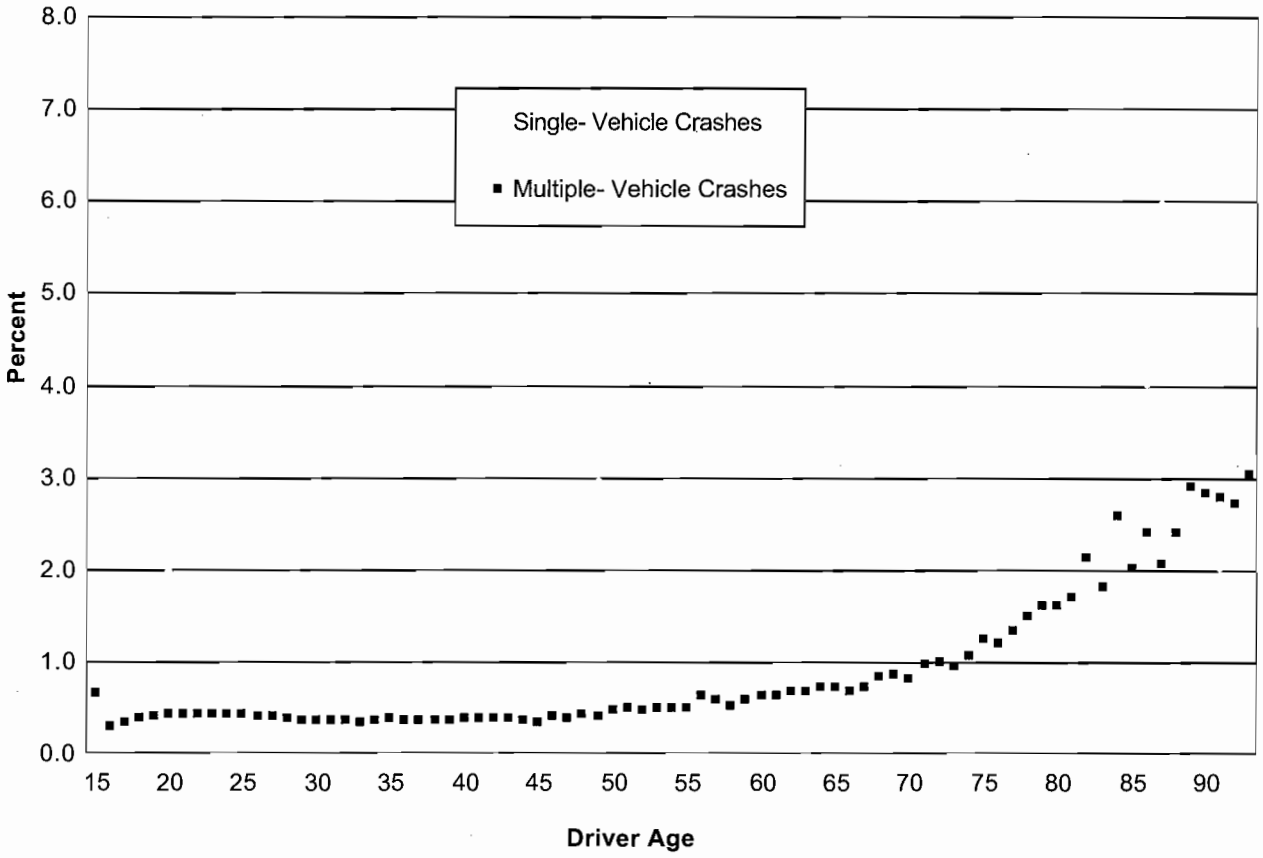
**Figure 2.** Number and Percent of Drivers Killed in Injury Crashes, by Age




| Driver Age Category | DRIVERS IN INJURY CRASHES (TEXAS, 1975–1999) Killed | Total | Probability | Relative Likelihood | 95% Confidence Interval Low | High |
|---|---|---|---|---|---|---|
| 55–64 | 3,899 | 424,522 | 0.0092 | - | - | - |
| 65+ | 5,871 | 415,415 | 0.0141 | 1.54 | 1.48 | 1.60 |
| 75+ | 2,889 | 151,242 | 0.0191 | 2.08 | 1.98 | 2.18 |
| 85+ | 589 | 22,089 | 0.0267 | 2.90 | 2.67 | 3.16 |

Overall, drivers involved in single-vehicle injury crashes are 4.89 times as likely to be killed as drivers involved in multiple-vehicle injury crashes (Figure 3).[3] In both types of crashes, the likelihood that the driver will be killed increases with age, and the likelihood of death for drivers in the three older age categories is significantly greater than the likelihood of death for drivers in the

**Figure 3.** Percent of Drivers Killed in Injury Crashes, by Age and Crash Type (Single Vehicle vs. Multiple Vehicle)




comparison group. For single-vehicle injury crashes, the relative likelihoods of death for drivers in the 65+, 75+, and 85+ age categories are 1.11, 1.21, and 1.56, respectively. For multiple-vehicle injury crashes, the comparable relative likelihoods are 1.89, 2.76, and 3.92.[4]

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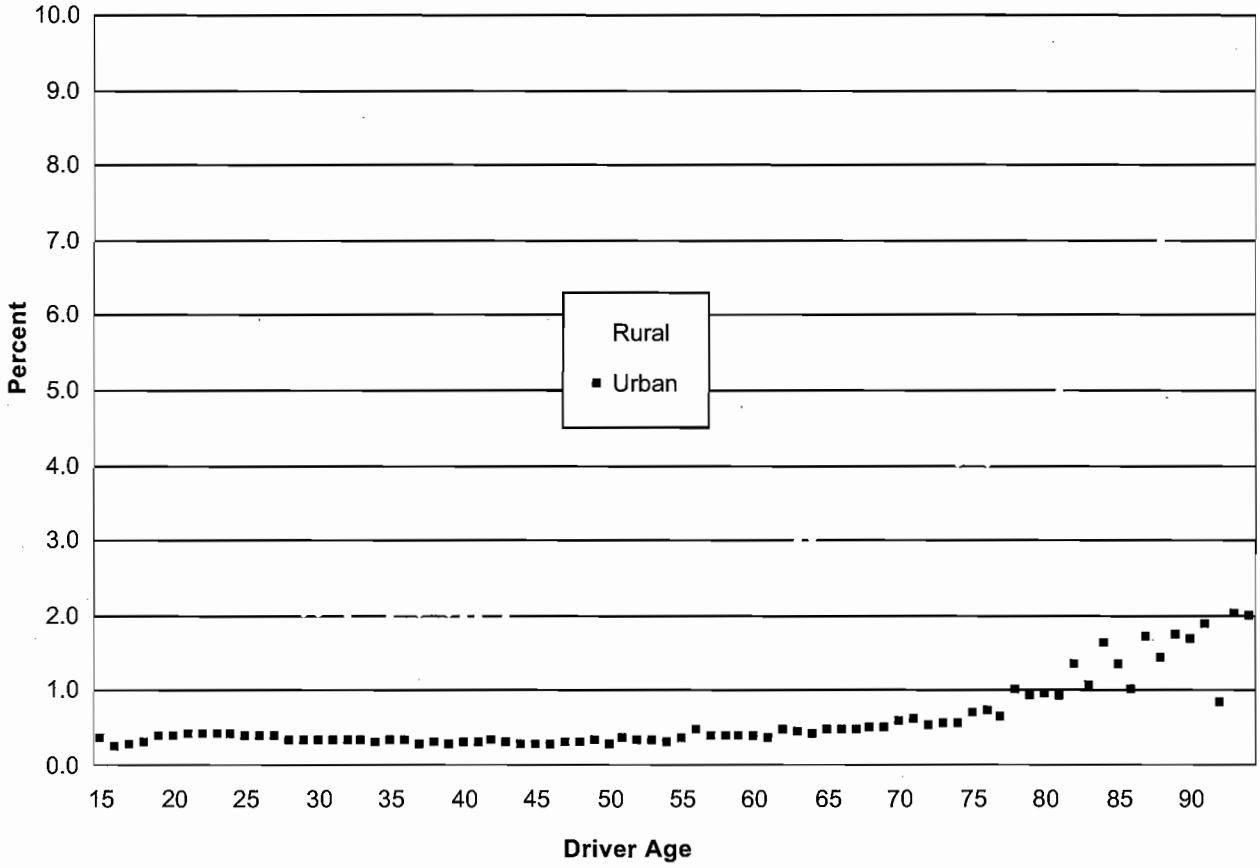
[3]Of 1,100,533 drivers involved in single-vehicle injury crashes, 24,675 (2.24 percent) were killed. Of 5,623,818 drivers involved in multiple-vehicle injury crashes, 25,778 (0.46 percent) were killed. Thus, other things being equal, drivers involved in single-vehicle injury crashes were 4.89 times as likely to be killed as drivers involved in multiple-vehicle injury crashes. Given these large sample sizes, 4.89 is obviously significantly different from 1.00—that is, the likelihood of driver death in single-vehicle injury crashes is significantly greater than the likelihood of death in multiple-vehicle injury crashes. The z-test shown in the Methods section can be used if desired.

[4]The analysis of the information in Figure 3 clearly shows that the likelihood of driver death in single-vehicle injury crashes is greater than the likelihood of driver death in multiple-vehicle

**Figure 4.** Percent of Drivers Killed in Injury Crashes, by Age and Population (Rural vs. Urban)




Overall, if age is not taken into account, drivers involved in injury crashes in rural areas are 5.8 times as likely as to be killed as drivers involved in injury crashes in urban areas (Figure 4). With increasing age, the likelihood of a driver's being killed in an injury crash increases in both rural areas and urban areas. For drivers in the 65+, 75+, and 85+ age categories, the relative likelihoods of death in rural injury crashes are 1.41, 1.79, and 2.32, respectively, and for urban injury crashes, 1.68, 2.42, and 3.52.

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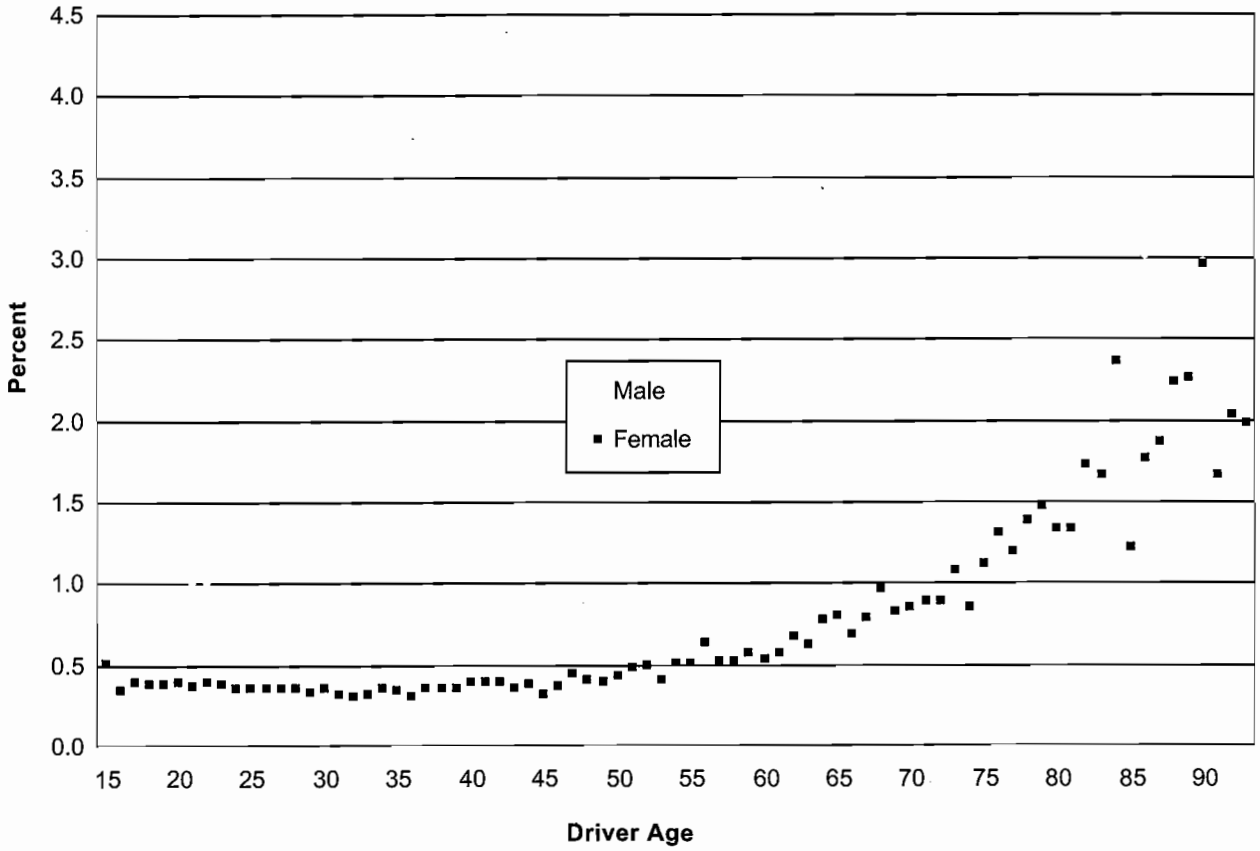
injury crashes. However, given that multiple-vehicle crashes necessarily include two or more drivers, whereas single-vehicle injury crashes necessarily include only one driver, it stands to reason that the plots of the multiple-vehicle data generally fall below those of the single-vehicle data. The same phenomenon will be manifest for other crossing variables that correlate with crash type. For example, to the extent that crashes in urban settings are more likely than rural crashes to be multiple-vehicle crashes, we might expect the percentage of drivers killed in rural

**Figure 5.** Percent of Drivers Killed in Injury Crashes, by Age and Sex

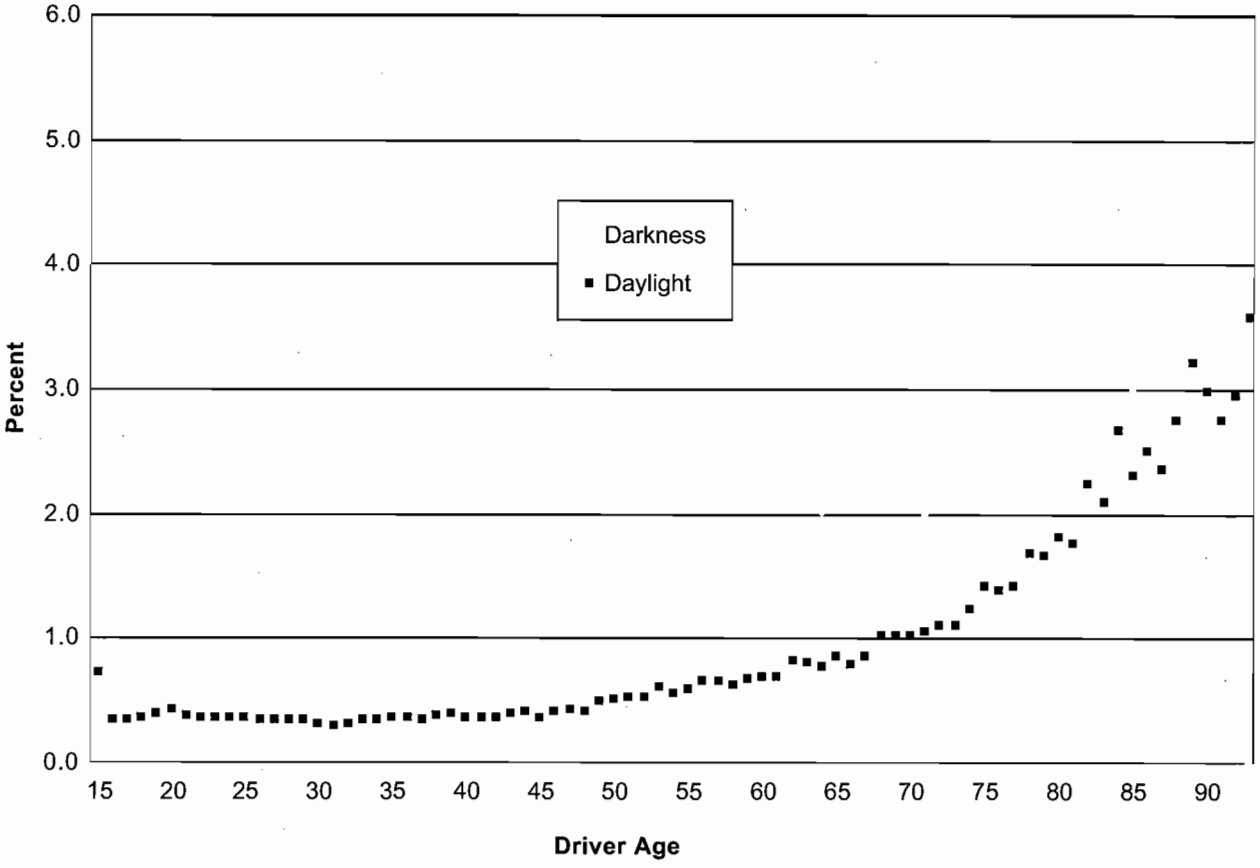



Male drivers involved in injury crashes are 2.25 times as likely as female drivers to be killed (Figure 5). Generally speaking, the likelihood of death in creases for both males and females with increasing age. For males in the three older age categories, the relative likelihoods of death are 1.46, 1.98, and 2.83, respectively, and for females, 1.85, 2.49, and 3.07.

Drivers involved in injury crashes that occur during hours of darkness, in-

injury crashes to be greater than the percentage of drivers killed in urban injury crashes (Figure 4). To the extent that intersection-related crashes are more likely than non-intersection-related crashes to be multiple-vehicle crashes, other things being equal, we might expect to see a lower percentage of drivers killed in intersection-related injury crashes than in injury crashes that are not intersection related (Figure 7). More detail on the relative likelihood of death in the three older age groups is provided in Appendix A.

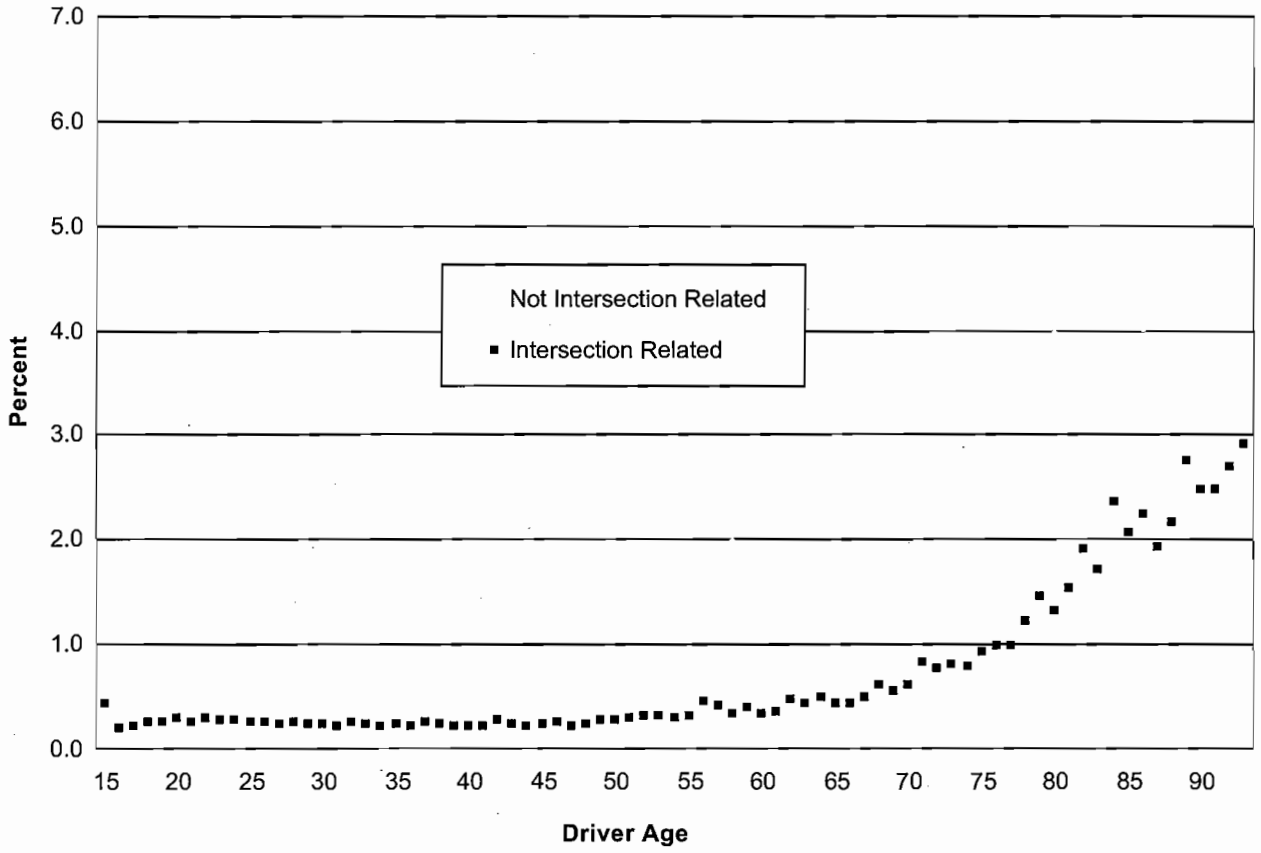
**Figure 6.** Percent of Drivers Killed in Injury Crashes, by Age and Light Condition




cluding dawn and dusk, are 2.90 times as likely to be killed as those involved in injury crashes during hours of daylight (Figure 6). Under both light conditions, the likelihood of death increases with age. For drivers in the three older age categories, the relative likelihoods of death in daylight injury crashes are 1.89, 2.66, and 3.79, respectively, and for injury crashes during hours of darkness, 1.18, 1.44, and 1.76.

Figure 7 depicts driver deaths in injury crashes by whether the crashes were intersection related. Intersection-related crashes include those that occur within an intersection, are "intersection related," or involve a driveway access. Injury crashes that are not intersection related are 4.91 times as likely as intersection-related injury crashes to produce a driver fatality. Here, too, with increasing age, drivers are more likely to be killed in both intersection-related crashes and crashes

**Figure 7.** Percent of Drivers Killed in Injury Crashes, by Age and Intersection Related



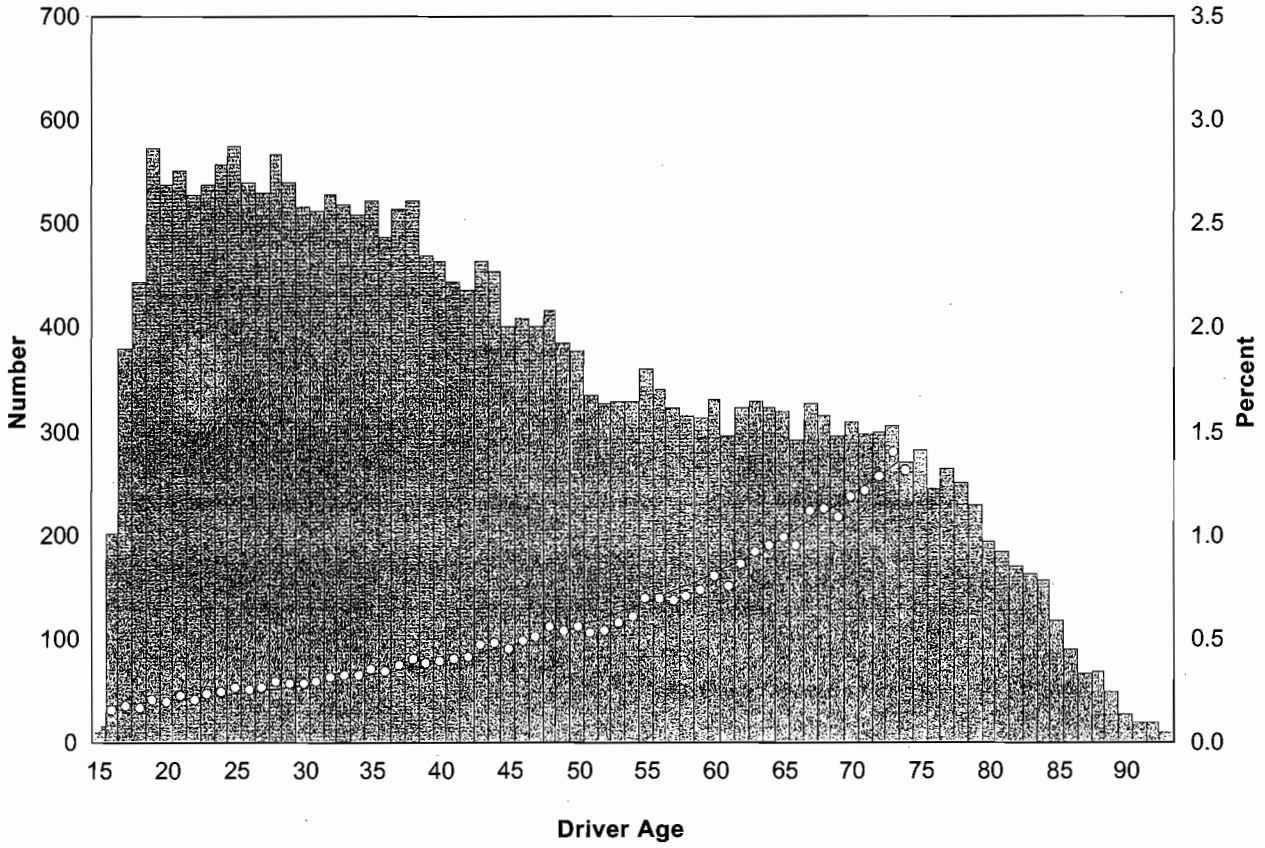

that are not intersection related. For drivers in the three older age categories, the relative likelihoods of death in intersection-related injury crashes are 2.38, 3.69, and 5.72, respectively, and for injury crashes that are not intersection related, 1.43, 1.81, and 2.25.

When all five factors depicted in Figures 3 through 7—crash type, population density, driver sex, light condition, and intersection relatedness—are considered simultaneously (see Appendix A) the following relative likelihoods result:

- Drivers 65 years of age and older are 1.78 times as likely those aged 55 to 64 to die in an injury crash.

- Drivers 75 years of age and older are 2.59 times as likely as those aged 55 to 64 to die in an injury crash.

**Figure 8.** Number and Percent of Drivers in Injury Crashes Impaired by Illness or Other Physical Defects, by Age



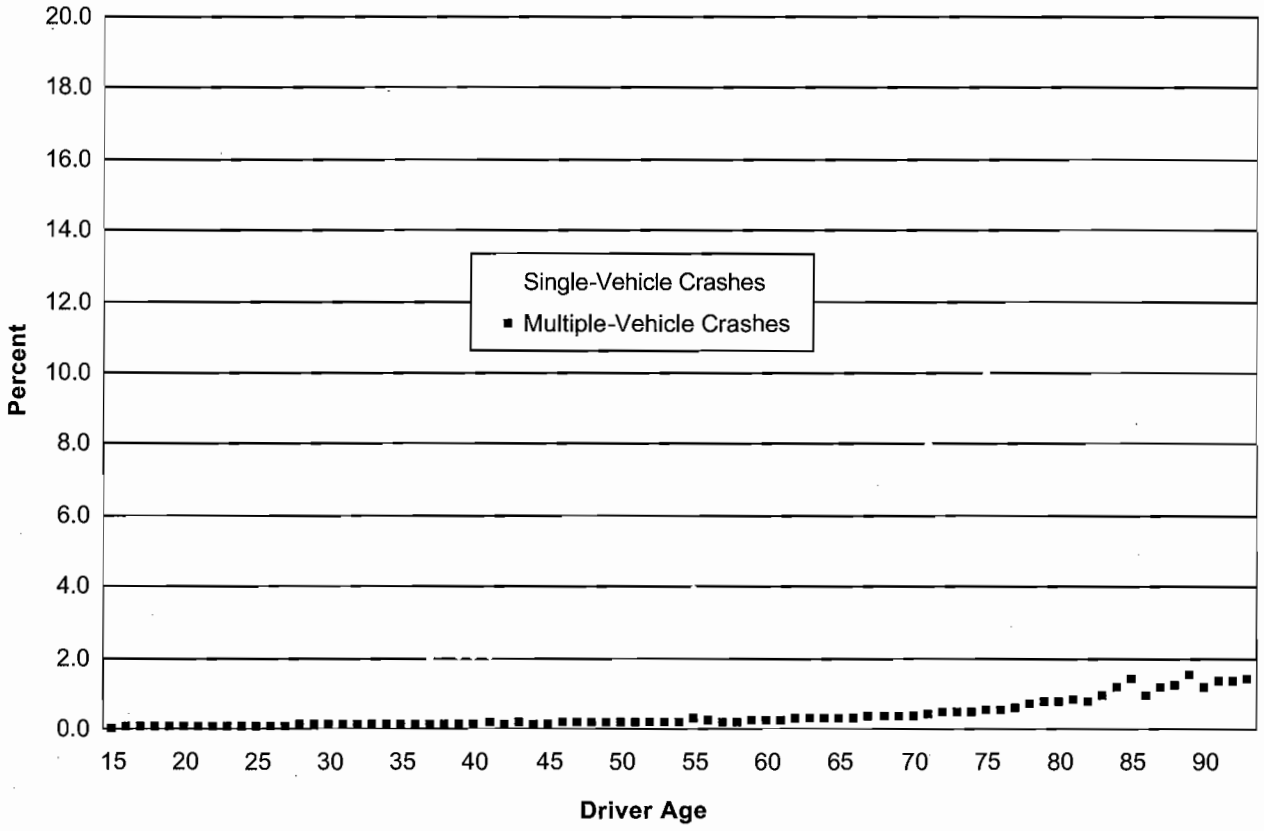

- Drivers 85 years of age and older are 3.72 times as likely as those aged 55 to 64 to die in an injury crash.

## ILLNESS

Figure 8 depicts the number and percentage of drivers impaired by illness or some other physical defect at the time of their injury crash by age. The number of drivers impaired by illness or some other physical defect is represented by vertical bars and is measured along the left axis, and the percentage of impaired drivers is represented by dots and measured along the right axis. The likelihood that a driver involved in an injury crash was impaired by illness or some other physical defect increases dramatically with age.

Drivers in the 65+ age category are 1.78 times as likely drivers in the compari-

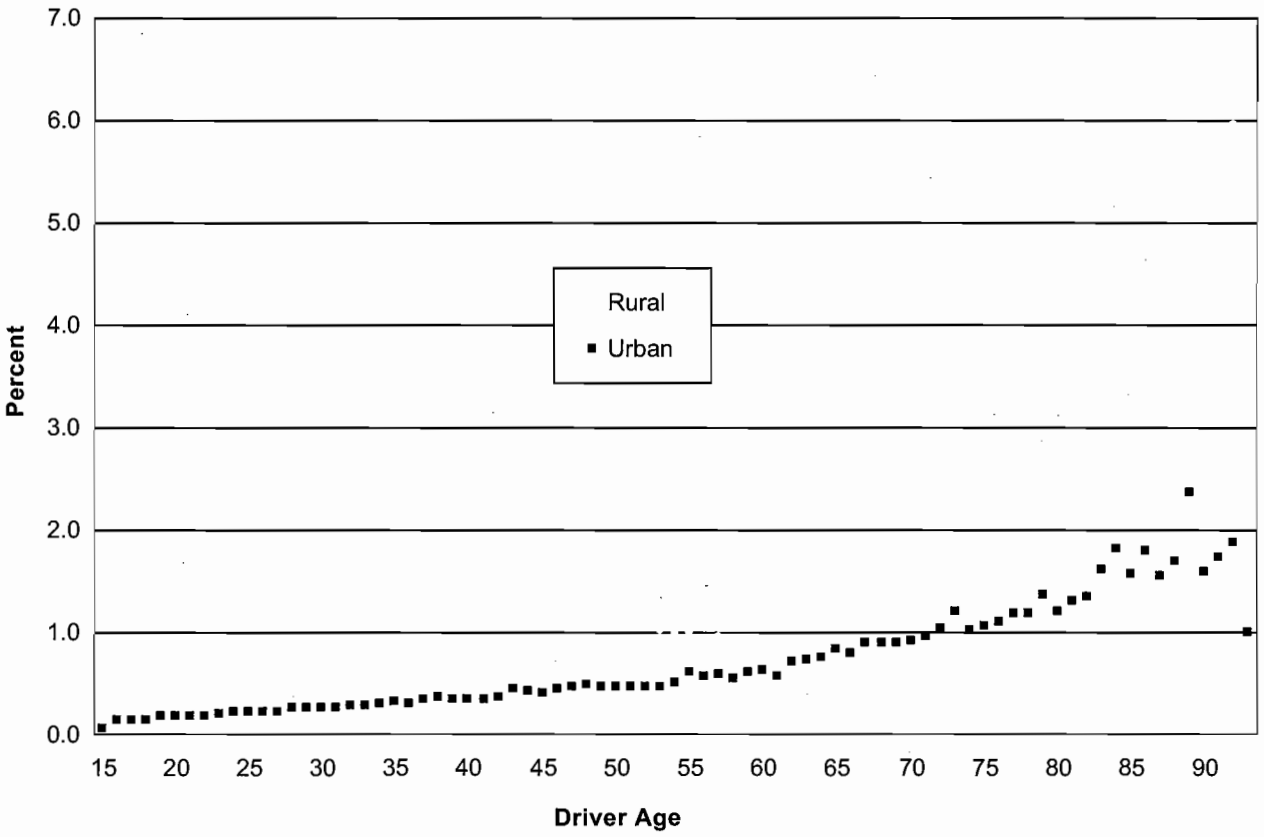
**Figure 9.** Percent of Drivers in Injury Crashes Impaired by Illness or Other Physical Defects, by Age and Crash Type (Single Vehicle vs. Multiple Vehicle)




son group to be impaired by illness or some other physical defect at the time of their crash. For drivers in the 75+ and 85+ categories, respectively, the relative likelihoods of impairment are 2.28 and 2.97. The 95 percent confidence intervals about these estimates are shown below.

| Driver Age Category | DRIVERS IN INJURY CRASHES (TEXAS, 1975–1999) Illness | Total | Probability | Relative Likelihood | 95% Confidence Interval Low | High |
|---|---|---|---|---|---|---|
| 55–64 | 3,247 | 424,522 | 0.0076 | - | - | - |
| 65+ | 5,666 | 415,415 | 0.0136 | 1.78 | 1.71 | 1.86 |
| 75+ | 2,639 | 151,242 | 0.0174 | 2.28 | 2.17 | 2.40 |
| 85+ | 502 | 22,089 | 0.0227 | 2.97 | 2.71 | 3.26 |

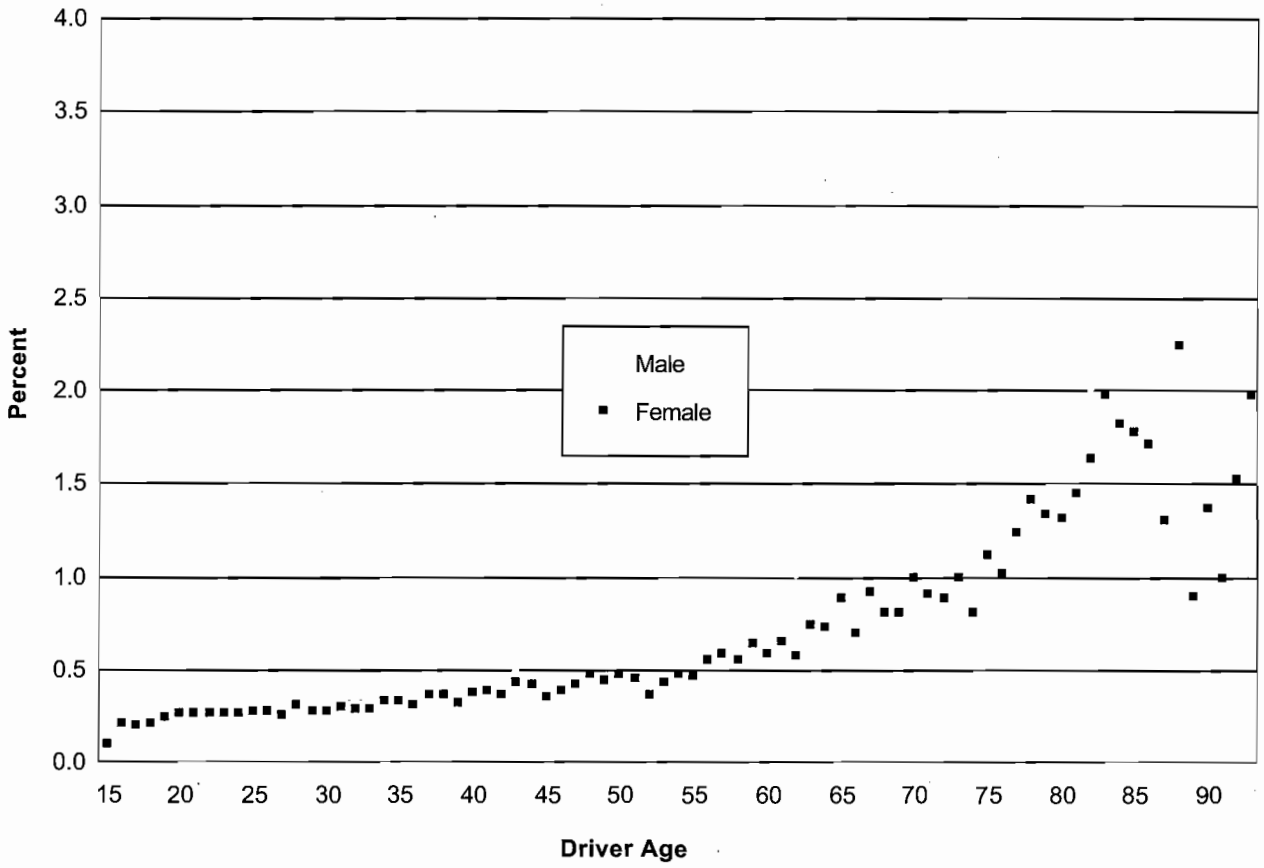
**Figure 10.** Percent of Drivers in Injury Crashes Impaired by Illness or Other Physical Defects, by Age and Population (Rural vs. Urban)




Impairment due to illness or some other physical defect is 12.35 times as likely for drivers in single-vehicle injury crashes as for those in multiple-vehicle injury crashes (Figure 9). In single-vehicle crashes, drivers in the 65+, 75+, and 85+ age categories are, respectively, 1.80, 2.17, and 2.28 times as likely as those in the comparison group to be impaired by illness or some other physical defect, and in multiple-vehicle crashes, the relative likelihoods are 2.16, 3.27, and 5.46.

Drivers involved in injury crashes in rural areas are 1.77 times as likely as those in urban areas to be impaired by illness or some other physical defect. As driver age increases, the proportion of drivers impaired also increases in both rural and urban areas (Figure 10). In rural areas, drivers in the older age categories are, respectively, 1.87, 2.49, and 3.12 times as likely as those in the comparison group to be impaired, and in urban areas, 1.71, 2.11, and 2.76 times as likely.

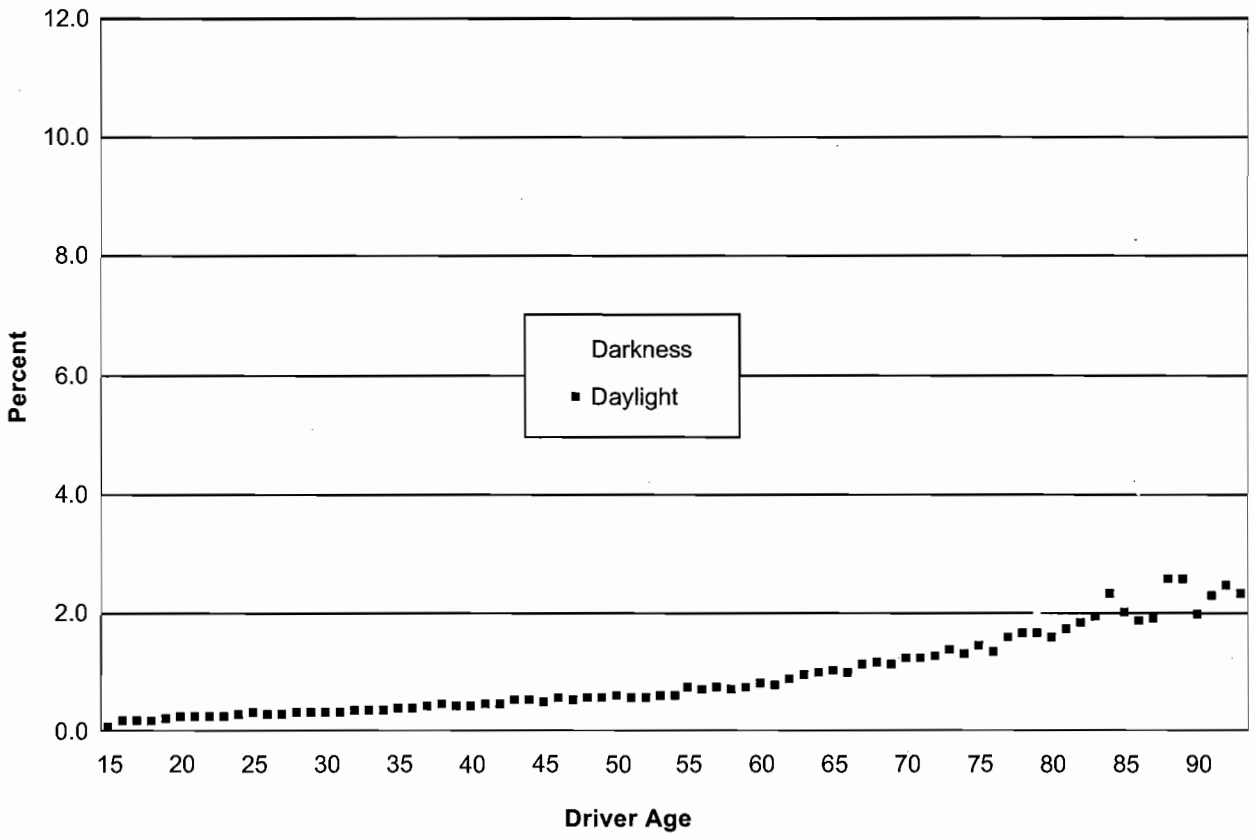
**Figure 11.** Percent of Drivers Impaired by Illness or Other Physical Defects, by Age and Sex




Male drivers involved in injury crashes are 1.14 times as likely as female drivers to be impaired by illness or some other physical defect. Again, the likelihood of impairment increases with age for both males and females (Figure 11). Males in the older age groups are 1.80, 2.29, and 3.03 times as likely, respectively, to be impaired as those in the comparison group, and females in the older groups are 1.78, 2.33, and 2.79 times as likely to be impaired as females in the comparison group.

Although the data depicted in Figure 12 might appear to suggest that the likelihood of impairment due to illness or some other physical defect among drivers in injury crashes is comparable during hours of daylight and hours of darkness, if driver age is disregarded, impairment is 1.57 times as likely during hours of daylight. The likelihood of impairment increases with age during both

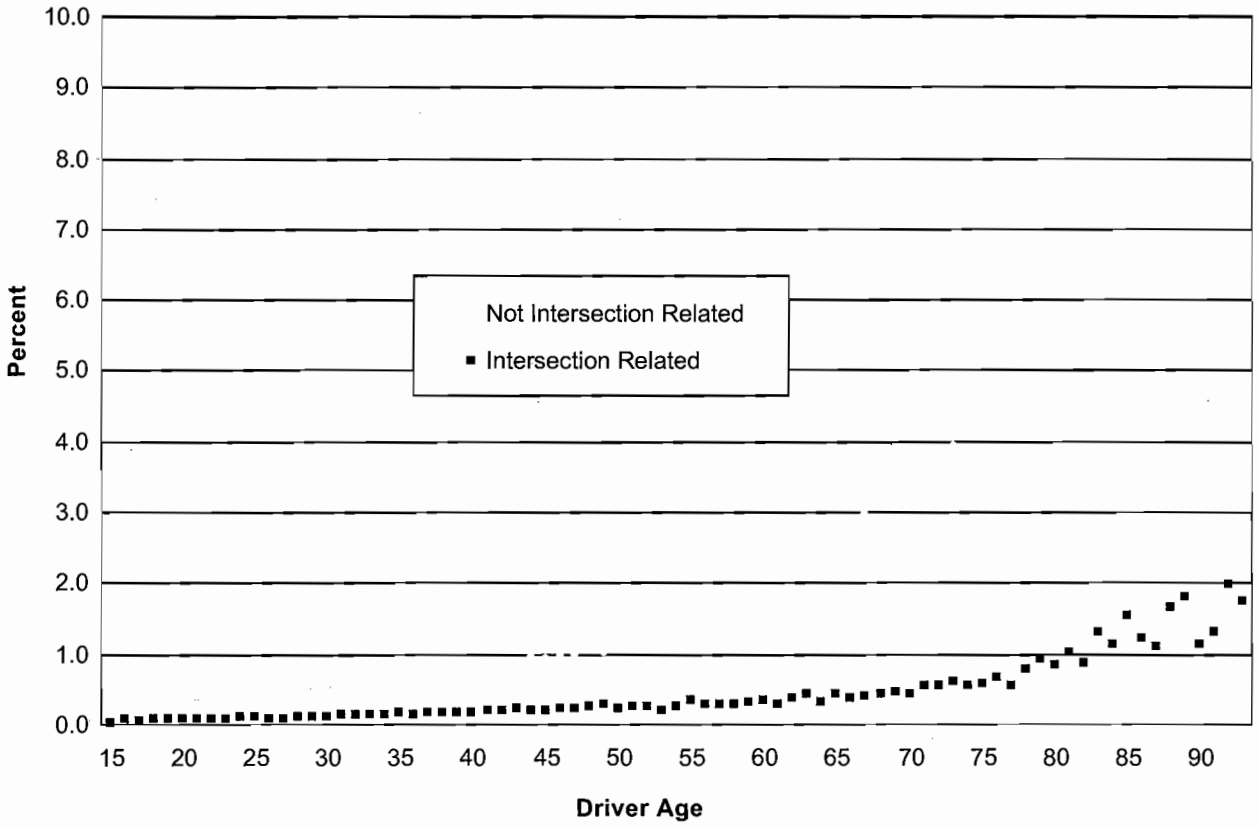
**Figure 12.** Percent of Drivers in Injury Crashes Impaired by Illness or Other Physical Defects, by Age and Light Condition




daylight and darkness conditions. During hours of daylight, impairment is 1.73, 2.14, and 2.76 times as likely for drivers in the three older age categories as for the comparison group, and during hours of darkness, 2.01, 3.13, and 5.22 times as likely.

Drivers involved in injury crashes that are not intersection related are 4.07 times as likely as drivers involved in intersection-related crashes to be impaired by illness or physical defect. In both intersection-related crashes and crashes that are not related to intersections, the likelihood that a driver will be impaired at the time of the crash increases with age (Figure 13). Drivers in the 65+, 75+, and 85+ age categories involved in intersection-related crashes are, respectively, 1.99, 2.82, and 4.64 times as likely as those in the comparison group to be impaired, and

**Figure 13.** Percent of Drivers in Injury Crashes Impaired by Illness or Other Physical Defects, by Age and Intersection Related



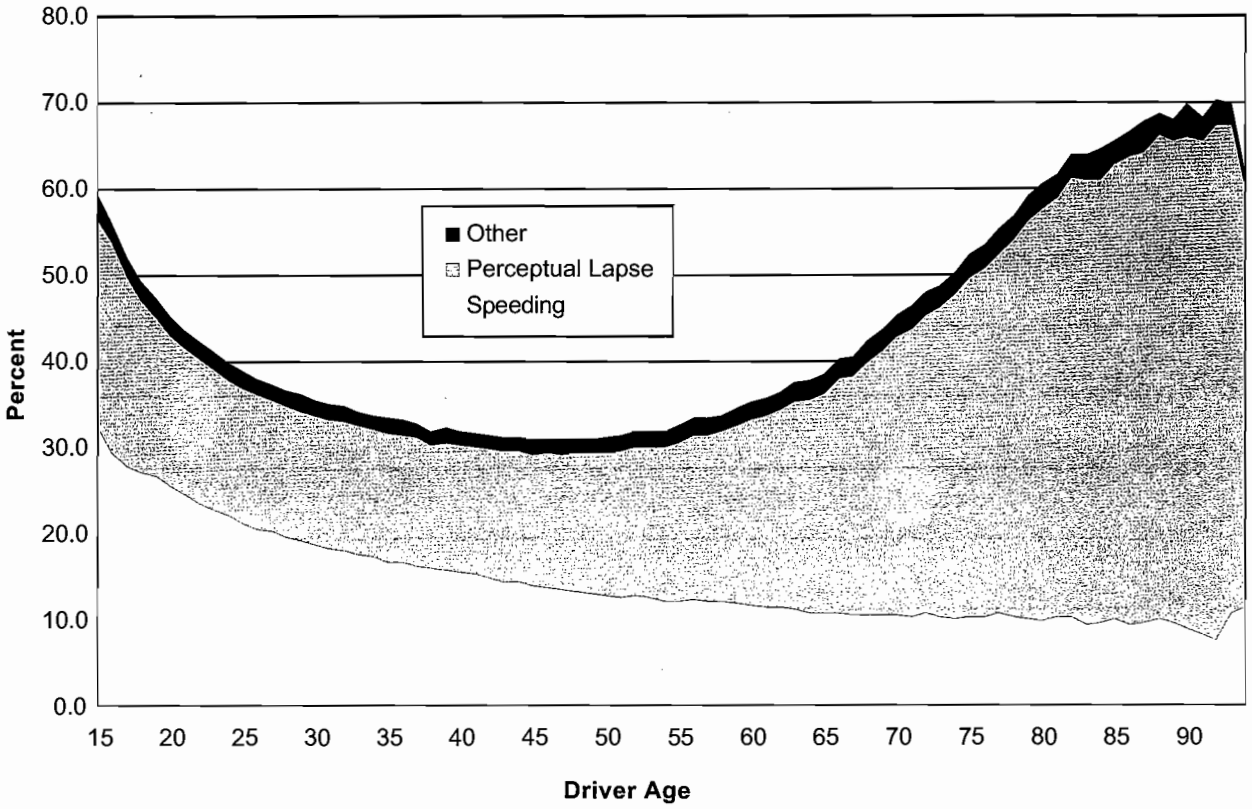

those involved in crashes that are not related to intersections are 2.14, 2.95, and 3.48 times as likely.

When all five factors depicted in Figures 9 through 13—crash type, population density, driver sex, light condition, and intersection relatedness—are considered simultaneously (see Appendix B), the following relative likelihoods result:

- Drivers 65 years of age and older are 1.83 times as likely as those aged 55 to 64 to be impaired by illness or some other physical defect at the time of their injury crash.

- Drivers 75 years of age and older are 2.38 times as likely as those aged 55 to 64 to be impaired by illness or some other physical defect at the time of their injury.

**Figure 14.** Percent of Drivers in Injury Crashes, by First Contributing Factor and Age

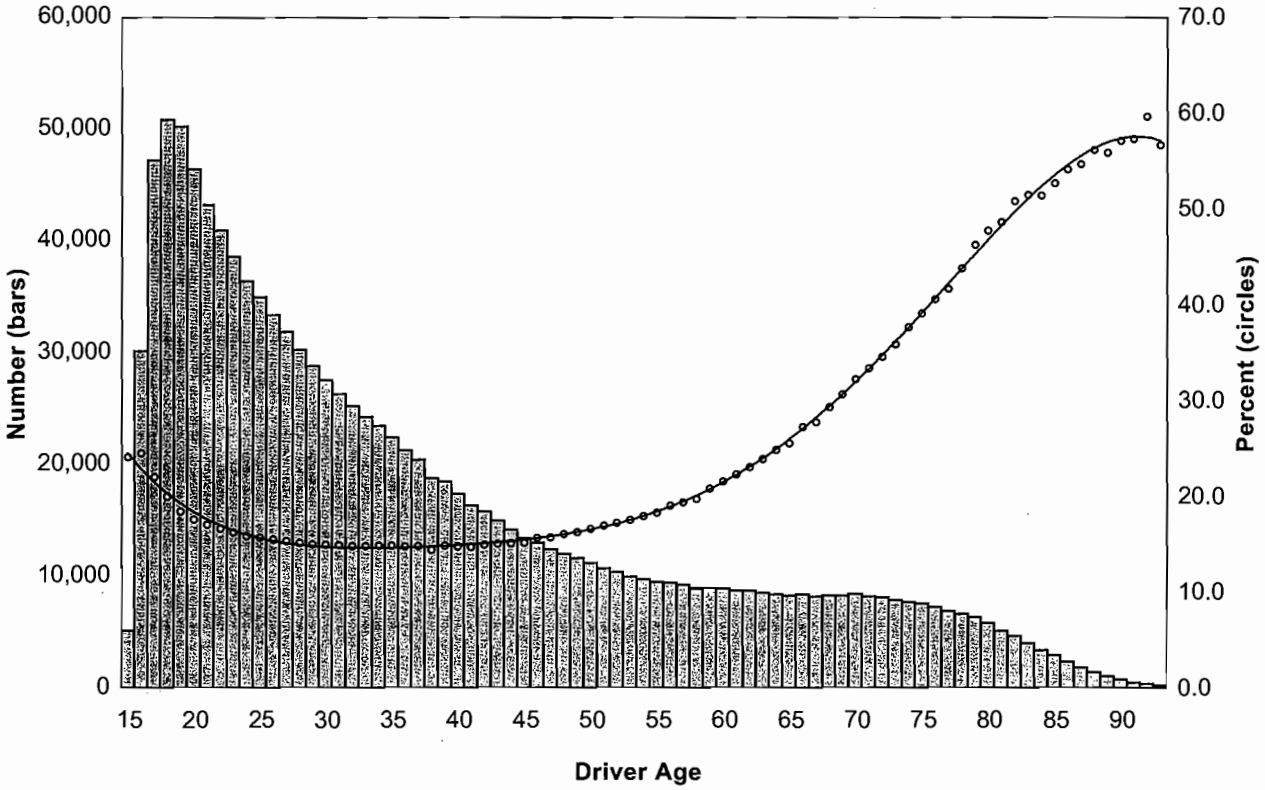



- Drivers 85 years of age and older are 3.06 times as likely as those aged 55 to 64 to be impaired by illness or some other physical defect at the time of their injury crash.

## PERCEPTUAL LAPSES

As Figure 14 shows, 59 percent of 15-year-old drivers involved in injury crashes were speeding, suffered perceptual lapses—that is, failed to yield the right of way or disregarded a traffic sign or signal—or committed some other error that contributed to their crashes. For drivers aged 55 to 64, the proportion is 35 percent. For drivers in the three older age categories, the proportions are 49 percent, 59 percent, and 67 percent, respectively. Note that among younger drivers, speeding is relatively more common than perceptual lapses. Beginning at age 42,

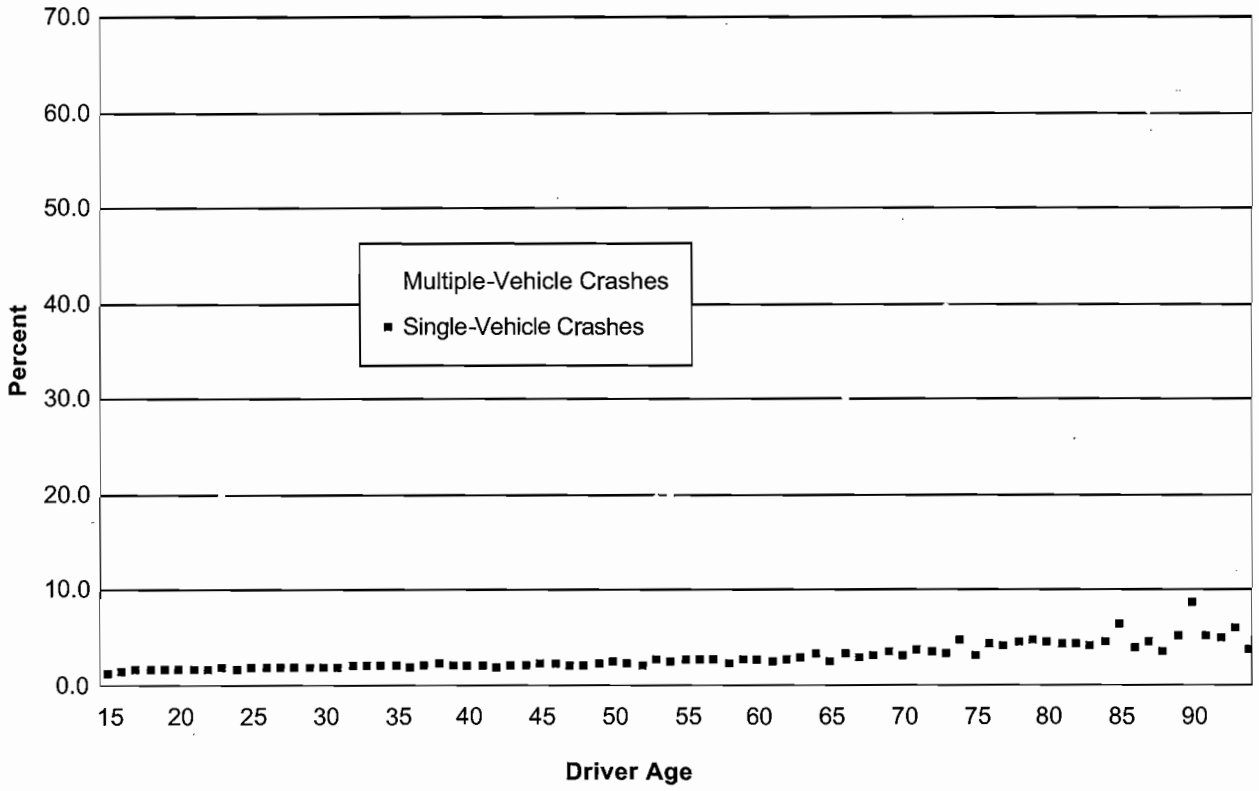
**Figure 15.** Number and Percent of Drivers in Injury Crashes Who Suffered Perceptual Lapses, by Age




however, perceptual lapses become relatively more common than speeding.

Figure 15 depicts the number and percentage of drivers in injury crashes who suffered some perceptual lapse. The number of drivers suffering perceptual lapses is represented by vertical bars and is measured along the left axis; the percentage of drivers suffering perceptual lapses is represented by dots and measured along the right axis. For drivers 55 to 64 years old, 21.03 percent were reported to have suffered perceptual lapses. For drivers in the three older age categories, the percentages were 36.47, 46.18, and 54.57, respectively. Relative to the comparison group, drivers in the older age categories were, respectively, 1.73, 2.20, and 2.59 times as likely to have suffered a perceptual lapse.

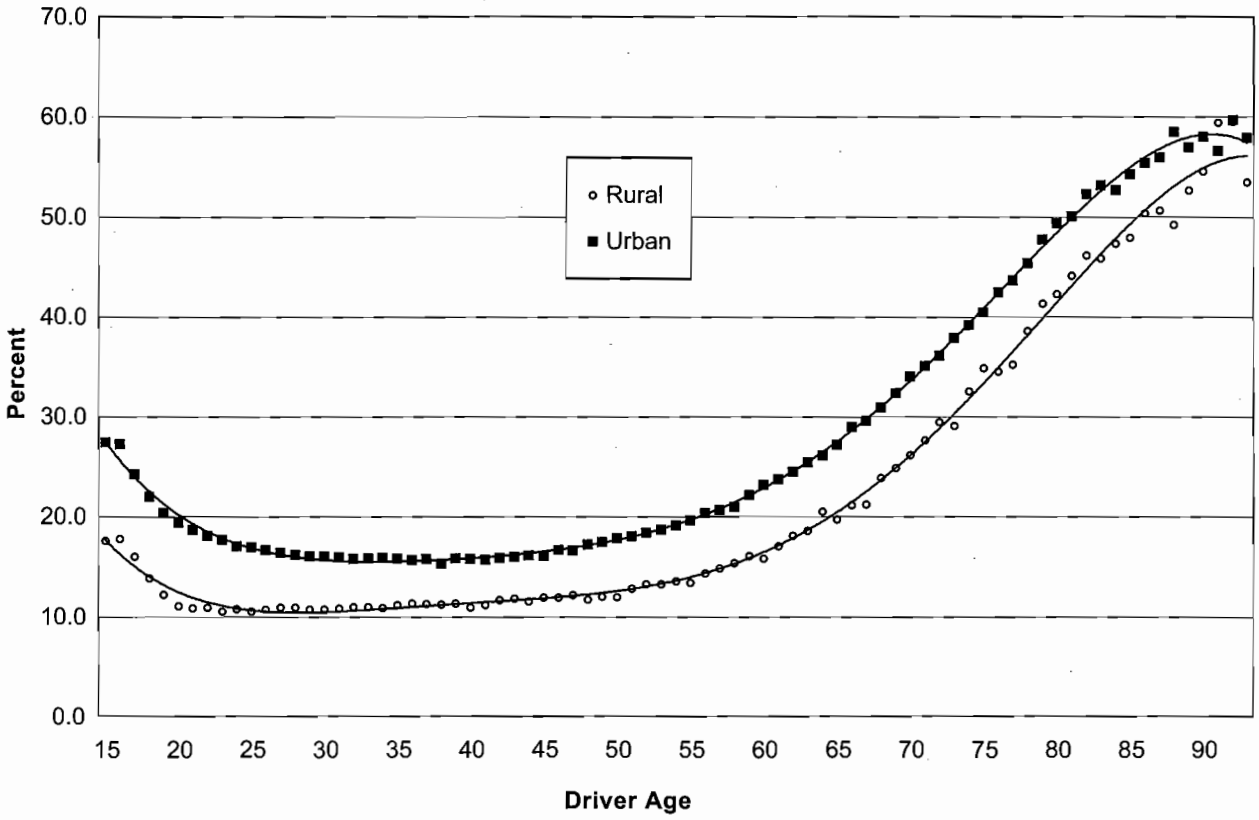
**Figure 16.** Percent of Drivers in Injury Crashes Who Suffered Perceptual Lapses, by Age and Crash Type (Single Vehicle vs. Multiple Vehicle)




| Driver Age Categ. | DRIVERS IN INJURY CRASHES (TEXAS, 1975–1999) Inattentive | Total | Probability | Relative Likelihood | 95% Confidence Interval Low | High |
|---|---|---|---|---|---|---|
| 55–64 | 89,294 | 424,522 | 0.2103 | - | - | - |
| 65+ | 151,480 | 415,415 | 0.3647 | 1.73 | 1.72 | 1.75 |
| 75+ | 69,845 | 151,242 | 0.4618 | 2.20 | 2.18 | 2.21 |
| 85+ | 12,053 | 22,089 | 0.5457 | 2.59 | 2.56 | 2.63 |

Not surprisingly, perceptual lapses are significantly more common in multiple-vehicle injury crashes than in single-vehicle injury crashes—10.79 times as common (Figure 16). The relative likelihoods of these lapses among drivers in

**Figure 17.** Percent of Drivers in Injury Crashes Who Suffered Perceptual Lapses, by Age and Population (Rural vs. Urban)




the three older age categories in single-vehicle injury crashes are 1.35, 1.60, and 1.90, respectively, and in multiple-vehicle crashes, 1.72, 2.17, and 2.57.

Perceptual lapses are 1.43 times as common among drivers involved in urban crashes than those involved in rural crashes (Figure 17). Drivers in the older age categories involved in injury crashes in rural areas were, respectively, 1.87, 2.49, and 3.12 as likely to have suffered a perceptual lapse as drivers in the comparison group, and in urban areas, 1.71, 2.11, and 2.76 times as likely.

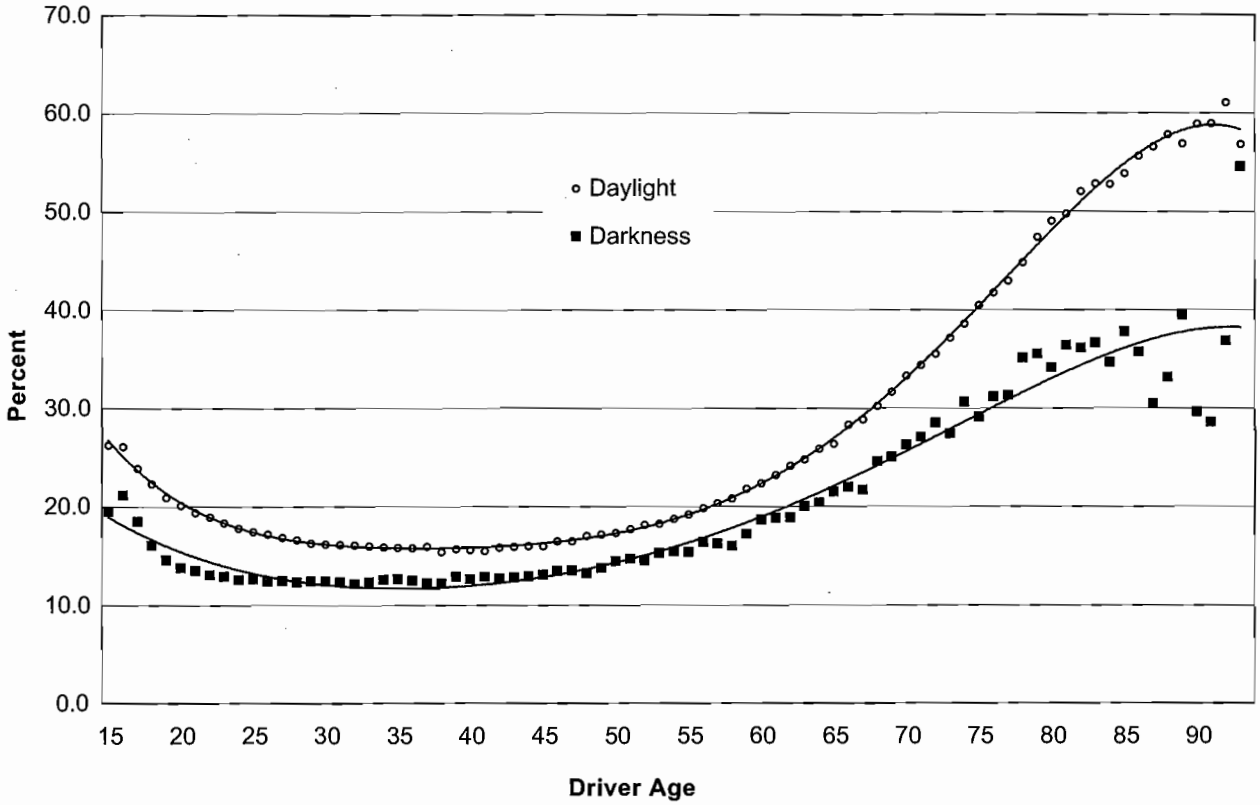
Female drivers involved in injury crashes are 1.22 times as likely as male drivers to be reported as having suffered a perceptual lapse (Figure 18). Women in the older age categories are, respectively, 1.78, 2.33, and 2.79 times as likely to have suffered such a lapse as drivers in the comparison group; for men the figures are 1.80, 2.29, and 3.03.

**Figure 18.** Percent of Drivers in Injury Crashes Who Suffered Perceptual Lapses, by Age and Sex


Drivers involved in injury crashes during daylight hours are 1.40 times as likely as those involved in injury crashes during hours of darkness to suffer perceptual lapses (Figure 19). During hours of daylight, drivers in the 65+, 75+, and 85+ age categories involved in injury crashes are, respectively, 1.73, 2.14, and 2.76 times as likely as drivers in the 55–64 age group to suffer perceptual lapses, and during hours of darkness, they are 2.01, 3.13, and 5.22 times as likely to suffer such lapses.

Finally, drivers involved in intersection-related crashes are 30.66 times as likely to have suffered perceptual lapses as drivers whose injury crashes were not intersection related (Figure 20). In intersection-related crashes, drivers in the three older age categories are 1.99, 2.82, and 4.64 times as likely as drivers in the comparison group to have had perceptual lapses, and in crashes that are not in-

**Figure 19.** Percent of Drivers in Injury Crashes Who Suffered Perceptual Lapses, by Age and Light Condition




tersection related, 2.14, 2.95, and 3.48 times as likely.

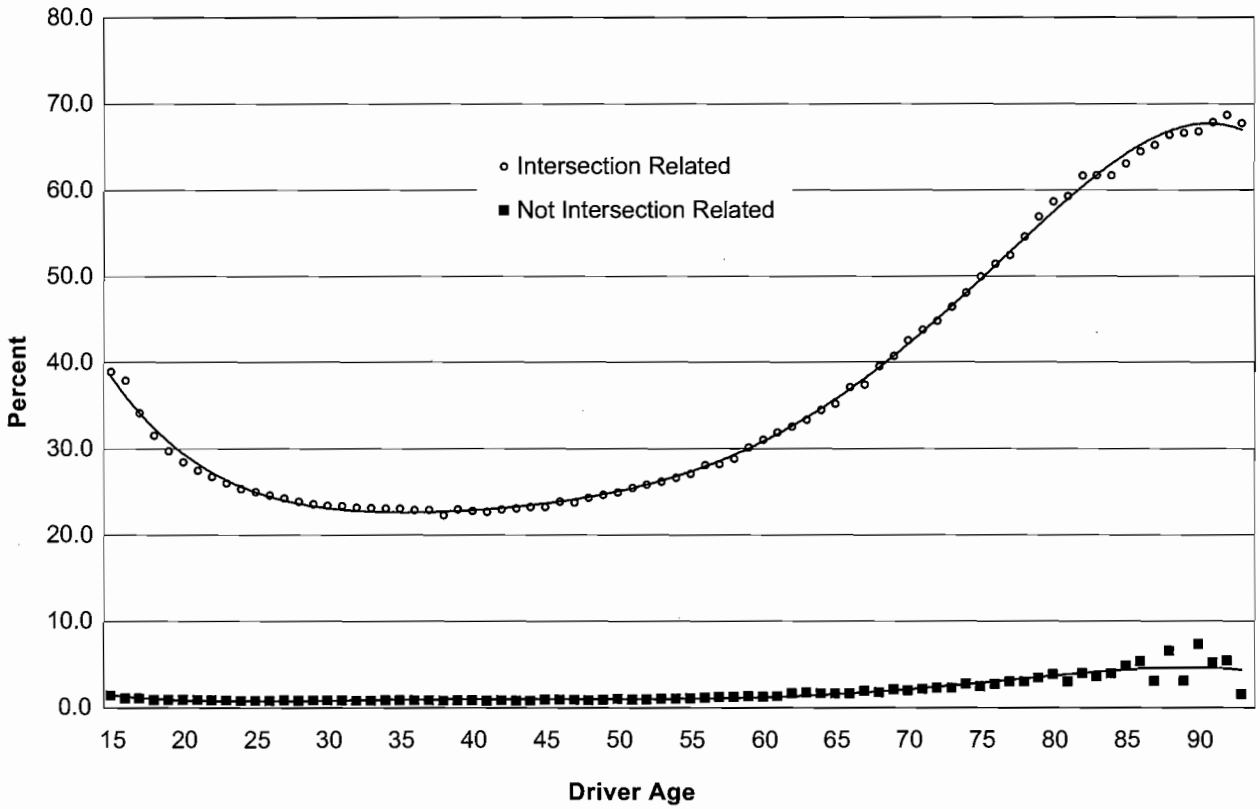
When all five factors depicted in Figures 16 through 20—crash type, population density, driver sex, light condition, and intersection relatedness—are considered simultaneously (see Appendix C) the following relative likelihoods result:

- Drivers 65 years of age and older are 1.56 times as likely as those aged 55 to 64 to have suffered perceptual lapses.

- Drivers 75 years of age and older are 1.89 times as likely as those aged 55 to 64 to have suffered perceptual lapses.

- Drivers 85 years of age and older are 2.17 times as likely as those aged 55 to 64 to have suffered perceptual lapses.

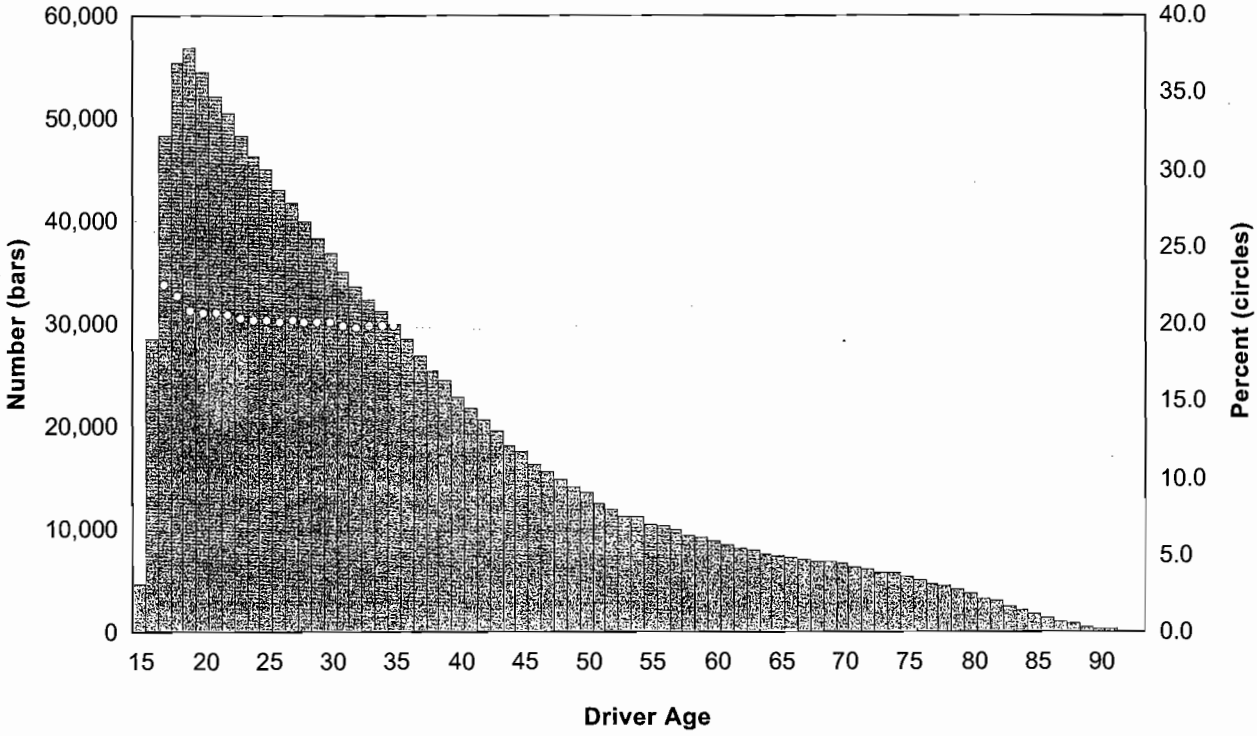
**Figure 20.** Percent of Drivers in Injury Crashes Who Suffered Perceptual Lapses, by Age and Intersection Relatedness




## LEFT TURNS

Figure 21 depicts the number and percentage of drivers involved in left-turn injury crashes by age. The vertical bars represent the number of drivers, and the dots represent the percentage of drivers. For drivers 35 to 54 years of age, 19.80 percent were involved in left-turn injury crashes. For drivers in the comparison group (55–64 years old), the percentage is 21.38. The relative likelihoods that drivers in the older age categories were involved in left-turn crashes are shown below.

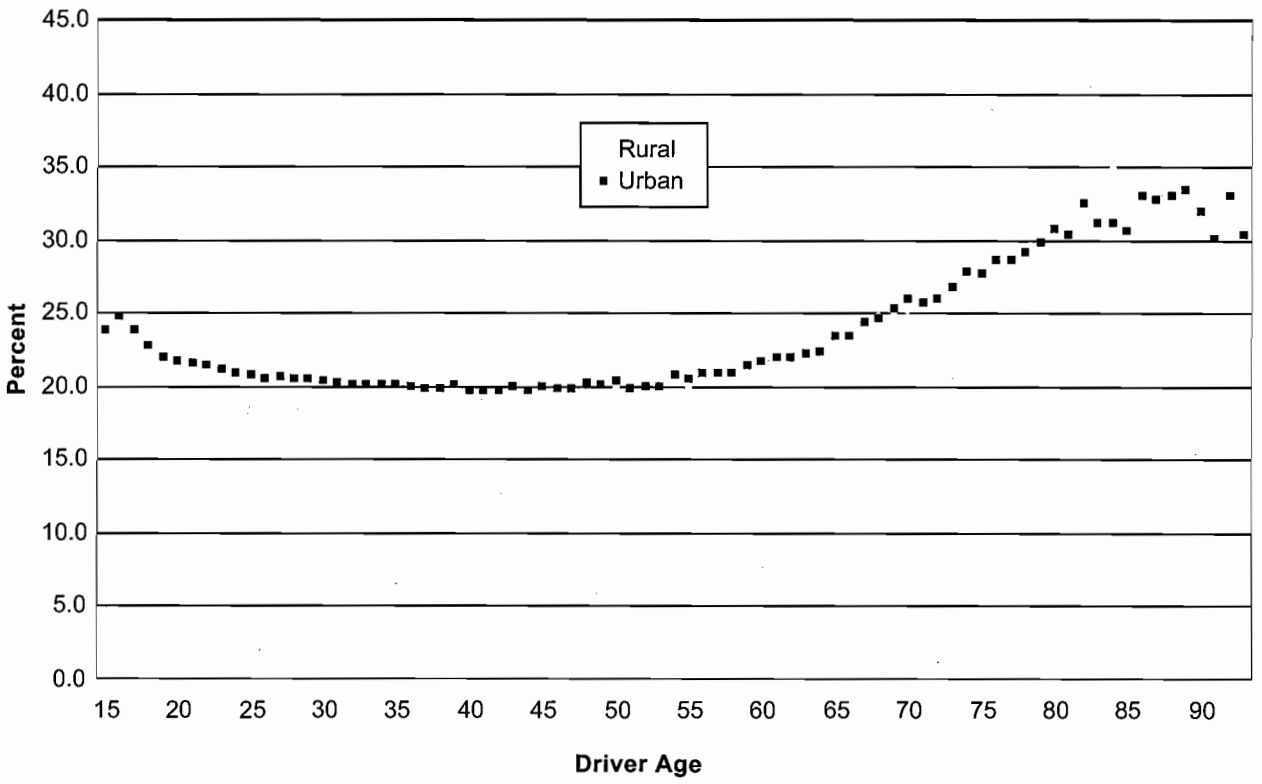
**Figure 21.** Number and Percent of Drivers in Injury Crashes Who Were Involved in Left Turn Crashes by Age




| Driver Age Categ. | DRIVERS IN INJURY CRASHES (TEXAS, 1975–1999) Left-turn Crashes | Total | Probability | Relative Likelihood | 95% Confidence Interval Low | High |
|---|---|---|---|---|---|---|
| 55–64 | 90,746 | 424,522 | 0.2138 | - | - | - |
| 65+ | 112,098 | 415,415 | 0.2699 | 1.26 | 1.25 | 1.27 |
| 75+ | 45,619 | 151,242 | 0.3016 | 1.41 | 1.40 | 1.42 |
| 85+ | 7,127 | 22,089 | 0.3227 | 1.51 | 1.48 | 1.54 |

Figure 22 depicts the percentages of drivers involved in left-turn injury crashes by whether the crash occurred in a rural or urban area and driver age. Drivers in the 65+, 75+, and 85+ age categories operating in rural areas are, respectively, 1.28, 1.45, and 1.54 times as likely to be involved in left-turn injury crashes as

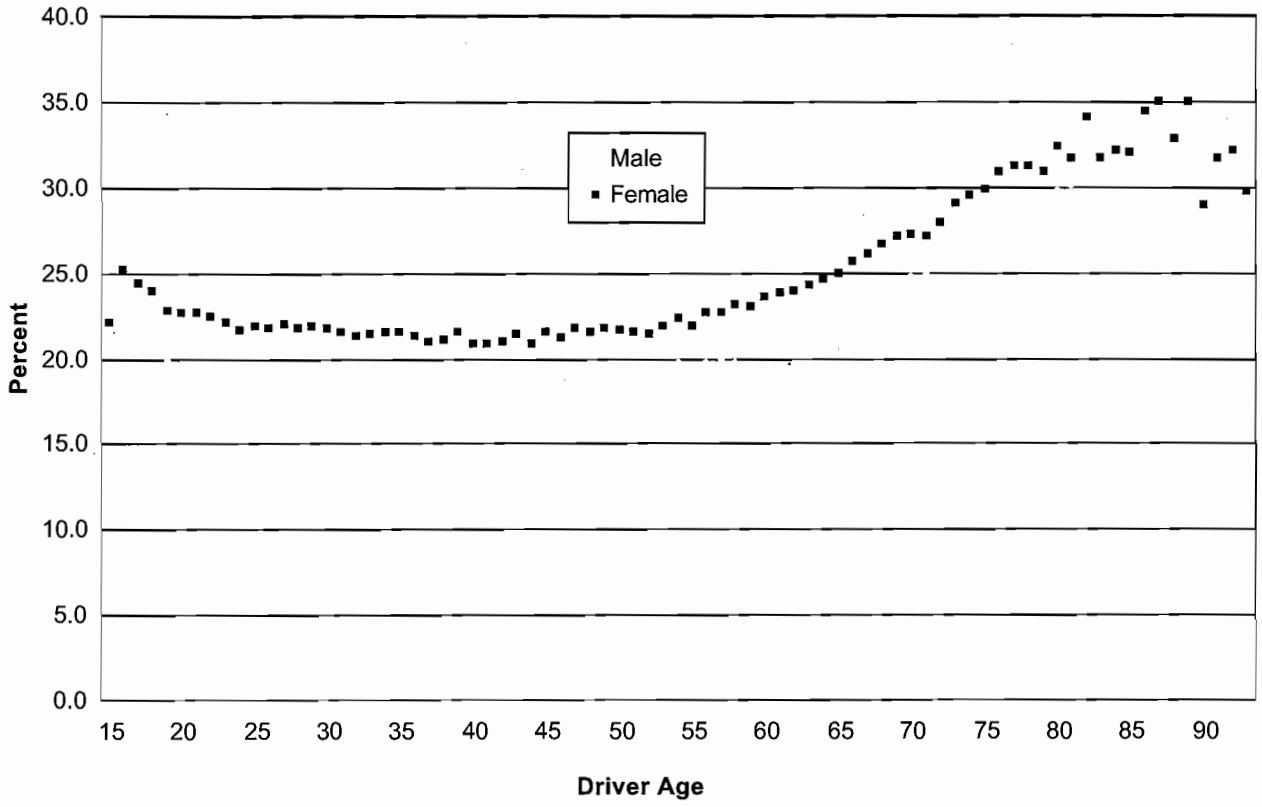
**Figure 22.** Percent of Drivers Who Were Involved in Left Turn Crashes, by Age and Population (Rural vs. Urban)




drivers in the 55–64 age group. In urban areas, the corresponding relative likelihoods are quite similar: 1.26, 1.40, and 1.50.

Figure 23 shows that female drivers are relatively more likely than male drivers to be involved in left-turn injury crashes. Overall, 22.50 percent of female drivers and 19.79 percent of male drivers were involved in left-turn injury crashes—that is, females were 1.14 times as likely as males to be involved in left-turn injury crashes. Males in the older age categories are significantly more likely than those in the comparison group to be involved in left-turn injury crashes: for males in the 65+, 75+, and 85+ age categories, the relative likelihoods are 1.28, 1.44, and 1.57, respectively. Older females are also significantly more likely than those in the comparison group to be involved in left-turn injury crashes. For females in the three older age categories, the relative likelihoods of being involved in left-

**Figure 23.** Percent of Drivers Who Were Involved in Left Turn Crashes, by Age and Sex

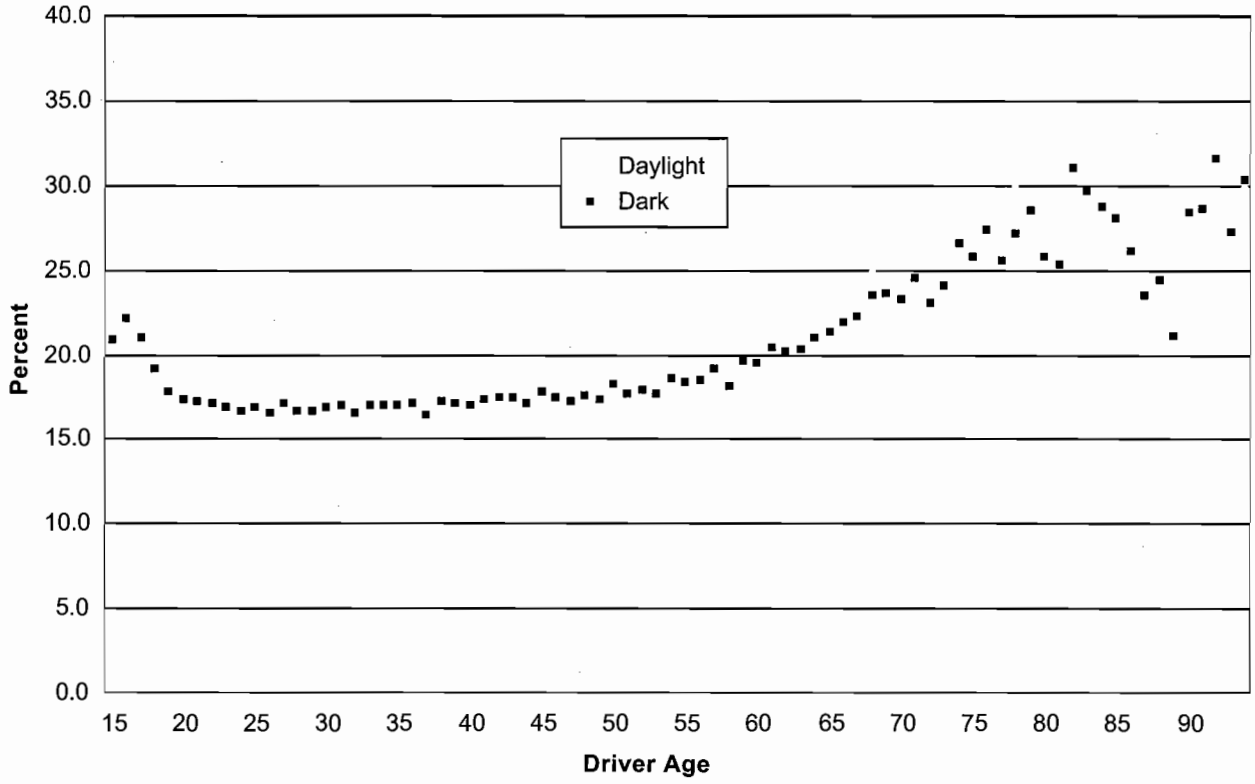



turn injury crashes are 1.23, 1.36, and 1.42.

Figure 24 depicts the percentages of drivers involved in left-turn injury crashes during hours of daylight (22.19 percent) and darkness, including dawn and dusk (17.70 percent), by driver age. Left-turn injury crashes are 1.25 times as likely to occur during hours of daylight than during hours of darkness. During hours of daylight, drivers in the older age categories are, respectively, 1.25, 1.39, and 1.49 times as likely as those in the comparison group to be involved in left-turn injury crashes, and during hours of darkness, 1.25, 1.39, and 1.35 times as likely.

Figures 25 and 26 present data on injury crashes involving left turns, but now including only two-vehicle crashes at intersections in which one vehicle is going straight and the other is turning left. The percentages reported in these

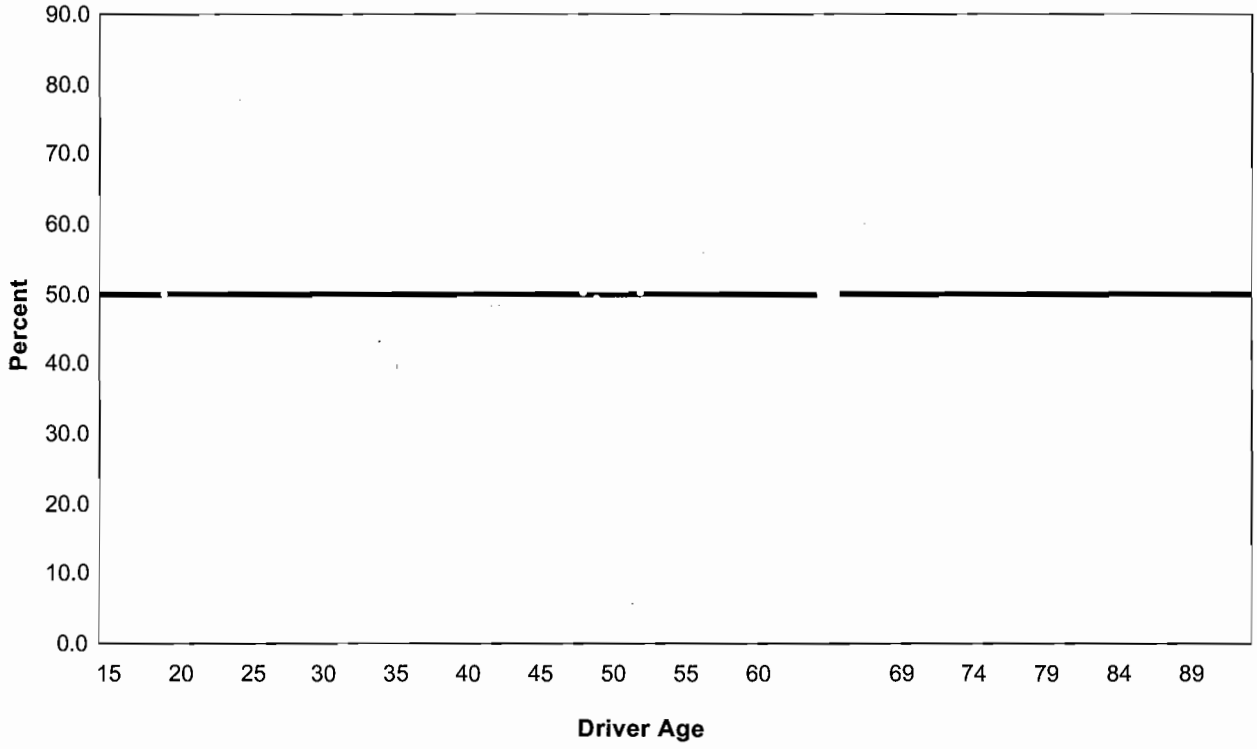
**Figure 24.** Percent of Drivers Involved in Left Turn Crashes, by Age and Light Condition




figures refer only to the drivers who were making a left turn in a left-turn injury crash, not all drivers involved in left-turn injury crashes. In Figure 25 the two vehicles are approaching each other at an angle, and in Figure 26, the two vehicles are approaching each other from opposite directions.

Since each driver in Figure 25 and each driver in Figure 26 is either going straight ahead or turning left, and since each crash involves two drivers, it follows that a driver chosen at random has a probability of 0.50 of turning left and a probability of 0.50 of going straight. In both of these figures, the bold horizontal line at 50 percent represents the line on which the data would have fallen had driver age been unrelated to whether the driver was turning left or going straight ahead. Both figures show clearly that older drivers are much more likely to have been turning left than to have been going straight ahead.

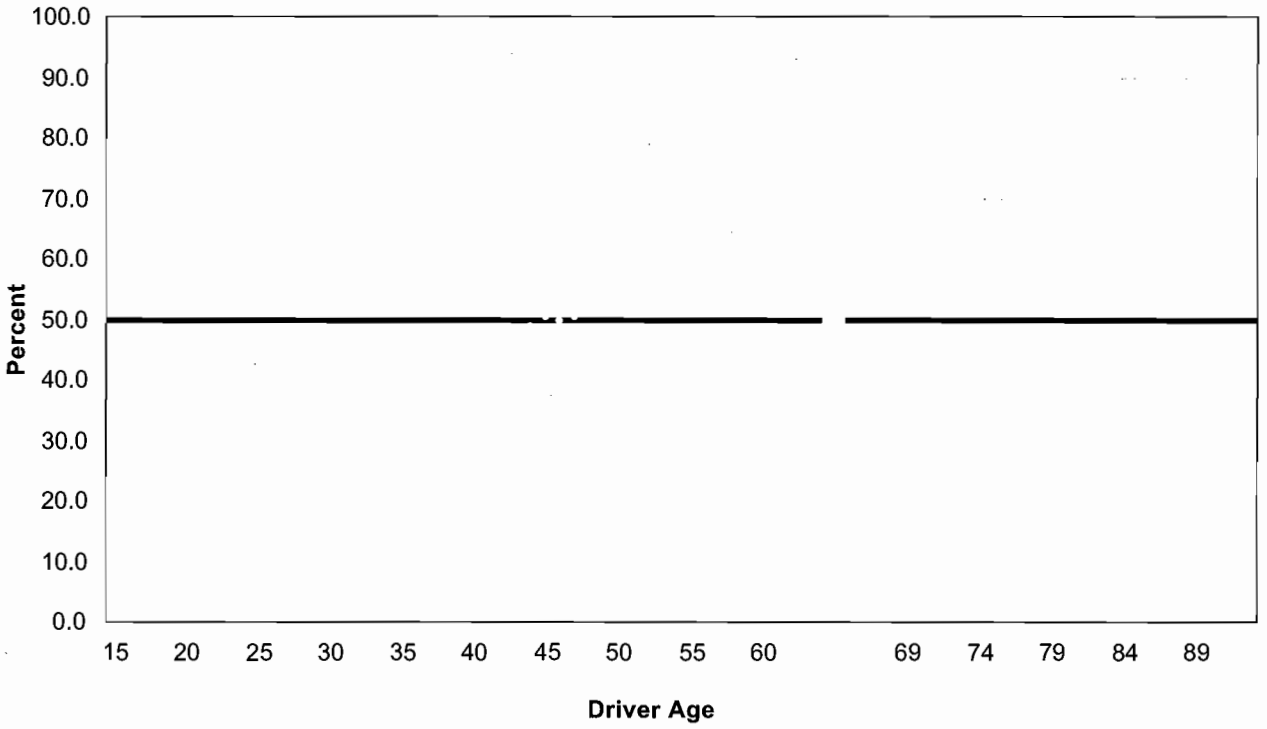
**Figure 25.** Percent of Drivers Turning Left in Two-Vehicle Injury Crashes at Intersections When Vehicles Are Approaching at an Angle (One Going Straight and the Other Turning Left), by Age




In Figure 25, drivers in the comparison group (55–64 years of age) are turning left in 54.63 percent of the cases, slightly above our overall expectation of 50 percent. For drivers in the 65+, 75+, and 85+ age categories, 66.51 percent, 73.13 percent, and 77.51 percent, respectively, are turning left. Drivers in these three age categories are 1.22, 1.34, and 1.42 times as likely to be turning left as drivers in the comparison group.

In Figure 26, drivers in the comparison group are turning left in 60.94 percent of the cases. For drivers in the three older age categories, the corresponding figures are 78.39 percent, 85.48 percent, and 89.65 percent, respectively. Among drivers 85 years of age and older, almost nine out of ten were turning left. The relative likelihoods of drivers in the older age categories turning left are 1.29, 1.40, and 1.47.

**Figure 26.** Percent of Drivers Turning Left in Two-Vehicle Injury Crashes at Intersections When Vehicles Are Approaching from Opposite Directions (One Going Straight and the Other Turning Left), by Age



# Discussion

In this study, data collected over 25 years on injury crashes in the state of Texas were analyzed to determine how certain driver and accident characteristics vary with driver age. The study examined four factors in particular that the literature has suggested are associated with older drivers involved in crashes—fragility, illness, perceptual lapses, and left turns. Relative likelihoods of death, illness, perceptual lapses, and left turns were computed for drivers in three older age categories, defined with successively higher age thresholds (65 and older, 75 and older, and 85 and older), in comparison with drivers aged 55–64.

| | Older Driver Age Category | | |
|---|---|---|---|
| | 65+ | 75+ | 85+ |
| Death | 1.54 | 2.08 | 2.90 |
| Illness | 1.78 | 2.28 | 2.97 |
| Perceptual Lapse | 1.73 | 2.20 | 2.59 |
| Left Turns | 1.26 | 1.41 | 1.51 |

These relative likelihoods were then recalculated controlling for crash type (single-vehicle vs. multiple-vehicle), population density (rural vs. urban), driver sex (male vs. female), light condition (daylight vs. darkness), and intersection relatedness. The following results were obtained.[5]

| | Older Driver Age Category | | |
|---|---|---|---|
| | 65+ | 75+ | 85+ |
| Death | 1.78 | 2.59 | 3.72 |
| Illness | 1.83 | 2.38 | 3.06 |
| Perceptual Lapse | 1.56 | 1.89 | 2.17 |

To the extent that the numbers in the second chart differ from the numbers in the first chart, the controlling variables are of consequence in the analysis. Note that in the second chart, the calculated relative likelihoods of death and illness for the older age categories increased, while the calculated relative likelihoods for perceptual lapse decreased. That is to say, when older drivers are put on a more comparable footing with drivers between 55 and 64 years of age, death and illness may be even more of a problem for older drivers than might at first appear to be the case, while perceptual lapses may be somewhat less of a problem.

It should be noted that other variables, such as vehicle type, "striking" or "struck" vehicle in multiple-vehicle crashes, primary point of impact on the vehicle, and so forth might have been used to control for differences in crash circumstances between the older age categories and the comparison group. Had other consequential control variables been used, the calculated relative likelihoods might have been somewhat different.

Adjusting the data to account for differences in crash circumstances between drivers in the older age categories and the comparison group is more logi-

[5] "Left turn" crashes are nearly always intersection related, and they typically involve two or more vehicles. Since "intersection relatedness" and "crash type," two of the five controlling variables used throughout this study are non-informative in left-turn crashes, no attempt was made to adjust or weight the data, though the remaining three variables (driver sex, population density, and light condition) might have been used for this purpose.

cally compelling when calculating the relative likelihood of death than when calculating the relative likelihood of illness and perceptual lapses. Death is an outcome variable, whereas illness and perceptual lapses are circumstantial variables that are themselves associated with the likelihood of a crash. The adjusted relative likelihoods of illness and perceptual lapse should be read with this caveat in mind.

The relative likelihoods of death, illness, and perceptual lapses shown in the chart above differ dramatically by age category. These differences clearly illustrate the point that if we simply define older drivers as those who are, say, 65 years of age and older, we may seriously underestimate the magnitude of the problems associated with drivers in their eighties and nineties.

In order to analyze a sample large enough that it contained an adequate number of drivers 85 years of age and older who were involved in crashes, this study used 25 years of data from the Texas crash database. However, using a sample that spans such a long period has a price. As more and more older drivers were being licensed between 1975 and 1999, the roadway and traffic environment in Texas as well as the vehicle fleet changed markedly. Naturally, these changes interact with the other variables in the analyses and influence the results obtained. For example, these factors no doubt influenced the likelihood that drivers would be involved in crashes as well as the likelihood of deaths or injuries being sustained in crashes. Ideally, analyses such as those provided in this study should be conducted with samples drawn from a much shorter time period.

A finding well worth highlighting in this study is the problem of left turns. Figures 25 and 26 are particularly instructive in this regard: they clearly document the magnitude of the left-turn problem that older drivers experience under two different crash scenarios. Further analyses using additional variables might prove interesting. For example, these two figures might be modified to compare rural and urban settings, different types of intersections, and daylight and dark conditions.

Finally, a word about the role of illness in injury crashes. Of 6,744,965

drivers, only 27,017, or 0.40 percent, were found to be ill or suffering from some physical impairment at the time of their crash (Figure 8). Although cases of illness or impairment are relatively rare in the general population, their frequency increases with age. Among drivers in this study who were 85 years of age and older, 2.27 percent were ill or suffering from some physical impairment. Because in the coming years that proportion will apply to an ever-growing base of drivers in that age group, more study should be devoted to learning what kinds and types of illnesses these drivers are suffering.

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# APPENDIX A

Table A1 depicts the relative likelihood (RL) of death for drivers in the older age categories (65+, 75+, and 85+) involved in injury crashes when compared with drivers aged 55–64 under 10 different conditions or circumstances:

- Single-vehicle and multiple-vehicle crashes
- Rural and urban crashes
- Male and female drivers
- Hours of daylight and hours of darkness
- Intersection-related crashes and crashes not related to intersections

Altogether, 30 different relative likelihoods are computed—the three older age categories by 10 different conditions or circumstances—and 95 percent confidence intervals are provided for each. As explained in the Methods section in the report, when 1.00 is not contained within the 95 percent confidence interval, the relative likelihood is significantly different from 1.00—that is, the difference between drivers in the older age category and those in the comparison group is statistically significant. The 30 relative likelihoods shown in Table A1 all suggest that drivers in all three older age categories, under all 10 conditions or circumstances, are significantly more likely to die in injury crashes than comparable drivers aged 55–64.

In Table A2, the 423,651 drivers in the comparison group are subdivided into 32 categories of crash conditions and circumstances. The first category is single-vehicle crash, rural setting, male driver, daylight conditions, and intersection-related crash. Of the 1,111 drivers who fall into this category, 19 were killed. Thus, we estimate that for drivers aged 55–64 involved in injury crashes under this set of conditions or circumstances, the probability of death is 0.0171. The remaining categories or rows in Table A2 may be interpreted in similar fashion.

Table A3 depicts 414,618 drivers 65 years of age and older who were involved in injury crashes, 5,865 of whom were killed. Looking at the first category or row—single-vehicle crash, rural setting, male driver, daylight conditions, and intersection-related crash—we see that 36 of 1,183 drivers at risk in this category died. The last column, expected deaths, is simply the corresponding probability of death from

Table A2 (0.0171) multiplied by the number of drivers at risk in this first category (0.0171 _ 1,183 = 20.23). Thus, if drivers in the 65+ age category were as likely as drivers aged 55–64 to die under the conditions or circumstances defined for this first category, we would expect to see 20.23 deaths for this older age group. Instead, 36 deaths were recorded for this category, or 1.78 times as many as we expected. The remaining categories or rows in Table A3 may be interpreted in similar fashion.

In Table A3, when the total number of drivers killed (5,865) is divided by the sum of the expected deaths in the 32 categories (3,302.65), we find that drivers 65 years of age and older who are involved in injury crashes are 1.78 times as likely to die as comparable drivers aged 55–64 when crash type, population, sex, light condition, and intersection relatedness are controlled for. Tables A4 and A5 may be interpreted in similar fashion for drivers in the 75+ and 85+ age categories.

**Table A1.** Relative Likelihood of Death in Injury Crashes for Drivers in the 65+, 75+, and 85+ Age Categories Relative to Comparison Group of Drivers Aged 55–64, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Factor | Driver Age Category | Drivers in Injury Crashes (Texas, 1975–1999) | | | Relative Likelihood | 95% Confidence Interval | |
|---|---|---|---|---|---|---|---|
| | | Killed | Total | Probability | | Low | High |
| Single-Vehicle Crashes | 55–64 | 1,606 | 48,091 | 0.0334 | | | |
| | 65+ | 1,576 | 42,623 | 0.0370 | 1.11 | 1.03 | 1.19 |
| | 75+ | 599 | 14,819 | 0.0404 | 1.21 | 1.10 | 1.33 |
| | 85+ | 113 | 2,174 | 0.0520 | 1.56 | 1.29 | 1.87 |
| Multiple-Vehicle Crashes | 55–64 | 2,293 | 376,431 | 0.0061 | | | |
| | 65+ | 4,295 | 372,792 | 0.0115 | 1.89 | 1.80 | 1.99 |
| | 75+ | 2,290 | 136,423 | 0.0168 | 2.76 | 2.60 | 2.92 |
| | 85+ | 476 | 19,915 | 0.0239 | 3.92 | 3.56 | 4.33 |
| Rural Crashes | 55–64 | 2,533 | 92,001 | 0.0275 | | | |
| | 65+ | 3,654 | 94,180 | 0.0388 | 1.41 | 1.34 | 1.48 |
| | 75+ | 1,737 | 35,226 | 0.0493 | 1.79 | 1.69 | 1.90 |
| | 85+ | 348 | 5,427 | 0.0641 | 2.32 | 2.09 | 2.60 |
| Urban Crashes | 55–64 | 1,366 | 332,521 | 0.0041 | | | |
| | 65+ | 2,217 | 321,235 | 0.0069 | 1.68 | 1.57 | 1.79 |
| | 75+ | 1,152 | 116,016 | 0.0099 | 2.42 | 2.24 | 2.61 |
| | 85+ | 241 | 16,662 | 0.0145 | 3.52 | 3.07 | 4.03 |
| Male Drivers | 55–64 | 2,985 | 267,781 | 0.0111 | | | |
| | 65+ | 4,159 | 256,361 | 0.0162 | 1.46 | 1.39 | 1.52 |
| | 75+ | 2,027 | 91,860 | 0.0221 | 1.98 | 1.87 | 2.09 |
| | 85+ | 448 | 14,189 | 0.0316 | 2.83 | 2.56 | 3.12 |
| Female Drivers | 55–64 | 910 | 155,870 | 0.0058 | | | |
| | 65+ | 1,706 | 158,257 | 0.0108 | 1.85 | 1.70 | 2.00 |
| | 75+ | 859 | 59,114 | 0.0145 | 2.49 | 2.27 | 2.73 |
| | 85+ | 141 | 7,862 | 0.0179 | 3.07 | 2.58 | 3.66 |
| Daylight | 55–64 | 2,333 | 336,041 | 0.0069 | | | |
| | 65+ | 4,763 | 362,581 | 0.0131 | 1.89 | 1.80 | 1.99 |
| | 75+ | 2,528 | 137,122 | 0.0184 | 2.66 | 2.51 | 2.81 |
| | 85+ | 542 | 20,582 | 0.0263 | 3.79 | 3.46 | 4.16 |
| Darkness (Including Dawn and Dusk) | 55–64 | 1,566 | 88,481 | 0.0177 | | | |
| | 65+ | 1,108 | 52,834 | 0.0210 | 1.18 | 1.10 | 1.28 |
| | 75+ | 361 | 14,120 | 0.0256 | 1.44 | 1.29 | 1.62 |
| | 85+ | 47 | 1,507 | 0.0312 | 1.76 | 1.32 | 2.34 |
| Intersection-Related | 55–64 | 1,145 | 289,288 | 0.0040 | | | |
| | 65+ | 2,976 | 316,202 | 0.0094 | 2.38 | 2.22 | 2.55 |
| | 75+ | 1,765 | 120,809 | 0.0146 | 3.69 | 3.43 | 3.97 |
| | 85+ | 414 | 18,275 | 0.0227 | 5.72 | 5.12 | 6.40 |
| Not Intersection-Related | 55–64 | 2,754 | 135,234 | 0.0204 | | | |
| | 65+ | 2,895 | 99,213 | 0.0291 | 1.43 | 1.36 | 1.51 |
| | 75+ | 1,124 | 30,433 | 0.0369 | 1.81 | 1.69 | 1.94 |
| | 85+ | 175 | 3,814 | 0.0459 | 2.25 | 1.94 | 2.61 |

**Table A2.** Drivers 55–64 Years of Age (Comparison Group) Killed in Injury Crashes, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Drivers Killed** | **Total Drivers** | **Estimated Probability of Death** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 19 | 1,111 | 0.0171 |
| | | | | No | 500 | 7,131 | 0.0701 |
| | | | Dark | Yes | 27 | 768 | 0.0352 |
| | | | | No | 410 | 5,597 | 0.0733 |
| | | Female | Daylight | Yes | 5 | 520 | 0.0096 |
| | | | | No | 120 | 3,457 | 0.0347 |
| | | | Dark | Yes | 5 | 200 | 0.0250 |
| | | | | No | 56 | 1,523 | 0.0368 |
| | Urban | Male | Daylight | Yes | 19 | 3,843 | 0.0049 |
| | | | | No | 172 | 7,441 | 0.0231 |
| | | | Dark | Yes | 27 | 1,786 | 0.0151 |
| | | | | No | 157 | 5,572 | 0.0282 |
| | | Female | Daylight | Yes | 5 | 2,372 | 0.0021 |
| | | | | No | 48 | 4,364 | 0.0110 |
| | | | Dark | Yes | 3 | 595 | 0.0050 |
| | | | | No | 31 | 1,684 | 0.0184 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 244 | 24,991 | 0.0098 |
| | | | | No | 342 | 12,489 | 0.0274 |
| | | | Dark | Yes | 113 | 6,222 | 0.0182 |
| | | | | No | 329 | 5,286 | 0.0622 |
| | | Female | Daylight | Yes | 111 | 14,094 | 0.0079 |
| | | | | No | 172 | 4,816 | 0.0357 |
| | | | Dark | Yes | 31 | 2,391 | 0.0130 |
| | | | | No | 48 | 1,281 | 0.0375 |
| | Urban | Male | Daylight | Yes | 222 | 109,274 | 0.0020 |
| | | | | No | 154 | 37,957 | 0.0041 |
| | | | Dark | Yes | 123 | 26,373 | 0.0047 |
| | | | | No | 127 | 11,940 | 0.0106 |
| | | Female | Daylight | Yes | 143 | 81,288 | 0.0018 |
| | | | | No | 56 | 20,234 | 0.0028 |
| | | | Dark | Yes | 46 | 12,919 | 0.0036 |
| | | | | No | 30 | 4,132 | 0.0073 |
| Total | | | | | 3,895 | 423,651 | 0.0092 |

**Table A3.** Observed and Expected Deaths for Drivers 65+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Drivers Killed** | **Total Drivers** | **Expected Deaths** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 36 | 1,183 | 20.23 |
| | | | | No | 582 | 7,014 | 491.79 |
| | | | Dark | Yes | 23 | 498 | 17.51 |
| | | | | No | 191 | 2,844 | 208.33 |
| | | Female | Daylight | Yes | 16 | 687 | 6.61 |
| | | | | No | 220 | 4,124 | 143.15 |
| | | | Dark | Yes | 1 | 176 | 4.40 |
| | | | | No | 27 | 755 | 27.76 |
| | Urban | Male | Daylight | Yes | 47 | 4,264 | 21.08 |
| | | | | No | 190 | 7,306 | 168.88 |
| | | | Dark | Yes | 21 | 1,267 | 19.15 |
| | | | | No | 93 | 3,182 | 89.66 |
| | | Female | Daylight | Yes | 24 | 2,872 | 6.05 |
| | | | | No | 83 | 4,821 | 53.03 |
| | | | Dark | Yes | 2 | 487 | 2.46 |
| | | | | No | 20 | 1,051 | 19.35 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 872 | 32,560 | 317.92 |
| | | | | No | 581 | 11,449 | 313.52 |
| | | | Dark | Yes | 124 | 4,675 | 84.90 |
| | | | | No | 233 | 2,883 | 179.44 |
| | | Female | Daylight | Yes | 410 | 18,271 | 143.90 |
| | | | | No | 239 | 4,495 | 160.53 |
| | | | Dark | Yes | 47 | 1,787 | 23.17 |
| | | | | No | 49 | 679 | 25.44 |
| | Urban | Male | Daylight | Yes | 730 | 127,056 | 258.18 |
| | | | | No | 212 | 27,315 | 110.82 |
| | | | Dark | Yes | 150 | 17,253 | 80.47 |
| | | | | No | 74 | 5,612 | 59.69 |
| | | Female | Daylight | Yes | 431 | 94,780 | 166.72 |
| | | | | No | 86 | 13,721 | 37.98 |
| | | | Dark | Yes | 38 | 7,790 | 27.74 |
| | | | | No | 13 | 1,761 | 12.78 |
| Total | | | | | 5,865 | 414,618 | 3,302.65 |

**Table A4.** Observed and Expected Deaths for Drivers 75+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatednes

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Drivers Killed** | **Total Drivers** | **Expected Deaths** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 21 | 487 | 8.33 |
| | | | | No | 225 | 2,487 | 174.38 |
| | | | Dark | Yes | 7 | 133 | 4.68 |
| | | | | No | 31 | 650 | 47.62 |
| | | Female | Daylight | Yes | 10 | 299 | 2.87 |
| | | | | No | 91 | 1,450 | 50.33 |
| | | | Dark | Yes | 1 | 66 | 1.65 |
| | | | | No | 8 | 183 | 6.73 |
| | Urban | Male | Daylight | Yes | 25 | 1,596 | 7.89 |
| | | | | No | 81 | 2,646 | 61.16 |
| | | | Dark | Yes | 6 | 407 | 6.15 |
| | | | | No | 34 | 862 | 24.29 |
| | | Female | Daylight | Yes | 19 | 1,181 | 2.49 |
| | | | | No | 34 | 1,861 | 20.47 |
| | | | Dark | Yes | 0 | 161 | 0.81 |
| | | | | No | 6 | 317 | 5.84 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 579 | 13,790 | 134.65 |
| | | | | No | 260 | 3,705 | 101.46 |
| | | | Dark | Yes | 50 | 1,388 | 25.21 |
| | | | | No | 77 | 701 | 43.63 |
| | | Female | Daylight | Yes | 230 | 7,596 | 59.83 |
| | | | | No | 107 | 1,515 | 54.11 |
| | | | Dark | Yes | 24 | 565 | 7.33 |
| | | | | No | 15 | 166 | 6.22 |
| | Urban | Male | Daylight | Yes | 452 | 48,998 | 99.56 |
| | | | | No | 97 | 7,970 | 32.33 |
| | | | Dark | Yes | 64 | 4,738 | 22.10 |
| | | | | No | 18 | 1,302 | 13.85 |
| | | Female | Daylight | Yes | 260 | 37,118 | 65.29 |
| | | | | No | 35 | 4,182 | 11.58 |
| | | | Dark | Yes | 15 | 2,072 | 7.38 |
| | | | | No | 4 | 382 | 2.77 |
| Total | | | | | 2,886 | 150,974 | 1,112.97 |

**Table A5.** Observed and Expected Deaths for Drivers 85+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Drivers Killed** | **Total Drivers** | **Expected Deaths** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 5 | 100 | 1.71 |
| | | | | No | 43 | 383 | 26.85 |
| | | | Dark | Yes | 1 | 13 | 0.46 |
| | | | | No | 8 | 83 | 6.08 |
| | | Female | Daylight | Yes | 1 | 47 | 0.45 |
| | | | | No | 12 | 162 | 5.62 |
| | | | Dark | Yes | 1 | 10 | 0.25 |
| | | | | No | 0 | 23 | 0.85 |
| | Urban | Male | Daylight | Yes | 9 | 285 | 1.41 |
| | | | | No | 16 | 399 | 9.22 |
| | | | Dark | Yes | 2 | 52 | 0.79 |
| | | | | No | 4 | 111 | 3.13 |
| | | Female | Daylight | Yes | 5 | 177 | 0.37 |
| | | | | No | 5 | 276 | 3.04 |
| | | | Dark | Yes | 0 | 18 | 0.09 |
| | | | | No | 1 | 31 | 0.57 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 164 | 2,522 | 24.62 |
| | | | | No | 44 | 538 | 14.73 |
| | | | Dark | Yes | 6 | 148 | 2.69 |
| | | | | No | 7 | 82 | 5.10 |
| | | Female | Daylight | Yes | 42 | 1,080 | 8.51 |
| | | | | No | 10 | 159 | 5.68 |
| | | | Dark | Yes | 4 | 54 | 0.70 |
| | | | | No | 0 | 17 | 0.64 |
| | Urban | Male | Daylight | Yes | 109 | 7,868 | 15.99 |
| | | | | No | 19 | 941 | 3.82 |
| | | | Dark | Yes | 8 | 541 | 2.52 |
| | | | | No | 3 | 123 | 1.31 |
| | | Female | Daylight | Yes | 56 | 5,163 | 9.08 |
| | | | | No | 2 | 447 | 1.24 |
| | | | Dark | Yes | 1 | 167 | 0.59 |
| | | | | No | 1 | 31 | 0.23 |
| Total | | | | | 589 | 22,051 | 158.34 |

# APPENDIX B

The findings depicted in Tables B1 through B5 are arithmetically equivalent to those presented in Appendix A, and the explanations provided there are directly applicable here. Whereas the tables in Appendix A focus on the likelihood of death for different age groups, those below focus on the likelihood of illness or other physical defects for different age groups.

**Table B1.** Relative Likelihood of Illness or Other Physical Defects for Drivers in the 65+, 75+, and 85+ Age Categories Relative to Comparison Group of Drivers Aged 55–64 Involved in Injury Crashes, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Factor | Driver Age Category | Drivers in Injury Crashes (Texas, 1975–1999) | | | Relative Likelihood | 95% Confidence Interval | |
|---|---|---|---|---|---|---|---|
| | | Illness | Total | Probability | | Low | High |
| Single-Vehicle Crashes | 55–64 | 2,347 | 48,091 | 0.0488 | | | |
| | 65+ | 3,737 | 42,623 | 0.0877 | 1.80 | 1.71 | 1.89 |
| | 75+ | 1,572 | 14,819 | 0.1061 | 2.17 | 2.04 | 2.31 |
| | 85+ | 242 | 2,174 | 0.1113 | 2.28 | 2.01 | 2.59 |
| Multiple-Vehicle Crashes | 55–64 | 900 | 376,431 | 0.0024 | | | |
| | 65+ | 1,929 | 372,792 | 0.0052 | 2.16 | 2.00 | 2.34 |
| | 75+ | 1,067 | 136,423 | 0.0078 | 3.27 | 2.99 | 3.57 |
| | 85+ | 260 | 19,915 | 0.0131 | 5.46 | 4.76 | 6.26 |
| Rural Crashes | 55–64 | 1,152 | 92,001 | 0.0125 | | | |
| | 65+ | 2,207 | 94,180 | 0.0234 | 1.87 | 1.74 | 2.01 |
| | 75+ | 1,099 | 35,226 | 0.0312 | 2.49 | 2.30 | 2.70 |
| | 85+ | 212 | 5,427 | 0.0391 | 3.12 | 2.70 | 3.60 |
| Urban Crashes | 55–64 | 2,095 | 332,521 | 0.0063 | | | |
| | 65+ | 3,459 | 321,235 | 0.0108 | 1.71 | 1.62 | 1.80 |
| | 75+ | 1,540 | 116,016 | 0.0133 | 2.11 | 1.97 | 2.25 |
| | 85+ | 290 | 16,662 | 0.0174 | 2.76 | 2.45 | 3.12 |
| Male Drivers | 55–64 | 2,307 | 267,781 | 0.0086 | | | |
| | 65+ | 3,972 | 256,361 | 0.0155 | 1.80 | 1.71 | 1.89 |
| | 75+ | 1,814 | 91,860 | 0.0197 | 2.29 | 2.16 | 2.44 |
| | 85+ | 370 | 14,189 | 0.0261 | 3.03 | 2.72 | 3.37 |
| Female Drivers | 55–64 | 931 | 155,870 | 0.0060 | | | |
| | 65+ | 1,683 | 158,257 | 0.0106 | 1.78 | 1.64 | 1.93 |
| | 75+ | 822 | 59,114 | 0.0139 | 2.33 | 2.12 | 2.56 |
| | 85+ | 131 | 7,862 | 0.0167 | 2.79 | 2.33 | 3.34 |
| Daylight | 55–64 | 2,662 | 336,041 | 0.0079 | | | |
| | 65+ | 4,964 | 362,581 | 0.0137 | 1.73 | 1.65 | 1.81 |
| | 75+ | 2,314 | 136,399 | 0.0170 | 2.14 | 2.03 | 2.26 |
| | 85+ | 450 | 20,582 | 0.0219 | 2.76 | 2.50 | 3.05 |
| Darkness (Including Dawn and Dusk) | 55–64 | 585 | 88,481 | 0.0066 | | | |
| | 65+ | 702 | 52,834 | 0.0133 | 2.01 | 1.80 | 2.24 |
| | 75+ | 292 | 14,120 | 0.0207 | 3.13 | 2.72 | 3.60 |
| | 85+ | 52 | 1,507 | 0.0345 | 5.22 | 3.95 | 6.90 |
| Intersection-Related | 55–64 | 941 | 289,288 | 0.0033 | | | |
| | 65+ | 2,044 | 316,202 | 0.0065 | 1.99 | 1.84 | 2.15 |
| | 75+ | 1,108 | 120,809 | 0.0092 | 2.82 | 2.59 | 3.07 |
| | 85+ | 276 | 18,275 | 0.0151 | 4.64 | 4.06 | 5.31 |
| Not Intersection-Related | 55–64 | 2,306 | 135,234 | 0.0171 | | | |
| | 65+ | 3,622 | 99,213 | 0.0365 | 2.14 | 2.03 | 2.25 |
| | 75+ | 1,531 | 30,433 | 0.0503 | 2.95 | 2.77 | 3.14 |
| | 85+ | 226 | 3,814 | 0.0592 | 3.48 | 3.04 | 3.97 |

**Table B2.** Drivers 55–64 Years of Age (Comparison Group) in Injury Crashes Impaired by Illness or Some Other Physical Defect, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Ill Drivers** | **Total Drivers** | **Estimated Probability of Illness** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 66 | 1,111 | 0.0594 |
| | | | | No | 467 | 7,131 | 0.0655 |
| | | | Dark | Yes | 14 | 768 | 0.0182 |
| | | | | No | 132 | 5,597 | 0.0236 |
| | | Female | Daylight | Yes | 35 | 520 | 0.0673 |
| | | | | No | 195 | 3,457 | 0.0564 |
| | | | Dark | Yes | 4 | 200 | 0.0200 |
| | | | | No | 32 | 1,523 | 0.0210 |
| | Urban | Male | Daylight | Yes | 174 | 3,843 | 0.0453 |
| | | | | No | 651 | 7,441 | 0.0875 |
| | | | Dark | Yes | 43 | 1,786 | 0.0241 |
| | | | | No | 156 | 5,572 | 0.0280 |
| | | Female | Daylight | Yes | 71 | 2,372 | 0.0299 |
| | | | | No | 238 | 4,364 | 0.0545 |
| | | | Dark | Yes | 10 | 595 | 0.0168 |
| | | | | No | 53 | 1,684 | 0.0315 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 54 | 24,991 | 0.0022 |
| | | | | No | 58 | 12,489 | 0.0046 |
| | | | Dark | Yes | 10 | 6,222 | 0.0016 |
| | | | | No | 16 | 5,286 | 0.0030 |
| | | Female | Daylight | Yes | 24 | 14,094 | 0.0017 |
| | | | | No | 34 | 4,816 | 0.0071 |
| | | | Dark | Yes | 3 | 2,391 | 0.0013 |
| | | | | No | 5 | 1,281 | 0.0039 |
| | Urban | Male | Daylight | Yes | 229 | 109,274 | 0.0021 |
| | | | | No | 163 | 37,957 | 0.0043 |
| | | | Dark | Yes | 44 | 26,373 | 0.0017 |
| | | | | No | 30 | 11,940 | 0.0025 |
| | | Female | Daylight | Yes | 135 | 81,288 | 0.0017 |
| | | | | No | 61 | 20,234 | 0.0030 |
| | | | Dark | Yes | 22 | 12,919 | 0.0017 |
| | | | | No | 9 | 4,132 | 0.0022 |
| Total | | | | | 3,238 | 423,651 | 0.0076 |

**Table B3.** Observed and Expected Illness and Other Physical Defects for Drivers 65+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Ill Drivers** | **Total Drivers** | **Expected Illness** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 136 | 1,183 | 70.28 |
| | | | | No | 817 | 7,014 | 459.34 |
| | | | Dark | Yes | 27 | 498 | 9.08 |
| | | | | No | 127 | 2,844 | 67.07 |
| | | Female | Daylight | Yes | 63 | 687 | 46.24 |
| | | | | No | 380 | 4,124 | 232.62 |
| | | | Dark | Yes | 12 | 176 | 3.52 |
| | | | | No | 35 | 755 | 15.86 |
| | Urban | Male | Daylight | Yes | 311 | 4,264 | 193.06 |
| | | | | No | 970 | 7,306 | 639.19 |
| | | | Dark | Yes | 60 | 1,267 | 30.50 |
| | | | | No | 173 | 3,182 | 89.09 |
| | | Female | Daylight | Yes | 118 | 2,872 | 85.97 |
| | | | | No | 436 | 4,821 | 262.92 |
| | | | Dark | Yes | 18 | 487 | 8.18 |
| | | | | No | 45 | 1,051 | 33.08 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 246 | 32,560 | 70.35 |
| | | | | No | 140 | 11,449 | 53.17 |
| | | | Dark | Yes | 24 | 4,675 | 7.51 |
| | | | | No | 30 | 2,883 | 8.73 |
| | | Female | Daylight | Yes | 81 | 18,271 | 31.11 |
| | | | | No | 60 | 4,495 | 31.73 |
| | | | Dark | Yes | 14 | 1,787 | 2.24 |
| | | | | No | 11 | 679 | 2.65 |
| | Urban | Male | Daylight | Yes | 576 | 127,056 | 266.26 |
| | | | | No | 245 | 27,315 | 117.30 |
| | | | Dark | Yes | 53 | 17,253 | 28.78 |
| | | | | No | 37 | 5,612 | 14.10 |
| | | Female | Daylight | Yes | 283 | 94,780 | 157.41 |
| | | | | No | 95 | 13,721 | 41.37 |
| | | | Dark | Yes | 20 | 7,790 | 13.27 |
| | | | | No | 12 | 1,761 | 3.84 |
| Total | | | | | 5,655 | 414,618 | 3,095.84 |

**Table B4.** Observed and Expected Illness and Other Physical Defects for Drivers 75+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Ill Drivers** | **Total Drivers** | **Expected Illness** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 71 | 487 | 28.93 |
| | | | | No | 346 | 2,487 | 162.87 |
| | | | Dark | Yes | 6 | 133 | 2.42 |
| | | | | No | 53 | 650 | 15.33 |
| | | Female | Daylight | Yes | 39 | 299 | 20.13 |
| | | | | No | 173 | 1,450 | 81.79 |
| | | | Dark | Yes | 8 | 66 | 1.32 |
| | | | | No | 15 | 183 | 3.85 |
| | Urban | Male | Daylight | Yes | 129 | 1,596 | 72.26 |
| | | | | No | 375 | 2,646 | 231.49 |
| | | | Dark | Yes | 30 | 407 | 9.80 |
| | | | | No | 61 | 862 | 24.13 |
| | | Female | Daylight | Yes | 55 | 1,181 | 35.35 |
| | | | | No | 186 | 1,861 | 101.49 |
| | | | Dark | Yes | 9 | 161 | 2.71 |
| | | | | No | 13 | 317 | 9.98 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 171 | 13,790 | 29.80 |
| | | | | No | 76 | 3,705 | 17.21 |
| | | | Dark | Yes | 14 | 1,388 | 2.23 |
| | | | | No | 16 | 701 | 2.12 |
| | | Female | Daylight | Yes | 60 | 7,596 | 12.93 |
| | | | | No | 38 | 1,515 | 10.70 |
| | | | Dark | Yes | 8 | 565 | 0.71 |
| | | | | No | 3 | 166 | 0.65 |
| | Urban | Male | Daylight | Yes | 320 | 48,998 | 102.68 |
| | | | | No | 104 | 7,970 | 34.23 |
| | | | Dark | Yes | 28 | 4,738 | 7.90 |
| | | | | No | 14 | 1,302 | 3.27 |
| | | Female | Daylight | Yes | 151 | 37,118 | 61.64 |
| | | | | No | 51 | 4,182 | 12.61 |
| | | | Dark | Yes | 8 | 2,072 | 3.53 |
| | | | | No | 5 | 382 | 0.83 |
| Total | | | | | 2,636 | 150,974 | 1,106.89 |

**Table B5.** Observed and Expected Illness and Other Physical Defects for Drivers 85+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Ill Drivers** | **Total Drivers** | **Expected Illness** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 13 | 100 | 5.94 |
| | | | | No | 62 | 383 | 25.08 |
| | | | Dark | Yes | 0 | 13 | 0.24 |
| | | | | No | 13 | 83 | 1.96 |
| | | Female | Daylight | Yes | 8 | 47 | 3.16 |
| | | | | No | 18 | 162 | 9.14 |
| | | | Dark | Yes | 2 | 10 | 0.20 |
| | | | | No | 2 | 23 | 0.48 |
| | Urban | Male | Daylight | Yes | 30 | 285 | 12.90 |
| | | | | No | 48 | 399 | 34.91 |
| | | | Dark | Yes | 3 | 52 | 1.25 |
| | | | | No | 13 | 111 | 3.11 |
| | | Female | Daylight | Yes | 11 | 177 | 5.30 |
| | | | | No | 16 | 276 | 15.05 |
| | | | Dark | Yes | 1 | 18 | 0.30 |
| | | | | No | 1 | 31 | 0.98 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 55 | 2,522 | 5.45 |
| | | | | No | 14 | 538 | 2.50 |
| | | | Dark | Yes | 2 | 148 | 0.24 |
| | | | | No | 2 | 82 | 0.25 |
| | | Female | Daylight | Yes | 14 | 1,080 | 1.84 |
| | | | | No | 6 | 159 | 1.12 |
| | | | Dark | Yes | 1 | 54 | 0.07 |
| | | | | No | 0 | 17 | 0.07 |
| | Urban | Male | Daylight | Yes | 89 | 7,868 | 16.49 |
| | | | | No | 16 | 941 | 4.04 |
| | | | Dark | Yes | 7 | 541 | 0.90 |
| | | | | No | 3 | 123 | 0.31 |
| | | Female | Daylight | Yes | 39 | 5,163 | 8.57 |
| | | | | No | 11 | 447 | 1.35 |
| | | | Dark | Yes | 0 | 167 | 0.28 |
| | | | | No | 1 | 31 | 0.07 |
| Total | | | | | 501 | 22,051 | 163.55 |

# APPENDIX C

The findings depicted in Tables C1 through C5 are arithmetically equivalent to those presented in Appendix A, and the explanations provided there are directly applicable here. Whereas the tables in Appendix A focus on the likelihood of death for different age groups, those below focus on the likelihood of perceptual lapse for different age groups.

**Table C1.** Relative Likelihood of Perceptual Lapse for Drivers in the 65+, 75+, and 85+ Age Categories Relative to Comparison Group of Drivers Aged 55–64 Involved in Injury Crashes, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Factor | Driver Age Category | Drivers in Injury Crashes (Texas, 1975–1999) | | | Relative Likelihood | 95% Confidence Interval | |
|---|---|---|---|---|---|---|---|
| | | Perceptual Lapse | Total | Probability | | Low | High |
| Single-Vehicle Crashes | 55–64 | 1,294 | 48,091 | 0.0270 | | | |
| | 65+ | 1,554 | 42,623 | 0.0365 | 1.35 | 1.26 | 1.46 |
| | 75+ | 637 | 14,819 | 0.0430 | 1.60 | 1.46 | 1.75 |
| | 85+ | 111 | 2,174 | 0.0511 | 1.90 | 1.57 | 2.29 |
| Multiple-Vehicle Crashes | 55–64 | 88,000 | 376,431 | 0.2334 | | | |
| | 65+ | 149,926 | 372,792 | 0.4022 | 1.72 | 1.71 | 1.73 |
| | 75+ | 69,208 | 136,423 | 0.5073 | 2.17 | 2.15 | 2.19 |
| | 85+ | 11,942 | 19,915 | 0.6000 | 2.57 | 2.53 | 2.60 |
| Rural Crashes | 55–64 | 14,874 | 92,001 | 0.1617 | | | |
| | 65+ | 29,318 | 94,180 | 0.3113 | 1.93 | 1.89 | 1.96 |
| | 75+ | 14,533 | 35,226 | 0.4126 | 2.55 | 2.50 | 2.60 |
| | 85+ | 2,741 | 5,427 | 0.5051 | 3.12 | 3.03 | 3.22 |
| Urban Crashes | 55–64 | 74,420 | 332,521 | 0.2238 | | | |
| | 65+ | 122,162 | 321,235 | 0.3803 | 1.70 | 1.69 | 1.71 |
| | 75+ | 55,312 | 116,016 | 0.4768 | 2.13 | 2.11 | 2.15 |
| | 85+ | 9,312 | 16,662 | 0.5589 | 2.50 | 2.46 | 2.53 |
| Male Drivers | 55–64 | 51,900 | 267,781 | 0.1938 | | | |
| | 65+ | 86,875 | 256,361 | 0.3389 | 1.75 | 1.73 | 1.77 |
| | 75+ | 40,204 | 91,860 | 0.4377 | 2.26 | 2.23 | 2.28 |
| | 85+ | 7,540 | 14,189 | 0.5314 | 2.74 | 2.69 | 2.79 |
| Female Drivers | 55–64 | 37,253 | 155,870 | 0.2390 | | | |
| | 65+ | 64,347 | 158,257 | 0.4066 | 1.70 | 1.68 | 1.72 |
| | 75+ | 29,538 | 59,114 | 0.4997 | 2.09 | 2.07 | 2.12 |
| | 85+ | 4,499 | 7,862 | 0.5723 | 2.39 | 2.34 | 2.45 |
| Daylight | 55–64 | 73,855 | 336,041 | 0.2198 | | | |
| | 65+ | 137,204 | 362,581 | 0.3784 | 1.72 | 1.71 | 1.73 |
| | 75+ | 65,151 | 137,122 | 0.4751 | 2.16 | 2.14 | 2.18 |
| | 85+ | 11,525 | 20,582 | 0.5600 | 2.55 | 2.51 | 2.58 |
| Darkness (Including Dawn and Dusk) | 55–64 | 15,439 | 88,481 | 0.1745 | | | |
| | 65+ | 14,276 | 52,843 | 0.2702 | 1.55 | 1.52 | 1.58 |
| | 75+ | 4,694 | 14,120 | 0.3324 | 1.91 | 1.85 | 1.96 |
| | 85+ | 5,28 | 1,507 | 0.3504 | 2.01 | 1.87 | 2.15 |
| Intersection-Related | 55–64 | 87,587 | 289,288 | 0.3028 | | | |
| | 65+ | 149,160 | 316,202 | 0.4717 | 1.56 | 1.55 | 1.57 |
| | 75+ | 68,847 | 120,809 | 0.5699 | 1.88 | 1.87 | 1.90 |
| | 85+ | 11,872 | 18,275 | 0.6496 | 2.15 | 2.12 | 2.17 |
| Not Intersection-Related | 55–64 | 1,707 | 135,234 | 0.0126 | | | |
| | 65+ | 2,320 | 99,213 | 0.0234 | 1.85 | 1.74 | 1.97 |
| | 75+ | 998 | 30,433 | 0.0328 | 2.60 | 2.41 | 2.81 |
| | 85+ | 181 | 3,814 | 0.0475 | 3.76 | 3.24 | 4.37 |

**Table C2.** Drivers 55–64 Years of Age (Comparison Group) Suffering Perceptual Lapses in Injury Crashes, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| Crash Type | Population | Driver Sex | Light Condition | Intersection Related | Drivers Suffering Perceptual Lapse | Total Drivers | Estimated Probability Perceptual Lapse |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 54 | 1,111 | 0.0486 |
| | | | | No | 90 | 7,131 | 0.0126 |
| | | | Dark | Yes | 113 | 768 | 0.1471 |
| | | | | No | 22 | 5,597 | 0.0039 |
| | | Female | Daylight | Yes | 27 | 520 | 0.0519 |
| | | | | No | 26 | 3,457 | 0.0075 |
| | | | Dark | Yes | 32 | 200 | 0.1600 |
| | | | | No | 5 | 1,523 | 0.0033 |
| | Urban | Male | Daylight | Yes | 328 | 3,843 | 0.0853 |
| | | | | No | 85 | 7,441 | 0.0114 |
| | | | Dark | Yes | 133 | 1,786 | 0.0745 |
| | | | | No | 63 | 5,572 | 0.0113 |
| | | Female | Daylight | Yes | 209 | 2,372 | 0.0881 |
| | | | | No | 41 | 4,364 | 0.0094 |
| | | | Dark | Yes | 44 | 595 | 0.0739 |
| | | | | No | 18 | 1,684 | 0.0107 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 7,080 | 24,991 | 0.2833 |
| | | | | No | 231 | 12,489 | 0.0185 |
| | | | Dark | Yes | 1,788 | 6,222 | 0.2874 |
| | | | | No | 62 | 5,286 | 0.0117 |
| | | Female | Daylight | Yes | 4,430 | 14,094 | 0.3143 |
| | | | | No | 117 | 4,816 | 0.0243 |
| | | | Dark | Yes | 762 | 2,391 | 0.3187 |
| | | | | No | 20 | 1,281 | 0.0156 |
| | Urban | Male | Daylight | Yes | 33,260 | 109,274 | 0.3044 |
| | | | | No | 454 | 37,957 | 0.0120 |
| | | | Dark | Yes | 7,981 | 26,373 | 0.3026 |
| | | | | No | 156 | 11,940 | 0.0131 |
| | | Female | Daylight | Yes | 27,066 | 81,288 | 0.3330 |
| | | | | No | 249 | 20,234 | 0.0123 |
| | | | Dark | Yes | 4,145 | 12,919 | 0.3208 |
| | | | | No | 62 | 4,132 | 0.0150 |
| Total | | | | | 89,153 | 423,651 | 0.2104 |

**Table C3.** Observed and Expected Perceptual Lapses Among Drivers 65+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| **Crash Type** | **Population** | **Driver Sex** | **Light Condition** | **Intersection Related** | **Drivers Suffering Perceptual Lapse** | **Total Drivers** | **Expected Perceptual Lapse** |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 101 | 1,183 | 57.50 |
| | | | | No | 89 | 7,014 | 88.52 |
| | | | Dark | Yes | 77 | 498 | 73.27 |
| | | | | No | 19 | 2,844 | 11.18 |
| | | Female | Daylight | Yes | 46 | 687 | 35.67 |
| | | | | No | 39 | 4,124 | 31.02 |
| | | | Dark | Yes | 13 | 176 | 28.16 |
| | | | | No | 5 | 755 | 2.48 |
| | Urban | Male | Daylight | Yes | 469 | 4,264 | 363.93 |
| | | | | No | 116 | 7,306 | 83.46 |
| | | | Dark | Yes | 126 | 1,267 | 94.35 |
| | | | | No | 34 | 3,182 | 35.98 |
| | | Female | Daylight | Yes | 289 | 2,872 | 253.06 |
| | | | | No | 58 | 4,821 | 45.29 |
| | | | Dark | Yes | 51 | 487 | 36.01 |
| | | | | No | 17 | 1,051 | 11.23 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 15,666 | 32,560 | 9,224.31 |
| | | | | No | 494 | 11,449 | 211.76 |
| | | | Dark | Yes | 2,064 | 4,675 | 1,343.44 |
| | | | | No | 62 | 2,883 | 33.81 |
| | | Female | Daylight | Yes | 9,574 | 18,271 | 5,742.91 |
| | | | | No | 200 | 4,495 | 109.20 |
| | | | Dark | Yes | 817 | 1,787 | 569.51 |
| | | | | No | 23 | 679 | 10.60 |
| | Urban | Male | Daylight | Yes | 59,602 | 127,056 | 38,672.35 |
| | | | | No | 616 | 27,315 | 326.71 |
| | | | Dark | Yes | 7,239 | 17,253 | 5,221.10 |
| | | | | No | 101 | 5,612 | 73.32 |
| | | Female | Daylight | Yes | 49,208 | 94,780 | 31,558.35 |
| | | | | No | 415 | 13,721 | 168.85 |
| | | | Dark | Yes | 3,566 | 7,790 | 2,499.38 |
| | | | | No | 26 | 1,761 | 26.42 |
| Total | | | | | 151,222 | 414,618 | 97,043.17 |

**Table C4.** Observed and Expected Perceptual Lapses Among Drivers 75+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| Crash Type | Population | Driver Sex | Light Condition | Intersection Related | Drivers Suffering Perceptual Lapse | Total Drivers | Expected Perceptual Lapse |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 56 | 487 | 23.67 |
| | | | | No | 38 | 2,487 | 31.39 |
| | | | Dark | Yes | 25 | 133 | 19.57 |
| | | | | No | 6 | 650 | 2.55 |
| | | Female | Daylight | Yes | 27 | 299 | 15.53 |
| | | | | No | 15 | 1,450 | 10.91 |
| | | | Dark | Yes | 5 | 66 | 10.56 |
| | | | | No | 1 | 183 | 0.60 |
| | Urban | Male | Daylight | Yes | 196 | 1,596 | 136.22 |
| | | | | No | 47 | 2,646 | 30.23 |
| | | | Dark | Yes | 45 | 407 | 30.31 |
| | | | | No | 11 | 862 | 9.75 |
| | | Female | Daylight | Yes | 129 | 1,181 | 104.06 |
| | | | | No | 19 | 1,861 | 17.48 |
| | | | Dark | Yes | 13 | 161 | 11.91 |
| | | | | No | 4 | 317 | 3.39 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 8,226 | 13,790 | 3,906.73 |
| | | | | No | 254 | 3,705 | 68.53 |
| | | | Dark | Yes | 708 | 1,388 | 398.87 |
| | | | | No | 19 | 701 | 8.22 |
| | | Female | Daylight | Yes | 4,751 | 7,596 | 2,387.56 |
| | | | | No | 87 | 1,515 | 36.81 |
| | | | Dark | Yes | 291 | 565 | 180.06 |
| | | | | No | 8 | 166 | 2.59 |
| | Urban | Male | Daylight | Yes | 27,887 | 48,998 | 14,913.64 |
| | | | | No | 262 | 7,970 | 95.33 |
| | | | Dark | Yes | 2,392 | 4,738 | 1,433.81 |
| | | | | No | 32 | 1,302 | 17.01 |
| | | Female | Daylight | Yes | 22,873 | 37,118 | 12,358.97 |
| | | | | No | 189 | 4,182 | 51.46 |
| | | | Dark | Yes | 1,120 | 2,072 | 664.79 |
| | | | | No | 6 | 382 | 5.73 |
| Total | | | | | 69,742 | 150,974 | 36,988.23 |

**Table C5.** Observed and Expected Perceptual Lapses Among Drivers 85+ Years of Age, by Crash Type, Population, Sex, Light Condition, and Intersection Relatedness

| Crash Circumstances | | | | | Outcome Measures | | |
|---|---|---|---|---|---|---|---|
| Crash Type | Population | Driver Sex | Light Condition | Intersection Related | Drivers Suffering Perceptual Lapse | Total Drivers | Expected Perceptual Lapse |
| Single-Vehicle Crash | Rural | Male | Daylight | Yes | 15 | 100 | 4.86 |
| | | | | No | 6 | 383 | 4.83 |
| | | | Dark | Yes | 2 | 13 | 1.91 |
| | | | | No | 1 | 83 | 0.33 |
| | | Female | Daylight | Yes | 1 | 47 | 2.44 |
| | | | | No | 6 | 162 | 1.22 |
| | | | Dark | Yes | 0 | 10 | 1.60 |
| | | | | No | 0 | 23 | 0.08 |
| | Urban | Male | Daylight | Yes | 37 | 285 | 24.32 |
| | | | | No | 12 | 399 | 4.56 |
| | | | Dark | Yes | 5 | 52 | 3.87 |
| | | | | No | 0 | 111 | 1.26 |
| | | Female | Daylight | Yes | 20 | 177 | 15.60 |
| | | | | No | 4 | 276 | 2.59 |
| | | | Dark | Yes | 2 | 18 | 1.33 |
| | | | | No | 0 | 31 | 0.33 |
| Multiple-Vehicle Crash | Rural | Male | Daylight | Yes | 1,776 | 2,522 | 714.49 |
| | | | | No | 49 | 538 | 9.95 |
| | | | Dark | Yes | 84 | 148 | 42.53 |
| | | | | No | 3 | 82 | 0.96 |
| | | Female | Daylight | Yes | 746 | 1,080 | 339.46 |
| | | | | No | 19 | 159 | 3.86 |
| | | | Dark | Yes | 31 | 54 | 17.21 |
| | | | | No | 0 | 17 | 0.27 |
| | Urban | Male | Daylight | Yes | 5,196 | 7,868 | 2,394.80 |
| | | | | No | 51 | 941 | 11.26 |
| | | | Dark | Yes | 300 | 541 | 163.72 |
| | | | | No | 3 | 123 | 1.61 |
| | | Female | Daylight | Yes | 3,547 | 5,163 | 1,719.09 |
| | | | | No | 27 | 447 | 5.50 |
| | | | Dark | Yes | 96 | 167 | 53.58 |
| | | | | No | 0 | 31 | 0.47 |
| Total | | | | | 12,039 | 22,051 | 5,549.88 |

# DPS Backgrounder: Medical Advisory Board [HSC Subch. H]

A panel of physicians that are appointed by the Texas Department of State Health Services governs the Medical Advisory Board (MAB). A physician from the panel convenes to review possible medical conditions as they relate to the driving ability of reported Texas drivers. The physician reviews medical documentation submitted by the subject's personal doctor regarding the condition in question.

The Department of Public Safety acts in accordance with the medical findings of the Medical Advisory Board by enforcing the decisions of medically incapable or medically approved to drive. A person who is found medically incapable of safely operating a motor vehicle is subject to license revocation. [TRC 521.294 (1)]

A Texas driver may be reported to the Medical Advisory Board by physicians, family, friends, acquaintances, driver license field personnel, anonymously or by admission of a possible health condition that may interfere with the safe operation of a motor vehicle upon application or renewal for a Texas driver license.

Family, friends and anonymous reports will be investigated by field personnel first. These reports may be kept confidential, unless the subject requests the document through an open records request. All records are subject to becoming open records if the person requests an administrative hearing.

If you wish to report a possible medical condition of a Texas driver, you must be able to identify the Texas driver with full name and date of birth or Texas driver license number.

Please send your written concern to the Texas Department of Public Safety, PO Box 4087, Austin, TX 78773-0320, Attention: Driver Improvement Bureau. Note: Verbal notification is not sufficient information for the Department to take action.

In fiscal year 2005, the Medical Advisory Board acted on 8,433 cases that had been referred by the Department. Of that number 3,840 licenses were denied or revoked and 911 people were required to submit to a driving test.

*Fast Facts from the DPS*

# Medical Advisory Board

Texas does not mandatorily test or retest drivers who reach a certain age. Every driver, regardless of age, is tested for vision each time the license is renewed in person at a DPS Driver License office.

In calendar year 2001, there were 1,582,919 drivers ages 65 and older. In 2001, 33,399 drivers over the age of 65 were involved in collisions in Texas. That is approximately 5.8 percent of the 571,534 drivers involved in collisions that year.

DPS has a way to examine drivers of any age if concerns are raised about their ability to safely operate a motor vehicle. Anyone who has a concern about a friend or relative can write to the DPS about those concerns.

If the letter raises medically related concerns, the driver is sent a letter with questions they need to answer about their driving. If the answers indicate there is a medical problem that could interfere with good driving, the case is referred to the Texas Department of Health's Medical Advisory Board for review. If the Medical Advisory Board agrees that the license should be revoked, then DPS revokes the license.

If the letter indicates that a driving examination is warranted, the driver is sent a letter asking them to report to a DPS Driver License office for a driving examination. If the driver fails the test, there is an administrative hearing process to revoke the driver license.

To report someone whose driving you're concerned about, please send a letter with the driver's name and address, as well as their driver license number (if available), and describe the driving problems you believe the driver is having.

Send the letter to:
Texas Department of Public Safety
Driver Improvement
P.O. Box 4087
Austin TX 78773-0320

In fiscal year 2002, the Medical Advisory Board acted on 9,949 cases that had been referred by the Department. Of that number 4,423 licenses were denied or revoked and 471 people were required to submit to a driving test.

*Produced by the Texas Department of Public Safety Public Information Office.* 9/04
*For additional information, please call 512-424-2080.*
**www.txdps.state.tx.us**

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# POSSESSION: CARE, CUSTODY AND CONTROL

**Presented by**

**W. Clay Abbott**
**DWI Resource Prosecutor**
**Texas District & County Attorney Association**
**Austin**

By the end of the session, participants will be able to:

- Define possession using case law and statutes;
- Determine which actions constitute illegal possession of alcohol, tobacco, narcotic paraphernalia, and other contraband;
- Discuss the legal interplay of care, custody, and control.

Funded by a grant from the Texas Department of Transportation.

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TEXAS COURT OF CRIMINAL APPEALS

# Proving Possession: Care, Custody or Control

## Municipal Cases Involving Possession

- MIP: Alcoholic Bev. Code sec. 106.05
- Minor in Possession of Tobacco: Health & Safety Code sec. 161.252
- Possession of Drug Paraphernalia: Health & Safety Code sec. 481.125
- Open Container: Penal Code sec. 49.031
- Parks & Wildlife Code Cases

## Definitions

- Penal Code definition applies to other laws. Penal Code sec. 1.03(b)
- "Possession" means "actual care, custody, control or management." Penal Code sec. 1.07(a)(39); Health & Safety Code sec. 481.002(38)
- "Possess" means the act of having in possession or control, keeping, detaining, restraining, or holding as owner or as agent, bailee, or custodian for another. Parks & Wildlife Code sec. 65.006(3)

## Voluntary and Knowing

- PC sec. 6.01. Requirement of Voluntary Act or Omission
- "(a) Person commits an offense only if he voluntarily engages in conduct…including possession."
- "(b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control."

## Proof of Possession

- Knowledge of Substance and Mere Presence in its Vicinity is Not Enough.
- If container belongs to someone else, State must show dominion or control by the defendant.
- Can be direct or circumstantial evidence

## Exclusive v. Joint

- Exclusive Possession is Sufficient
- Sole Access is Sufficient
- If all others are excluded then care, custody and control are established
- But Exclusive Possession is not Required
- Can be Joint Possession
- But if Non-exclusive Affirmative Links must be Shown.

## Affirmative Links

- Contraband in plain view
- Strong odor of contraband was present
- Contraband conveniently accessible
- Accused owner of car or house where contraband found
- Accused was driver of car where contraband found
- Contraband in a closed container

## Affirmative Links Factors

- Paraphernalia to use contraband was in view or found on accused
- Physical condition of accused indicated recent consumption of the contraband
- Conduct by accused indicated guilt such as attempt to flee or furtive gestures

## Affirmative Links Factors

- Conflicting statements were given about the contraband
- Statements were made connecting accused with the contraband

## Standard of Review

- Can a rational person find beyond a reasonable doubt that the defendant possessed the substance in question?

## Scenario One

- Defendant is a 20 year old college student that was stopped for speeding at 10:30 at night in a vehicle registered in his name. He was the driver and sole occupant of the vehicle. A routine warrant check shows arrest warrants for traffic violations and failure to appear. The officer does a He is placed under arrest. In the trunk is an open cooler with two six packs of beer chilling in ice water.

## Is there legally sufficient evidence of possession?

1. No, his hand was not on the beer.
2. No, no proof he knows what is in the trunk.
3. Yes, he is in exclusive possession.
4. Yes, the beer being on ice in his vehicle constitutes sufficient affirmative links.

## Scenario Two

Two resource officers are watching the high school parking lot based on reports students are smoking in their cars during lunch breaks. The defendant (a 16 year old student) leaves the school to the parking lot and mills around then removes a key to a car from under the front bumper. As he opens the car the officers approach and he acts very nervous. He consents to being searched and having the car searched after being warned he has the right not to consent. The officers find a pack of cigarettes hidden in the passengers seat cushion. Registration of the car was not run.

## Is there legally sufficient evidence of possession?

1. No, possession is not exclusive and there are insufficient affirmative links.
2. No, the officers had no probable cause to search.
3. Yes, he was in exclusive control of the vehicle.
4. Yes, he was not in exclusive control of the vehicle, but his suspicious actions are sufficient affirmative links.

## Scenario Three

- The officers observe about 10-15 high school kids gathered in a park. The defendant is observed mingling with and exchanging something with several of the other kids. The defendant is 19. As the officers approach they see the kids are playing poker eating and drinking. The defendant is standing about six feet from a trash can. She is the closest person to the trash can and looks at it repeatedly as the officers talk with the kids. The officers look in the trash can and find a half full tequila bottle buried in the trash. The defendant is not intoxicated and officers say she did not have smell of alcohol on her breath. She is holding an empty cup. They did not observe any furtive gestures, nor did she run. Every single kid denies knowledge of the bottle.

## Is there legally sufficient evidence of possession?

1. No, possession is not exclusive and there are insufficient affirmative links.
2. No, the officers had no probable cause to search.
3. Yes, being closest she was in exclusive control of the trash can.
4. Yes, she was not in exclusive control of alcohol, but her suspicious actions and looking at the trash can are sufficient affirmative links.

## Scenario Four

- While acting as a magistrate you are doing a 15.17 hearing on a married codefendants charged with Possession of a Controlled substance. The affidavit states that they were responding to a domestic disturbance and entered the home fearing for the occupants safety. As they entered, the husband raced to the kitchen where he tried to pour Methamphetamine down the sink. They both look years older than their actual ages and appear to be very thin and unhealthy.

## What do you do?

1. Release both because the affidavit fails to justify entry into the home under the 4th amendment.
2. Commit the husband and release the wife because there is insufficient probable cause to establish joint possession on her part.
3. Commit both due to the existence of probable cause, if not proof beyond a reasonable doubt.

## Scenario One

Defendant is a 20 year old college student that was stopped for speeding at 10:30 at night in a vehicle registered in his name. He was the driver and sole occupant of the vehicle. A routine warrant check shows arrest warrants for traffic violations and failure to appear. The officer does a He is placed under arrest. In the trunk is an open cooler with two six packs of beer chilling in ice water.

Is there legally sufficient evidence of possession?

1. No, his hand was not on the beer.
2. No, no proof he knows what is in the trunk.
3. Yes, he is in exclusive possession.
4. Yes, the beer being on ice in his vehicle constitutes sufficient affirmative links.

See: *Brown v. State*, 911 S.W.2d 744 (Tex. Crim. App. 1995).

## Scenario Two

Two resource officers are watching the high school parking lot based on reports students are smoking in their cars during lunch breaks. The defendant (a 16 year old student) leaves the school to the parking lot and mills around then removes a key to a car from under the front bumper. As he opens the car the officers approach and he acts very nervous. He consents to being searched and having the car searched after being warned he has the right not to consent. The officers find a pack of cigarettes hidden in the passengers seat cushion. Registration of the car was not run.

Is there legally sufficient evidence of possession?

1. No, possession is not exclusive and there are insufficient affirmative links.
2. No, the officers had no probable cause to search.
3. Yes, he was in exclusive control of the vehicle.
4. Yes, he was not in exclusive control of the vehicle, but his suspicious actions are sufficient affirmative links.

See: *Guiton v. State*, 742 S.W.2d (Tex.Crim.App. 1987). and *Wiersing v.* State, 571 S.W.2d 188 (Tex. Crim. App 19??).

## Scenario Three

. The officers observe about 10-15 high school kids gathered in a park. The defendant is observed mingling with and exchanging something with several of the other kids. The defendant is 19. As the officers approach they see the kids are playing poker eating and

drinking. The defendant is standing about six feet from a trash can. She is the closest person to the trash can and looks at it repeatedly as the officers talk with the kids. The officers look in the trash can and find a half full tequila bottle buried in the trash. The defendant is not intoxicated and officers say she did not have smell of alcohol on her breath. She is holding an empty cup. They did not observe any furtive gestures, nor did she run. Every single kid denies knowledge of the bottle.

Is there legally sufficient evidence of possession?

1. No, possession is not exclusive and there are insufficient affirmative links.
2. No, the officers had no probable cause to search.
3. Yes, being closest she was in exclusive control of the trash can.
4. Yes, she was not in exclusive control of alcohol, but her suspicious actions and looking at the trash can are sufficient affirmative links.

See: *Oaks v. State*, 642 S.W.2d 174 (Tex. Crim. App. 1992).

## Scenario Four

While acting as a magistrate you are doing a 15.17 hearing on a married codefendants charged with Possession of a Controlled substance. The affidavit states that they were responding to a domestic disturbance and entered the home fearing for the occupants safety. As they entered, the husband raced to the kitchen where he tried to pour Methamphetamine down the sink. They both look years older than their actual ages and appear to be very thin and unhealthy.

What do you do?

1. Release both because the affidavit fails to justify entry into the home under the 4th amendment.
2. Commit the husband and release the wife because there is insufficient probable cause to establish joint possession on her part.
3. Commit both due to the existence of probable cause, if not proof beyond a reasonable doubt.

See: *Harrison v. State*, 555 S.W.2d 736 (Tex. Crim. App. 1977).

**TEXAS MUNICIPAL COURTS EDUCATION CENTER**

1609 SHOAL CREEK BOULEVARD, SUITE 302 AUSTIN, TEXAS 78701
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# A PROTOCOL FOR CONDUCTING DANGEROUS DOG HEARINGS

**Presented by**

**Adrianna Martinez Goodland**
**Attorney-at-Law**
**Richardson**

By the end of the session, judges will be able to:

- Identify the components of a dangerous dog case; and,
- Examine the potential pitfalls of handling a dangerous dog case in municipal court.


## Man's Best Friend

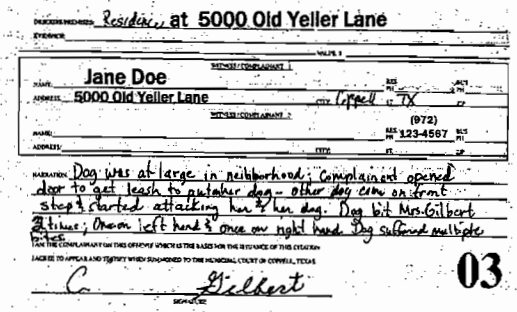
## Man's Best Friend?

## A Side-by-Side Comparison

- 7000 venomous bites requiring medical attention annually
- 15 deaths

- Over 4.7 million bites annually
- 15 deaths
- 800,000 bites require medical attention
  - Half are children
  - Half require ER treatment

Source: Centers for Disease Control, National Center for Injury Prevention and Control



Residence at 5000 Old Yeller Lane

WITNESS / COMPLAINANT 1

Jane Doe

ADDRESS: 5000 Old Yeller Lane CITY: Coppell ST: TX ZIP:

WITNESS / COMPLAINANT 2

NAME: (972) 123-4567

ADDRESS: CITY: ST: ZIP:

NARRATION: Dog was at large in neighborhood. Complainant opened door to get leash to put other dog - other dog came on front step & started attacking her & her dog. Dog bit Mrs. Gilbert 2 times; Once on left hand & once on right hand. Dog suffered multiple

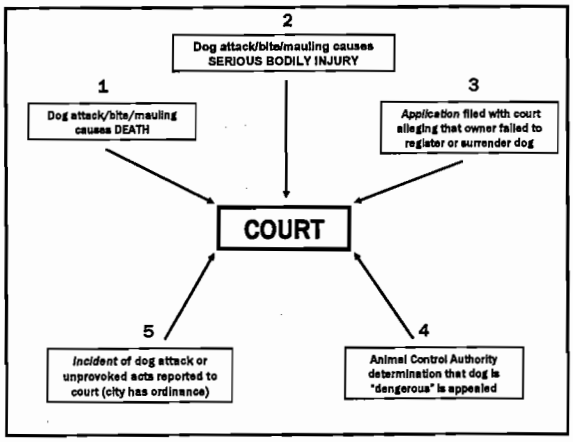
I AM THE COMPLAINANT ON THIS OFFENSE WHICH IS THE BASIS FOR THE ISSUANCE OF THIS CITATION

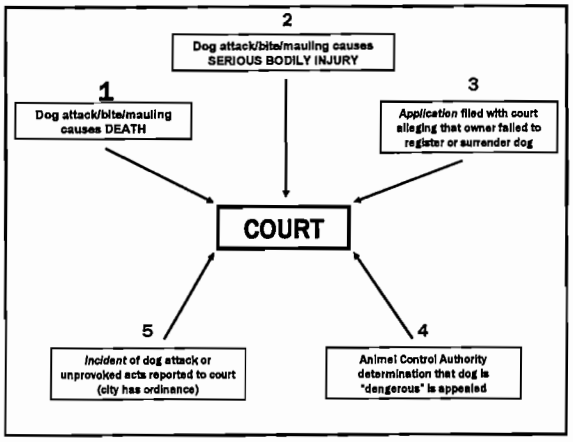
I AGREE TO APPEAR AND TESTIFY WHEN SUMMONED TO THE MUNICIPAL COURT OF COPPELL, TEXAS

C. Gilbert

SIGNATURE

03



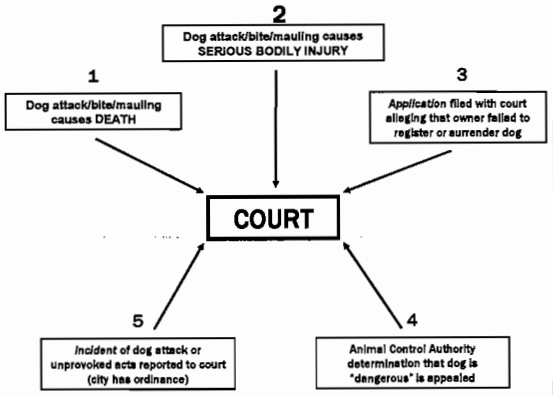




## Dog Attack, Bite, or Mauling Causes Person's Death

- H&SC 822.002 & 822.003
- Person files sworn complaint that dog attack, bite, or mauling caused death
  - Allegations must establish probable cause to believe dog caused death
- Court SHALL order seizure and impoundment of dog

## Death (cont.)

- Court hearing w/in 10 days
  - Written notice to owner or person from whom dog seized, & to person who made complaint
- Any *interested* person entitled present evidence
- Did attack, bite or mauling cause person's death?
  - ☑ If YES, court MUST order destruction
  - ☑ If NO, court MUST release dog DOG*




## Dog Attack or Bite or Mauling Causes Serious Bodily Injury

- H&SC 822.001, 822.002, & 822.003
- "Serious Bodily Injury" – An injury characterized by severe bite wounds or severe ripping & tearing of muscle that would cause a reasonably prudent person to seek treatment from a medical professional & would require hospitalization without regard to whether the person actually sought medical treatment.

## Serious Bodily Injury (cont.)

- Person files sworn complaint – dog attack, bite, or mauling caused serious bodily injury (SBI)
  - Allegations must establish probable cause of SBI
- Court SHALL order seizure & impoundment of dog
- Court hearing w/in 10 days
  - Notice to owner/person seized from & complainant
- Did dog attack or bite or mauling cause SBI?

## Serious Bodily Injury (cont.)

- If YES, court MAY order destruction
- If YES, court may choose not to order destruction??*
- If NO, court SHALL order dog's release

## Serious Bodily Injury (cont.)

**Court MAY NOT order destruction if defense:**

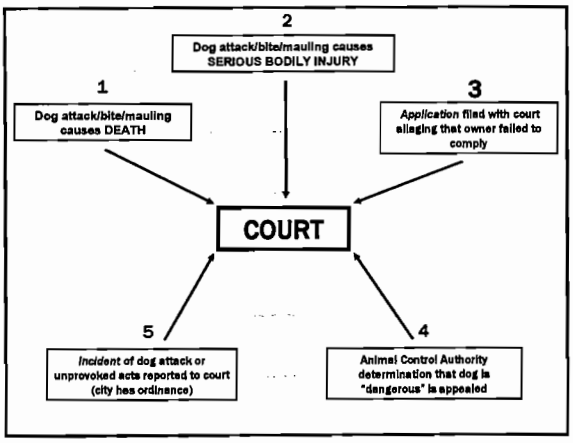
- Dog used for protection of person or property & attack/bite occurred in dog's enclosure, AND
  - Enclosure secure and provided notice of dog, and
  - Injured person was at least 8, and trespassing
- Dog not used for protection of person or property, victim, at least 8, was trespassing in dog's enclosure

## Serious Bodily Injury (cont.)

- Peace officer using dog for law enforcement purposes
- Dog defending person from assault or his property from damage or theft
- Victim, younger than 8, and incident occurred within dog's secure enclosure

## Requirements for Owner of a "Dangerous Dog"

- H&SC 822.042
- MUST w/in 30 days of learn dog dangerous:
  - Register dog with animal control authority, &
  - Restrain dog at all times (leash or secure enclosure), &
  - Establish proof of financial responsibility – min. $100,000, &
  - Comply with municipal/county dangerous dog restriction
- In lieu of compliance, owner MUST deliver dog to animal control by 30th day after learn of "dangerous dog"




## *Application* Filed Alleging Owner Fail to comply or Surrender

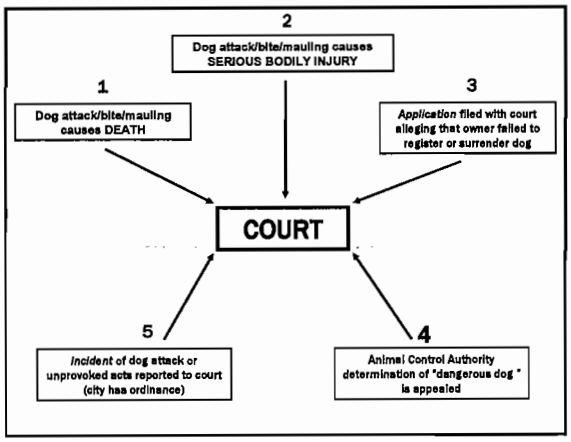
- H&SC 822.042(c) and 822.0423
- Person files "*application*" with court*
- Court provides notice of hearing to:
  - Owner/person from whom dog was seized
  - Person filing application

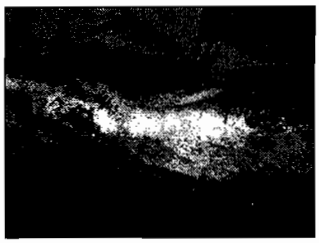
## Owner Fails to Comply or Surrender Dog (cont.)

- Court hearing w/in 10 days
- Any "interested person," including city attorney is entitled to present evidence
- If court finds noncompliance, SHALL order dog seized & shall issue seizure warrant

## Owner Fails to Comply or Surrender Dog (cont.)

- If owner NOW complies before 11th day, court SHALL order dog's return
- If NO compliance, court SHALL order destruction



## Owner Appeals Animal Control "Dangerous Dog" Determination

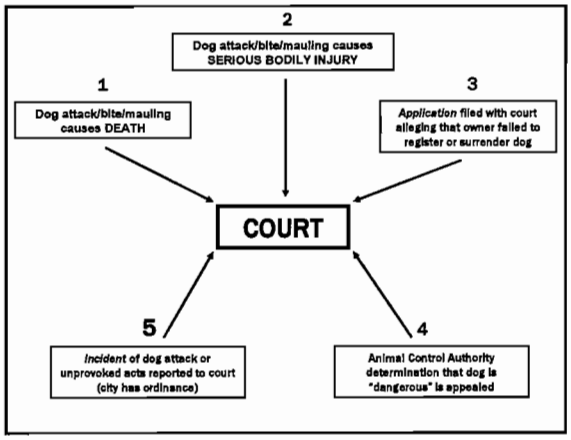
- H&SC 822.041(2) and 822.0421(a)&(b)
- "Dangerous dog":
  - ☑Makes unprovoked attack outside enclosure, causing bodily injury; OR
  - ☑Commits unprovoked acts outside enclosure, causing person to reasonably believe dog will attack and cause bodily injury

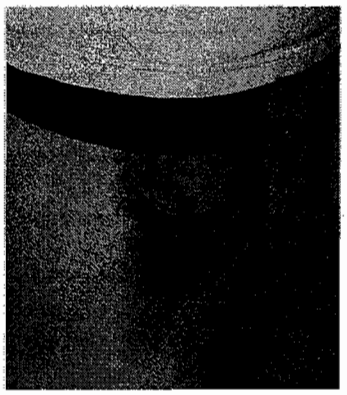
## Owner Appeals Animal Control Determination (cont.)

- Person "reports incident" to animal control
- Animal control may investigate – sworn witness statements
- Animal control finds "dangerous dog" & notifies owner

## Owner Appeals Animal Control Determination (cont.)

- Owner may appeal determination w/in 15 days of date notified "dangerous dog"
- Court makes decision*
  - recommend protocol in 822.0423
- Owner may appeal court's decision in same manner as appeal of other cases



## *Incident* of Attack or Unprovoked Acts Reported to Court

- H&SC 822.041(2), 822.0422, 822.042
- 822.422 applies only to:
  - Counties w/ pop. > 2.8 million
  - Counties where commissioners court entered order electing this provision
  - Municipalities where governing body adopted ordinance electing this provision

## *Incident* of Attack or Unprovoked Acts is Reported (cont.)

- Person reports "incident" to court
- Owner notified of report,* & MUST deliver dog to animal control w/in 5 days
- If owner fails to deliver, court SHALL order seizure, & SHALL issue seizure warrant

## *Incident* of Attack or Unprovoked Acts is Reported (cont.)

- Court hearing w/in 10 days of seizure
- Notice to owner/person from whom dog seized & person who complained
- Is dog "dangerous?"
  - If YES, court MAY order continued impoundment pending disposition
  - If NO, court orders release

## *Incident* of Attack or Unprovoked Acts is Reported (cont.)

- Options for disposition include:
  - Humane destruction
  - Compliance with 822.042(a) – register, restrain, obtain & obey, then release
  - Ordinance may provide other options*

DESCRIPTION/EVIDENCE: Residence at 5000 Old Yeller Lane

VALUE $

WITNESS/COMPLAINANT 1

NAME: Jane Doe

ADDRESS: 5000 Old Yeller Lane CITY: Coppell ST: TX

WITNESS/COMPLAINANT 2

NAME:

ADDRESS: CITY: ST:

(972) 123-4567

VIOLATION: Dog was at large in neighborhood; Complainant opened door to get leash to put other dog - other dog ran on front step & started attacking her & her dog. Dog bit Mrs. Gilbert 2 times; Once on left hand & once on right hand. Dog suffered multiple bites

I AM THE COMPLAINANT ON THIS OFFENSE WHICH IS THE BASIS FOR THE ISSUANCE OF THIS CITATION.

I AGREE TO APPEAR AND TESTIFY WHEN SUMMONED TO THE MUNICIPAL COURT OF COPPELL, TEXAS

C. Gilbert

SIGNATURE

03

## Knowledge - Judge's Best Friend

- Read
- Ask
- TMCEC

# Developing a Procedural Protocol for a Dangerous Dog Hearing

**Presented by: Marian Moseley**
**Presiding Judge**
**Coppell Municipal Court**

**Adrianna Martinez Goodland**
**Attorney at Law**
**Richardson**

In the United States alone, there are almost 5 million dog bite incidents annually. As a result, it is possible a municipal judge may be required to preside over a case involving a dog that attacked a person and caused serious injuries or even death. The purpose of this paper is to examine the state statute on 'dangerous dogs" to identify applicable laws that may govern this type of case, with alternatives other than a fine and costs. This paper will also assist in recognizing the components involved when conducting a dangerous dog hearing and potential pitfalls a judge may face in such situations.

Dog attack or bite cases differ procedurally from offenses governed by the Transportation Code. In fact, the Texas Health and Safety Code (H &SC) Title 10 is the statute which governs dangerous dogs. Chapter 822 defines a "dangerous dog" as one that:

> (A) makes an unprovoked attack on a person that causes bodily injury in a place other than an enclosure in which the dog was being kept; or
> (B) commits unprovoked acts in a place other than where the dog was being kept that cause a person to believe that the dog will attack and cause bodily injury

Despite this specific definition, in practice, the term "dangerous dog" is used more broadly, and a judge may be called upon to conduct different types of "dangerous dog" hearings under this statute.

Chapter 822 consists of five subchapters. Subchapter A regulates **Dogs that are a Danger to Persons**. Subchapter B addresses **Dogs and Coyotes That are a Danger to Animals**. Subchapter C defines **County Registration and Regulation of Dogs**. Subchapter D addresses statutorily defined **"Dangerous Dogs"**. Subchapter E regulates **Dangerous Wild**

## 1. Dog Attacking, Biting, or Mauling Causes the Death of a Person

Subchapter A of Chapter 822 addresses situations in which a dog attack has resulted in Death or Serious Bodily Injury to a person. Hearings conducted under Section 822.003 are not concerned with a formal determination of whether a dog is a "dangerous dog" by definition. Instead, a judge must determine if a dog has attacked someone, and if so, the nature of the injury. With death or serious bodily injury, the dangerous nature of the animal is already clear, and the judge is charged with determining the dog's ultimate disposition. While the procedures for the seizure of the animal and for the subsequent hearing follow the same format, the permissible outcomes of each hearing vary, depending on whether the court is dealing with death or with serious bodily injury.[2] Therefore, Death and Serious Bodily Injury cases are addressed separately.

Two prerequisites must be met in order to bring a dangerous dog "death" case into a municipal court. First, someone must file a sworn complaint regarding the attack. The complaint may be from *any person* (including a county attorney, city attorney, or a peace officer), and it must set forth information indicating that a dog has caused the death of a person by attacking, biting, or mauling the person. Second, probable cause that the *dog* caused the person's death must be shown. If both prerequisites are satisfied, a justice, county, or municipal court shall order the animal control authority[3] to seize the dog, and the court shall issue a warrant authorizing the seizure. The local animal control authority must seize the dog pursuant to the

[2] It is noteworthy that H&SC Section 822.005 provides that, with limited exceptions set forth in Section 822.003(f), Subchapter A applies to any dog that causes a person's death or serious bodily injury by attacking, biting, or mauling the person, regardless of whether the dog was provoked and regardless of where the incident resulting in the person's death or serious bodily injury occurred.

[3] HS&C Section 822.001 defines "Animal control authority" as a municipal or county animal control office with authority over the area in which the dog is kept, or the county sheriff in an area that does not have an animal control office.

order, and must provide for the dog's impoundment in secure and humane conditions until the court orders the disposition of the dog.

In the event an animal control official secured the seizure warrant from either a justice or county court, the municipal court's involvement may not begin until the local animal control authority notifies the court clerk of the attack and the seizure. Regardless of who ordered the seizure, it becomes the court's responsibility to hold a hearing to determine whether the dog did, in fact, cause the person's death. This hearing **must** be held not later than the tenth ($10^{th}$) day after the date on which the warrant was issued. Timing is critical, and the ten-day time period may begin to run on a day other than the date the court became aware of the person's death. Thus, the clerk must determine when the applicable warrant was signed, as the ten-day period will run accordingly. As a practical matter, holding this hearing timely may require that the judge cancel or postpone previously set cases/dockets.

The lack of statutory guidance governing the procedure of this type of dog hearing is problematic and could become a pitfall for the judge. Section 822.003(b) provides that "[t]he court **shall** give written notice of the time and place of the hearing to:

(1) the owner of the dog or the person from whom the dog was seized;[4] and

(2) the person who made the complaint.[5]

Although not specified in the statute, it is recommended that the notice provided to the owner or person from whom the dog was seized and the person who made the complaint include

[4] Think about the potential ramifications of this option, if the dog was seized while a babysitter was caring for the dog and residence. If the court is required to send notice to the person from whom the dog was seized, what happens if that person receives the notice, but fails to notify the owner of the hearing? The more prudent route would be to attempt to notify *both* the owner *and* the person from whom the dog was seized.

[5] Presumably, the person who notified authorities of the attack will remain at or near the scene, but this is not always the case. It may be necessary for the court clerk to consult police dispatch to obtain records regarding the name and address of the reporting person or to insure they obtain the address and telephone numbers from a person filing the complaint with the clerk. In addition, due to time constraints, the court may not want to rely solely upon mail as a means of timely notifying these individuals. It may be advisable to have a court marshal/bailiff/officer personally serve the notice.

language designed to alert the individual what the hearing may entail and that, at the conclusion of the hearing, the judge might order that the dog be destroyed. The individuals may choose to employ counsel, and they may present evidence at the hearing.

In addition, any *interested party*, including the county attorney or city attorney is entitled to present evidence at the hearing. The law does not define who is an 'interested' party or how an interested party is to receive notice of the hearing. Other individuals who may be interested in the outcome of the hearing include the family of the victim, the family of the dog owner, friends, and neighbors on both sides. Given the potential list of *interested parties*, can the court provide notice of the hearing to all these individuals? In a smaller town, word of mouth may provide notice of the hearing, but in larger cities, it is not practical for court clerks to contact every person who *may* have an interest in the outcome of the hearing. In these situations, the animal control official and the county or city attorney may help ensure that *interested* parties are aware of the hearing date and time; having spent time investigating the circumstances surrounding the attack, they will have already made contact with a number of interested individuals.

The H&SC is also silent with respect to procedural components of the hearing itself, and case law provides very little guidance. The one issue that has been addressed in case law, however, is that the nature of the hearing is *not criminal.*[6] However, despite this, some Tarrant County Courts of Appeals, as of January 2007, are grappling with this issue.[7] The apparent non-

[6] In Timmons v. Pecorino, 977 S.W.2d 603 (Tex.Crim.App. – 1998) (an appeal from Humble Municipal Court to Harris County Criminal Court No. 4), the Texas Court of Criminal Appeals determined that, although a hearing to determine the disposition of a dog who had bitten and caused serious bodily injury to a small girl was held in municipal court and handled by the municipal court prosecutor, and although the Government Code would appear to grant only criminal jurisdiction to municipal courts, a case to determine disposition of a dangerous dog "cannot be considered criminal," since no person has been charged with or convicted of a criminal offense; the "Court of Criminal Appeals has no jurisdiction over this dispute, which *remains a civil matter.*"

[7] A municipal judge's order in a dangerous dog hearing in Grapevine, Texas was appealed to a Tarrant County Criminal Court, who transferred the case to a Tarrant County Court at Law, where the judge signed an order dismissing the matter for lack of jurisdiction. As of January 15, 2007, an appeal had not yet been taken to the Second District Court of Appeals in Fort Worth. A similar dangerous dog case from Keller, Texas is also pending.

criminal nature of the hearing presents its own issues and questions. For example, the Code of Criminal Procedure will not apply; therefore, the Texas Rules of Civil Procedure will apply. Municipal courts can conduct civil hearings, as administrative appeals or final forfeiture hearings on bonds after judgment nisi, and more recently perhaps, appeals from red light camera civil penalties, so the court may already have exposure to the Texas Rules of Civil Procedure.

Perhaps most important for the fact finder is what burden of proof will be applied? If it is not a criminal proceeding, "beyond a reasonable doubt" will not be the applicable standard. Since the judge is conducting a civil hearing, the judge may apply "preponderance of the credible evidence" or "clear and convincing evidence." The statue gives no guidance. However, given the emotional nature of the hearing, and the fact that the dog's life is at stake (an order for destruction has such final consequences), a judge may want to err on the side of caution.

Another question to consider is whether the process should be adversarial. The victim is deceased, and the hearing is not a criminal matter, but are there parties? Essentially, the dog is on trial for its life, but it is not the respondent. Might the respondent be the owner or the person from whom the dog was seized? As it is not a criminal offense, the State of Texas is not the petitioner. Would the petitioner be the victim's next of kin, or perhaps the local animal control authority? A case may best be titled, "In Re Dog" without the State of Texas versus 'Defendant' language normally seen in criminal cases. A case number, not civil or criminal, must be assigned, with the suggestion being the use of a simple year-month-day format. Courts may also want to maintain these files in a location distinct from the court's criminal files.

The code is silent on the issue of the recording of the hearing. Should it be recorded? If so, who should pay the associated fees? It may not matter in a non-record court, as any appeal will be a trial *de novo*. In a court of record, however, a court reporter's statement of facts would

be critical for the appellate court to make its ruling. This section does not address any appeal; however, Texas Code of Criminal Procedure section 45.042(a) addresses appeals from municipal courts.

Given that the county attorney or city attorney may present evidence, does he/she represent the interest of the animal control authority and the city or citizens? Does this entitle him/her to direct the testimony of any animal control official or other witness?

The fact is that there is no existing "right" protocol for a hearing of this nature. The lack of guidance in this area allows a judge a great deal of discretion in conducting the hearing. It also gives rise to a number of pitfalls a judge will want to foresee and avoid.

There do exist a few common expectations at such a hearing. First, it is expected that emotions would run high on both sides. On one side, someone has lost a family-member, friend, and neighbor. On the other side, someone stands to lose, depending on their viewpoint, a family member and friend. Although one cannot equate the life of a dog to that of a human, judges still must be aware of, and likely deal with, the fact that to a majority of pet owners, Rover is a much-loved member of the family who just happens to have four feet instead of two.

In general, the hearing may be less traumatic when the court downplays the adversarial aspects of the hearing. A judge may start a hearing with an explanation that judges are regularly called upon to make judgments regarding a person's guilt, if the State of Texas has provided sufficient evidence to convince the judge beyond a reasonable doubt of an individual's guilt. In this hearing, the State of Texas is not responsible for proving guilt, and the judge's job in the hearing is that of fact-finder. Most important is that as many facts as possible be presented so that the judge has an accurate picture of what happened. Of course, the owner must be warned

that, if the facts show that the dog caused the person's death, the judge's only option is to order that the dog be destroyed.

Since the code is silent with respect to conduct and components of the hearing, the judge must determine whether witnesses will be subject to cross-examination, and if so, by whom. Neighbors who are already reluctant to come forward and cause more friction and disharmony in the neighborhood may fear being subject to cross-examination, even if the dog continues to terrorize the neighborhood. A large number of persons may be present, and the judge must set the tone of the court proceedings and maintain the decorum of the court. Limits may have to be set on the amount of time given witnesses testifying, while still providing a person their right to be heard.

As the hearing is not a criminal proceeding, there will be no 'prosecutor.' If a city or county attorney is present, they may present evidence and determine the order of the witnesses. This allows the judge to hear the testimony without giving any appearance of favoritism by calling one witness before another. If a city attorney will not be present, the court may start the hearing with eyewitnesses to the attack or someone other than the animal control official, in an effort to downplay the adversarial nature of court proceedings.

The judge must determine if any of the interested parties will be allowed to make a "final argument" after the testimony is presented. Often such arguments only antagonize an already volatile situation. Thus the judge may want to consider taking evidence and no more. Foreseeing and handling these components in a judicious manner decreases the likelihood of missteps by the judge.

After considering all the evidence, the options are limited. Section 822.003(d) provides that, if the judge finds that the dog attacking or biting or mauling caused the person's death, an

order must be entered that the dog be destroyed. There are no alternatives. Section 822.004 provides that destruction must take place at the hands of a licensed veterinarian, by personnel of a recognized animal shelter or humane society trained in the humane destruction of animals, or by personnel of a governmental agency responsible for animal control and trained in the humane destruction of animals.

If a judge finds that the dog attacking or biting or mauling *did not* cause the person's death, the dog must be released to its owner, to the person from whom it was seized, or to any other person authorized to take possession of dog. In either case, the judgment should be reduced to a written order. This may not be the final word, as a report of an incident may be filed with the animal control authority, or perhaps even with the court, to determine if the dog is a "dangerous dog." This is further addressed in Sections 4 and 5.

**2. <u>Dog Attacking, Biting, or Mauling Causes Serious Bodily Injury to a Person</u>**

The applicable law under Subchapter A, Section 822.003, and the procedures discussed in Section 1 with respect to dog attacks causing Death, also apply to attacks causing Serious Bodily Injury *to a person.* Likewise, the potential for pitfalls remain. When an attacking or biting or mauling is brought to the court, if the prerequisites of a sworn complaint and probable cause are met, the judge must order the seizure of the dog, issue a warrant of seizure, and hold a disposition hearing within ten (10) days from the date the warrant is issued. Serious Bodily Injury is discussed here separately as the remedies available differ from those if Death results.

Section 822.001(2) of the H&SC defines "serious bodily injury" as,

> "an injury characterized by severe bite wounds or severe ripping and tearing of muscle that would cause a reasonably prudent person to seek treatment from a medical professional and would require hospitalization without regard to whether the person actually sought medical treatment."

This definition of 'serious bodily injury' is different than the one in the Penal Code. Clearly, this definition covers a range of injury, and it is left to the judge to determine, after considering the evidence, whether the injury suffered would cause a reasonably prudent person to seek medical treatment. Unless the judge has the benefit of hearing from a medical professional who treated the victim of the attack, the judge will have to appraise the nature of the injury.

As in cases of death, a hearing must be held, requiring the judge to determine two things. The first is whether the injury suffered meets the statutory definition of "serious bodily injury."[8] The second is whether the dog attacking, biting, or mauling caused the serious bodily injury. If the judge considers all the evidence and finds that the injury was *not* serious bodily injury, the dog must be released to its owner, to the person from whom it was seized, or to any other person authorized to take possession of the dog. Should the court determine the victim did suffer serious bodily injury, but that the dog did not directly cause it, the result is the same – the dog must be released.

In the event the judge finds that the person did suffer serious bodily injury, *and* that the injury occurred as a result of the dog attacking or biting or mauling, the judge *may* order that the dog be destroyed. This decision may be affected by five circumstances listed in Section 822.003(f); the court may **not** order the dog destroyed if the court finds that the dog caused the serious bodily injury to a person by attacking, biting or mauling the person and:

> (1) the dog was being used for the protection of a person or person's property, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and:

[8] Note that the statute does not describe a specific number of bites or wounds necessary to constitute "serious bodily injury." It is conceivable that a single bite/puncture, if it hits a vital organ or blood supply, may suffice.

(A) the enclosure was reasonably certain to prevent the dog from leaving the enclosure on its own and provided notice of the presence of the dog; and
(B) the injured person was at least eight years of age, and was trespassing in the enclosure when the attack, bite, or mauling occurred;

(2) the dog was not being used for the protection of a person or person's property, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and the injured person was at least eight years of age and was trespassing in the enclosure when the attack, bite, or mauling occurred;

(3) the attack, bite, or mauling occurred during an arrest or other action of a peace officer while the peace officer was using the dog for law enforcement purposes;

(4) the dog was defending a person from an assault or person's property from damage or theft by the injured person; or

(5) the injured person was younger than eight years of age, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and the enclosure was reasonably certain to keep a person younger than eight years of age from entering.

If one of these "defenses" applies, the judge is prohibited from ordering that the dog be destroyed. Where none of these are found, however, the judge must determine whether to order destruction. {This is the decision Judge Pecorino rendered in the Timmons v. Pecorino case included in Appendices "E-1"}. Section 822.003(e) clearly states that the court *may* order destruction – it is not required. The statute does not set a standard that must be met before destruction is ordered. The judge must determine whether it is likely that the dog at issue will be a danger to the public.

Interestingly, the text of Section 822.003(e) does not address a situation in which a judge determines that the dog did indeed cause serious bodily injury but declines to order destruction. {Section 4 discusses how a dog may be determined to be a "dangerous dog," which triggers Section 822.042 (a) requirements}. The judge may fashion an order designed to allow the owner

to keep the dog, while still protecting the public welfare. The statute's lack of guidance may become a pitfall, so caution is urged. Appendices "D-2" contain a sample order releasing a dog to its owner, with provisions for consideration.

## "Traditional" Dangerous Dog Hearings

A determination that a dog is "dangerous" may be an issue where neither death nor serious bodily injury to a person has resulted. H&SC Subchapter D, Dangerous Dogs, addresses dog hearings, which may be heard in municipal courts. While the nature of the injury involved is necessarily less serious, the paths to the court and the remedies available may be confusing and warrant further discussion.

In Subchapter A, no finding of a 'dangerous dog' is required; the issue is whether a dog caused death or serious bodily injury. In Subchapter D, the term "dangerous dog" is statutorily defined, and the court must determine if acts by a dog meets these statutory requirements. Section 822.041(2) defines as a "dangerous dog" one that:

(A) "makes an unprovoked attack on a person that causes bodily injury and occurs in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own; or

(B) commits unprovoked acts in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person."

Under Subsection D, a judge may be called upon to conduct a hearing in making the initial determination that a dog is a "dangerous dog," according to this statutory definition. A judge may also be called upon to hold a hearing after a dog has previously been determined to be

"dangerous" by statute[9] after committing an act under Section 822.041(2) (A) or (B). Each of these hearings is slightly different, and therefore, each will be addressed separately.

**3. Application filed in Court – Owner Failed to Comply with "Dangerous Dog" Requirements**

Under Section 822.042(g), a person learns that he/she is the owner of a "dangerous dog" when he/she knows of an attack described in Section 822.041(2)(A) or (B); or when he/she receives notice that a justice, county, or municipal court has found the dog to be a "dangerous dog"; or when he/she is informed by the animal control authority that the dog is "dangerous". Once the owner learns he owns a "dangerous dog," he shall, not later than thirty (30) days from the date of learning this, comply with registration, restraint, insurance and statutory requirements (hereafter the "822.042(a) conditions"), which are:

-registration of the dog with the local animal control authority, and
-restraint of the dog at all times, and
-establishment of $100,000 financial responsibility for damages suffered in the event of an attack, and
-compliance with any municipal or county regulations or restriction pertaining to dangerous dogs.

If the owner fails to comply with these requirements, Section 822.042(b) mandates the owner shall deliver the dog to the local animal control authority not later than the thirtieth ($30^{th}$) day after the owner learns that the dog is a "dangerous dog".

Once an owner is required to comply with the 822.042(a) conditions, 822.0423 allows any person to file an *application* with the court, indicating that the owner has failed to comply with these conditions within the thirty (30) day time frame, or has failed to comply with the conditions and did not deliver the dog to the animal control authority, as required by Section

[9] The initial determination that the dog is a "dangerous dog," according to the statutory definition may have been made by the local animal control authority under Section 822.0421(a), or by a court or a justice or county court under Section 822.0422(d).

822.042(b). The court must conduct a hearing to determine if the owner complied. This "compliance" hearing is another type of dangerous dog hearing which a judge may conduct, with the many of the same components and pitfalls as previously addressed.

Section 822.0423 provides that the court shall set a time for a hearing to determine whether the owner of the dog complied with Section 822.042. The hearing must be held not later than the tenth ($10^{th}$) day after the date on which the dog was seized by an animal control authority or delivered by an owner. The court must provide written notice of the hearing to the owner of the dog, or to the person from whom the dog was seized, and to the person who made the complaint {application}. The language in the notice should put the owner on notice that the dog may be destroyed for failure of the owner to comply. At the hearing itself, any *interested* party, including the county or city attorney, is entitled to present evidence.

After the evidence is presented in this hearing, the judge will decide whether the dog's owner failed to comply with the 822.042(a) conditions. First, the judge must determine whether the owner had learned that the dog was a "dangerous dog," pursuant to Section 822.042(g).[10] If it is determined that the owner had learned he owned a "dangerous dog", the court must find: a) whether the owner failed to comply with the 822.042(a) conditions, and b) if the owner did not comply with the conditions, whether he surrendered the dog to animal control. If the judge finds that the owner failed to comply with one or both of these requirements, the judge shall order that the animal control authority seize the dog and shall issue a warrant authorizing the seizure. The Affidavit and Warrant provided in Appendices 'B-1,' 'B-2' and 'C' are examples.

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[10] Pursuant to Section 822.042(a), an owner of a dangerous dog must, not later than the thirtieth ($30^{th}$) day after the person learns that the person is the owner of a dangerous dog, (1) register the dangerous dog with the animal control authority for the area in which the dog is kept; (2) restrain the dangerous dog at all times on a leash in the immediate control of a person or in a secure enclosure; (3) obtain liability insurance coverage or show financial responsibility in an amount of at least $100,000.00 to cover damages resulting from bodily injury caused by an attack/bite, etc; and (4) comply with any applicable municipal or county regulations or restriction on dangerous dogs.

The owner will then have one final opportunity to comply in order to secure the dog's release. If the owner does comply with the 822.042(a) conditions before the eleventh ($11^{th}$) day after the date on which the dog was seized, the court shall order the animal control authority to return the dog to its owner.

If the owner does not comply with the 822.042(a) conditions before the eleventh ($11^{th}$) day after the date on which the dog is seized, the court must order that the animal control authority humanely destroy the dog. An important item to note is that, depending upon one's interpretation of Section 822.042(c), the judge may be placed in the position of holding a hearing on the tenth ($10^{th}$) day following seizure, and having to issue an order for the dog's humane destruction on the eleventh ($11^{th}$) day - the next day following the hearing. An owner who suddenly understands the 822.042(a) conditions, having been brought before the judge for a hearing under this section, may find himself in a position of having a mere day in which to arrange compliance with all the 822.042(a) conditions in order to save the dog's life.

Note that under this section, the owner or the person who filed the application may appeal the judge's decision "in the manner provided for the appeal of cases from the municipal, justice, or county court."

**4. <u>Animal Control Authority Makes Dangerous Dog Determination and Owner Appeals</u>**

A person who is the victim of a dog's unprovoked attack or unprovoked acts may report these incidents directly to the local animal control authority. Subchapter D Section 822.0421(a) provides that the local animal control authority *may* investigate such an *incident* of a dog's unprovoked attack, under Section 822.041(2)(A), or of a dog's committing unprovoked acts causing a person to think the dog will attack, under Section 822.041(2)(B). The statute gives animal control officials discretion to determine whether they will investigate a particular report

of an incident. The animal control official may also receive sworn statements from any witnesses to the incident.[11] After considering these statements, the animal control authority is authorized to determine whether the dog is a "dangerous dog" under the H&SC definition. If a "dangerous dog" determination is made, the animal control authority shall notify the owner of that determination. Although the H&SC does not specify the form of this notice, it is recommended that animal control officials provide written notice via regular and certified mail. Alternatively, the animal control official might deliver the notice and receive the owner's signature acknowledging receipt.

Once the animal control officer notifies the owner that he/she owns a "dangerous dog," the owner shall not later than thirty (30) days, from the date of notice, comply with the 822.042(a) conditions. If the owner fails to comply with these conditions, pursuant to Section 822.042(b), he shall deliver the dangerous dog to the local animal control authority not later than the thirtieth ($30^{th}$) day following the owner's receipt of notice that the dog was deemed to be dangerous.

Section 822.0421(b) provides that, not later than the fifteenth ($15^{th}$) day after the owner is notified that an animal control official has designated his/her dog as a "dangerous dog," the owner may **appeal** the determination of the animal control authority to a justice, county, or municipal court of competent jurisdiction.[12] So, before the expiration of the thirty days that the owner is to comply with registration requirements, the judge may receive an appeal to consider whether the dog does meet the statutory definition of a 'dangerous dog'.

[11] The statute is silent regarding the format of the sworn statements. It is assumed that a notarized written statement will suffice for the purposes of animal control's investigation.

[12] Note that the statute is silent regarding the format of this notice of appeal. One might assume that the filing of a simple letter evidencing intent to appeal may perfect an appeal to your court.

Interestingly, this provision of the statute does not address whether the judge should conduct a hearing in order to make this determination, just as it did not address whether the animal control authority should hold a hearing before making the determination of 'dangerous dog'. Conceivably, a judge could affirm the animal control officer's determination that the dog is a dangerous dog based upon the written materials submitted with the owner's appeal and any documents submitted by the animal control officer. It is not recommended that a judge proceed in this manner, however, as this could be a pitfall. An owner also has the right to appeal the judge's decision "in the same manner as appeal for other cases from the justice, county, or municipal court." The owner may be more likely to be disgruntled and more likely to appeal a municipal judge's determination to the next level, if he/she believes that he/she has not been given an opportunity to be heard. Once the matter is appealed to the next level, jurisdiction is lost, with any ability to monitor or enforce an order. It is recommended that a hearing be held for the purpose of reviewing the animal control officer's determination.

Presumably, the court, in hearing this appeal, is entitled to proceed in a manner that the court deems just. This is another area in which to foresee and avoid pitfalls. Upon receipt of the appeal from the animal control authority's determination, the court should set a hearing date and notify interested persons, although this section does not define who is an interested person. Presumably, this would include the owner of the dog, the county or city attorney, animal control official, or the victim of any act prompting the report of the incident to be made. The statute is silent on when the appeal must be heard, but the hearing should be held as soon as possible. Section 822.0421 does not provide for impoundment of the dog pending the appeal of the animal

control authority's determination, and any subsequent appeals from the court's ruling.[13] Thus, Fido may continue to commit similar acts in the interim.

Again, a judge can expect that emotions will run high during this hearing. On one hand, an owner is arguing that his/her "baby" could not have committed the act alleged. However, citizens, who feel terrorized by the dog, want it removed from their neighborhood. For this reason, it is recommended that the judge downplay the adversarial nature of the hearing and receive evidence from all interested persons. The statute does not address cross-examination of any witnesses or final argument.

The judge must either uphold or overrule the animal control officer's determination that the dog is a 'dangerous dog'- whether the dog made an unprovoked attack or committed unprovoked acts causing a person to believe the dog will attack and injure that person. The court's affirming the determination that a dog is a "dangerous dog" may trigger an owner's responsibility to comply with the requirements in Section 822.042(a).[14] All decisions should be reduced to a written order including the date of the order, as this date starts the thirty-day period for compliance by the owner. The order should recite that the owner was in court when the animal control official's determination was upheld and that the owner received notice that the dog is "dangerous." The owner may also sign, acknowledging receipt of the order. A sample order is included in Appendices "D-1."

The statute does not address what a judge must do if the judge overrules an animal control officer's determination. Presumably, the dog must be released to its owner. In this event,

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[13] Section 822.0421(b) provides that 'an owner may appeal the decision of a justice, county, or municipal court in the same manner as appeal for other cases from the justice, county, or municipal court.'

[14] Again, under Section 822.042(g), a person learns that he/she is the owner of a dangerous dog when he/she knows of an attack described in Section 822.041(2)(A) or (B); when he/she receives notice that a justice, county, or municipal court has made this finding; or when he/she is informed by the animal control authority that the dog is dangerous.

the judge should reduce its judgment to a written order. The following section addresses the possibility of reporting the incident of actions by the dog directly to the court.

**5. Court Receives Report of an Incident Under Section 822.0422**

H&SC Section 822.0422 applies only to counties with a population of more than 2.8 million people, to a county in which the commissioners' court has elected to be governed by the section, and to a municipality in which the governing body has adopted an ordinance electing to be governed by the section. For those cities with "dangerous dog" ordinances, Section 822.0422(a) is the likely origin of the authority. Under Section 822.0422(b), a person may report an **incident** in which a dog made an unprovoked attack on a person or committed unprovoked acts that led a person to reasonably believe that the dog would attack and cause bodily injury to a person. This incident may be reported to a municipal, justice, or county court. The section does not require that the incident report be sworn, and it provides no guidance as to what information the incident report must include.

This may include a number of situations: a death case, in which the court released the dog after a hearing; a case involving serious bodily injury, in which the judge released the dog after a hearing; or a case in which an owner appealed the animal control officer's determination of a 'dangerous dog,' and the court did not affirm the determination. A local ordinance may present still other scenarios.

In a proceeding under Section 822.0422, the dog owner must deliver the dog to the animal control authority not later than the fifth ($5^{th}$) day after an owner receives notice that the incident report has been filed with the court. In the event the owner fails to deliver the dog to the animal control authority, the court shall order the animal control authority to seize the dog and shall issue a warrant authorizing the seizure. Under this section, there is no need for a sworn

complaint or probable cause to be shown before the court orders the seizure of the dog or issues the warrant authorizing seizure. The dog shall remain impounded until the court orders disposition of the dog.[15]

Once again, Section 822.0423 governs the hearing, with the same components involved, and pitfalls to foresee. The court is required to conduct a hearing to determine if the dog is a "dangerous dog" under the statutory definition no later than the tenth ($10^{th}$) day after the dog is seized or delivered. Written notice of the time and place of the hearing must be given to the owner or to the person from whom the dog was seized, and to the person who made the complaint. Again, any *interested* party, including the county or city attorney, is entitled to present evidence at the hearing. If the court determines that the dog is a "dangerous dog," the owner becomes subject to the requirements for a "dangerous dog" under 822.042(a).

The owner will have the opportunity to secure the dog's release by complying with these requirements. Presumably, the time of compliance is not later than the $30^{th}$ day after the court notifies the owner his/her dog is dangerous. In the event the owner fails to comply with said requirements, the dog may be humanely destroyed. In the interim, the court may order that the dog remain in the custody of the animal control authority. An appeal of the municipal, justice or county court's decision whether the dog is a 'dangerous dog' maybe made by the owner or the person filing the action "in the manner provided for the appeal of cases from the municipal, justice, or county court".[16]

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[15] Note that 822.042 (c) states the owner is responsible for paying the cost incurred in seizing the dog. This would presumably include impound fees to the time of final disposition of the dog.

[16] That the appeal is handled as any other appeal is interesting. In general, an appeal from municipal court is a criminal appeal. Yet, the Texas Court of Criminal Appeals has made clear that the determination of whether a dog is a "dangerous dog" is not a criminal proceeding. *See* Timmons v. Pecorino, 977 S.W.2d 603 (Tex.Crim.App. – 1998).

Proceedings conducted under a local ordinance and subject to the provisions of Section 822.0422 remain somewhat problematic, as conflicts can arise between the state statute and an ordinance. This is one area in which a city's ordinance may be more expansive than Section 822.0422, and may set forth requirements for the making of an incident report under this provision of the H&SC. A sample ordinance from the City of Frisco is included as Appendices "G" to illustrate how a local ordinance may expand upon the state law.

An ordinance may also provide for a greater range of options for disposing of the dog. This can be a good thing, in that an ordinance may provide for options between releasing the dog to the owner and destroying the dog.[17] For example, the City of Frisco ordinance included in Appendices "G" provides that a court may order that the dog be permanently removed from the city.

On the other hand, the court must proceed with care if an ordinance provides remedies and timelines that are at odds with the provisions of H &SC Section 822. One important factor to consider in determining whether the ordinance provision is viable is the potential for preemption by applicable state law. A discussion of this issue is beyond the scope of this paper; however, Judge Stephen Crane's paper on Ordinances (presented at 2005-06 12-Hour TMCEC judge's school) is a good reference. Additionally, the City of Richardson vs. Responsible Dog Owners of Texas case, which discusses pre-emption, is included in Appendices "E-2".

**Attack by "Dangerous Dog"**

An owner of a "dangerous dog" may appear in the court yet again. If a dog previously determined to be a 'dangerous dog" makes an unprovoked attack on a person outside its enclosure, causing bodily injury, its owner may be charged with a Class C misdemeanor under

[17] Note that H&SC Sec. 822.047 indicates that a city may place additional requirements or restrictions upon dangerous dogs if the requirements or restrictions are not specific to one breed or several breeds of dogs.

822.044(b). If an owner is found guilty of this offense, the court **may** order that the "dangerous dog" be destroyed under Section 822.044(c). This section does not address whether a hearing should be held before a judge may enter such an order. The court may want to conduct a hearing with all the interested persons and procedures as discussed in Section 1; however, the statute is silent on this matter, and it is best to proceed with caution.

## Conclusion

Although the dangerous dog provisions of Section 822 of the Health and Safety Code provide the court with some guidance for processing such cases, many questions remain. Additionally, the law may change in the current legislative session. In the last special session, Representative Dan Gattis introduced "Lillian's Law" in memory of the Thorndale, Texas woman mauled to death in November 2005. This bill proposed a 3rd degree felony offense if a dog attack caused a person's death. It currently has not been reintroduced. In addition, the Houston City Council is reconsidering their dog ordinance, included in Appendices "H". If initiatives like these pass, procedures in the municipal court could change locally or statewide.

A judge must be innovative in his/her approach to dangerous dog hearings that are emotional and stressful, and yet be watchful for pitfalls that come with so many unanswered questions. Although the procedures suggested in this paper will not work without alteration in all situations, it is hoped that each judge will be able to consider these materials as a framework upon which to build. Given the seriousness of both a dog attack, bite or mauling, and of the destruction of "man's best friend," always proceed with caution. Also, it is always helpful to consult with TMCEC staff and fellow jurists. The 2006 TMCEC Bench Book includes a section on handling dangerous dog hearings (dogs dangerous to persons and dogs dangerous to animals).

The authors wish to express much appreciation to Judges Brian Holman, Vic Pecorino, and Bonnie Goldstein for their invaluable assistance and guidance.

# Appendices

A. Heath and Safety Code Section 822 – Subchapters A and D

B-1. TMCEC Affidavit for Warrant to seize "Dangerous Dog"

B-2. Sample Affidavit to Seize "Dangerous Dog", Chico (after owner failed to comply with court-imposed conditions)

C. Warrant to Seize Dog with Return and inventory

D-1. TMCEC Order Affirm Dog is Dangerous & Impose conditions (Animal Control Officer's determination of Dangerous Dog appealed to municipal court)

D-2. Sample Order Affirm Dog, Chico, is Dangerous & Impose Conditions

E-1. Timmons vs. Pecorino -1998
case states dangerous dog proceeding is civil

E-2. City of Richardson vs. Responsible Dog Owners of Texas -1990
case discusses pre-emption

F. Various news articles on dog causing death/injuries

G. Sample Dangerous Dog Ordinance Frisco

H-1. Bill introduced 2006 Special Session on dangerous dogs

H-2. Dallas and Houston proposed initiatives

I. Scenarios

J. Dangerous Dog Hearing Comparison Chart

# "A"

## HEALTH & SAFETY CODE

### CHAPTER 822. REGULATION OF ANIMALS

### SUBCHAPTER A. DOGS THAT ARE A DANGER TO PERSONS

**§ 822.001. DEFINITIONS.** In this Subchapter:

(1) "Animal control authority" means a municipal or county animal control office with authority over the area in which the dog is kept or the county sheriff in an area that does not have an animal control office.

(2) "Serious bodily injury" means an injury characterized by severe bite wounds or severe ripping and tearing of muscle that would cause a reasonably prudent person to seek treatment from a medical professional and would require hospitalization without regard to whether the person actually sought medical treatment.

Amended by Acts 1997, 75th Leg., ch. 99, § 1, eff. Sept. 1, 1997.

**§ 822.002. SEIZURE OF A DOG CAUSING DEATH OF OR SERIOUS BODILY INJURY TO A PERSON.** (a) A justice court, county court, or municipal court shall order the animal control authority to seize a dog and shall issue a warrant authorizing the seizure:

(1) on the sworn complaint of any person, including the county attorney, the city attorney, or a peace officer, that the dog has caused the death of or serious bodily injury to a person by attacking, biting, or mauling the person; and

(2) on a showing of probable cause to believe that the dog caused the death of or serious bodily injury to the person as stated in the complaint.

(b) The animal control authority shall seize the dog or order its seizure and shall provide for the impoundment of the dog in secure and humane conditions until the court orders the disposition of the dog.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989.
Renumbered from V.T.C.A., Health & Safety Code § 822.001 and amended by Acts 1997, 75th Leg., ch. 99, § 1, eff. Sept. 1, 1997.

**§ 822.003. HEARING.** (a) The court shall set a time for a hearing to determine whether the dog caused the death of or serious bodily injury to a person by attacking, biting, or mauling the person. The hearing must be held not later than the 10th day after the date on which the warrant is issued.

(b) The court shall give written notice of the time and place of the hearing to:

(1) the owner of the dog or the person from whom the dog was seized; and

(2) the person who made the complaint.

(c) Any interested party, including the county attorney or city attorney, is entitled to present evidence at the hearing.

(d) The court shall order the dog destroyed if the court finds that the dog caused the death of a person by attacking, biting, or mauling the

person. If that finding is not made, the court shall order the dog released to:

(1) its owner;

(2) the person from whom the dog was seized; or

(3) any other person authorized to take possession of the dog.

(e) The court may order the dog destroyed if the court finds that the dog caused serious bodily injury to a person by attacking, biting, or mauling the person. If that finding is not made, the court shall order the dog released to:

(1) its owner;

(2) the person from whom the dog was seized; or

(3) any other person authorized to take possession of the dog.

(f) The court may not order the dog destroyed if the court finds that the dog caused the serious bodily injury to a person by attacking, biting, or mauling the person and:

(1) the dog was being used for the protection of a person or person's property, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and:

(A) the enclosure was reasonably certain to prevent the dog from leaving the enclosure on its own and provided notice of the presence of a dog; and

(B) the injured person was at least eight years of age, and was trespassing in the enclosure when the attack, bite, or mauling occurred;

(2) the dog was not being used for the protection of a person or person's property, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and the injured person was at least eight years of age and was trespassing in the enclosure when the attack, bite, or mauling occurred;

(3) the attack, bite, or mauling occurred during an arrest or other action of a peace officer while the peace officer was using the dog for law enforcement purposes;

(4) the dog was defending a person from an assault or person's property from damage or theft by the injured person; or

(5) the injured person was younger than eight years of age, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and the enclosure was reasonably certain to keep a person younger than eight years of age from entering.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989.
Renumbered from V.T.C.A., Health & Safety Code § 822.002 and amended by Acts 1997, 75th Leg., ch. 99, § 1, eff. Sept. 1, 1997.

**§ 822.004. DESTRUCTION OF DOG.** The destruction of a dog under this subchapter must be performed by:

(1) a licensed veterinarian;

(2) personnel of a recognized animal shelter or humane society who are trained in the humane destruction of animals; or

(3) personnel of a governmental agency responsible for animal control who are trained in the humane destruction of animals.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989.
Renumbered from V.T.C.A., Health & Safety Code § 822.003 by Acts 1997, 75th Leg., ch. 99, § 1, eff. Sept. 1, 1997.

**§ 822.005. PROVOCATION OR LOCATION OF ATTACK IRRELEVANT.**

Except as provided by Section 822.003(f), this subchapter applies to any dog that causes a person's death or serious bodily injury by attacking, biting, or mauling the person, regardless of whether the dog was provoked and regardless of where the incident resulting in the person's death or serious bodily injury occurred.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989.
Renumbered from V.T.C.A., Health & Safety Code § 822.004 and amended by Acts 1997, 75th Leg., ch. 99, § 1, eff. Sept. 1, 1997.

**SUBCHAPTER B. DOGS AND COYOTES THAT ARE A DANGER TO ANIMALS**
Text not included

**SUBCHAPTER C. COUNTY REGISTRATION AND REGULATION OF DOGS**
Text not included

**SUBCHAPTER D. DANGEROUS DOGS**

**§ 822.041. DEFINITIONS.** In this subchapter:

(1) "Animal control authority" means a municipal or county animal control office with authority over the area where the dog is kept or a county sheriff in an area with no animal control office.

(2) "Dangerous dog" means a dog that:

(A) makes an unprovoked attack on a person that causes bodily injury and occurs in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own; or

(B) commits unprovoked acts in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person.

(3) "Dog" means a domesticated animal that is a member of the canine family.

(4) "Secure enclosure" means a fenced area or structure that is:

(A) locked;

(B) capable of preventing the entry of the general public, including children;

(C) capable of preventing the escape or release of a dog;

(D) clearly marked as containing a dangerous dog; and

(E) in conformance with the requirements for enclosures established by the local animal control authority.

(5) "Owner" means a person who owns or has custody or control of the dog.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.

**§ 822.042. REQUIREMENTS FOR OWNER OF DANGEROUS DOG.** (a) Not later than the 30th day after a person learns that the person is the owner of a dangerous dog, the person shall:

(1) register the dangerous dog with the animal control authority for the area in which the dog is kept;

(2) restrain the dangerous dog at all times on a leash in the immediate control of a person or in a secure enclosure;

(3) obtain liability insurance coverage or show financial responsibility in an amount of at least $100,000 to cover damages resulting from an attack by the dangerous dog causing bodily injury to a person and provide proof of the required liability insurance coverage or financial responsibility to the animal control authority for the area in which the dog is kept; and

(4) comply with an applicable municipal or county regulation, requirement, or restriction on dangerous dogs.

(b) The owner of a dangerous dog who does not comply with Subsection (a) shall deliver the dog to the animal control authority not later than the 30th day after the owner learns that the dog is a dangerous dog.

(c) If, on application of any person, a justice court, county court, or municipal court finds, after notice and hearing as provided by Section 822.0423, that the owner of a dangerous dog has failed to comply with Subsection (a) or (b), the court shall order the animal control authority to seize the dog and shall issue a warrant authorizing the seizure. The authority shall seize the dog or order its seizure and shall provide for the impoundment of the dog in secure and humane conditions.

(d) The owner shall pay any cost or fee assessed by the municipality or county related to the seizure, acceptance, impoundment, or destruction of the dog. The governing body of the municipality or county may prescribe the amount of the fees.

(e) The court shall order the animal control authority to humanely destroy the dog if the owner has not complied with Subsection (a) before the 11th day after the date on which the dog is seized or delivered to the authority. The court shall order the authority to return the dog to the owner if the owner complies with Subsection (a) before the 11th day after the date on which the dog is seized or delivered to the authority.

(f) The court may order the humane destruction of a dog if the owner of the dog has not been located before the 15th day after the seizure and impoundment of the dog.

(g) For purposes of this section, a person learns that the person is the owner of a dangerous dog when:

(1) the owner knows of an attack described in Section 822.041(2)(A) or (B);

(2) the owner receives notice that a justice court, county court, or municipal court has found that the dog is a dangerous dog under Section 822.0423; or

(3) the owner is informed by the animal control authority that the dog is a dangerous dog under Section 822.0421.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.
Amended by Acts 1997, 75th Leg., ch. 99, § 2, eff. Sept. 1, 1997;
Acts 1999, 76th Leg., ch. 96, § 1, eff. May 17, 1999.

**§ 822.0421. DETERMINATION THAT DOG IS DANGEROUS.** (a) If a person reports an incident described by Section 822.041(2), the animal control authority may investigate the incident. If, after receiving the sworn statements of any witnesses, the animal control authority determines the dog is a dangerous dog, it shall notify the owner of that fact.

(b) An owner, not later than the 15th day after the date the owner is notified that a dog owned by the owner is a dangerous dog, may appeal the determination of the animal control authority to a justice, county, or municipal court of competent jurisdiction. An owner may appeal the decision of the justice, county, or municipal court in the same manner as appeal for other cases from the justice, county, or municipal court.

Added by Acts 1997, 75th Leg., ch. 99, § 2, eff. Sept. 1, 1997.

**§ 822.0422. REPORTING OF INCIDENT IN CERTAIN COUNTIES AND MUNICIPALITIES.** (a) This section applies only to a county with a population of more than 2,800,000, to a county in which the commissioners court has entered an order electing to be governed by this section, and to a municipality in which the governing body has adopted an ordinance electing to be governed by this section.

(b) A person may report an incident described by Section 822.041(2) to a municipal court, a justice court, or a county court. The owner of the dog shall deliver the dog to the animal control authority not later than the fifth day after the date on which the owner receives notice that the report has been filed. The authority may provide for the impoundment of the dog in secure and humane conditions until the court orders the disposition of the dog.

(c) If the owner fails to deliver the dog as required by Subsection (b), the court shall order the animal control authority to seize the dog and shall issue a warrant authorizing the seizure. The authority shall seize the dog or order its seizure and shall provide for the impoundment of the dog in secure and humane conditions until the court orders the disposition of the dog. The owner shall pay any cost incurred in seizing the dog.

(d) The court shall determine, after notice and hearing as provided in Section 822.0423, whether the dog is a dangerous dog.

(e) The court, after determining that the dog is a dangerous dog, may order the animal control authority to continue to impound the dangerous dog in secure and humane conditions until the court orders disposition of the dog under Section 822.042 and the dog is returned to the owner or destroyed.

(f) The owner shall pay a cost or fee assessed under Section 822.042(d).

Added by Acts 1997, 75th Leg., ch. 99, § 2, eff. Sept. 1, 1997.
Amended by Acts 1999, 76th Leg., ch. 96, § 2, eff. May 17, 1999.

**§ 822.0423. HEARING.** (a) The court, on receiving a report of an incident under Section 822.0422 or on application under Section 822.042(c), shall set a time for a hearing to determine whether the dog is a dangerous dog or whether the owner of the dog has complied with Section 822.042. The hearing must be held not later than the 10th day after the date on which the dog is seized or delivered.

(b) The court shall give written notice of the time and place of the hearing to:

(1) the owner of the dog or the person from whom the dog was seized; and

(2) the person who made the complaint.

(c) Any interested party, including the county or city attorney, is entitled to present evidence at the hearing.

(d) An owner or person filing the action may appeal the decision of the municipal court, justice court, or county court in the manner provided for the appeal of cases from the municipal, justice, or county court.

Added by Acts 1997, 75th Leg., ch. 99, § 2, eff. Sept. 1, 1997.

**§ 822.043. REGISTRATION.** (a) An animal control authority for the area in which the dog is kept shall annually register a dangerous dog if the owner:

(1) presents proof of:

(A) liability insurance or financial responsibility, as required by Section 822.042;

(B) current rabies vaccination of the dangerous dog; and

(C) the secure enclosure in which the dangerous dog will be kept; and

(2) pays an annual registration fee of $50.

(b) The animal control authority shall provide to the owner registering a dangerous dog a registration tag. The owner must place the tag on the dog's collar.

(c) If an owner of a registered dangerous dog sells or moves the dog to a new address, the owner, not later than the 14th day after the date of the sale or move, shall notify the animal control authority for the area in which the new address is located. On presentation by the current owner of the dangerous dog's prior registration tag and payment of a fee of $25, the animal control authority shall issue a new registration tag to be placed on the dangerous dog's collar.

(d) An owner of a registered dangerous dog shall notify the office in which the dangerous dog was registered of any attacks the dangerous dog makes on people.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.

**§ 822.044. ATTACK BY DANGEROUS DOG.** (a) A person commits an offense if the person is the owner of a dangerous dog and the dog makes an unprovoked attack on another person outside the dog's enclosure and causes bodily injury to the other person.

(b) An offense under this section is a Class C misdemeanor, unless the attack causes serious bodily injury or death, in which event the offense is a Class A misdemeanor.

(c) If a person is found guilty of an offense under this section, the court may order the dangerous dog destroyed by a person listed in Section 822.003.

(d) In addition to criminal prosecution, a person who commits an offense under this section is liable for a civil penalty not to exceed $10,000. An attorney having civil jurisdiction in the county or an attorney for a municipality where the offense occurred may file suit in a court of competent jurisdiction to collect the penalty. Penalties collected under this subsection shall be retained by the county or municipality.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.

**§ 822.045. VIOLATIONS.** (a) A person who owns or keeps custody or control of a dangerous dog commits an offense if the person fails to comply with Section 822.042 or Section 822.0422(b) or an applicable municipal or county regulation relating to dangerous dogs.

(b) Except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

(c) An offense under this section is a Class B misdemeanor if it is shown on the trial of the offense that the defendant has previously been convicted under this section.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.
Amended by Acts 1997, 75th Leg., ch. 99, § 2, eff. Sept. 1, 1997.

**§ 822.046. DEFENSE.** (a) It is a defense to prosecution under Section 822.044 or Section 822.045 that the person is a veterinarian, a peace officer, a person employed by a recognized animal shelter, or a person

employed by the state or a political subdivision of the state to deal with stray animals and has
temporary ownership, custody, or control of the dog in connection with that position.

(b) It is a defense to prosecution under Section 822.044 or Section 822.045 that the person is an employee of the institutional division of the Texas Department of Criminal Justice or a law enforcement agency and trains or uses dogs for law enforcement or corrections purposes.

(c) It is a defense to prosecution under Section 822.044 or Section 822.045 that the person is a dog trainer or an employee of a guard dog company under Chapter 1702, Occupations Code.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.
Amended by Acts 2001, 77th Leg., ch. 1420, § 14.809, eff. Sept. 1, 2001.

**§ 822.047. LOCAL REGULATION OF DANGEROUS DOGS.** A county or municipality may place additional requirements or restrictions on dangerous dogs if the requirements or restrictions:

(1) are not specific to one breed or several breeds of dogs; and

(2) are more stringent than restrictions provided by this subchapter.

Added by Acts 1991, 72nd Leg., ch. 916, § 1, eff. Sept. 1, 1991.

## SUBCHAPTER E. REGULATION OF WILD ANIMALS

Text Not Included

# "B-1"

# AFFIDAVIT FOR WARRANT TO SEIZE A DANGEROUS DOG

**TMCEC 2004 FORMS BOOK**

**STATE OF TEXAS**
**COUNTY OF _____**
**CITY _____**

**IN THE NAME OF AND BY THE AUTHORITY OF STATE OF TEXAS:**

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who after being by me duly sworn, deposes and makes the following statements and accusations:

Affiant is _____, who is the Animal Control Officer _____*(peace officer)*_____ for the City of _____, Texas and has responsibility for animal control in the municipality of the City of _____, County of _____, Texas.

**I.**

## Property

There is in _____ County, Texas, a suspected place and premises described and located as follows:

A private residence known as _____*(physical address)*_____, with a legal description as follows: _____*(legal description)*_____, owned and occupied by _____*(name or owner)*_____, the owner of the animal named in this matter.

**II.**

## Declaration of Dangerous Dog

It is the investigation belief of the Affiant, based on _____*(personal knowledge)*/*(information and belief)*/*(investigation)* and he/she hereby charges and accuses that:

One _____*(gender and breed)*_____ dog having been declared a dangerous dog by Officer _____ due to the nature of said animal and the history of incidents that pose a threat to the welfare and safety of citizens of the City of _____, Texas as more fully set forth in Section _____. This animal is further described in Section _____.

**III.**
**Failure to Comply Details**

Persons residing at this residence have shown an inability to properly contain and restrain this _____*(gender and breed)*_____ dog in a manner sufficient to prevent further unprovoked attacks to the person, property, and other domestic animals. This dog is hereby proclaimed to be a dangerous dog as that defined in Texas Health and Safety Code, to wit: Chapter 822, Subchapter D, "Dangerous Dogs, Section 822.041," "Definitions, subsection 2, paragraph B," which states:

"Dangerous Dog" means a dog that:

commits unprovoked acts in a place other that an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person.

Furthermore, the owner of said _____*(gender and breed)*_____ dog failed to comply with the Texas Health and Safety Code, to wit: 822.045, subparagraph (a), which states, in pertinent part:

> A person who owns or keeps custody or control of a dangerous dog commits an offense if the person fails to comply with Section 822.042 or Section 822.0422 b) or an applicable municipal or county regulation relating to dangerous dogs.

**IV.**

Description of Dog

This animal is a canine, _____*(breed)*_____, _____*(gender)*_____, _____ in color, estimated to weigh _____ pounds, called by the name "_____," and owned by _____, who resides at _____*(physical address)*_____, County, Texas.

**V.**
**Background Facts**

(*State details regarding the incident and the response of the Animal Control Officer(s). Also state what actions the Animal Control Officer(s) took to notify the owner of the "dangerous dog" determination, the actions taken or not taken by the owner, any follow-up actions taken by Animal Control Officer(s), subsequent actions, if any, taken by the Court, and any incidents of unprovoked acts or attacks since notification and/or the Court hearing.*)

THEREFORE, based on the facts stated above, Affiant hereby requests this Court issue a warrant for the search and seizure of said property described in Section I above in accordance with the Health and Safety Code, Section 822.001 *et seq.*, and further that said search warrant authorize a full search of the aforesaid premises including the cartilage and all structures and vehicles on said premises and authorize the seizure of said property determined to be a dangerous dog and for it to remain in custody of the animal control authority of the City of _____ at the expense of the owner until such time as a disposition be handed down by the Court to determine the final disposition of the animal. Affiant further requests the Court set hearing within ten (10) days to determine whether the animal should be returned to the owner or humanely destroyed.

Further, affiant sayeth naught.

Signed on this the _____ day of _____, 200__.

_____
Affiant

Subscribed and sworn to before me the undersigned authority on this the _____ day of _____, 200__.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

# "B-2"

**STATE OF TEXAS**

**COUNTY OF COLLIN** §
§
**CITY OF FRISCO** §

**SAMPLE APPLICATION AND AFFIDAVIT FOR WARRANT TO SEIZE DANGEROUS DOG, CHICO, AFTER OWNER'S FAILURE TO COMPLY WITH MUNICIPAL ORDINANCE CONDITIONS IMPOSED BY JUDGE**

**IN THE NAME OF AND BY THE AUTHORITY OF STATE OF TEXAS:**

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who after being by me duly sworn, deposes and makes the following statements and allegations:

Affiant is Mike H. who is the Animal Control Officer for the City of Frisco, Texas, and has responsibility for animal control in the municipality of the City of Frisco, Texas.

## I. Property

There is in Collin County, Texas, a suspected place and premises described and located as follows:

A private residence known as _123 Street Name_, with a legal description as follows: _Lot 1 of Block B of the Scooby Doo Estates Division_, owned and occupied by _Jane Doe_, the owner of the animal named in this matter.

## II. Declaration of Dangerous Dog

It is the investigation belief of the Affiant, based on information and belief, and he/she hereby charges and accuses that:

One male/female neutered pit bull dog, known by the name of "Chico," having been declared a dangerous dog, as defined in Section 822.041 of the Texas Health and Safety Code, by the Judge of the Frisco Municipal Court, after a hearing conducted on June 1, 2006, poses a threat to the welfare and safety of citizens of the City of Frisco, Texas, in light of the nature of said animal and the history of incidents.

## III. Failure to Comply Details

Persons residing at this residence have failed to comply with the Court's Order of June 1, 2006, wherein the Court ordered that Jane Doe permanently remove "Chico" from the City of Frisco, in order to ensure the public welfare.

**IV. Description of Dog**

This animal is a canine, male neutered, pit bull, brown/black in color, weighing approximately thirty (30) pounds, known by the name "Chico," and owned by Jane Doe, who resides at 123 Street Name, Frisco, Collin County, Texas.

**V. Background Facts**

On Wednesday, May 31, 2006, I received a telephone call from Ms. Homemaker, a Frisco resident, and neighbor of Jane Doe, who had previously been a victim of unprovoked acts committed by "Chico" against her in her home. Ms. Homemaker stated that earlier that morning, between seven o'clock and eight o'clock a.m., while she was attempting to speak with Jane Doe, who resides at 123 Street Name, Ms. Homemaker observed a dog inside Jane Doe's residence. Ms. Homemaker immediately recognized the dog as "Chico." As a result of prior unprovoked acts committed by "Chico" against Ms. Homemaker, "Chico" had been declared a dangerous animal by the City of Frisco Municipal Court, and had been ordered permanently removed from the city. Thus, it is believed that Jane Doe continues to permit "Chico" to reside within the City of Frisco, in direct violation of the Order of the Frisco Municipal Court.

THEREFORE, based on the facts stated above, Affiant hereby requests this Court issue a warrant for the search and seizure of said property described in Section I above in accordance with the Health and Safety Code, Section 822.001 *et seq.*, and further that said search warrant authorize a full search of the aforesaid premises including the cartilage and all structures and vehicles on said premises and authorize the seizure of said property determined to be a dangerous dog and for it to remain in custody of the animal control authority of the City of Frisco at the expense of the owner until such time as a disposition be handed down by the Court to determine the final disposition of the animal. Affiant further requests the Court set hearing within ten (10) days to determine whether the animal should be returned to the owner or humanely destroyed.

Further, affiant sayeth not.

Signed on this the _____ day of _____, 200__.

_____

Affiant (animal control officer/police officer)

Subscribed and sworn to before me the undersigned authority on this the _____ day of _____, 200__ at _____.

_____

Judge, Municipal Court

City of _____

_____ County, Texas

"C"

STATE OF TEXAS )
)
COUNTY OF _____ )

**WARRANT FOR ENTRY AND SEIZURE OF A DANGEROUS DOG NAMED "_____"**

WHEREAS, an application in writing duly verified by oath, has been filed with the undersigned judge of this court stating upon information and belief that certain property, articles, materials or substances that constitute evidence of a violation of Section 822.002 OR 822.042 OR 822.0422 of the Texas Health and Safety Code, to-wit:

**one [male/female Breed of Dog] dog named "_____;" described as _____[color, weight, distinguishing marks]**

is being kept in the below described premises:

**A private residence or location known as [Insert City and street Address], with a legal description as follows: [Insert Legal Description], owned and occupied by [ Owner's Name ], the owner of the animal named in this matter.**

WHEREAS, the Judge of this Court from the sworn allegations of said application has found that there is probable cause to believe the allegations of the application to be true and probable cause exists for the issuance of a search and seizure warrant herein.

NOW THEREFORE, any peace officer is commanded to search the premises or place above-described within [_____] days after the issuance of this search warrant by day or night, and, if said above-described property is found on said premises, that you seize same and take same into possession, making a complete and accurate inventory of the property so taken in the presence of the person from whom possession the same is taken, if that be possible, and giving to such person a receipt for such property, together with a copy of this warrant, or, if no person be found in possession of said property, leaving said receipt and said copy upon the premises and that the property so taken be held for safekeeping and that a duly verified copy of the return and inventory be filed with this Court within [____] days of the execution of this search warrant.

This warrant is issued at _____on the ___ day of _____, 2006, at _____m.

Witness my hand and seal of this Court attached hereto at that time and date.

_____

MUNICIPAL JUDGE, City of _____

**Return and Inventory of Warrant**

Check and complete One or Two:

☐ 1. I receive the attached Warrant for Entry and Seizure of a Dangerous Dog. I executed this Warrant on _____, 200___, at _____m., by entering the premises described in the Warrant. I left a copy of the Warrant with [Insert name of person with whom Warrant was left or Owner of premises] together with a copy of the inventory for the item(s) seized.

The following is an inventory of property taken pursuant to the Warrant:

_____

_____

This inventory was made in the presence of _[Name of Person Executing Warrant] and _[Name of owner of the premises. If owner is not available, name of any credible person witnessing the inventory].

This inventory is a true and detailed account of all the property taken pursuant to the Warrant for Entry and Seizure of a Dangerous Dog.

☐ 2. After careful search, I could not find at the premises above described, the property described in this Warrant.

_____ _____

Signature of Officer Date

_____

Signature of Owner of Premises or Other Witness

**Magistrate's Order of Safekeeping – Return**

The return of the Warrant for Entry and Seizure of a Dangerous Dog, with the manner of its execution on _____, 2000_____, and the inventory of property_____(dog) taken into possession at _____(address) under the warrant is acknowledged.

IT IS ORDERED that the manner of safekeeping of the property shall be by delivery to _____
_

Return made this _____ day of _____, 200____, at _____o'clock _____m.

_____

Magistrate, _____ County, Texas

# "D-1"

*CASE NUMBER: _____[year, date]____*

| | | |
|---|---|---|
| **IN RE _____ [Dog's name]** | **§** | **IN THE MUNICIPAL COURT** |
| **_____** | **§** | **CITY OF _____** |
| **[name of owner of dog]** | **§** | **_____COUNTY, TEXAS** |

**TMCEC Order AFFIRMING DETERMINATION OF ANIMAL CONTROL AUTHORITY THAT " _____" IS A DANGEROUS DOG and IMPOSING CONDITIONS ON OWNER**

On this day came on to be considered the above – referenced matter. All parties appeared (in person) (by attorney) (failed to appear and wholly made default) and announced ready for trial. This Court, having determined that it had jurisdiction over the parties and the subject matter in controversy and that venue was proper, heard the evidence and arguments of counsel and considered all pleadings on file with the Court, and having considered same, is of the opinion that the _____*(gender and breed)*_____ owned by ____*(name of owner)*_____ and known as "*(name of dog)*" is a dangerous dog, as that term is defined by the City of _____ ordinances Chapter ___, Section _____, entitled "_____" in that the dog has been found to have (committed an unprovoked attack) (committed unprovoked acts) (behaved in a manner that _____*(name of owner)*_____knows or reasonably should know indicated tendencies to commit unprovoked attacks or to injure person or domestic animals).

**IT IS THEREFORE ORDERED** that the administrative determination of the City of _____ Animal Control Officer be upheld in that respect.

**IT IS FURTHER ORDERED** that ____*(name of owner)*_____ shall be required to register the dangerous dog named_____" *(name of dog)* " with the City of _____ Animal Control Officer.

**IT IS FURTHER ORDERED** that_____*(name of owner)*_____ shall obtain and maintain liability insurance that expressly and specifically provides for coverage for claims arising out of a dangerous animal in an amount not less than One Hundred Thousand and 00/100 Dollars ($100,000.00) covering bodily injury and or death of any person, and/or for damages to the property of any person, resulting from the possession, ownership, control or keeping of such dangerous animal as long the dangerous dog ___" *(name of dog)* " is living and kept in the City of _____ .

**IT IS ORDERED** THAT ____*(name of owner)*____ must present proof of such liability insurance to the ___*(City)* Animal Control Officer no later than thirty (30) days from the date of this Order. ____*(name of owner)*_____ must present continuing proof of such liability insurance each year during the anniversary month of this Order.

**IT IS ORDERED** that_____*(name of owner)*_____or his immediate family (the _____ Family) must restrain the dangerous dog, ___" *(name of dog)* "___, at all times on a leash in the immediate control of the _____ Family, or in a secure enclosure. The secure enclosure must be a pen or cage constructed from materials of sufficient strength to prevent the animal's escape, and must have secure sides, a secure top attached to sides, and secure bottom which is either attached to the sides or constructed so that so that the sides are embedded in the ground no less than two (2) feet. Both the leash and secure enclosure must be inspected by *(name of owner)*_____and the _____*(City)*_____ Animal Control Officer and approved by the_____*(City)* Animal Control Officer no later than _____*(date)*_____.

**IT IS ORDERED** that_____*(name of owner)*_____must provide to the _____*(City)* Animal Control Officer his full legal name, address, the breed, age, gender, color, and any other identifying marks of the dangerous dog___" *(name of dog)* "___; the location where the dangerous dog ___" *(name of dog)*

" is to be kept if not at the address of *(name of owner)*; two (2) color photographs of the dangerous dog " *(name of dog)* "; and the aforementioned certified liability insurance.

**IT IS ORDERED** that *(name of owner)* must provide proof of the required documents necessary to register the dangerous dog " *(name of dog)* " and pay the registration fee. The *(City)* Animal Control Officer shall provide to *(name of owner)* a registration tag designating the dog " *(name of dog)* " as dangerous. *(name of owner)* must place the tag on the dangerous dog " *(name of dog)* 's" collar and must ensure that the dangerous dog " *(name of dog)* " wears such a tag collar at all times.

**IT IS ORDERED** that *(name of owner)* must not allow the dangerous dog " *(name of dog)* " to go outside the secure enclosure described above unless the animal is on a leash in the immediate control of *(name of owner)* or the _____ Family or under the immediate physical restraint of the _____ Family. *(name of owner)* shall not permit the dangerous dog " *(name of dog)* " to be kept outside of the secure enclosure on a chain or rope or any other type of leash unless a member of the _____ Family is in immediate physical control of the chain, rope or other type of leash. The dangerous dog " *(name of dog)* " shall not be leashed to immediate objects, including but not limited to trees, posts or buildings.

**IT IS ORDERED** that *(name of owner)* must prominently display signs giving notice of the presence of the dangerous dog " *(name of dog)* " so that all persons entering said property are immediately notified that a dangerous animal is being kept at the location.

IT IS FURTHER ORDERED that should the above-named Defendant fail to comply with any one or more of the foregoing requirements within thirty (30) days from the date hereof, the Defendant shall deliver the dog to the animal control authority of the City/County of _____. Failure to so deliver shall result in the issuance of a warrant ordering seizure and impoundment of the dog, and, should the Defendant fail to pay the impoundment fees, reclaim the dog, and comply with the requirements set forth above by the eleventh ($11^{th}$) day following seizure, the animal control authority shall humanely destroy the dog.

**SIGNED** this _____ day of _____ 200__.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

Received on this ____ day of _____, 200__, at ____m.

_____
Owner's Signature

**"D-2"**

CAUSE NO. 06-07-13-DD1

IN RE CHICO, a Dog
(E.R.)
Owner

IN THE MUNICIPAL COURT

CITY OF FRISCO

COLLIN COUNTY, TEXAS

**SAMPLE COMPLETED ORDER AFFIRMING DOG IS 'DANGEROUS' AND IMPOSING CONDITIONS ON OWNER**

On this 24th day of July 2006, the above-styled and numbered cause came on for hearing. The Court, after hearing the evidence and argument of all interested parties present, makes the following findings:

1. The pit bull dog known by the name of "Chico," and belonging to owner E.R., does meet the legal definition of a "dangerous dog," as that term is defined in Section 14-3 of Chapter 14 of the City of Frisco's Code of Ordinances.
2. "Chico" has, on more than one occasion, committed unprovoked acts in a place other than the secure enclosure in which the animal was being kept and that was reasonably certain to prevent the animal from leaving the secure enclosure on its own.
3. The acts committed by "Chico" caused a person to reasonably believe that the animal would attack and cause bodily injury to that person.
4. The dog "Chico" is hereafter to be termed a "Dangerous Dog," and shall be subject to any and all disabilities the distinction entails.

After considering all the evidence presented, the COURT FURTHER FINDS that the best interest of the residents of the City of Frisco will be served by permanently removing "Chico" from the City of Frisco.

IT IS ORDERED that E.R. shall have ten (10) calendar days to notify animal control officials for the City of Frisco, Collin County, Texas, that "Chico" will be removed from the City

of Frisco by 5:00 p.m. on August 3, 2006, and that he will thereafter be the property of _____, who resides at the following location, and who does not have resident in his/her home a child under the age of fifteen (15), or any other animal:

Street Address: _____

City, County, State, Zip Code: _____

Telephone Number: _____ e-mail address: _____

In order to secure "Chico's" release for the purpose of permanently removing him from within the corporate limits of the City of Frisco, E.R. is hereby ORDERED to provide adequate proof to animal control officials for the City of Frisco that she and/or the new owner listed above has complied with ***each*** of the requirements listed below:

(1) Register "Chico" with animal control officials resident in the city or county of "Chico's" new home. The dangerous animal registration shall be valid for one year from the date of issue for the new owner and is not transferable.
(2) Present proof of current rabies vaccination.
(3) Provide proof of liability insurance in a single incident amount of $100,000.00 for bodily injury or death of any person or persons, or for damage to property owned by any person that may result from the ownership of such animal.
(4) Maintain on the dangerous animal at all times a fluorescent orange colored ID collar visible at 50 feet in normal daylight and a tag that provides the animal control issued registration number of the dangerous animal, along with the owner's name, current address and current telephone number so the animal can be identified.
(5) Keep all dangerous animals securely confined indoors or in a secure enclosure behind the front building line, except when leashed as provided herein.
(6) Not keep a dangerous animal on a porch, patio or in any part of a house or structure that would allow the animal to exit such building of its own volition. In addition, no dangerous animal may be kept in a house or structure when the windows are open or when screen windows or screen doors are the only obstacles preventing the animal from exiting the structure.
(7) Prevent a dangerous animal from going outside its secure enclosure, unless such animal is securely leashed with a leash not longer than six feet in length and in the immediate control of a person.
(8) Prevent a dangerous animal from going outside its secure enclosure, unless such animal is muzzled in a manner that will not cause injury to the animal nor interfere with its vision or respiration but shall prevent it from biting any person or animal when the dangerous animal is taken out of its secure enclosure for any reason.
(9) Display in a conspicuous place on their premises a sign that is easily readable by the public using the words "Beware -- Dangerous Animal". The sign shall be no smaller than one-foot total area, with alphabetic letters with no less than one-inch height. A similar,

easily readable sign with a total area of 18 inches shall be posted on the enclosure or pen of such dangerous animal and posted on all entrances to the dwelling, building or structure.
(10) Provide to local animal control officials in the new city or county of "Chico's" residence, a minimum of two current color photographs of the dangerous animal in two different poses (front and side views) showing the color, any specific markings, and the approximate size of the dangerous animal.
(11) Have a microchip inserted into the dangerous animal by a licensed veterinarian and provides animal control with the alphanumeric combination code contained in the microchip. The dangerous animal must also be made available, at any time, to animal control to verify the microchip data by scanning the animal.
(12) Report any attack the dangerous animal makes on any person or animal as soon as possible, but not later than 24 hours from the time of the incident.
(13) Report to animal control in writing within ten calendar days that:
a. The dangerous animal has been removed from the city, along with the new owner's name, current address and current telephone number.

IT IS ORDERED that "Chico" shall continue to be held in the custody of local animal control officials, at E.R.'s sole expense, until such time as she has provided local animal control officials satisfactory evidence of compliance with each condition above. In the event that E.R. fails to timely provide proof of compliance with each condition, animal control officials for the City of Frisco shall retain possession of "Chico," and E.R. shall continue to be responsible for any and all fees incurred in the housing of "Chico."

In the event that E.R. fails to timely provide proof of compliance with each of the conditions above, she shall have five (5) calendar days from August 3, 2006, to petition this Court to consider approving an alternate residential placement for "Chico." If E.R. fails to request said consideration from this Court within the allotted time, City of Frisco animal control officials shall have discretion to euthanize "Chico," according to department policy.

IT IS FURTHER ORDERED that, if E.R. does timely provide satisfactory proof of compliance with each of the conditions above, City of Frisco animal control officials shall release "Chico" to the custody of E.R. for immediate transport to his new home outside the corporate limits of the City of Frisco. In the event "Chico" is released to E.R. for relocation to a

home outside the City of Frisco, it is ORDERED that E.R. shall be prohibited from bringing "Chico" back to the City of Frisco at any time in the future.

IT IS FURTHER ORDERED that City of Frisco animal control officials shall be responsible for verifying all information regarding the out-of-Frisco placement of "Chico" with the local authorities in the location of "Chico's" placement.

Signed on this 24th day of July, 2006

_____

Judge Presiding

# "E - 1"

**Court of Criminal Appeals of Texas, En Banc.**
**Jim TIMMONS, Relator,**
**v.**
**Judge Vic PECORINO, Respondent.**
**No. 37,733-01.**

June 17, 1998.

Appeal from the County Criminal Court at Law No. 4, Harris County; James E. Anderson, Judge.

James A. Moore, Ronald G. Mock, Michael A. Moriarty, for relator.
Gerry Guerinot, Matthew Paul, State's Atty., Austin, for Respondent.

Before the court en banc.

Application for writ of mandamus denied.

***604** PRICE, J., concurring opinion, joined by MANSFIELD, BAIRD and OVERSTREET, JJ.PRICE, Judge, concurring in the Denial of Leave to File.
I concur in the Court's denial of leave to file, but write separately to explain my reason for doing so.

This case has provided no small amount of humor to many of those familiar with its details (a canine "defendant" named Darth Vader, rumors of a "tainted" dog line-up, a case of canine "capital punishment," etc.), and no small amount of sadness to many over the imminent destruction of one of "man's best friends." Nevertheless, there are significant jurisdictional issues at stake.

Relator's dog bit a small girl, requiring her to get more than thirty stitches. As a result of this, Relator's dog and several other dogs were seized by animal control personnel, and Relator's dog was identified by the girl and her mother in a dog line-up. Judge Pecorino of the City of Humble Municipal Court (and Respondent in this action) summoned Relator for a hearing pursuant to Ttex. Health & Safety Code § § 822.001-822.004, and eventually the Court ordered that the dog be destroyed. Relator perfected an appeal, but filed it as a mandamus application in the Harris County Criminal Court No. 4. That court dismissed the mandamus request for lack of jurisdiction. Relator then filed Writs of Certiorari, Mandamus and Habeas Corpus in this Court, and asked us to grant his Motion for Temporary Relief to stay the order of Respondent to destroy the dog pending our action on the Writs of Certiorari, Mandamus and Habeas Corpus.

Respondent Judge Pecorino ordered Relator's dog destroyed under tex. Health & Safety Code § 822.003(e), under which a court may order destruction of a dog if it "... finds that the dog caused serious bodily injury to a person by attacking, biting or mauling the person." [FN1] However, this Court's jurisdiction is limited to criminal cases. *See* tex. Const. art. V, § 5; Tex.Code Crim. Proc. Ann. art. 4.04 (Vernon Supp.1998). Relator contends that this is a criminal matter because the Humble Municipal Court has only criminal jurisdiction, a complaint was filed, the case was handled by the municipal court prosecutor and a warrant was issued.

> FN1. 822.003(f) contains exceptions, under which a court may not order a dog destroyed, even though it has caused serious bodily injury to a person.

Despite all this, in no way can Relator's case be considered "criminal," since Relator has neither been charged with nor convicted of a criminal offense. [FN2] *See, e.g., Armes v. State,* 573 S.W.2d 7, 8 (Tex.Crim.App. [Panel Op.] 1978) (Court of Criminal Appeals held to have no jurisdiction over appeal of order requiring that appellant go to California to appear before a California grand jury, since appellant had not been charged with or convicted of a criminal offense, and therefore was not a criminal defendant); *Ex parte Beal,* 157 Tex.Crim. 466, 250 S.W.2d 221,

221-222 (1952) (Court of Appeals held to have no jurisdiction over appeal of juvenile proceeding, as appellants' incarceration or restraint was not by reason of a judgment in a criminal case, no criminal statute was shown to have been violated, judgment was not based upon a complaint, information, or indictment, and none of the requisites of a trial in a criminal case appeared); *State ex rel. Edwards v. Reyna,* 160 Tex. 404, 333 S.W.2d 832, 836 (1960) ("All cases considered by [the Court of Criminal Appeals] necessarily involve violations of penal statutes"); *see also City of Lubbock v. Green,* 312 S.W.2d 279, 283 (Tex.Civ.App.-Amarillo 1958, no writ) (hearing on right of city to execute dog held not to constitute a criminal case). Whether or not a municipal court has civil jurisdiction [FN3] is irrelevant to whether *this* ***605** Court has jurisdiction over this particular case.

FN2. tex. Health & Safety Code § 822.044(a) does make it an offense for the owner of a dangerous dog to allow his or her dog to attack a person outside the dog's enclosure if the attack causes bodily injury, and § 822.044(b) does allow the court to order that a dog be destroyed if its owner is convicted under this provision. However, Relator has not been prosecuted under this provision.

FN3. Although Tex. Gov't Code § 29.003 appears not to confer civil jurisdiction on municipal courts, Tex. Health & Safety Code § § 822.002 & 822.003 may well confer jurisdiction upon those courts for this specific type of action. Nevertheless, because we have no jurisdiction in this instance, we are not at liberty to decide this issue.

As Relator has neither been charged with nor convicted of a criminal offense, this Court has no jurisdiction over this dispute, which remains a civil matter. Therefore, I concur in the Court's denial of leave to file.

Tex.Crim.App.,1998.
Timmons v. Pecorino
977 S.W.2d 603

END OF DOCUMENT

"E-2"

**Supreme Court of Texas**

**City of Richardson v. Responsible Dog Owners of Texas**

**794 S.W.2d 17 (Tex. 1990).**

**Summary:**
Dog owners brought action against city, seeking declaratory judgment regarding city's authority to adopt ordinance regulating keeping of dogs. The 192nd Judicial District Court, Dallas County, Merrill Hartman, J., entered judgment in favor of city, and owners appealed. The Dallas Court of Appeals, Fifth Supreme Judicial District, 781 S.W.2d 667, reversed, and city petitioned for review. The Supreme Court, Spears, J., held that city's comprehensive animal control ordinance was not preempted by state Penal Code provisions governing keeping of vicious dogs and establishing preemptive effect of Penal Code.

**Judge Justice Spears delivered the opinion of the court.**

Opinion of the Court:
At issue is the validity of the City of Richardson's animal control ordinance. Several people, denominated as Responsible Dog Owners, sued for declaratory judgment, alleging that the legislature, through its enactment of sections 1.08 and 42.12 of the Texas Penal Code, has preempted the City's power to adopt an ordinance regulating the keeping of dogs. The trial court granted summary judgment in favor of the City. The court of appeals, however, held that the City's ordinance was preempted by the Penal Code, reversed the trial court's judgment, and rendered judgment in favor of Responsible Dog Owners. 781 S.W.2d 667. We reverse the judgment of the court of appeals and remand the cause to that court.

Section 1.08 of the Texas Penal Code provides:
No governmental subdivision or agency may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty.

In accordance with this provision, a city cannot enact an ordinance proscribing the same conduct as is proscribed by the Penal Code. In holding that the City of Richardson's animal control ordinance is void, the court of appeals held that the ordinance proscribes the same conduct as is proscribed by section 42.12 of the Penal Code. In order to compare the City's ordinance with section 42.12, we will quote their provisions at length.

PENAL CODE PROVISIONS

Section 42.12 of the Texas Penal Code provides in pertinent part:
(a) In this section:

* * * * * *
*18 (3) "Vicious conduct" with respect to a dog means an attack made by the dog on a person in which the dog initiated continued physical contact with the person and fails to retreat and:
(A) the attack resulted in bodily injury to the person;
(B) the attack was unprovoked; and
(C) the attack did not occur in a pen or other enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the pen or enclosure on its own.
(b) A person commits an offense if the person owns or keeps in his custody or control a dog that he knows has engaged in vicious conduct

and the person does not:
(1) restrain the dog at all times on a leash ... or in a pen ...; and
(2) have insurance coverage in an amount of at least $100,000....
(c) A person has 60 days from the date on which the person knows his dog has engaged in vicious conduct ... to comply with the provisions of Subsection (b)....

* * * * * *

(e) An offense under this section is a Class B misdemeanor.

CITY ORDINANCE PROVISIONS
Pertinent parts of the City of Richardson's ordinance read:

Article I. In General
Sec. 3-1. Definitions.

* * * * * *

"Vicious or dangerous animal" shall mean:
(a) Any animal which because of its physical nature and vicious propensity is capable of inflicting serious physical harm or death to human beings and would constitute a danger to human life or property; or
(b) Any animal which has behaved in such a manner that the owner thereof knows or should reasonably know that the animal is possessed of tendencies to attack or to bite human beings or other animals;
(c) Any animal certified by a doctor of veterinary medicine, after observation thereof, as posing a danger to human life, animal life, or property upon the basis of a reasonable medical probability; or
(d) Any animal that commits an unprovoked attack on a person or animal ...; or
(e) Any animal that attacks or threatens to attack a person;
Sec. 3-2. Penalties.
Any person who violates any of the provisions of this article shall be guilty of a misdemeanor and upon conviction in the municipal court shall be assessed a fine not to exceed that set out by Section 1-5 of the Code, and each and every day that the same shall continue shall constitute a separate and distinct offense.

* * * * * *

Sec. 3-10. Dangerous and vicious animals.
(a) Complaint. Should any person desire to file a complaint concerning an animal which is believed to be a vicious or dangerous animal, a sworn, written complaint must be filed with the Environmental Health Department of the City of Richardson....

* * * * * *

Article II. Restrictions on Pit Bull Dogs Within The City
Sec. 3-15. General.
It shall be unlawful for any person to own, keep, harbor, or in any way possess a pit bull dog within the City, unless such pit bull dog is properly registered with the City, the registration fees paid, and said pit bull dog maintained within the City in accordance with the requirements of this Section.

* * * * * *

Sec. 3-17. Standards and Requirements.

It shall be unlawful for any person to own, keep, harbor, or in any way possess a pit bull dog within the City without complying *19 with the following standards and requirements:
(a) Leash and muzzle....
(b) Confinement....
(c) Confinement indoors....
(d) Signs....
(e) Insurance....
(f) Identification Photograph....
(g) Reporting Requirements....

In addition to the provisions specifically set forth above, the ordinance contains provisions related to the inhumane treatment of animals, the impoundment of animals, the vaccination of animals, the sale of baby chicks and rabbits, and the permitting of guard dogs.

Comparing the City's ordinance with section 42.12, we observe that the ordinance applies

to all animals within city limits; section 42.12 relates only to dogs. Moreover, the ordinance is a comprehensive attempt to address the control of animals. Section 42.12 is much more limited in that it requires only that an owner restrain a dog and carry insurance coverage. Finally, the ordinance applies to any animal which may present a threat to the safety and welfare of the City's citizens; its enforcement does not depend on the dog having already bitten someone. By contrast, section 42.12 is essentially a "first bite" law which makes it an offense only if a person keeps a dog that has actually engaged in vicious conduct and fails to restrain the dog or obtain the required insurance coverage within sixty days of the dog's vicious conduct.

Under article XI, section 5 of the Texas Constitution, home-rule cities have broad discretionary powers provided that no ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State...." Thus, the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted. When there is no conflict between a state law and a city ordinance, the ordinance is not void. See City of Weslaco v. Melton, 158 Tex. 61, 308 S.W.2d 18 (1957) (city ordinance requiring pasteurization of all milk sold and offered for sale within city was valid because it did not conflict with statute creating certain grades and labels for milk). [FN1] "A general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." City of Beaumont v. Fall, 116 Tex. 314, 291 S.W. 202 (1927); see also City of Houston v. Reyes, 527 S.W.2d 489, 494 (Tex. Civ. App .--Houston [1st Dist.] 1975, writ ref'd n.r.e.). Section 1.08 does not place any greater restriction on a home-rule city than that which existed prior to its enactment by virtue of article XI, section 5 of the Texas Constitution. There is no repugnancy between the City's comprehensive animal control ordinance and section 42.12. A reasonable construction of each allows both to be given effect because they are not inconsistent. Although there is a small area of overlap in the provisions of the narrow statute and the broader ordinance, we hold that it is not fatal. [FN2]

FN1. But see Knott v. State, 648 S.W.2d 20 (Tex. App.--Dallas 1983, no writ), in which a city's ordinance relating to highway speed control enforcement was held to be preempted by state law. However, the city's ordinance proscribed in almost identical language the very same conduct as was proscribed by the State law; thus Knott is distinguishable from this situation involving an ordinance that is much more comprehensive than the state statute.

FN2. Although plaintiffs complain about both the enactment and enforcement of the ordinance, their complaint about enforcement is, on this record, anticipatory. We do not hold today that a person could be prosecuted under both the statute and ordinance in the rather limited circumstances where conduct is violative of both, nor need we address here whether the ordinance could be enforced against conduct also violative of the statute.

We hold therefore that sections 1.08 and 42.12 of the Penal Code do not preempt the City of Richardson's power to adopt this comprehensive animal control ordinance. The judgment of the court of appeals is reversed, and this cause is remanded to that court for it to consider points of error that were previously left unaddressed.

"F"

## Woman Fatally Mauled While Bathing Dog

The Associated Press
Aug 20, 2006 1:58 AM (24 days ago)

**CORAL SPRINGS, Fla.** - A woman who was fatally mauled by her dog was trying to give it a bath when it attacked, police said.

Shawna Willey, 30, died Friday. Her daughter apparently witnessed the attack by the 120-pound Presa Canario and alerted a neighbor who called authorities, Coral Springs Police spokesman Rich Nicorvo said.

It was not clear what made the dog attack, Nicorvo said.

When police arrived at the house, the officers saw the dog standing over the woman's body in the backyard near the swimming pool.

The dog made aggressive movements toward officers when they entered the yard, so they shot and killed it.

A coroner will determine Willey's exact cause of death.

Willey was cited in Hillsborough County several years ago for having dangerous dogs, according to court records.



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**Pit bulls attack blind woman's seeing-eye dog**

05:10 PM CDT on Monday, September 4, 2006

By CAROL CAVAZOS / WFAA-TV

A curb on Bridalwreath bears tire marks from a car neighbors used to try and stop two pit bulls from attacking a woman's guide dog. "Sitting there revving the engine, honking the horn. Dogs just still attacking the other dog. Just still attacking without stopping. Car didn't even affect them. We pulled out. Did it again. Didn't move or anything," said Tyrone Whitlow.

Tyrone Whitlow says another neighbor poured buckets of water on the pit bulls, which broke the attack. "They left. The dogs left. Just strolled off like nothing ever happened," said Whitlow.

The neighbor they call "Miss Shirley" was standing with her guide dog on the sidewalk, waiting for her ride to church, when the pit bulls attacked.

Roy Eubanks, blind from a childhood hunting accident, lives in that same neighborhood with his vision-impaired wife Sharon. Roy says he might've been the one attacked. Rain kept him from going out with his guide dog Ellis that morning.

The blind community, their friends and family are concerned.

"Sharon's brother called this morning and said he's going to pick up some bear repellent," said Eubanks. "Next time he comes by he's going to bring a can for us, so we're going to try that."

They're not the only ones in that neighborhood who're worried. Bob and Janet McElroy have seen several pit bulls running loose in this neighborhood. "They are scary. We had one that came right up to our door here. We couldn't even get out of our house," said Bob McElroy.

E-mail ccavazos@wfaa.com

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khou.com
11 NEWS The Spirit of Texas

**Pit bulls kill cat, attack owner**

05:50 PM CDT on Wednesday, September 13, 2006

**By Brad Woodard / 11 News**
A Texas City woman survived a terrifying ordeal after being attacked by two pit bull dogs.

Rhonda Trujillo-Lambert watched in horror as the dogs killed her cat then turned on her.

"There was nothing but hate and viciousness and the desire to kill. that's all those dogs had right then," said Rhonda Trujillo-Lambert

From her hospital bed at Mainland Medical Center, the tubes and bandages are testament to just how close Rhonda Trujillo-Lambert came to death.

"And they attacked me, biting and biting," she remembered.

They were two pit bulls from just down the street and only moments earlier they had killed her cat.

"And I was screaming and screaming and nobody heard me," said Trujillo-Lambert.

"I went to the house after getting a harrowing phone call, that 'I'm being attacked, I'm being attacked,'" said Dana Rogers, the victim's sister.

"So it just went through my head they were going to kill me," said Trujillo-Lambert.

Still under attack, she somehow managed to get back in the garage where her husband keeps a shop fan. What she did with that fan very well could have saved her life.

"Oh, it's so noisy. When I turned it on, it scared 'em and they took off running," said the victim.

But not before breaking her left arm.

We went to the dog owner's home, but were told he wasn't there.

At least one neighbor said the behavior of the animals was out of character.

"We always played with them. My little niece and little nephew plays with the all the time," said Robert Montez.

But for the dogs, play time is over.

"The dogs were surrendered to us and they were humanely euthanized," said Kim Schoolcraft with the Galveston County Animal Shelter.

Samples taken are being tested for rabies.

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Wichita Falls Times Record News August 8, 2006

# Surge of wild dogs raises concern

## Animal control workers: One dog can cause as much problems as packs

> "The times we have the packs is when the females go into season."
>
> Pat Garcia, animal warden and Animal Control supervisor

**Michael Hines**
Times Record News

Cases of individual dog attacks made headlines recently, but wild dog packs are a constant concern for animal control workers.

The end of July saw a spate of animal attacks, with one dog even being shot after lunging at a police officer. Animal Control workers seized three dogs from Landon Road after they attacked Sidney Lackey, 64, on the night of July 20. Later that week, a pit bull was shot when workers tried to capture the animal after it had attacked and knocked down a 53-year-old woman.

Wild dogs operating in packs can pose just as much of a danger with one distinction — they know the quick escape routes, said Pat Garcia, animal warden and Animal Control supervisor.

"They know which fences have holes in them and which don't," she said.

Dog packs aren't widespread phenomena, Garcia said, but they do have particular stomping grounds.

"We have area problems," she said.

What's more, many times just one animal is lurking in neighborhoods and can still cause problems.

"It's not a dog pack, it's a dog," Garcia said.

The worst pack behavior occurs when female dogs go into heat.

"The times we have the packs is when the females go into season," Garcia said. "They can attract males (from a) mile or two away."

Exact statistics on wild dogs aren't kept. Members of dog gangs are undistinguished from the 1,000 loose animal complaint calls that come into the Wichita Falls-Wichita County Public Health District each monthly.

Packs typically hang out

Please see **DOGS** on Page 2B

## DOGS continued from Page 1B

on the east side of Wichita Falls. The Wichita River area attracts many, as do the wooded areas that give the animals shade and shelter. One pack has consistently been around the Washington-Jackson Math and Science Center. A single dog is also known to be a problem-causer in Faith Village.

The dogs' ability to stay wild is one reason they're hard to catch.

"They wouldn't come up to humans," Garcia said.

That makes countering the beasts particularly hard, said Susan Morris, zoonosis coordinator for the Wichita Falls-Wichita County Public Health District. Loose pets can be approached and might come to a human. Wild dogs stay away and have to be ensnared.

"We have traps that we set, but wild dogs won't go in there because there's no live bait," she said. "They're smart. They're street smart."

Firearms are about the only real solution, Morris said.

"We don't carry guns. We can't shoot them," she said. "Animal Control is really trained for domesticated animals. These are feral."

Animal control has had some success in capturing some animals. One female had three litters before being caught three months ago. Many of her last litter, though, escaped. At the same time, workers have also known of the dog in Faith Village that has earned the nickname "Hobo." It takes a lot of work to apprehend the animals, Morris said.

"It's very important for people to be responsible pet owners," Morris said. "These were once somebody's pet, and they got loose."

Wichita Falls Times Record News August 8, 2006

# Woman's pet attacked by dogs again

**Jessica Langdon**
Times Record News

When three dogs went after Sidney Lackey's little dog in July, the 64-year-old woman put herself in harm's way to protect her pet.

When different dogs went for the Pekingese again, timing just didn't work in her pet's favor.

Lackey's family said two dogs got into the yard in the 1000 block of Landon Road on Tuesday morning.

"They shook him like a rag doll," Lackey's son, Jeff Watson, said Tuesday, a few hours after the dogs attacked Puggy, then escaped.

Puggy went into shock and might have suffered spinal injuries, Watson said. A veterinary clinic was caring for the dog Tuesday, and Watson said because of Puggy's condition, workers were waiting to do X-

**PLUS**

■ Wild dog packs are a constant concern for animal control workers.

— Page 1B

Please see **DOGS** on Page 8A

## DOGS continued from Page 1A

rays and some other work.

"It's one of the nicest little dogs you could ever hope to know," Watson said. He said Lackey's home basically belongs to Puggy. When someone steps inside, "You've got to pet him in order to get any farther."

If Puggy pulls through, he could lose a leg, said Susan Morris, zoonosis coordinator for the Wichita Falls-Wichita County Public Health District. She said he was receiving an IV.

Someone had propped up the gate, and Lackey's family and a neighbor said the dogs that entered her yard Tuesday appeared to have been pit bull mixes, Morris said.

Animal Control officers went to the neighborhood after the incident and started searching the area, looking for the animals that hurt Puggy.

"I went out with the guys trying to find the dogs, trying to do all we can for this lady," Morris said.

"Animal Control came out — they were just really great, the way they started combing the neighborhood," Watson said.

The dogs hadn't turned up by Tuesday afternoon. Animal Control set a trap in hopes of catching the dogs later.

Watson said his wife got to Lackey's yard in time to see two dogs escaping under the fence, but it was too late to rescue Puggy from them. The damage was done.

"We don't know who owns the dogs that attacked it," Morris said. A neighbor on another street had also reported seeing the same dogs Tuesday.

"She's devastated," Watson said, adding that enough is enough when it comes to dangers from dogs.

This attack came on the heels of another dog attack, not only in the same neighborhood but at the same address.

Less than three weeks earlier — on July 20 — Lackey found herself facing three pit bull type dogs when she went into her yard to get Puggy away from them, she said.

Lackey went to the hospital after she suffered a bite, scratches and bruises when the dogs closed in on her.

She and neighbors said that wasn't the first time dogs from one particular property in the neighborhood had caused problems.

The most severe, they said, happened about two years ago when an elderly neighbor suffered a stroke because of a dog attack.

The health department reported a dog — from the same address as the dogs in the July attack — was declared vicious after a September 2004 incident.

Morris said this month that she also declared the three dogs involved in the attack on Lackey in July vicious.

Several people in the north Wichita Falls neighborhood expressed fears about their own safety and their children's safety because of the animals. Things have changed for the people who live there.

"In the evenings, the older couples would get out and be walking up and down the streets. That doesn't happen anymore," Watson said. "There's no kids playing in the street."

He said his mother had been starting to really enjoy the life she led at her home, but he's afraid that's also changing.

"It's just another thing that makes my mom not want to live here anymore," he said. "I can't help but feel bad for her."

*Reporter Jessica Langdon can be reached at (940) 763-7530 or by e-mail at langdonj(at)TimesRecord-*

"G"

**CODE OF ORDINANCES**
**City of FRISCO, TEXAS**
**Codified through**
**Ord. No. 05-08-61, adopted Aug. 3, 2005.**
**(Codification)**

## Chapter 14 ANIMALS* ...

**Sec. 14-12. Dangerous animal.**

(a) It shall be unlawful for any person to own, keep or harbor a dangerous animal within the city limits, except as provided in this section.

(b) For the purposes of this section, a person learns that the person is the owner of a dangerous animal when:

(1) The owner knows of an attack committed by the animal as described in the definition of "dangerous animal" in section 14-3 above; or

(2) The owner is informed by the court of jurisdiction that the animal is a dangerous animal.

(c) Should any person desire to file a complaint concerning an animal which is believed to be a dangerous animal, a sworn, written complaint must be first filed with animal control and include the following:

(1) Name, address and telephone number of complainant and other witnesses;

(2) Date, time and location of any incident involving the animal;

(3) Description of the animal;

(4) Name, address and telephone number of the animal's owner, if known;

(5) A statement describing the facts upon which such complaint is based; and

(6) Statement describing any incidents where the animal has exhibited dangerous propensities in past conduct, if known.

(d) If a person reports an incident described by the definition of "dangerous animal" in section 14-3 above, animal control may investigate the incident. Animal control shall accept sworn statements from all victims and witnesses to the attack.

(e) After a sworn complaint is filed, it shall be referred to the court of jurisdiction to set a time and place for a hearing not to exceed 20 days from the time the complaint is received. The animal control officer, or designee, shall give notice of the hearing to the animal's owner at least ten days prior to the hearing date. After the owner of the animal is notified, the owner shall keep such animal at the city's animal shelter or at a veterinarian's clinic, at the owner's expense, until such time the hearing is held by the court of jurisdiction. After the owner receives notice, animal control or other city-authorized person shall impound the animal specified in the complaint if such animal is found at large. The owner is liable for all fees and citations pertaining to the animal's impoundment.

(1) Any interested party, including the city attorney, is entitled to present evidence at the hearing.

(2) The court of jurisdiction shall receive testimony at the hearing to determine if the animal specified in the complaint is a dangerous animal and should be permanently removed from the city, euthanized, or registered as a dangerous animal for the protection of the public health, safety and welfare of the community. To order euthanasia, removal, or registration as a

dangerous animal for the public health, safety and welfare, the court of jurisdiction must find the following facts to be true:
a. The animal is a dangerous animal; and
b. The euthanasia, removal, or registration of a dangerous animal is necessary to preserve the public health, safety, and welfare of the community.
(3) If the court of jurisdiction orders destruction or removal of the animal and the owner is not present at the hearing, the owner shall be given notice of the decision. If the destruction or removal of the animal is not ordered, the city's animal control officer or other city-authorized person shall return the animal to the owner upon the owner's payment of all fees to the city and its authorized agents. If the court of jurisdiction orders the animal removed from the city, the owner has ten days to do so. The owner shall furnish animal control or other city-authorized designee evidence of such removal within ten days thereof.
(4) A person commits an offense if he knowingly possesses and fails to release to the city's animal control authority or veterinarian, as approved by animal control, an animal that has been charged by sworn complaint as provided in subsection (3) of this section and whose euthanasia or removal has been ordered by the court of jurisdiction; provided that such euthanasia or removal order has not been appealed. Each day the animal has not been released to the city's animal control authority or approved veterinarian shall constitute a separate offense.
(f) An owner or person filing the action may appeal the decision of the court of jurisdiction in the manner provided for the appeal of cases from the court of jurisdiction within five days of the decision.
(g) It is a defense to the determination of an animal as dangerous that:
(1) The threat, injury or damage was sustained by a person who at the time was committing a willful trespass or other tort upon the premises occupied by the owner of the animal;
(2) The person was teasing, tormenting, abusing or assaulting the animal or has, in the past, been observed or reported to have teased, tormented, abused or assaulted the animal;
(3) The person was committing or attempting to commit a crime;
(4) The animal attacked or killed was at the time teasing, tormenting, abusing or attacking the alleged dangerous animal;
(5) The animal was protecting or defending a person within the immediate vicinity of the animal from an unjustified attack or assault;
(6) The animal was injured and responding to pain; or
(7) The animal at issue is a trained guard animal in the performance of official duties while confined or under the control of its handler.
(h) It is a defense to prosecution under this subsection that:
(1) The person is a veterinarian, a peace officer, a person employed by a recognized animal shelter or person employed by the state, or a political subdivision of the state, to deal with stray animals and has temporary ownership, custody or control of the animal; provided, however, that for any person to claim a defense in this subsection, that person must be acting within the course and scope of his official duties as regards to the dangerous animal;
(2) The person is an employee of the institutional division of the Texas Department of Criminal Justice or a law enforcement agency and trains or uses animals for law enforcement or corrections purposes; provided, however, that for any person to claim a defense in this subsection, that person must be acting within the course and scope of his official duties as regards to the dangerous animal; or

(3) The person is a trainer or an employee of a guard animal company under the Private Investigators and Private Security Agencies Act in V.T.C.A., Occupations Code ch. 1702, as it exists or may be amended; provided, however, that for any person to claim a defense in this subsection, that person must be acting within the course and scope of his official duties as regards to the dangerous animal.

(i) Requirements for any dangerous animal within the city limits. The owner must comply with all of the following:

(1) Register the dangerous animal with animal control. The dangerous animal registration is valid for one year from the date of issue for the original owner and is not transferable.

(2) Present proof of current rabies vaccination.

(3) Provide proof of liability insurance in a single incident amount of $100,000.00 for bodily injury or death of any person or persons, or for damage to property owned by any person which may result from the ownership of such animal.

(4) Maintain on the dangerous animal at all times a fluorescent orange colored ID collar visible at 50 feet in normal daylight and a tag that provides the animal control issued registration number of the dangerous animal, along with the owner's name, current address and current telephone number so the animal can be identified.

(5) Keep all dangerous animals securely confined indoors or in a secure enclosure behind the front building line, except when leashed as provided herein.

(6) Not keep a dangerous animal on a porch, patio or in any part of a house or structure that would allow the animal to exit such building of its own volition. In addition, no dangerous animal may be kept in a house or structure when the windows are open or when screen windows or screen doors are the only obstacles preventing the animal from exiting the structure.

(7) Prevent a dangerous animal from going outside its secure enclosure, unless such animal is securely leashed with a leash not longer than six feet in length and in the immediate control of a person.

(8) Prevent a dangerous animal from going outside its secure enclosure, unless such animal is muzzled in a manner that will not cause injury to the animal nor interfere with its vision or respiration but shall prevent it from biting any person or animal when the dangerous animal is taken out of its secure enclosure for any reason.

(9) Display in a conspicuous place on their premises a sign that is easily readable by the public using the words "Beware -- Dangerous Animal". The sign shall be no smaller than one foot total area, with alphabetic letters with no less than one inch height. A similar, easily readable sign with a total area of 18 inches shall be posted on the enclosure or pen of such dangerous animal and posted on all entrances to the dwelling, building or structure.

(10) Provide to animal control a minimum of two current color photographs of the dangerous animal in two different poses (front and side views) showing the color, any specific markings, and the approximate size of the dangerous animal.

(11) Have a microchip inserted into the dangerous animal by a licensed veterinarian and provides animal control with the alphanumeric combination code contained in the microchip. The dangerous animal must also be made available, at any time, to animal control to verify the microchip data by scanning the animal.

(12) Report any attack the dangerous animal makes on any person or animal as soon as possible, but not later than 24 hours from the time of the incident.

(13) Report to animal control in writing within ten calendar days that:

a. The dangerous animal has been removed from the city, along with the new owner's name, current address and current telephone number;
b. The dangerous animal has died; or
c. The dangerous animal has moved within the city, along with the new owner's name, current address and current telephone number. The new owner must comply with this section and reregister the dangerous animal with animal control.
(14) Comply with the ownership requirements listed above. If the owner of a dangerous animal fails to comply with the ownership requirements, the owner or harborer will be given written notice that if the animal is not surrendered to animal control for impoundment within seven calendar days, then the animal may be destroyed wherever it is found. After this notice, the dangerous animal may be destroyed during an attempt to impound, if impoundment cannot be made safely, wherever the impoundment is attempted. A written notice left at the entrance to the premises where the dangerous animal is harbored will be considered valid notice under this subsection.
(j) Animal control officers, police officers, the LRCA, and other city-authorized personnel shall be authorized to obtain a search and seizure warrant if there is reason to believe that an animal ordered to be removed from the city for being vicious has not been so removed.
(k) A person commits an offense if the person is the owner of a dangerous animal and the animal makes an unprovoked attack on another person outside the animal's secure enclosure and causes bodily injury to the other person.
(l) A person who owns or keeps custody or control of a dangerous animal commits an offense if the person fails to comply with any provision of this section 14-12. An offense under this section is a class C misdemeanor.
(1) An offense under this section is a class C misdemeanor, unless the attack causes serious bodily injury or death, in which event the offense is a class A misdemeanor, unless otherwise classified by state law.
(2) If a person is found guilty of an offense under this section, the court may order the dangerous animal destroyed by a person listed in V.T.C.A., Health and Safety Code § 822.004, as it currently exists or may be amended.
(3) In addition to criminal prosecution, a person who commits an offense under this section is liable for a civil penalty not to exceed $10,000.00. The city attorney may file suit in a court of competent jurisdiction to collect the penalty. Penalties collected under this subsection shall be retained by the city.
(Ord. No. 05-04-27, § 12, 4-19-2005)

"H-1"

1. By: Gattis H.B. No. 108

A BILL TO BE ENTITLED

AN ACT

relating to dog attacks on persons; creating an offense.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as "Lillian's Law" in memory of Mrs. Lillian Styles.

SECTION 2. The heading to Subchapter A, Chapter 822, Health and Safety Code, is amended to read as follows:

SUBCHAPTER A. GENERAL PROVISIONS; DOGS THAT ATTACK PERSONS OR ARE A DANGER TO PERSONS

SECTION 3. Section 822.001, Health and Safety Code, is amended by adding Subdivision (3) to read as follows:

(3) "Dangerous dog," "dog," "owner," and "secure enclosure" have the meanings assigned by Section 822.041.

SECTION 4. Section 822.005, Health and Safety Code, is amended to read as follows:

Sec. 822.005. ATTACK BY DOG. (a) A person commits an offense if the person is:

(1) the owner of a dog and the dog makes an unprovoked attack on another person that occurs at a location other than the owner's property and that causes serious bodily injury or death to the other person; or

(2) the owner of a dog the owner knows to be a dangerous dog and the dangerous dog makes an unprovoked attack on another person that occurs at a location other than a secure enclosure in which the dog is restrained in accordance with Subchapter D and that causes serious bodily injury or death to the other person.

(b) An offense under this section is a state jail felony unless the attack causes death, in which event the offense is a third degree felony.

(c) If a person is found guilty of an offense under this section, the court may order the dog destroyed by a person listed in Section 822.004.

(d) In addition to criminal prosecution, a person who commits an offense under this section is liable for a civil penalty not to exceed $10,000. An attorney for the municipality or county where the offense occurred may file suit in a court of competent jurisdiction to collect the penalty. Penalties collected under this subsection shall be retained by the municipality or county.

(e) A person who engages in conduct that constitutes an offense under this section is liable to a claimant for actual damages incurred by the claimant and arising from serious bodily injury or death caused by the attack. A claimant may recover damages under this subsection without regard to whether the owner has been convicted of an offense under this section.

(f) For purposes of this section, a person knows the person is the owner of a dangerous dog when the person learns the person is the owner of a dangerous dog as described by Section 822.042(g).

[~~PROVOCATION OR LOCATION OF ATTACK IRRELEVANT. Except as provided by Section 822.003(f), this subchapter applies to any dog that causes a person's death or serious bodily injury by attacking, biting, or mauling the person, regardless of whether the dog was provoked and regardless of where the incident resulting in the person's death or serious bodily injury occurred.~~]

SECTION 5. Subchapter A, Chapter 822, Health and Safety Code, is amended by adding Sections 822.006 and 822.007 to read as follows:

Sec. 822.006. DEFENSE; EXCEPTION. (a) It is a defense to prosecution under Section 822.005(a) and a defense to a suit brought under Section 822.005(d) or (e) that the person is a veterinarian, a peace officer, a person employed by a recognized animal shelter, or a person employed by this state or a political subdivision of this state to deal with stray animals and has temporary ownership, custody, or control of the dog in connection with that position.

(b) It is a defense to prosecution under Section 822.005(a) and a defense to a suit brought under Section 822.005(d) or (e) that the person is an employee of the Texas Department of Criminal Justice or a law enforcement agency and trains or uses dogs for law enforcement or corrections purposes and is training or using the dog in connection with the person's official capacity.

(c) It is a defense to prosecution under Section 822.005(a) and a defense to a suit brought under Section 822.005(d) or (e) that the person is a dog trainer or an employee of a guard dog company under Chapter 1702, Occupations Code, and has temporary ownership, custody, or control of the dog in connection with that position.

(d) It is a defense to prosecution under Section 822.005(a) and a defense to a suit brought under Section 822.005(d) or (e) that the person is disabled and uses the dog to provide assistance, the dog is trained to provide assistance to a person with a disability, and the person is using the dog to provide assistance in connection with the person's disability.

(e) It is an exception to the application of Section 822.005(a) and a defense to a suit brought under Section 822.005(d) or (e) that the person attacked by the dog was at the time of the attack engaged in conduct prohibited by Section 30.02 or 30.05, Penal Code.

Sec. 822.007. LOCAL REGULATION OF DOGS. This subchapter does not prohibit a municipality or county from adopting leash or registration requirements applicable to dogs.

SECTION 6. Section 822.044, Health and Safety Code, is amended by amending Subsections (b) and (c) and adding Subsections (e) and (f) to read as follows:

(b) An offense under this section is a Class C misdemeanor[~~, unless the attack causes serious bodily injury or death, in which event the offense is a Class A misdemeanor~~].

(c) If a person is found guilty of an offense under this section, the court may order the dangerous dog destroyed by a person listed in Section 822.004 [~~822.003~~].

(e) A person who engages in conduct that constitutes an offense under this section is liable to a claimant for actual damages incurred by the claimant and arising from bodily injury caused by the attack. A claimant may recover damages under this subsection without regard to whether the owner has been convicted of an offense under this section.

(f) If conduct constituting an offense under this section also constitutes an offense under Section 822.005, the actor may be prosecuted only under Section 822.005.

(g) SECTION 7. (a) The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

SECTION 8. This Act takes effect on the 91st day after the last day of the legislative session.

"H-2"

DallasNews.com
The Dallas Morning News

City crafts list for Legislature

Dallas: Laws on drivers, diners, dogs among 44 items on initial agenda

12:00 AM CDT on Monday, August 21, 2006

**By DAVE LEVINTHAL / The Dallas Morning News**

**Go dine with your dog on your favorite restaurant's outdoor patio.**

Just don't get drunk, as you might meet police sobriety checkpoints driving home on residential roads featuring 25-mph speed limits. That is, of course, if city officials haven't immobilized your car because you've accumulated $100 in parking tickets.

**Such changes in Texas law are among 44 items included on Dallas City Hall's preliminary 2007 legislative agenda. The agenda represents the foundation for Dallas' lobbying efforts in Austin, where legislators will convene next year.**

Council members provided five proposals, including Bill Blaydes' plan to require taxing districts to record all real property sale prices.....

....Council member Mitchell Rasansky wants to revisit a frequently proposed and consistently blocked measure to increase the penalty for vehicle burglaries from a Class A misdemeanor to a state jail felony. Some state lawmakers believe felony charges don't fit these nonviolent crimes.

"For me, auto burglaries are among the most important things in Dallas we must address," Mr. Rasansky said, noting that such crimes have increased locally in recent years. "It's a sorry state of affairs when we have lawmakers who don't want to do this."

He added, however, that he'd be willing to support a less-stringent bill stipulating that a third or even fourth car burglary conviction would bring a felony-level penalty.

Mayor Laura Miller says she supports the Blaydes and Rasansky proposals. Ms. Miller also is joining several other area mayors in a bid to curb drunken driving.

"The only way to reduce the number of deaths significantly, in my opinion, is to go back to the days when we used to do sobriety checkpoints on weekend nights when most of these accidents occur," she wrote in an e-mail.

Dallas County has the nation's second-highest number of drunken driving-related deaths, the mayor said, "and Texas, no surprise, is the No. 1 state in the nation with that problem"....

.....The city's Code Compliance Department wants to amend state law so the names of people who report suspected violations of municipal codes or ordinances are not matters of public

record. Such a change "would enable citizens to report municipal code violations in their community without fear of reprisal from code violators," the department stated.

**Several of Angela Hunt's colleagues snickered privately at her attempt to allow pet lovers opportunities to share a meal with their pets on an outdoor restaurant patio.**

**"Is it the most important issue to be addressed by our Legislature? No," Ms. Hunt said, explaining that she simply wants the state to give municipalities the right to pass their own ordinances regulating the practice. "But for residents in our urban centers, this will be a nice quality-of-life chance."**

Staff and council members will continue to tweak the preliminary list over the next few weeks, and the full council likely will formalize Dallas' legislative agenda by early October, said Larry Casto, an assistant city attorney who coordinates City Hall's lobbying.

Among Dallas' other preliminary proposals:

• The Department of Public Works and Transportation seeks the ability to immobilize or tow vehicles if the owners accumulate $100 worth of Dallas parking tickets. Today, motorists must collect three delinquent parking tickets within a calendar year to become eligible for such measures. Public Works also wants to legalize registration holds for outstanding parking tickets, potentially meaning you couldn't register your vehicle unless you paid your fines.

• Public Works and Transportation also seeks to lower residential speed limits statewide from 30 mph to 25 mph.

E-mail dlevinthal@dallasnews.com

khou.com
11 NEWS The Spirit of Texas

City may put more bite in dangerous dog law

01:37 PM CDT on Sunday, August 13, 2006

**By Chau Nguyen / 11 News**

The number of dog attacks in Houston is on the rise and it's got the attention of city council.

One council member said, "dogs aren't bad, owners are bad". Members are considering a new law that would tighten the leash on dangerous dogs and their owners.

Lots of training paid off for Stephen Costello. As a dog owner, he's got Holly being the well-behaved dog he'd always wanted.

"She's a golden retriever she's a great dog," he said.

But for every friendly dog, some of man's best friends have a mean streak.

City leaders are concerned about the number of dog attacks outside of people homes.

In fact in the last year alone, nearly 1,400 dogs had to be quarantined for biting people. Now the city wants to make both the dog and the dog owner more accountable.

"What we're after is a bad owner. Dogs aren't bad, owners are bad," said Houston City Council member Toni Lawrence.

City councilmember Toni Lawrence says council is tossing around the idea of making the city's current dangerous dog ordinance stricter.

Right now dogs have to seriously injure people before they can be deemed dangerous.

But under the revised ordinance, one bite, regardless of the severity, and the dog may automatically be labeled a dangerous dog.

They must then wear a red dangerous dog tag at all times, be micro- chipped and their owners have to build a secure, 6-foot fence.

What's more, owners have to take out a $100,000 insurance policy on their pets.

"We're just protecting people walking by so that you can cover their bite," said Lawrence.

If this revised dangerous dog ordinance is passed, owners who might not be so responsible will have to answer to the city's bark.

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Online at: http://www.khou.com/news/local/stories/khou060813_cd_dogbites.4e90699.html

# I.
## Scenarios

1.

A boy, under 10 years of age, is at home with the family St. Bernard dog. During a party, in the home's living room, something happens, and the dog turns on the young boy. The boy suffers multiple lacerations and puncture wounds on his face, serious enough that he must be transported to a children's hospital. He received 20 stitches and was hospitalized 2 days until released.

The dog was not registered with the city. Animal control took the dog for observation, because it was not current on rabies vaccination. The dog was quarantined for 10 days, during which time it showed signs of aggression towards the animal control officer.

The owners of the dog were not real friendly towards the animal control officer.

2.

A Black Lab dog bit the utility man, who was reading meters. The man received many punctures to his hand. The man was looking over a resident's fence to get the current meter reading. The fence was a six-foot high privacy fence. The man had to stand up on the fence in order to see the reading on the meter. The dog grabbed the man's hand while the man was holding onto the fence. The man was upset and wanted the dog picked up.

3.

Judge is out for walk on sunny afternoon and nearing home. Two dogs in fenced yard on judge's right side begin barking furiously. The judge sees a young man open garage door to home on her left side. Judge hears barking, yelling, and suddenly sees from garage door a large brown dog, barking, and running from home on left straight towards the judge. Dog jumps up and bites judge on back of her leg and then runs across street towards two dogs in fenced yard on right. There is snarling, yelling, barking, dogs jumping up and down and at each other. Finally, young man grabs the large brown dog, and apologizing to judge, he takes his dog home.

Back of judge's leg is open puncture wound 1/3 inch deep, immediately turning black and blue with large swelling. Judge cannot walk home, due to pain. Judge goes to hospital Emergency Room; sees doctor and gets tetanus shot, pain reliever, and wound bandaged before release.

"J"

Dangerous Dog Hearing Comparison Chart

| | Dogs That are a Danger | | "Dangerous Dogs" | | |
|---|---|---|---|---|---|
| | Person's Death | Serious Bodily Injury | Owner Doesn't Comply | ACO Determination | 822.0422 Adopted |
| Subchapter | Subchapter A | Subchapter A | Subchapter D | Subchapter D | Subchapter D |
| H&SC Section: | 822.002, 822.003 | 822.001, 822.002, 822.003 | 822.041, 822042c 822.0423a | 822.0421b, 822.041(2) | 822.041(2), 822.0422, 822.0423a |
| Start Proceedings: | Any One - Sworn complaint | Any One - Sworn complaint | Any one file Application filed in court | Owner appeals (has 15 days) | Any One "Incident" Reported |
| Seize dog prior to hearing? | If PC, yes | If PC, yes | Owner must deliver, ACO seize | ? | Owner not comply in 5 days,ACO seize |
| Defined: | Attack, bit or maul | Severe bite wound, rip/tear | | Attack/unprovoked act(s) | Attack/unprovoked act(s) |
| Hearing: | w/in 10 days | w/in 10 days | w/in 10 days | Discretionary | w/in 10 days |
| Defense: | None | 1 of 5 | None | None | None |
| Court Options: | Must destroy dog or must release dog | May destroy dog; may not destroy dog; must release dog | If comply, release dog; If not comply, destroy | Court affirms determination; Court does not affirm | If comply, release dog; if not, destroy |
| Appeal from Municipal Court: | ? | ? | Owner/ or one files application | Owner | Owner or one filing incident |
| Application: | State-wide | State-wide | State-wide | State-wide | >2.8 Million, city adopts |
| "Party:" | Dog | Dog | Dog/Owner | Dog/Owner | Dog/Owner |

FUNDED BY A GRANT FROM THE
TEXAS COURT OF CRIMINAL APPEALS

**TEXAS MUNICIPAL COURTS EDUCATION CENTER**

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TELEPHONE (512) 320-8274
1-800-252-3718
FAX (512) 320-0996

# AGGRESSIVE DRIVING

**Presented by**

**W. Clay Abbott**
**DWI Resource Prosecutor**
**Texas District & County Attorney Association**
**Austin**

By the end of the session, judges will be able to:

- Identify offenses which constitute aggressive driving;
- Identify offenses which could constitute aggressive driving; and,
- Examine options and procedures available to process aggressive driving violations.

Funded by a grant from the Texas Department of Transportation.

Aggressive Driving:

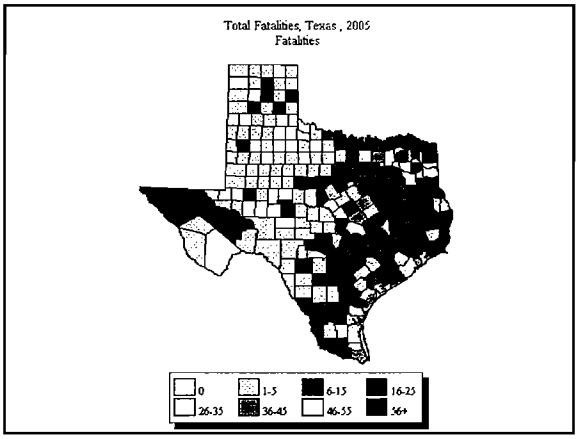
Identifying and Dealing with Aggressive Drivers in Municipal Court

## NHTSA Definition

- **NHTSA, after discussions with law enforcement and the judiciary, defines aggressive driving as occurring when "an individual commits a combination of moving traffic offenses so as to endanger other persons or property.**

## Why does it matter?

- **In 2004, 42,636 people were killed in the estimated**
- **6,181,000 police reported motor vehicle traffic crashes.**
- **2,788,000 people were injured, and**
- **4,281,000 crashes involved property damage only.**




## FUN NHTSA Facts

- Approximately 6,800,000 crashes occur in the United States each year; a substantial number are estimated to be caused by aggressive driving.
- 1997 statistics compiled by NHTSA and the American Automobile Association show that almost 13,000 people have been injured or killed since 1990 in crashes caused by aggressive driving.

## FUN NHTSA Facts

- According to a NHTSA survey, more than 60 percent of drivers consider unsafe driving by others, including speeding, a major personal threat to themselves and their families.
- About 30 percent of respondents said they felt their safety was threatened in the last month, while 67 percent felt this threat during the last year. Weaving, tailgating, distracted drivers, and unsafe lane changes were some of the unsafe behaviors identified.

## FUN NHTSA Facts

- Aggressive drivers are more likely to drink and drive or drive unbelted.
- Aggressive driving can easily escalate into an incident of road rage. Motorists in all 50 states have killed or injured other motorists for seemingly trivial reasons. Motorists should keep their cool in traffic, be patient and courteous to other drivers, and correct unsafe driving habits that are likely to endanger, antagonize or provoke other motorists.
- More than half of those surveyed by NHTSA admitted to driving aggressively on occasion.

## FUN NHTSA Facts

- Only 14 percent felt it was "extremely dangerous" to drive 10 miles per hour over the speed limit.
- 62 percent of those who frequently drive in an unsafe and illegal manner said they had not been stopped by police for traffic reasons in the past year.
- The majority of those in the NHTSA survey (52 percent) said it was "very important" to do something about speeding. Ninety-eight percent of respondents thought it "important" that something be done to reduce speeding and unsafe driving.

## Road Rage v. Aggressive Driving

- Road rage differs from aggressive driving. It is a criminal offense and is "an assault with a motor vehicle or other dangerous weapon by the operator or passenger(s) of one motor vehicle on the operator or passenger(s) of another motor vehicle or is caused by an incident that occurred on a roadway

## Exercise

- Use Index in Binder
- Identify Offenses Which Are Aggressive Driving
- Identify Offenses Which Could be Aggressive Driving

## Offenses Identified as Aggressive Driving by NHTSA

- exceeding the posted speed limit,
- following too closely,
- erratic or unsafe lane changes,
- improperly signaling lane changes,
- failure to obey traffic control devices
  - stop signs,
  - yield signs,
  - traffic signals,
  - railroad grade cross signals, etc

## Is it really Reckless Driving or Deadly Conduct?

- Reckless Driving
  - 545.401 T.C.
  - 30 days and/or $200
  - Drives a Vehicle
  - Willful or Wanton Disregard
  - Safety of Persons or Property
- Deadly Conduct
  - 22.05 P.C.
  - Class A
  - Recklessly engages in conduct
  - Places another in imminent danger
  - Of Serious Bodily Injury

## Can't address it if we don't identify it.

- Judges
- Clerks
- Prosecutors
- Officers
- City Hall
- Public

## Sentencing Issues

- **DSC**
- **Multiple Offenses**
- **Fines**
- **Tailored Terms under 45.051**

We need to get to the point in society, where aggressive driving simply is not acceptable.

To reduce injuries and deaths resulting from aggressive driving, public awareness must be raised.

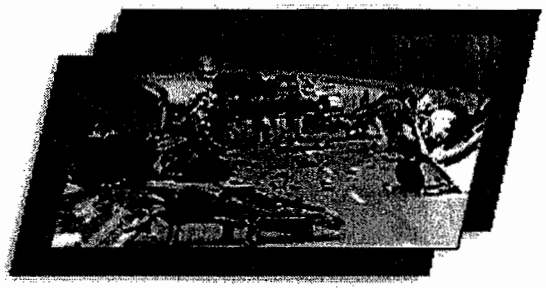
Prosecutors should develop guidelines on the uniformity and consistency in charging and disposing of cases.

Law enforcement should reflect the seriousness by convicting the aggressive driver of every violation committed.

# AGGRESSIVE DRIVING ENFORCEMENT

## STRATEGIES FOR IMPLEMENTING BEST PRACTICES

NHTSA
People Saving People
www.nhtsa.dot.gov



## Preface

Law enforcement agencies throughout the country are improving traffic safety in their jurisdictions by reducing the incidences of aggressive driving, speeding and red light running.

The purpose of this guide is to provide step-by-step assistance to law enforcement personnel to develop an aggressive driving enforcement program. A number of suggestions are provided that will help law enforcement agencies design and implement an effective aggressive driving program.

In addition, the guide will look at a number of agencies that are conducting successful aggressive driving enforcement programs. These programs have changed behaviors and attitudes and have achieved results. We will describe what these agencies have learned, their different approaches and what technology they used. In the end, it is hoped that law enforcement agencies will benefit from reading about these programs when they design a program for their area.

## Define Aggressive Driving

As law enforcement agencies develop their programs, they should define aggressive driving based on their state laws, customs and practices by the agency, and by the public's understanding.

The National Highway Traffic Safety Administration (NHTSA) defines aggressive driving as, "when individuals commit a combination of moving traffic offenses so as to endanger other persons or property." Some other communities define aggressive driving as "the operation of a motor vehicle involving three or more moving violations as part of a single continuous sequence of driving acts, which is likely to endanger any person or property."

To avoid conflict with the term road rage, departments should clearly identify that issue and train their officers to use the correct terminology during the program as well as during traffic stops and public information opportunities. Road rage differs from aggressive driving. It is a criminal offense and is "an assault with a motor vehicle or other dangerous weapon by the operator or passenger(s) of one motor vehicle on the operator or passenger(s) of another motor vehicle or is caused by an incident that occurred on a roadway."

Some behaviors typically associated with aggressive driving include: exceeding the posted speed limit, following too closely, erratic or unsafe lane changes, improperly signaling lane changes, failure to obey traffic control devices (stop signs, yield signs, traffic signals, railroad grade cross signals, etc.). Law enforcement agencies should include red light running as part of their definition of aggressive driving. NHTSA calls the act of red light running as one of the most dangerous forms of aggressive driving.

## Introduction

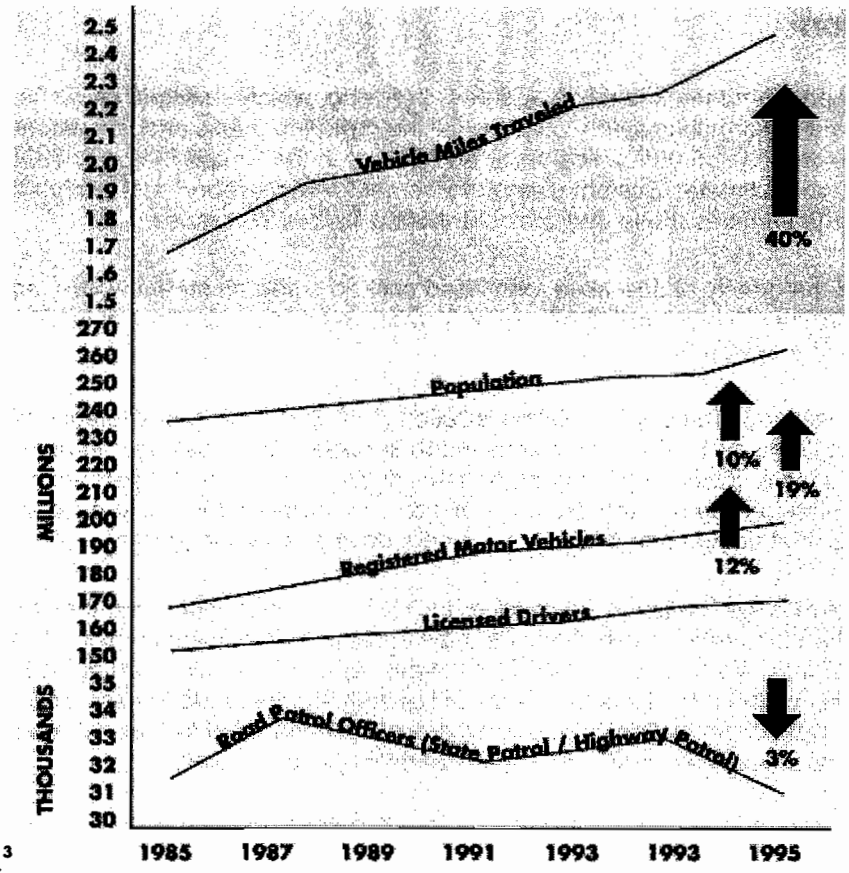
A traffic safety phenomenon known as aggressive driving, which emerged as an "issue of the 90's," threatens to be a major public safety concern for the motoring public and law enforcement into the 21st Century. There were 6,335,000 police-reported crashes in the United States in 1998 according to NHTSA's General Estimates System. Law enforcement officers report that many aggressive driving behaviors are the same as those that are contributing factors in crashes.

To understand the gravity of this issue, one need only do a search on the words "aggressive driving" on the Internet. More than three million hits appear, ranging from congressional testimony to articles in newspapers and magazines.

The National Highway Traffic Safety Administration (NHTSA) published a telephone survey of 6,000 drivers, sixteen years and older, who discussed their experiences, beliefs and behaviors regarding speeding and unsafe driving, including aggressive driving. More than 60 percent of the drivers interviewed believe that unsafe driving by others is a major personal threat to them and their families. Three out of four drivers feel that doing something about unsafe driving is very important. [1]

The motoring public also believes aggressive driving is a huge problem and they fear for their own safety, maybe more than they fear impaired drivers. Law enforcement officers continue to see lives ruined because of motor vehicle crashes caused by drivers venting frustration and aggression. In turn, insurance companies observe the increase in numbers of crashes and the need to pass on these increased costs to the consumer. Civic organizations and private groups see the need to offer advice to their members and form alliances to educate them about the risks of driving aggressively.

So, what is causing the increase in aggressive driving? We know that congestion is a contributing cause.[2] Studies have shown that the number of motor vehicles registered rose 19 percent over the past ten years, reflecting an increase in population. The number of licensed drivers rose 12 percent during the same period. At the same time, the number of law enforcement officers available to enforce laws has decreased. For example, state police and highway patrol agencies have seen a 3 percent decrease in the number of officers working traffic




enforcement.[3]

## Highway Use Trends Vs. Traffic Enforcement

(From NHTSA Fact Sheets and IACP's State and Provincial Division reports)

This means that as highway use increases, congestion is likely to continue to get worse. During the past ten years, the surface road miles increased only 1.1 percent while total miles traveled has increased 40 percent. Highway construction is not keeping up with the growth in the general population, or the increase in the number of licensed drivers, vehicles registered, and highway miles driven.

Frustration over congestion, especially in larger cities, is likely to continue to get worse. People feel the pressure of time and seem to live in the acceleration lane in all aspects of their lives–making every minute count. We believe these feelings on the roadways lead to high risk and aggressive driving, and that, in turn, leads to an increase in crashes.

Law enforcement agencies around the country must look for ways to address this issue. Many similarities exist between the aggressive driving issue today and the impaired driving issue of twenty-five years ago. It was socially acceptable to drink and sometimes comical to share stories of driving drunk and getting arrested. It was the practice in some communities for law enforcement officers to take impaired drivers home and make no arrests. However, because of the high numbers of motor vehicle deaths caused by impaired driving and the public outrage, public attitudes changed. Getting arrested for driving under the influence of alcohol is no longer acceptable. We need to get to that point in society, where aggressive driving simply is not acceptable.

## Involve Prosecutors and Judges

Heightened awareness of the aggressive driving issue will be aided by the education of prosecutors and judges. For example, if law enforcement agencies are considering non-traditional enforcement strategies, new technology or something unique, prosecutors and judges need to be involved early in the planning process so they will become familiar with the new techniques and new technology.

The successful programs described later in this document, involve judges and prosecutors in demonstrations, ride-alongs and other training opportunities to make them knowledgeable of the aggressive driving issues and aware of what the law enforcement agency is trying to accomplish. They should also be educated on traffic enforcement and, specifically, on how aggressive driving impacts the quality of life in their community.

Prosecutors should develop written guidelines that provide uniformity and consistency in charging and disposing of cases. In turn, law enforcement should provide detailed information to prosecutors, and prosecutors should provide information to judges, along with the citation and charging documents. This approach will help prosecutors in exercising discretion in the charging and disposition decision.

Briefing the prosecutor's office and the courts will allow them to prepare for the additional caseload. It also allows prosecutors to provide suggestions or information about specific laws that may strengthen the aggressive driving program. This is an important step because prosecutors and judges who are left out of the information loop may not fully support the aggressive driving program. This could be detrimental to the overall impact of the program. A briefing during the developmental stage of the enforcement program will avoid this problem.

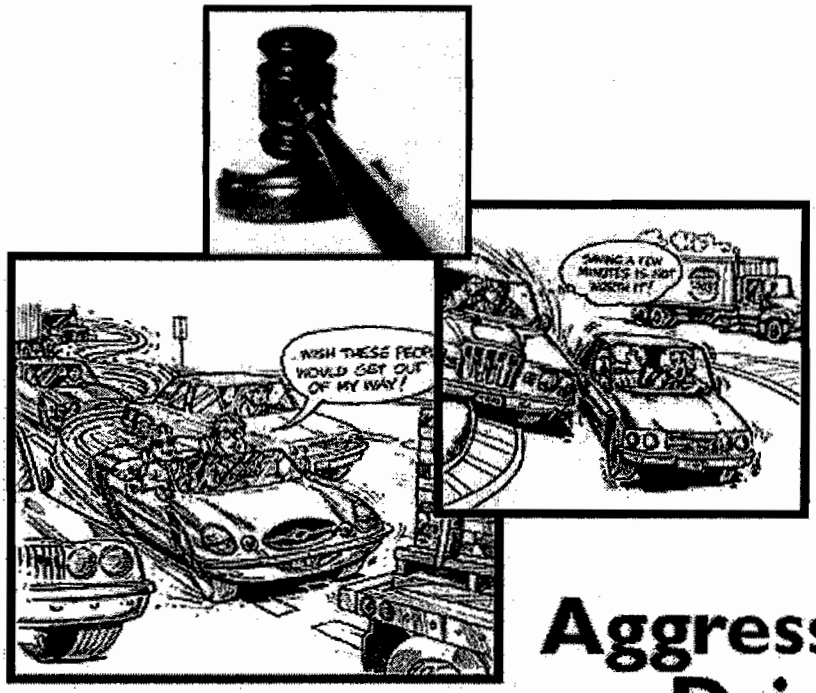
## Summary

This manual is intended to generate discussion and to assist law enforcement agencies who wish to develop aggressive driving enforcement programs. Much of the information used for this manual is based on successful experiences of law enforcement agencies. The recommended guidelines and suggestions can be adopted or modified to fit any size law enforcement agency, with any number of officers and other available resources.

Law enforcement officials are encouraged to contact the National Highway Traffic Safety Administration web site, **www.nhtsa.dot.gov/people/injury/enforce/adsped.htm** or to contact them at the following address for resources and to learn more about aggressive driving enforcement programs.

National Highway Traffic Safety Administration
Traffic Law Enforcement Division, NTS-13
400 Seventh Street, SW.
Washington, D.C. 20590
Phone: (202) 366-4295
Fax: (202) 366-7721

PROSECUTORS' PLANNER




# Aggressive Driving

- Intro/Aggressive Driving Prosecutor's Planner
- Sample Press Release – Aggressive Driving Prosecutor's Planner
- Sample Op-Ed Article – Aggressive Driving Prosecutor's Planner
- Sample Drop-In News Article – Aggressive Driving Prosecutor's Planner
- Talking Points – Aggressive Driving Prosecutor's Planner

**Aggressive Driving.**
- January 2001

U.S. Department of Transportation

**National Highway Traffic Safety Administration**


Drivers who routinely speed, run red lights and stop signs, tailgate and otherwise disregard the safety of other motorists are turning our highways into high-risk arenas. Of the approximately 6,800,000 crashes that occur in the United States each year, a substantial number are believed to be caused by aggressive driving—defined by the National Highway Traffic Safety Administration (NHTSA) as "the operation of a motor vehicle in a manner that endangers or is likely to endanger persons or property." Statistics compiled in 1997 by NHTSA and the American Automobile Association show that almost 13,000 people have been injured or killed since 1990 in crashes caused by aggressive driving. And while aggressive driving is a combination of traffic offenses, it can easily escalate into the criminal offense known as road rage. We're all too familiar with stories of motorists who've killed or injured other drivers for seemingly trivial reasons.

The public is crying out for relief from this threat they encounter every day. According to a NHTSA survey, more than 60 percent of drivers consider unsafe driving by others, including speeding, a major personal threat to themselves and their families. About 30 percent of respondents said they felt their safety was threatened in the last month, while 67 percent felt this threat during the last year. Weaving, tailgating, distracted drivers, and unsafe lane changes were some of the behaviors identified. A full 98 percent of respondents said it was important that something be done to reduce speeding and unsafe driving.

NHTSA research shows that compliance with, and support for, traffic laws can be increased through aggressive, targeted enforcement combined with a vigorous public information and education program. As a prosecutor with the power and influence to make a significant impact on behalf of concerned citizens, you have many avenues for leading your community in the fight against dangerous drivers:

- Educate the public about situations that precipitate aggressive driving behavior and encourage appropriate responses.
- Contact different groups to help educate the public and raise awareness, such as insurers and insurance consortiums, educators, the medical community, media outlets, community leaders, church and civic groups, and drivers age 16 to 30—the most common offenders.

- Support stepped-up police enforcement of traffic safety laws. Penalize violators—especially repeat offenders—to the fullest extent of the law.
- Develop charging and sentencing guidelines for prosecution and law enforcement; the charging decision can rest with the arresting officer at the misdemeanor level, but should be referred to the prosecutor at the felony level.
- Pursue more varied and innovative sentencing strategies, including graduated penalties for escalating offenses, probation, possible incarceration, mandatory penalties in certain circumstances, community service, anger management classes, restitution and more.
- Become an expert on the technology being used to fight aggressive driving, such as radar, laser and auto sensing; share your knowledge with others in law enforcement.
- Educate legislaters in your state to support aggressive driving legislation in your state to improve funding of prosecutorial efforts, increase fines and penalties, develop state education programs, emphasize seatbelt laws and legislate traffic camera radar devices.
- Submit op-ed and news articles to your local newspapers; samples are enclosed for your convenience in this kit.

When Maryland launched its "Aggressive Driver Campaign" in 1995, with an emphasis on public information, education and enforcement, instead of receiving the negative feedback which usually accompanies beefed up enforcement efforts, the media and the public praised the Maryland state police for their efforts. The public's perception was that the police were "out there to catch the other guy." And the program has worked. Fatalities have declined dramatically.

The same can happen in your jurisdiction. Support a zero tolerance policy for aggressive driver violations. Take dangerous motorists out of the driver's seat.

**Talking Points**

- The National Highway Traffic Safety Administration (NHTSA) defines aggressive driving as "the operation of a motor vehicle in a manner that endangers or is likely to endanger persons or property"—a traffic and not a criminal offense like road rage. Examples include speeding or driving too fast for conditions, improper lane changing, tailgating and improper passing.
- Approximately 6,800,000 crashes occur in the United States each year; a substantial number are estimated to be caused by aggressive driving.
- 1997 statistics compiled by NHTSA and the American Automobile Association show that almost 13,000 people have been injured or killed since 1990 in crashes caused by aggressive driving.
- According to a NHTSA survey, more than 60 percent of drivers consider unsafe driving by others, including speeding, a major personal threat to themselves and their families.
- About 30 percent of respondents said they felt their safety was threatened in the last month, while 67 percent felt this threat during the last year. Weaving, tailgating, distracted drivers, and unsafe lane changes were some of the unsafe behaviors identified.
- Aggressive drivers are more likely to drink and drive or drive unbelted.
- Aggressive driving can easily escalate into an incident of road rage. Motorists in all 50 states have killed or injured other motorists for seemingly trivial reasons. Motorists should keep their cool in traffic, be patient and courteous

to other drivers, and correct unsafe driving habits that are likely to endanger, antagonize or provoke other motorists.

- More than half of those surveyed by NHTSA admitted to driving aggressively on occasion.
- Only 14 percent felt it was "extremely dangerous" to drive 10 miles per hour over the speed limit.
- 62 percent of those who frequently drive in an unsafe and illegal manner said they had not been stopped by police for traffic reasons in the past year.
- The majority of those in the NHTSA survey (52 percent) said it was "very important" to do something about speeding. Ninety-eight percent of respondents thought it "important" that something be done to reduce speeding and unsafe driving.
- Those surveyed ranked the following countermeasures, in order, as most likely to reduce aggressive and unsafe driving behaviors: (1) more police assigned to traffic control, (2) more frequent ticketing of traffic violations, (3) higher fines, and (4) increased insurance costs. Increased police enforcement was rated "Number 1," both for effectiveness and as a measure acceptable to the public to reduce unsafe and illegal driving.
- NHTSA research shows that compliance with, and support for, traffic laws can be increased through aggressive, targeted enforcement combined with a vigorous public information and education program.
- When Maryland launched its "Aggressive Driver Campaign" in 1995, with an emphasis on public information, education and enforcement, the media and the public praised the state police for their efforts. The public's perception was that the police were "out there to catch the other guy." Related fatalities have declined dramatically.
- According to State Farm Insurance, the number of drivers on the road is increasing. In 1990, an estimated 91 percent of people drove to work, and commuters in one-third of the largest cities spent well over 40 hours a year in traffic jams.

# TRAFFIC OFFENSES TITLES

**BASED ON CHANGES FROM THE 79TH LEGISLATURE, REGULAR SESSION**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| **BICYCLE OFFENSES** | |
| Carried Articles so as to Interfere With Handling of Bicycle | 551.102(c) |
| Clung to Vehicle on Bicycle, Coaster, Roller Skates, Sled or Toy Vehicle | 551.102(d) |
| | |
| Electric Bicycles ; Regulation of | 551.106 |
| | |
| Failure to Keep Bicycle on Right Side of Roadway | 551.103(a) |
| Failure to Ride in Single Lane When Riding Two Abreast | 551.103(c) |
| | |
| No Brake or Defective Brake on Bicycle or Moped | 551.104(a) |
| No Red Reflector or Red Light or Defective Reflector or Red Light on Rear of Bicycle or Moped--Nighttime | 551.104(b) |
| No White Light or Defective Light on Front of Bicycle or Moped--Nighttime | 551.104(b) |
| | |
| Rider Commit Any Applicable Hazardous Traffic Violation (specify applicable violation) | 551.101 |
| Rode Improperly | 551.102 |
| | |
| **DRIVER LICENSE VIOLATIONS** | |
| Display Altered, or Fictitious DL (specify) | 521.451(1) |
| Driving In Violation of Suspension (Driving While License Suspended) – S/R | 521.457(a) |
| Driving While License Invalid (Driving While License Suspended) - D/L | 521.457 |
| Driving With Out-of-State Driver License for More Than 30 Days | 521.029 |
| | |
| **Electronically Readable Information on DL: Sold or Disseminated to Third Party** | **HSC §161.0825** |
| Electronically Readable Information on DL: Accesses or Uses | 521.126(b) |
| Electronically Readable Information on DL: Compiles Database | 521.126(c) |
| Employed Unlicensed Driver | 521.459(b) |
| Employ Unauthorized School Bus Driver | 521.022 |
| Expired Driver's License | 521.021; 521.026 |
| | |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Fail to Display Court Order (Occupational License) | 521.253 |
| Fail to Display DL | 521.025 |
| Fail to Report Change of Address or Name | 521.054 |
| False Statement on DL Application | 521.451(6) |
| False Swearing to or Affirming an Application for DL or ID Certificate | 521.454 |
| Fictitious Driver's License In Possession | 521.451(1) |
| Forging or Counterfeiting DL or ID Certificate | 521.456 |
| | |
| Improper Driver's License for Type Vehicle (specify) | 521.085; 521.122 |
| | |
| More Than One Valid DL in Possession | 521.451(5) |
| | |
| No Driver's License (when unlicensed) | 521.021 |
| No Motor-Assisted Bicycle Operator's License (Class M License) | 521.224; 521.225 |
| | |
| Permit Unlawful use of DL (lend to another) | 521.451(2) |
| Permit Unlicensed Minor to Drive (parent or guardian) | 521.458(a) |
| Permit Unlicensed Person to Drive (all except parent or guardian) | 521.458(b) |
| Present DL Issued to Another Person | 521.451(3) |
| **Purchase of Alcohol for Minor or Furnishing Alcohol to Minor: Automatic Susp; License Denial** | **521.351** |
| | |
| Refuse to Surrender; Return Driver License - Suspended, Revoked, Cancelled, Disqualified | 521.315; 521.451(4) |
| Rent Motor Vehicle to Unlicensed Person | 521.460 |
| | |
| Sell, Manufacture, Distribute, or Possess Fictitious DL or ID Certificate | 521.453, 521.451(1) |
| Surcharge on DL Violation, Failure to Pay | 708.152 |
| | |
| < 18: Operate Motor Vehicle with Restrictions: **Including Wireless Communications Device** | 545.424 |
| Use of Illegal DL or ID Certificate | 521.455 |
| | |
| Violate DL Restriction | 521.221(c) |
| Violate DL Restriction on Occupational License | 521.253 |
| | |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| **DRIVERS - MISCELLANEOUS VIOLATIONS** | |
| Aggravated Assault with Motor Vehicle | PC §22.02 |
| Alcoholic Beverage: Possession of in Motor Vehicle | PC §49.031 |
| | |
| Allow Dangerous Driver to Borrow Vehicle | 705.001 |
| Assault with Motor Vehicle | PC §22.01 |
| | |
| Backed so as to Interfere or Without Safety | 545.415(a) |
| Backed Upon Shoulder or Roadway of Controlled Access Highway | 545.415(b) |
| Bus Failed to Stop at RR Crossing | 545.253 |
| Bus Shifting Gears While Crossing RR Track | 545.253(b) |
| | |
| Coasting (any vehicle, in neutral) | 545.406(a) |
| Coasting (truck, truck tractor, or bus; specify) With Clutch Disengaged | 545.406(b) |
| Criminally Negligent Homicide With Motor Vehicle | PC §19.05 |
| Crossed RR with Heavy Equipment Without Notice | 545.255(b) |
| Crossed RR with Heavy Equipment Without Stop or Safety | 545.255(c) |
| | |
| Disregard Police Officer | 542.501(1) |
| Disregard School Crossing Guard | 542.501(2) |
| Drawbar Over 15 Feet | 545.409(a)(2) |
| Drive Controlled Access Highway | 545.064 |
| Drive on Improved Shoulder | 545.058 |
| Drive On or Across Streetcar Tracks Where Prohibited | 545.203 |
| Driver Opened Door (or leave door open) in Moving Lane of Traffic | 545.418 |
| Drive on Sidewalk | 545.422 |
| | |
| Drove Without Being Secured by Safety Belt | 545.413(a) |
| Drove Without Lights - When Required | 547.302(a) |
| | |
| Electric Vehicle, Operation | 551.302;551.202; |
| | |
| Failed to Dim Headlights - Following | 547.333(c)(2) |
| Failed to Dim Headlights - Meeting | 547.333(c)(1) |
| Failed to Give Way When Overtaken | 545.053(b) |
| Failed to Give Way When Overtaken by Streetcar | 545.203(a) |
| Failed to Keep Right On Mountain Road | 545.405 |
| Failed to Maintain Financial Responsibility | 601.191 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Failed to Stop - Emerging From Alley, Driveway or Building (specify) | 545.256 |
| Failed to Stop for Approaching Train - Hazardous Proximity | 545.251(4) |
| Failed to Stop for Approaching Train - Whistled | 545.251(3) |
| Failed to Use Designated Lane (Slow or Direction) | 545.060(c) |
| Failed to Use Proper Headlight Beam | 547.333(c) |
| Failure to Appear | 706.004 |
| Failure to Pay or Satisfy a Judgment Ordering the Payment of a Fine | 706.004 |
| Failure to Stop/Permit Inspection, Petroleum Product Transport Vehicle | NRC §115.047 |
| Fleeing from Police Officer | 545.421 |
| | |
| Improper Use of Auxiliary Driving Lamps | 547.330 |
| Improper Use of Auxiliary Passing Lamps | 547.329 |
| Improper Use of Fog Lamps | 547.328 |
| Improper Use of Spot Lamps | 547.327 |
| Increased Speed While Being Overtaken | 545.053(b) |
| Involuntary Manslaughter With Motor Vehicle, Airplane, Helicopter, or Boat (DWI) | PC §49.08 |
| Involuntary Manslaughter With Motor Vehicle (not DWI) | PC §19.04 |
| | |
| More Than Four Driving Lamps Lighted | 547.302(d) |
| Motor-Assisted Scooters: Operation | **551.352** ~~**551.302**~~ |
| | |
| No White Flag on Tow Chain or Cable | 545.409(b) |
| | |
| Operate Motor Vehicle by Person < 18 | 545.424 |
| Operate Vehicle on Dune Seaward of Dune Protection Line | 750.003 |
| Operate Vehicle with Child <18 in Open Bed | 545.414 |
| | |
| Parked with Head Lamps Not Dimmed | 547.383(d) |
| Parked without Lights | 547.383(b) |
| Passengers (exceeding 3) or Load Obstructed Driver's View or Control | 545.417 |
| Persons Riding in Trailer or Semitrailor | 545.4191 |
| Prohibited Motor Vehicle on Controlled Access Highway | 545.065 |
| | |
| Reckless Driving | 545.401 |
| | |
| Safety Belt, Child, Required to be Secured by: ~~**>4 but**~~ <17 **and Not Required to be Secured Under** | 545.413(b)(2) |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| **545.412(a)** | |
| ~~**Safety Belt, Child, >5 but < 15 not Secured by**~~ | ~~**545.413(b)(2)**~~ |
| Safety Belt, Drove Without Being Secured by | 545.413(a) |
| Safety Seat, Child Passenger, Child < ~~Five Four and or~~ Less than 36 Inches in Height Not Secured by | 545.412(a) |
| | |
| School Bus Driver, Unauthorized | 521.022 |
| Slower Vehicle Failed to Keep Right | 545.051(b) |
| | |
| **Toll Road: Electronic Toll Collection Stolen or Insufficinet Funded Transponder** | **228.057** ~~**361.255**~~ |
| **Toll Road: Failure to Possess Evidence of Proper Payment** | **370.355(d)** |
| **Toll Road: Failure or Refusal to Pay** | **228.054** ~~**361.252**~~ |
| Toll, Turnpike Project: Failure to Pay | 370.177 |
| Too Many Auxiliary Driving Lamps | 547.330 |
| Too Many Auxiliary Passing Lamps | 547.329 |
| Too Many Fog Lamps | 547.328 |
| Too Many Spot Lamps | 547.327 |
| Turn so as to Impede or Interfere with Streetcar | 545.203(c) |
| | |
| Unauthorized Use of Siren, Whistle or Bell | 547.501(b) |
| | |
| Vehicle Hauling Explosives or Flammable Materials Failed to Reduce Speed at RR Crossing | 545.254(a) |
| Vehicle Hauling Explosives or Flammable Materials Failed to Stop at RR Crossing Inside Incorporated City or Town | 545.254(b) |
| Vehicle Registration Suspended: Permit Vehicle to be Operated | 601.371 |
| Violate DL Restriction (specify) | 521.221 |
| | |
| Warning Devices Not Displayed (flags, flares, fuses, reflectors) | 547.503; 547.504; 547.505; 547.506; 547.507 |
| **Wireless Communication Device Use Restriction: Operate Motor Vehicle by Person <18 with Restrictions** | 545.424**(a)(3)** |
| **Wireless Communications Device Use Restriction: Operate Motorcycle or Moped by Person < 17 with Restrictions** | 545.424**(b)(2)** |
| **Wireless Communication Device Use Restriction: Operating Passenger Bus** | **545.425** |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| | |
| | |
| **DWI** | |
| 1st Offense | PC §49.04(b) |
| 2nd Offense | PC §49.09(a) |
| 3rd or Subsequent Offense | PC §49.09(b) |
| | |
| Intoxication Assault (Serious Bodily Injury) | PC §49.07 |
| Intoxication Manslaughter (Involuntary Manslaughter - DWI) | PC §49.08 |
| | |
| Open Container | PC §§49.031; 49.04(c) |
| | |
| **FOLLOWING** | |
| Following Too Closely | 545.062(a) |
| Following Too Closely - Caravan | 545.062(c) |
| Following Too Closely - Truck (or combination) | 545.062(b) |
| | |
| **HIGHWAY** | |
| **Barricades: Driving Around** | **472.022(a)(2)** |
| | |
| Flashing Light or Sign within 1,000 Feet of Intersection | 544.006(c) |
| | |
| **Obeying Warning Signs and** Tampering with Barricades | 472.022 |
| Obscuring or Interfering With Official Traffic Control Device or RR Sign | 544.005 |
| | 544.006(a) |
| | |
| Place or Maintain Unauthorized Sign, Signal or Device | 544.006(a) |
| | |
| **LEASE LAW** | |
| Fail to Display Letter of Acknowledgment | 641.025(d)(2) |
| Fail to Display Receipt for Certified Mail | 641.025(d)(1) |
| | |
| No Copy of Lease in Cab of Leased Motor Vehicle | 641.025(a)(1) |
| No Lease on File | 641.021 |
| No Lease Signs | 641.041; 641.042 |
| No Letter of Acknowledgment | 641.025 |
| No Letter Transmittal | 641.025 |
| No Receipt for Certified Mail | 641.025 |
| | |
| **MISCELLANEOUS VIOLATIONS** | |
| Coroner Fail to Report to DPS | 550.081 |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| | |
| Discarding Refuse in County Park | HSC §365.033 |
| Display Traffic Sign or Signal Bearing Advertising | 544.006(b) |
| Disposing of Solid Wastes | HSC §365.012 |
| | |
| Erect Tent, Shelter, Booth or Structure at Rest Area Where Prohibited (specify) | 545.411(a) |
| Evading Arrest | PC §38.04 |
| | |
| Fail to Comply with Regulations Transporting Hazardous Materials | 644.151 |
| Fail to Display Certificate When Hauling Citrus Fruits | AGC §102.104 |
| Fail to Remove Injurious Material From Highway | 600.001 |
| Fail to Properly Identify Vehicle Hauling Citrus Fruit | AGC §102.104 |
| Fail to Secure Child in Safety Seat System | 545.412 |
| False Report to Peace Officer | PC §37.08 |
| | |
| Illegal Dumping From Vehicle | HSC §365.016 |
| | |
| Judge or Clerk Fail to Report | 543.203 |
| | |
| Leave Refuse on Highway (garbage, rubbish, junk, etc.; specify) | HSC §365.013 |
| Leave Unattended Child in Motor Vehicle | PC §22.10 |
| | |
| Operate Unlicensed Vehicle Storage Facility | Occ Ch. 2303 |
| Owner Fail to Mark Special Mobile Equipment | 622.072 |
| Owner (parent or guardian) Permit Violation (hazardous) | 542.302 |
| Owner Permit Violation (not hazardous) | 542.302 |
| | |
| Passenger Interfered with Driver's View or Control | 545.206; 545.417(b) |
| Permit Display of Unauthorized Traffic Control Device (local authorities) | 544.002(c) |
| Permit Livestock to Roam | AGC §143.108 |
| Permit Unlicensed Minor to Drive (parent or guardian) | 521.458(a) |
| Permit Unlicensed Person to Drive (all except parent or guardian) | 521.458(b) |
| Person (other than driver) Opened Door or Leave Door Open in Moving Lane of Traffic | 545.418 |
| Personal Property on Roadway: Reimburse for Removal | 545.3051 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| | |
| Rent Motor Vehicle to Unlicensed Person | 521.460 |
| Ride - Not Secured by Safety Belt (when required) | 545.413(a) |
| Riding In House Trailer | 545.419 |
| | |
| Stay at Rest Area Longer Than Permitted | 545.411 |
| | |
| Throwing Injurious Substance on Highway | HSC §365.014 |
| **Traffic - Control Signal Preemption Device: Uses, Sells, offers for Sale, Purchases or Possesses for Use or Sale** | **544.0055** |
| Train Obstructing Crossing | 471.007 |
| Transport Animals without Permit or with Fraudulent Permit | AGC §146.008 |
| **Transport Loose Material, Aggregates: Covered and Secured** | **725.021(e)** |
| Transport Unmarked Special Mobile Equipment (documented) | 622.073 |
| Transport Unmarked Special Mobile Equipment (undocumented) | 622.073 |
| | |
| Violate Regulation by Roadside Vendor | 285.004 |
| | |
| Wrecker Driver Failed to Remove Glass (etc.) From Highway | 600.001 |
| | |
| **MOTOR CARRIER LAW** | |
| Bond, Motor Transportation Broker | 646.004 |
| | |
| Failure to Register Vehicle | 645.004 |
| | |
| Inspection of Premises (Vehicle) | 644.151 |
| | |
| No Liability Insurance: May Detain or Impound Commercial Vehicle | 643.104(d) |
| | |
| **Violate Motor Carrier Registration** | **643.253** |
| Violate Motor Carrier Regulations | 643.252 |
| Violate Motor Carrier Safety Standards | 644.001 et seq |
| | |
| **MOTORCYCLE VIOLATIONS** | |
| Carry Motorcycle Passenger without Approved Headgear | 661.003(b) |
| | |
| Motorcycle Passenger without Approved Headgear | 661.003(a) |
| | |
| Operate Motorcycle without Approved Headgear | 661.003(a) |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Operate Motorcycle/Moped by Person < 17 with Restrictions: **Including Wireless Communications Device** | 545.424 |
| | |
| Too Many Riders | 545.416 |
| | |
| **OVERSIZE VIOLATIONS** | |
| Illegal Load Extensions (Front or Rear) | 621.206 |
| Illegal Load Extension to Left or Right on Passenger Car | 621.201 |
| | |
| No Valid Permit - MH | 623.092 |
| | |
| Overheight | 621.207 |
| Overlength Combination | 621.205(a) |
| Overlength - Single Trailer Operated with Truck Tractor | 621.205(a) |
| Overlength - Twin Trailers Operated with Truck Tractor | 621.205(a) |
| Overlength Vehicle (single) | 621.205(b) |
| Overwidth (over 96") | 621.201(b) |
| Overwidth (over 102") | 621.201(a) |
| | |
| Pull More Than One Trailer or Other Vehicle (when not authorized to do so) | 545.409 |
| Pull More Than Two Trailers or Vehicles | 621.205 |
| | |
| Victoria County Navigation District: Overweight Permits | 623.230 |
| | |
| **OVERTAKING** | |
| Cut in After Passing | 545.053 |
| | |
| Failed to Pass to Left Safely | 545.053 |
| Failed to Pass to Right Safely | 545.057 |
| Failed to Stop or Remain Stopped for School Bus (specify) | 545.066 |
| Failed to Stop for Streetcar or Stop at Wrong Location | 545.202 |
| | |
| Illegal Pass on Right | 545.057 |
| | |
| Passed - Insufficient Clearance | 545.054 |
| Passed Streetcar on Left (in motion or stopped) | 545.201(a) |
| Passed Streetcar on Left without Reducing Speed or Without Caution | 545.201(b) |
| Passed Vehicle Stopped for Pedestrian | 552.003(c) |
| | |
| | |
| **PARKING VIOLATIONS** | |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Disabled Parking Placard: Sale, Possession, Use of Counterfeit | 681.011 |
| | |
| Loaned Disabled Person ID Card to Another for Unlawful Purpose | 681.011(d) |
| | |
| Park, Stand or Stop in Prohibited Area (signs by Highway Department) | 545.303(d) |
| Parked All Night Where Prohibited | City Ordinances |
| Parked and Failed to Set Brakes | 545.404 |
| Parked at Angle (where not permitted) | 545.303(c) |
| Parked Facing Traffic | 545.303(b) |
| Parked in Block Where Fire Engine Stopped | 545.407(a) |
| Parked in Prohibited Area | 545.302(c)(2) |
| Parked on Grade-Failed to Turn Wheels | 545.404 |
| Parked Overtime | City Ordinances |
| Parked so as to Block Access to Curb Ramp, Aisle Architectural Improvement Designed to Aid the Handicapped | 681.011(c) |
| | |
| Parked a Vehicle Displaying Special Device or Temporarily Disabled Person ID Card in Parking Space or Area When Not Authorized (not disabled or transporting disabled person) | 681.011(a) |
| Parked Without Locking Ignition and/or Removing Key (specify) | 545.404 |
| Parked Without Stopping Engine | 545.404 |
| Parked with Wheels (left or right) over 18" From Curb or Edge of Roadway | 545.303(a) |
| | 545.303(b) |
| Parked Where Ambulance Summoned | 545.407(b)(2) |
| Parked within 50 Feet of RR Crossing | 545.302(c)(1) |
| Parking Meter Violation | City Ordinances |
| Parking Unlawfully, Unauthorized | 545.304 |
| Pulling Away-Unsafe Start from Parked Position (stopped or standing) | 545.402 |
| | |
| Stand or Park in Front of Public or Private Driveway | 545.302(b)(1) |
| Stand or Park in Prohibited Area (standing) | 545.302(b)(6) |
| Stand or Park within 15 Feet of Fire Hydrant | 545.302(b)(2) |
| Stand or Park within 20 feet of Crosswalk (at intersection) | 545.302(b)(3) |
| Stand or Park within 20 Feet of Driveway or Opposite Entrance to Fire Station | 545.302(b)(5) |
| Stand or Park within 30 Feet of Traffic Control Device | 545.302(b)(4) |
| | |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Stop, Stand or Park Alongside or Opposite Street Excavation or Obstruction | 545.302(a)(6) |
| Stop, Stand or Park Between Safety Zone and Curb | 545.302(a)(5) |
| Stop, Stand or Park - Double | 545.302(a)(1) |
| Stop, Stand or Park in Prohibited Area (stopping) | 545.302(a)(9) |
| Stop, Stand or Park on Crosswalk | 545.302(a)(4) |
| Stop, Stand or Park on a Sidewalk | 545.302(a)(2) |
| Stop, Stand or Park on Main Traveled Way (outside of business or residence district) | 545.301 |
| Stop, Stand or Park on Railroad Track | 545.302(a)(8) |
| Stop, Stand or Park Upon Bridge or in Tunnel | 545.302(a)(7) |
| Stop, Stand or Park Within an Intersection | 545.302(a)(3) |
| | |
| **Unauthorized Vehicles: Tow Truck/Parking Facilities Violation for Removal** | **684.085** |
| | |
| Valet Parking: Financial Responsibilty Required | 686.002 |
| Valet Parking Employee: Operation of MV without Financial Responsibility | 686.006 |
| | |
| **PEDESTRIANS - MISCELLANEOUS** | |
| Crossed Between Intersections Where Prohibited | 552.005(b) |
| | |
| Disobeyed Police Officer | 542.501 |
| | |
| Jaywalking (crossed roadway intersection diagonally) | 552.005(c) |
| | |
| Non-Motorized Vehicle (specify) on Prohibited Roadway | 545.065 |
| | |
| Pedestrian Entering Path of Vehicle | 552.003(b) |
| Pedestrian Failed to Yield ROW to Vehicle (when overhead crossing or tunnel provided) | 552.005(a)(2) |
| Pedestrian Failed to Yield ROW to Vehicle not at Crosswalk | 552.005(a)(1) |
| Pedestrian on Prohibited Roadway | 545.065 |
| Public Intoxication - Pedestrian (pedestrian on or adjacent to public highway) | PC §49.02 |
| | |
| Stood in Roadway to Solicit Ride, Contributions, Employment, or Business (specify) | |
| Stood on or Near Street or Highway to Solicit Guarding Vehicle | 552.007(b) |
| | |
| Use Left Half of Crosswalk | 552.004 |
| | |
| Walked on Highway with Traffic (no sidewalks) | 552.006(b) |
| Walked on Roadway Where Sidewalks Provided | 552.006(a) |
| Walked on Roadway Where Sidewalks Provided | 552.006(a) |
| | |
| **REGISTRATION AND TITLE VIOLATIONS** | |
| Alter Certificate of Title | 501.151(a) |
| Alter (change, erase, mutilate) Vehicle Identification Number (or serial number) of Vehicle or Part | 501.151(b) |
| Alter, Change or Mutilate Transfer Papers | 520.035(b)(2) |
| Apply for Registration without Motor Number | 520.011 |
| | |
| Buyer Accepts Papers Wholly or Partially Blank | 520.035(b)(1) |
| | |
| Dealer's License Violation | 503.094; 503.095 |
| Display Expired License Plates | 502.404(b) |
| Display Fictitious, Altered, Or Obscured License Plates/Registration Insignia | 502.409 |
| Display License Plate: Attached Illuminated Device | 502.409(a)(6) |
| Display Unclean License Plate | 502.409 |
| | |
| Fail to Deliver Certificate of Title at Time of Sale | 520.022 |
| Fail to Display License Receipt (commercial motor vehicle) | 621.501 |
| Fail to Present Receipt for New Motor Number to Tax Collector | 520.013 |
| Fail to Surrender Certificate of Title When Vehicle Junked | 501.091 |
| Farm License Violation | 502.163 |
| | |
| No In-Transit License | 503.023; 503.069 |
| | |
| Operate Motor Vehicle With Fictitious License Plate | 502.408 |
| Operate Motor Vehicle Without License Plates (or with one plate) | 502.404 |
| Operate Unregistered All Terrain | 502.406 |

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| TITLE | TRC (unless otherwise noted) |
|---|---|
| Vehicle | |
| Operate Unregistered Motor Vehicle | 502.402 |
| Operate Unregistered Tow Truck | 502.402 |
| Operate With License for Other Class Vehicle | 502.403 |
| | |
| Place Unauthorized Motor Number on Motor Vehicle | 501.151(b) |
| Possess, Sell or Offer for Sale Motor Vehicle or Part with Vehicle Identification Number Removed, Changed or Obliterated | 501.158 |
| | |
| Sell Unregistered Second-Hand Vehicle | 502.022 |
| Soil Conservation Equipment Operated on Highway – Failure to Register | 502.188(e) |
| | |
| Tax Collector Register Motor Vehicle Without Motor Number | 520.014 |
| Transfer Motor Vehicle With Papers Blank or Partially Blank | 520.035 |
| | |
| **RIGHT OF WAY** | |
| Failed to Yield at Stop Intersection | 545.151(a) |
| | 545.153 |
| Failed to Yield at Yield Intersection | 545.151(a) |
| | 545.153(c) |
| Failed to Yield ROW - Alley, Private Drive, Building | 545.155 |
| | 545.256 |
| Failed to Yield ROW - at Open Intersection (specify type) | 545.151 |
| Failed to Yield ROW - Changing Lanes | 545.061 |
| Failed to Yield ROW - on Left at Obstruction | 545.051(a)(2) |
| Failed to Yield ROW on Green Arrow Signal | 544.007(c); 552.001(b) |
| Failed to Yield ROW on Green Signal | 544.007(b); 552.001(b) |
| Failed to Yield ROW to Emergency Vehicle | 545.156; 545.204 |
| Failed to Yield ROW Turning Left at Intersection, Alley, Private Road or Driveway | 545.152 |
| Failed to Yield ROW - Turning on Red Signal | 544.007(d) |
| | |
| Passed Stationery Emergency Vehicle | 545.157 |
| | |
| **SIGNAL INTENTION** | |
| Failed to Signal for Stop | 545.105 |
| Failed to Signal Lane Change | 545.104 |
| Failed to Signal Required Distance | 545.104 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| | |
| Failed to Signal Start From Parked Position | 545.104 |
| Failed to Signal Turn (including moving right or left) | 545.103; 545.104 |
| Failed to Signal With Turn Indicator | 545.106(b) |
| Failed to Sound Horn - Mountain Road | 545.405 |
| | |
| Improper Turn or Stop Signal | 545.106; 545.107 |
| Improper Use of Turn Indicator | 545.104 |
| | |
| School Bus Driver Failed to Activate All Flashing Warning Signal Lights (or other equipment) | 547.701 |
| | |
| **SPEEDING** | |
| Fail to Control Speed | 545.351 |
| | |
| Impeding Traffic | 545.363 |
| | |
| **Oversize/overwieght Vehicle Permit – Chambers Co.: speed limit** | **623.257** |
| | |
| Port Authority Permitted Vehicle | 623.217 |
| | |
| Racing - Drag Racing - Acceleration Contest | 545.420 |
| Racing – Drag Racing :DL Suspension | 521.350 |
| | |
| Speed Under Minimum | 545.363 |
| Speeding (exceed prima facie limit at time and place for that type vehicle) | 545.351; 545.352 |
| Speeding – Beach Area | 545.352(b)(5) |
| Speeding – Mobile Home | 623.102 |
| Speeding Motor-Driven Cycle (over 35) | 545.361 |
| Speeding - Zoned | 545.353; 545.354; 545.355; 545.356; 545.357; 545.358; 545.359; 545.360 |
| Speeding - Zoned (inclement weather, signs posted) | 545.353 |
| Speeding - 10 m.p.h. Maximum for Solid Tire | 545.361 |
| | |
| Unsafe Speed | 545.351 |
| | |
| **TOW TRUCKS** | |
| Cab, Failure to Maintain Card | 643.253 |
| Charges fee greater than authorized | 643.253(d) |
| Failure to Maintain Insurance | 643.253 |
| Failure to Register Vehicle Correctly | 643.253 |
| | |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| **TRAFFIC SIGNALS - PEDESTRIANS** | |
| Disregarded Green Turn Signal Arrow | 552.001(b) |
| Disregarded Pedestrian Control Signal | 552.002 |
| Disregarded Red Signal (Traffic Light) | 552.001(c) |
| Disregarded Yellow Signal (Traffic Light) | 552.001(c) |
| | |
| **TRAFFIC SIGNS, SIGNALS AND ROAD MARKINGS** | |
| Changed Lane When Unsafe | 545.060 |
| | |
| Disregarded Flashing Red Signal (at stop sign, etc.) | 544.008 |
| Disregarded Flashing Yellow Signal | 544.008 |
| Disregarded Lane Control Signal | 544.009 |
| Disregarded No Lane Change Device | 545.060 |
| Disregarded No Passing Zone | 545.055 |
| Disregarded Official Traffic Control Device | 544.004 |
| Disregarded RR Crossing Gate or Flagman | 545.251 |
| Disregarded Red Light (traffic signal) | 544.007(d) |
| Disregard Signal at RR Crossing | 545.251 |
| Disregarded Stop Sign | 545.151 |
| Disregardes Warning Signs **or Barricades** | 472.022 |
| Drove Through Safety Zone | 545.403 |
| | |
| Failed to Drive in Single Lane | 545.060 |
| Failed to Stop at Designated Point at Stop Sign) | 544.010 |
| Failed to Stop at Designated Point at Yield Sign | 544.010 |
| Failed to Stop at Marked RR Crossing | 545.252 |
| Failed to Stop at Proper Place at Traffic Light | 544.007(d) |
| Failed to Stop at Proper Place - Flashing Red Signal | 544.008 |
| Failed to Stop at Proper Place - Not at Intersection | 544.007(g) |
| | |
| Heavy Equipment Disregarded Signal of Approaching Train (automatic signal, crossing gates, or flagman) | 545.255 |
| | |
| Lack of Caution on Green Arrow Signal | 544.007(c) |
| | |
| **TRAFFIC VIOLATIONS - MISCELLANEOUS** | |
| Crossing Fire Hose Without Permission | 545.205; 545.408 |
| | |
| Drive Into Block Where Fire Engine Stopped | 545.407 |
| Drive Where Ambulance Summoned | 545.407 |
| | |
| Fail to Comply with Requirements on Striking Fixtures or Landscaping on Highway | 550.025 |
| Fail to Comply With Requirements on Striking Unattended Vehicle | 550.024 |
| Fail to Cover Load to Prevent Spillage | 725.021 |
| Fail to Make Written Report of Accident | 550.061 |
| Fail to Report Accident - S/R (under S/R laws as required) | 601.004 |
| Fail to Report Injury Accident at Once (to proper authorities, etc.) | 550.026 |
| Fail to Stop and Render Aid After Train Accident | VCS 6419b |
| Fail to Stop and Render Aid - Felony | 550.021 |
| Fail to Stop and Render Aid - Misdemeanor | 550.022 |
| Fail to Surrender License Plates and/ or DL-S/R (under S/R laws, when required) | 601.373 |
| Failure to Appear (Traffic) | 543.009 |
| **Failure to Remove Driveable Vehicle After Accident on Freeway in Metropolitan Area** | **550.022(c-1)** |
| Following Ambulance | 545.407 |
| Following Fire Apparatus | 545.407 |
| | |
| Mobile Home: Compensation for Unlawful Movement | 623.105 |
| Modified or Weighted Motor Vehicle | 727.001 |
| | |
| No Escort Vehicle – Mobile Home | 623.099 |
| No Liability Insurance | 601.191 |
| No Liability Insurance as Required – Mobile Home | 623.103 |
| No Red Flags - Escort – Mobile Home | 623.099 |
| No Wide Load Signs – Mobile Home | 623.099 |
| Non-Motorized Vehicle (specify) on Prohibited Roadway | 545.065 |
| | |
| Obstructing Railway Crossing | 471.007 |
| Operation Motor Vehicle Protected Freshwater Area | PWC §90.002 |
| Overcrowded School Bus | 750.001 |
| | |
| Parked in Block Where Fire Engine Stopped | 545.407 |
| Parked Where Ambulance Summoned | 545.407 |
| | |
| | |
| | |

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| TITLE | TRC (unless otherwise noted) |
|---|---|
| School Bus Driver Fail to Activate All Flashing Warning Signal Lights | 547.701 |
| | |
| Transponder, Insufficiently Funded: Seizure by Peace Officer | 284.213(b) |
| | |
| Unnecessary Use of Horn | 547.501 |
| | |
| Wrong Use of School Bus Signal | 547.701 |
| | |
| Violate Promise to Appear | 543.009 |
| | |
| **TURNING MOVEMENTS** | |
| Cut Across Driveway (sidewalk, parking lot, business or residential entrance) to Make Turn | 545.423 |
| Cut Corner Left Turn | 545.101 |
| | |
| Disregarded Turn Marks at Intersection | 545.101 |
| | |
| Made U-Turn on Curve or Hill | 545.102 |
| | |
| Turned Across Dividing Section | 545.063 |
| Turned From Wrong Lane | 545.101 |
| Turned When Unsafe | 545.103 |
| | |
| **VEHICLE - ALL TERRAIN VEHICLES** | |
| Operate All-Terrain Vehicle on Public Street, Road or Highway | 663.037 |
| Operate All-Terrain Vehicle Without Safety Certificate | 663.031; 663.032 |
| Operate All-Terrain Vehicle with Passenger on Public Property (Unless Equipped for Passengers) | 663.036 |
| Operate All-Terrain Vehicle Without Safety Helmet | 663.034 |
| Operate or Equip All-Terrain Vehicle with Modified Exhaust System or Spark Arrester | 663.033 |
| | |
| **VEHICLE - BRAKES** | |
| Brakes Improperly Adjusted | 547.402 |
| Brakes Not Maintained in Good Working Order | 547.402 |
| Brakes Not on All Wheels (when required) | 547.401 |
| Brakes Not on All Wheels - Motorcycle | 547.802 |
| | |
| Defective Air-Brake Reservoir | 547.406 |
| Defective (or no) Automatic Brake Application on Breakaway Trailer, Semi-trailer and Pole Trailer | 547.405 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Defective Brakes - Motorcycle or Motor-Driven Cycle | 547.408 |
| Defective Brakes (or no brakes) on Motor Vehicle, (trailer, semi-trailer, pole trailer or combination of vehicles, specify) | 547.401 |
| | |
| Inadequate Air Brake Reservoir | 547.406(a) |
| Inadequate Reservoir Safeguard (air or vacuum brakes, specify) | 547.406(c) |
| Inadequate Vacuum Brake Reservoir | 547.406(b) |
| | |
| No Automatic Brake Application on Breakaway (trailers, semi-trailers and pole trailers) | 547.405 |
| No Parking Brakes (or defective parking brakes) | 547.404 |
| No Single Control to Operate All Brakes | 547.402; 547.403 |
| No Two Means of Emergency Brake Operation (air brakes or vacuum brakes) | 547.405(a) |
| No Warning Devices on Brakes (other than gauges when vehicle equipped with both air and vacuum brakes) | 547.407(c) |
| No Warning Signal (other than pressure gauge) or Defective Warning Signal for Air Brakes | 547.407(a) |
| No Warning Signal (other than vacuum gauge) or Defective Warning Signal for Vacuum Brakes | 547.407(b) |
| | |
| Tractor Brakes Not Protected (in case of breakaway) | 547.405 |
| | |
| **VEHICLE LIGHTS, SIGNAL LAMPS AND REFLECTORS** | |
| Clearance (or Side Markers) Improperly Mounted | 547.354 |
| | |
| Defective Head Lamp(s) | 547.321, 547.302 |
| Defective Head Lamp on Motorcycle (or motor-driven cycle) | 547.801 |
| Defective Lamp(s) - Reflector(s) on Farm or Other Equipment | 547.371 |
| Defective Parking Lamp(s) | 547.383 |
| Defective Stop Lamp(s) | 547.323 |
| Defective Tail Lamp(s) | 547.322 |
| Defective Turn Signal Lamp(s) | 547.324 |
| | |
| Federal Standard Compliance | 547.3215 |
| | |
| Hazard Lamps, Public Transportation | 547.7011 |
| Head Lamp Improperly Located on Motorcycle | 547.801 |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| | |
| Improper Flashing Lights | 547.702(c) |
| Improper Headlamp on Motor- Driven Cycle | 547.801 |
| Improper Use of Back-up Lamps | 547.332 |
| Improperly Directed Lamp(s) (over 300 candlepower) | 547.305 |
| Improperly Mounted Rotating Beacon - MH | 623.098 |
| Improperly Mounted Rotating Beacon - Towing Vehicle - MH | 623.098 |
| | |
| No Amber Rotating Beacon - MH | 623.098 |
| No Amber Rotating Beacon - Towing Vehicle - MH | 623.098 |
| No Beam Indicator | 547.333 |
| No Clearance Lamp(s) (identification or side marker(s) on (specify) type of vehicle and location of vehicle) | 547.352 |
| No Electric Turn Signal Lamps | 547.324 |
| No Head Lamp(s) on Motorcycle or Motor-driven Cycle, (when not equipped) | 547.801 |
| No Head Lamp(s) (when not equipped) | 547.321 |
| No Lamp(s) or Reflector(s) on Farm or Other Equipment (head lamps, tail lamps, etc.) | 547.371 |
| No License Plate Lamp on Motorcycle (or motor-driven cycle) | 547.801 |
| No License Plate Light | 547.322 |
| No Light(s) (front, rear) on Animal-Drawn Vehicle (or other vehicles when applicable) | 547.326 |
| No Multiple -Beam Road Lighting Equipment | 547.333 |
| No Multiple-Beam Road Lighting Equipment (or defective) on Motorcycle | 547.801 |
| No Parking Lamps | 547.383 |
| No Parking Lamps - MH | 623.102 |
| No Reflector(s) on Rear | 547.325 |
| No Reflector(s) on Rear of Motorcycle (or motor-driven cycle) | 547.801 |
| No Reflector(s) on Side - at or Near Front, Rear, Central (specify) | 547.352 |
| No Stop Lamps | 547.323 |
| No Stop Lamps - MH | 623.102 |
| No Stop Lamps on Motorcycle (or motor-driven cycle) | 547.801 |
| No Tail Lamp on Motorcycle (or motor-driven cycle) | 547.801 |
| No Tail Lamps (when not equipped) | 547.322 |
| No Turn Signal Lamps - When Required | 545.106 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| (vehicle not equipped) | |
| No Turn Signal Lamps - L/R-MH | 623.102 |
| No Vehicular Hazard Warning Lights on Farm Tractor (or self-propelled farm equipment or implement of husbandry) | 547.371 |
| | |
| Red Lights on Front | 547.305 |
| Reflectors, Clearance Lights, Identification Lamps, Distance Side Marker Lamps - Not Visible Sufficient Distance (front, side or rear) | 545.419 |
| Reflectors Improperly Mounted - Rear (too high, too low, etc.) | 547.325 |
| Reflectors Improperly Mounted - Side (too high, too low, etc.) | 547.354 |
| | |
| Sell Motor Vehicle with Overlay Place on Center High-Mounted Stop Lamp | BCC §35.46 |
| | |
| Tail Lamp Improperly Located on Motorcycle (or motor-driven cycle) | 547.801 |
| Tail Lamp(s) Improperly Located (too high, too low, etc.) | 547.322 |
| | |
| Unauthorized Use of Flashing Red, White, or Blue Lights | 547.305 |
| | |
| Wrong Color Clearance Lamps, Side Marker Lamps, Identification Lamps, Side Reflectors | 547.353 |
| Wrong Color Stop Light, License Plate Light, Back-up Lamp, Signal Device | 547.303; 547.322(d), (f); 547.332 |
| | |
| **VEHICLE - MISCELLANEOUS** | |
| Affix Unauthorized Sunscreening Device to Motor Vehicle | 547.613(a)(2) |
| Allowed Vehicle Equipped in Violation of Uniform Act to be Moved or Driven | 547.004 |
| Allowed Vehicle in Unsafe Condition to be Moved or Driven (so as to endanger any person) | 547.004 |
| Allowed Vehicle Not Equipped with Required Equipment to be Moved or Driven | 547.004 |
| | |
| Defective Exhaust Emission System (equipped but not in good working order) | 547.605 |
| Defective Safety Glazing Material | 547.608 |
| Defective (no) Windshield Wiper | 547.603 |
| Drove Vehicle Equipped in Violation of Uniform Act | 547.004 |
| Drove Vehicle in Unsafe Condition (so | 547.004 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| as to endanger any person) | |
| Drove Vehicle Not Equipped with Required Equipment | 547.004 |
| | |
| Emblem Improperly Mounted (too high, too low, etc.) | 547.703 |
| Emblem not in clean (or Reflective) Condition | 547.703 |
| Equipped With Unauthorized Siren, Whistle or Bell | 547.501 |
| | |
| Fail to Comply with Regulations - Transporting Hazardous Materials | 644.151 |
| Fail to Cover Load to Prevent Spillage | 725.021 |
| | |
| Horn Violation (no horn or defective; specify) | 547.501 |
| | |
| Improper Identifying Markings - Commercial Vehicle | 642.002 |
| Improper Mud Flaps (too short, etc.) | 547.606 |
| Improper Use of Emblem | 547.005 |
| Improperly Secured Tailgate | 725.021 |
| Inadequate Bed (sideboards, front or rear panel; specify) | 725.021 |
| Inadequate (or defective) Bed (escaping loose material) | 725.021 |
| | |
| Loose Material Not Removed (from non-load carrying parts of loaded vehicle) | 725.022 |
| Loose Material Not Removed (from non-load carrying parts of unloaded vehicle) | 725.022 |
| | |
| Mirror Violation (none or improperly located; specify) | 547.602 |
| | 547.701 |
| Muffler Violation (none, defective, loud, cut-out, or by-pass; specify) | 547.604 |
| | |
| No Crankcase Emission System | 547.605 |
| No Exhaust Emission System (originally equipped but removed) | 547.605 |
| No Flag on Projecting Load (to rear or side; specify) - Daytime | 547.382 |
| No Front Seat Belts (when required) | 547.601 |
| No Identifying Markings - Commercial Vehicle | 642.002 |
| No Lamp(s) on Projecting Load (to side) at Night | 547.382 |
| No Lamp(s) (or reflector(s)) on Projecting Load (to rear) at Night | 547.382 |
| No Mud Flaps | 547.606 |
| No Placard - or other Marking as | 644.151 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| | |
| No Safety Belts | 547.601 |
| No Slow-Moving Vehicle Emblem (of approved type) | 547.703 |
| No Windshield Wiper | 547.603 |
| Non-Motorized Vehicle (specify) on Prohibited Roadway | 545.065 |
| | |
| Obstructed View Through Windshield (side or rear windows) | 547.613 |
| Operate Vehicle with Unapproved Sunscreening Device | 547.613(a)(1) |
| | |
| Slow-Moving Vehicle Emblem Not in Clean (or reflective) Condition | 547.703 |
| | |
| Television Receiver, Video Equipment Improperly Located (visible to driver) | 547.611 |
| | |
| Unsafe Air Conditioning Equipment | 547.001; 547.103; 547.610 |
| | |
| Vehicle With Defective Required Equipment (or in unsafe condition) | 548.004; 548.104; 548.401; 548.405; 548.406; 548.407; 548.408; 548.502; 548.603; 548.604 |
| | |
| Warning Devices Not Installed - or Defective (flares, fuses, electric lanterns, flags, etc.) | 547.502; 547.001 |
| | |
| **VEHICLE - MISCELLANEOUS EQUIPMENT** | |
| Cause or Permit Display Fictitious Inspection Certificate | 548.004; 548.502 |
| | |
| Display Fictitious Inspection Certificate | 548.004; 548.502 |
| Display Inspection Certificate Issued for Another Vehicle | 548.004; 548.502 |
| Display Inspection Certificate Issued Without Inspection | 548.004; 548.502 |
| | |
| Failed to Conceal Signs on School Bus | EDC §34.002 |
| Fire Extinguisher Violation - Hazardous Materials (none or improper class, specify) | 644.151 |
| | |
| Illegal Cleats | 547.612 |
| Illegal Use of Metal Tires | 547.612 |
| Improper Signs on School Bus | EDC §34.002 |
| | |
| No Fire Extinguisher - Bus | 547.607 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| No Fire Extinguisher - School Bus | 547.607 |
| No Fire Extinguisher - Taxicab | 547.607 |
| No Signs on School Bus (applicable to front and rear only) | EDC §34.002 |
| No Valid Inspection Certificate | 548.601; 548.605 |
| | |
| Placed (or cause to be placed) Inspection Certificate on Wrong Vehicle | 548.603 |
| Restrictions on Airbags | 547.614(b) |
| | |
| Use Equipment Not Approved (head lamp, signal lamp, reflector, safety glass, glass coating material, etc., specify) | 547.101; 547.201 |
| | |
| **VIOLATIONS AGAINST PEDESTRIANS** | |
| Failed to Use Due Care for Pedestrian | 552.008 |
| Failed to Yield for Blind (or incapacitated) Person | HRC §121.007 |
| Failed to Yield ROW to Pedestrian at Signal Intersection | 552.002 |
| Failed to Yield ROW to Pedestrian (green arrow signal - alone or with another indication) | 544.007; 552.001 |
| Failed to Yield ROW to Pedestrian in Crosswalk - No Signals | 552.003 |
| Failed to Yield ROW to Pedestrian in Crosswalk - Other Vehicle Stopped | 552.003 |
| Failed to Yield ROW to Pedestrian on Sidewalk (vehicle emerging from or entering alley, etc.) | 552.006 |
| Failed to Yield ROW to Pedestrian (turning right or left at intersection having green signal or red signal) | 544.007; 552.001 |
| | |
| **WEIGHT VIOLATIONS** | |
| Aid and Abet (use weight arrest title) - 15% or over | 621.503 |
| Aid and Abet (use weight arrest title) - 15% or under | 621.503 |
| | |
| Failure to carry copy of bond in vehicle | 622.013; 622.017; 622.134; 622.136; 623.163; 623.165 |
| Failure to Maintain Weight Record as listed under conditions in Sec. 621.410 | 621.509 |
| | |
| Over Axle Load (Recyclable materials transport) | 622.136 |
| Over Axle Load (Zoned ____) | 621.102; 621.301; 621.302; 621.502; 621.507 |

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Over Gross Weight | 502.151; 621.101 |
| Over Gross Weight (Cement) | 622.011; 622.012; 622013; 622.014; 622.015; 622.016; 622.017 |
| Over Gross Weight (Group of Axles) | 502.151; 621.101 |
| Over Gross (Zoned) | 621.102; 621.301; 621.302; 621.502; 621.507 |
| Over Permissible Wheel Weight | 502.151; 621.101 |
| Over Tandem Load (Zoned ____) | 621.102; 621.301; 621.302; 621.502; 621.507 |
| Over Tire Size Limitation | 502.151; 621.101 |
| Over Wheel Load (Zoned ____) | 621.102; 621.301; 621.302; 621.502; 621.507 |
| Over 20,000 lbs. Axle | 502.151; 621.101 |
| Over 34,000 lbs. Tandem Axle | 502.151; 621.101 |
| Over 44,000 lbs. Tandem (Cement) | 622.011; 622.012; 622.013; 622.014; 622.015; 622.016; 622.017 |
| Over 44,000 lbs. Tandem (solid waste) | 623.161; 623.162; 623.163; 623.164; 623.165 |
| Over 64,000 lbs. Gross Weight (Cement) | 622.011; 622.012; 622.013 |
| Over 64,000 lbs. Gross Weight (solid waste) | 623.161; 623.162; 623.163; 623.164; 623.165 |
| | |
| Second Offense | 521.461; 547.802; 621.506 |
| Third or Subsequent Offense | 521.461; 547.802; 621.506 |
| Tow Trucks – permit not required to exceed weight limitations | 622.954 |
| | |
| **WRONG SIDE OR WRONG WAY** | |
| Drove in Center Lane (not passing or not making left turn) | 545.060 |
| Drove on Wrong Side Divided Highway | 545.063 |
| Drove on Wrong Side of Road Approaching Bridge (viaduct or tunnel) | 545.055; 545.056 |
| Drove on Wrong Side of Road Approaching (or traversing) Intersection | 545.055; 545.056 |
| Drove on Wrong Side of Road Approaching (or traversing) RR Grade Crossing | 545.055; 545.056 |
| Drove on Wrong Side of Road Awaiting Access to Ferry (ferry operated and signs posted by State Highway Commission) | 545.055; 545.056 |

**Bold text indicates change to a specific Transportation Code section.**

| TITLE | TRC (unless otherwise noted) |
|---|---|
| Drove on Wrong Side of Road - No Passing Zone (sight restriction) | 545.055; 545.056 |
| Drove to Left of Rotary Traffic Island | 545.059 |
| Drove Wrong Way in Designated Lane | 545.060 |
| Drove Wrong Way on One-Way Roadway | 545.059 |
| | |
| Failed to Give One-Half of Roadway (meeting oncoming vehicle) | 545.052 |
| Failed to Pass Met Vehicle to Right | 545.052 |
| Failed to Yield ROW on Left at Obstruction | 545.051 |
| | |
| Slower Vehicle Failed to Keep Right | 545.051 |
| | |
| Wrong Side of Road - Not Passing | 545.051 |
| Wrong Side, 4 or More Lane, Two Way Roadway | 545.051 |

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# JUVENILE CASE MANAGERS

**Presented by**

**Deanna Burnett**
**Municipal Judge**
**Carrollton**

By the end of the session, judges will be able to:

- Identify the steps necessary to establish a juvenile case manager program;
- Describe the benefits of having juvenile case managers;
- Identify and explain the statutes relating to case management; and,
- Create an action plan for establishing a case management program.

# JUVENILE CASE MANAGERS

Judge's/Clerk's Conference

Judge Deanie M. King
Municipal Juvenile Court
Corpus Christi, Texas
(361)826-4010
deaniek@cctexas.com

True or False: It is generally accepted that minor offenses are "gateway behavior" to delinquency.

## Objectives

- Describe what a Case Manager can be in your city
- Identify and explain the statutes relating to Case Management
- Discuss the benefits of having Case Managers
- Create an action plan for establishing a Case Management Program

## Case Manager

No Definition

So....

WE BORROW

## Three Basic Models

1. The Compliance Officer Model
2. The Probation Officer Model
3. The Social Worker Model

## Compliance Officer Model

EX: The case manager is employed by the court (or school or probation dept.), may have some "clerk-like" duties; CM checks on compliance with court orders;

The case manager has little to no contact with the juvenile defendant, but may have contact with schools, providers, etc. to make sure the defendant is in compliance. The case manager reports findings to the court.

## Compliance Officer Model

1. Includes clerk-like duties
2. Little to no contact with juvenile
3. Reports non-compliance to the court

## Probation Officer Model

EX: The case manager meets regularly with and supervises the juvenile defendant.

The case manager assures that the juvenile defendant attends all programs, classes, etc. required by the court order and reports compliance and non-compliance to the court.

## Probation Officer Model

1. Meets regularly with juvenile
2. Oversees the court order
3. Reports back to the court

## Social Worker Model

EX: The case manager is employed by a governmental authority, a non-profit or independent office and serves as an advocate for the juvenile defendant. The case manager assesses the needs, creates a case management plan.

The case manager links the juvenile defendant and family with needed services and monitors service delivery. Progress reports are provided to the court and recommendations made.

## Social Worker Model

1. Meets with juvenile and family regularly
2. Assessment
3. Link to services
4. Monitoring

The best approach for you depends on what you are trying to accomplish.

For delinquency prevention, a combination approach may be best. It is also what was contemplated in case management legislation.

## Legislative Intent

The latest legislation providing for a case manager fund recognizes the importance of case management at the early stages of criminal activity.

The intent was for a case manager to be part court clerk, part probation officer, and part social worker.

(I suggest part probation officer, part social worker and part mentor.)

## The Statutes

- Section 45.056 CCP

  Authority to Employ Juvenile Case Managers; Reimbursement

- Section 102.0174 CCP

  Creation of a Juvenile Case Manager Fund

## 2001....

The legislature added the first juvenile justice language which included the term "case manager."

Article 45.056, Code of Criminal Procedure (amended in 2003 and 2005):

(a) On approval of the ....city council..., a ...court, school district, juvenile probation department, or other appropriate governmental entity may:

(1)employ a case manager to provide services in cases involving juvenile offenders before a court....

So much talk about case managers....

So little money to hire them...

H.B. 1575, Juvenile Omnibus Bill

Article 45.056 CCP

(c) *A county or justice court on approval of the commissioners court or a municipal court on approval of the city council may employ one or more full-time juvenile case managers to assist the court in administering the court's juvenile docket and in supervising its court orders in juvenile cases.*

Art. 45.056 CCP

*(d) Pursuant to Article 102.0174, the court may pay the salary and benefits of the juvenile case manager from the case manager fund.*

*(e) A juvenile case manager employed under Subsection (c) shall work primarily on cases brought under Section 25.093 and 25.094, Education Code.*

## Article 102.0174 COURT COSTS; JUVENILE CASE MANAGER FUND

*(b) The governing body of a municipality by ordinance may create a juvenile case manager fund and may require a defendant convicted of a fine-only misdemeanor offense in a municipal court to pay a juvenile case manager fee not to exceed $5 as a cost of court.*

## Questions

What does it mean?

"...assist the court in administering the court's juvenile docket and in supervising its court orders in juvenile cases."

## More Questions

What does it mean?

"...shall work primarily on cases brought under Sections 25.093 and 25.094, Education Code."

## More Questions

How much is a fee "not to exceed $5"?

## True or False

1. A City Ordinance is required before your city begins collecting the case management fund fee?

## True or False

2. The fee set by your city can be less than $5.00?

## True or False

3. The money from the Case Manager Fund can be used for office supplies, office space and other operating expenses?

## True or False

4. Small cities and/or counties may agree to employ a case manager and share expenses?

## True or False

5. A case manager must be employed full time and receive benefits?

## True or False

6. Your city/county must collect a juvenile case manager fee?

## WHY ESTABLISH A CASE MANAGEMENT PROGRAM?

## WHERE DOES CASE MANAGEMENT FIT IN THE MUNICIPAL JUVENILE JUSTICE SYSTEM?

## Court Goals

- A Criminal Justice Response to Criminal Behavior
- Promote the concepts of Accountability, Responsibility and Choice
- Encourage respect for the law and courts
- Address underlying problems in an attempt to prevent future delinquency

CASE MANAGEMENT CONTRIBUTES TO ALL OF THESE GOALS

## COURT SENTENCING OPTIONS

If a juvenile is found guilty the court may require the following:

1. Pay fine - usually there is an option for immediate payment or a payment plan
2. Community Service (if the defendant qualifies)- CCP Art. 45.049
3. Deferred Disposition - CCP Art. 45.051, Art. 45.0511 and Art. 45.052

THIS IS WHERE CASE MANAGEMENT FITS

The Court may enter orders affecting parents, CCP Art. 45.057

The Court may order programs and other requirements (regardless of sentencing option) in juvenile cases, CCP Art. 45.054 and Art. 45.057 (both effective 9/2001)

Case management may also be used here.

## MTRs in Municipal Court?

## Benefits of Having Case Managers

- Monitor compliance with Court Orders
- Promote accountability and responsibility
- Gives credibility to the Court (someone is watching)
- Address the risk factors for delinquency
- Reduce recidivism
- Get kids back in school
- Motions to Revoke or Modify can be used
- Helps the court do the right thing

## HOW TO BEGIN

## Action Plan Example

1. Begin discussions in your jurisdiction about case management.

   - Who are the key players?
   - What concerns do you expect?
   - How will you address the concerns?
   - How will you show them WIFM?

2. Ordinance – Work with your City Attorney (or whatever person normally assists with the preparation of ordinances.) Draft a proposed ordinance and have it approved.

- Who is involved?

- What is the process in your city

3. Account – The person/department in your jurisdiction that handles finances will need to set up a separate account for this fund. (Similar to the process for the Technology Fund and Security Fund).

- Who will do this?

- Is anything else required?

## Action Plan cont.

4. Collect the Fee – Begin collecting whatever court cost amount is authorized (up to $5)

- What systems need to be changed?

- Who needs to be trained on the new court cost?

5. Create the Program/Procedure – While the account is building, begin brainstorming and creating the program and procedures that you will use for your case manager program and its implementation. (Prepare job descriptions, policy and procedures manuals, etc.)

- Who will create the program?

- What will your case manager do?

6. Appropriate the Funds – When the funds are adequate, your City Council can appropriate the funds from the Juvenile Case Manager Fund by ordinance and allow the funds to be used to hire case managers.

- Who will prepare the appropriation ordinance?

7. Hire Case Manager(s) (Training?)

## CASE MANAGEMENT
## Corpus Christi Model

This program originated as the Truancy Reduction Impact Program (T.R.I.P.)

The program sought to solve a community need by giving the police somewhere to take kids, providing services to families to help prevent future delinquency, and help get kids back in school. (Park and Recreation Department)

## The Problem

One of the main problems with the TRIP Center program and the subsequent Juvenile Assessment Center was compliance.

The families most in need of services would refuse voluntary participation.

## The Answers

Y.O.U. recommended the creation of a new court dedicated to municipal level juvenile cases. The Municipal Juvenile Court was created in 2001.

The Juvenile Assessment Center (JAC) was partnered with the Municipal Juvenile Court (MJC) so that families would be "ordered" to receive needed services.

Case Managers:

*Assess the needs of Juveniles and Family (tool is available for no charge) (risk factors, protective factors, assets)

*Create case management plan

*Connect family to needed services and monitor compliance

*Report compliance/violations to the court or prosecutor

*Make recommendations to the court at compliance/show cause hearings

## Delinquency Prevention

89% - 93%
success rate

# JUVENILE CASE MANAGERS

***OBJECTIVES:*** *At the end of this session, participants should be able to:*

1. *Describe what a Case Manager could be/do in their city;*
2. *Identify and explain the statutes relating to Case Management;*
3. *Discuss the benefits of having Case Managers;*
4. *Create an action plan for establishing a Case Management program.*

**CASE MANAGEMENT MODELS:**

1. **Compliance Officer Model** – The case manager is employed by the court (or school or probation dept.) and may have some "clerk-like" duties. This person checks to see that all requirements of the court order have been fulfilled. The case manager has little to no contact with the juvenile defendant, but may have contact with schools, providers, etc. to make sure the defendant is in compliance. The case manager reports findings to the court.

**Keynotes:**

A. Includes _____- like duties;

B. Little to no contact with the _____;

C. Reports non-compliance to the _____.

2. **Probation Officer Model** – The case manager is employed by the court or by the applicable governmental authority. The case manager meets regularly with and supervises the juvenile defendant during the period of case management. The case manager assures that the juvenile defendant attends all programs, classes, etc. required by the court order and reports compliance and non-compliance to the court.

**Keynotes:**

A. Meets _____ with the juvenile;

B. Oversees the _____ _____;

C._____ back to the court.

3. **Social Worker Model** – The case manager is employed by a governmental authority, a non-profit or independent office and serves as an advocate for the juvenile defendant. The case manager assesses the needs of the juvenile defendant and creates a case management plan. The case manager links the juvenile defendant and family with needed services and monitors service delivery. Compliance letters are provided to the juvenile defendant to deliver to the court.

**Keynotes:**

A. Meets regularly with the _____ and _____;

B. _____;

C. Links to _____;

D. _____.

**Brainstorming: HOW CAN A CASE MANAGER HELP IN YOUR CITY?**

1. _____

_____

_____

2. _____

_____

_____

3._____

_____

_____

4_____

_____

_____

**LEGISLATIVE INTENT:**

The original idea of case management was for case managers to be part
The latest legislation providing for a case manager fund recognizes the importance of case management at the early stages of criminal activity.

_____, part _____,

and part

_____.

My suggestion: part _____, part

_____, and part _____.

**THE STATUTES:**

Section 45.056 CCP – Authority to Employ Case Managers: Reimbursement

Section 102.0174 CCP – Court Costs; Juvenile Case Manager Fund

TRUE OR FALSE?

1. A City Ordinance is required before your city begins collecting the case management fund fee?

2. The fee set by your city can be less than $5.00?

3. The money from the Case Manager Fund can be used for office supplies, office space and other operating expenses?

4. Small cities and/or counties may agree to employ a case manager and share expenses?

5. A case manager must be employed full time and receive benefits?

6. Your city/county must collect a juvenile case manager fee?

## BENEFITS OF HAVING JUVENILE CASE MANAGERS

1. Monitor compliance with Court Orders
2. Promote accountability and responsibility
3. Gives credibility to the Court (someone is watching)
4. Address the risk factors for delinquency
5. Reduce recidivism
6. Get kids back in school
7. Motions to Revoke or Modify can be used
8. Helps the court do the right thing

## HOW TO BEGIN: AN ACTION PLAN

1. Begin discussions in your jurisdiction about case management.

   - Who are the key players?

   - What concerns do you expect?

   - How will you address the concerns?

   - How will you show them WIFM?

2. Ordinance – Work with your City Attorney (or whatever person normally assists with the preparation of ordinances.) Draft a proposed ordinance and have it approved.

- Who is involved?

- What is the process in your city

3. Account – The person/department in your jurisdiction that handles finances will need to set up a separate account for this fund. (Similar to the process for the Technology Fund and Security Fund).

- Who will do this?

- Is anything else required?

4. Collect the Fee – Begin collecting whatever court cost amount is authorized (up to $5)

- What systems need to be changed?

- Who needs to be trained on the new court cost?

5. Create the Program/Procedure – While the account is building, begin brainstorming and creating the program and procedures that you will use for your case manager program and its implementation. (Prepare job descriptions, policy and procedures manuals, etc.)

- Who will create the program?

- What will your case manager do?

6. Appropriate the Funds -- When the funds are adequate, your City Council can appropriate the funds from the Juvenile Case Manager Fund by ordinance and allow the funds to be used to hire case managers.

- Who will prepare the appropriation ordinance?

7. Hire Case Managers
(Training?)

## Art. 45.056. Authority to Employ Juvenile Case Managers; Reimbursement.

(a) On approval of the commissioners court, city council, school district board of trustees, juvenile board, or other appropriate authority, a county court, justice court, municipal court, school district, juvenile probation department, or other appropriate governmental entity may:

(1) employ a case manager to provide services in cases involving juvenile offenders before a court consistent with the court's statutory powers; or

(2) agree in accordance with Chapter 791, Government Code, to jointly employ a case manager.

(b) A local entity may apply or more than one local entity ay jointly apply to the Criminal justice division of the governor's office for reimbursement of all or part of the costs of employing one or more juvenile case managers from funds appropriated to the governor's office or otherwise available for that purpose. To be eligible for reimbursement, the entity applying must present to the governor's office a comprehensive plan to reduce juvenile crimes in the entity's jurisdiction that addresses the role of the case manager in that effort.

(c) A county or justice court on approval of the commissioners court or a municipal court on approval of the city council may employ one or more full-time juvenile case managers to assist the court in administering the court's juvenile docket and in supervising its court orders in juvenile cases.

(d) Pursuant to Article 102.0174, the court may pay the salary and benefits of the juvenile case manager from the juvenile case manager fund.

(e) A juvenile case manager employed under Subsection (c) shall work primarily on cases brought under Sections 25.093 and 25.094, Education Code.

Leg.H. Stats. 2001 77th Leg. Sess. Ch. 1514, effective September 1, 2001; Stats. 2003 78th Leg. Sess. Ch. 283, effective September 1, 2003; Stats. 2005 79th Leg. Sess., Ch. 949 (H.B. 1575), § 34, effective Sept. 1, 2005.

## Art. 102.0174. Court Costs; Juvenile Case Manager Fund.

(a) In this article, "fund" means a juvenile case manager fund.

(b) The governing body of a municipality by ordinance may create a juvenile case manager fund and may require a defendant convicted of a fine-only misdemeanor offense in a municipal court to pay a juvenile case manager fee not to exceed $5 as a costs of court.

(c) The commissioners court of a county by order may create a juvenile case manager fund and may require a defendant convicted of a fine-only misdemeanor offense in a justice court, county court, or county court at law to pay a juvenile case manager fee not to exceed $5 as a cost of court.

(d) The ordinance or order must authorize the judge or justice to waive the fee required by Subsection (b) or (c) in a case of financial hardship.

(e) In this article, a defendant is considered convicted if:

(1) a sentence is imposed on the defendant;

(2) the defendant receives deferred disposition, including deferred proceedings under Article 45.052 or 45.053; or

(3) the defendant receives deferred adjudication in county court.

(f) The clerks of the respective courts shall collect the costs and pay them to the county or municipal treasurer, as applicable, or to any other official who discharges the duties commonly delegated to the county or municipal treasurer for deposit in the fund.

(g) A fund created under this section may be used only to finance the salary and benefits of a juvenile case manager employed under Article 45.056.

(h) A fund must be administered by or under the direction of the commissioners court or under the direction of the governing body of the municipality.

Leg.H. Stats. 2005 79th Leg. Sess., Ch. 949 (H.B. 1575), § 35, effective Sept. 1, 2005.

**AN ORDINANCE**

**AMENDING THE CODE OF ORDINANCES, CITY OF CORPUS CHRISTI, CHAPTER 29 TO ESTABLISH THE JUVENILE CASE MANAGER FEE; PROVIDING FOR SEVERANCE; PROVIDING FOR PUBLICATION; PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY**

**WHEREAS,** the Texas Legislature recently enacted Section 102.0174 of the Code of Criminal Procedure in House Bill 1575 to authorize the juvenile case manager fee not to exceed five dollars ($5.00) as a cost of court;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CORPUS CHRISTI, TEXAS:**

**SECTION 1.** That Section 29-52 is added to Chapter 29 of the Code of Ordinances to read as follows:

**"Sec. 29-52. Juvenile case manager fee.**

"(a) There is created a juvenile case manager fee pursuant to Article 102.0174 of the Texas Code of Criminal Procedure.

(b) A defendant convicted of a fine-only misdemeanor offense in municipal court shall pay a three dollar ($3.00) juvenile case manager fee as a court cost. This fee does not apply to parking citations.

(c) For purposes of this section, a person is considered convicted if

(1) a sentence is imposed on the defendant; or

(2) the defendant receives deferred disposition, including deferred proceedings under Article 45.052 or 45.053 of the Texas Code of Criminal Procedure.

(d) The municipal court judge is authorized to waive this fee in a case of financial hardship, for example, if a municipal court judge has determined that the defendant is indigent, or has insufficient resources or income, or is otherwise unable to pay all or part of the underlying fine or costs.

(e) The municipal court administrator shall collect this cost of court and pay it to the city treasurer to be kept in a separate fund known as juvenile case manager fund.

(f) The juvenile case manager fund may be used only to finance the salary and benefits of a juvenile case manager employed by the municipal court under Article 45.056 of the Texas Code of Criminal Procedure.

(g) The municipal court on approval of the city council may employ one or more full-time juvenile case managers to assist the court in administering the court's juvenile docket and in supervising its court orders in juvenile cases.

(h) This fund shall be administered by or under the direction of the City Council.

(i) This fee applies only to conduct that occurs on or after January 1, 2006."

**SECTION 2.** If for any reason any section, paragraph, subdivision, clause, phrase, word or provision of this ordinance shall be held invalid or unconstitutional by final judgment of a court of competent jurisdiction, it shall not affect any other section, paragraph, subdivision, clause, phrase, word, or provision of this ordinance, for it is the definite intent of this City Council that every section, paragraph, subdivision, clause, phrase, word or provision of this ordinance be given full force and effect for its purpose.

**SECTION 3.** Publication shall be made in the official publication of the City of Corpus Christi as required by the City Charter of the City of Corpus Christi.

**SECTION 4.** This ordinance takes effect January 1, 2006.

**SECTION 5.** That upon written request of the Mayor or five Council members, copy attached, the City Council (1) finds and declares an emergency due to the need for immediate action necessary for the efficient and effective administration of City affairs and (2) suspends the Charter rule that requires consideration of and voting upon ordinances at two regular meetings so that this ordinance is passed and takes effect upon first reading as an emergency measure this the ____ day of _____, 2005.

**ATTEST:**

_____

Armando Chapa
City Secretary

**THE CITY OF CORPUS CHRISTI**

_____

Henry Garrett
Mayor

Legal form approved August 9, 2005

By: _____
Lisa Aguilar
Assistant City Attorney
for City Attorney

FUNDED BY A GRANT FROM THE
TEXAS COURT OF CRIMINAL APPEALS

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# CITATIONS: TICKETS ARE FOR CONCERTS AND SPORTING EVENTS

**Presented by**

**Ryan K. Turner**
**General Counsel and Director of Education**
**TMCEC**

By the end of the session, judges will be able to:

- Identify basic and complicated issues that accompany this critical area of the law; and,
- Identify the legal authority for the issuance of citations.

Funded by a grant from the Texas Department of Transportation.

**Citations: Tickets are for Concerts and Sporting Events**
TMCEC Academic Year 2006-2007
October 9, 2006
Revision Date: January 3, 2007

## 1. What is a "citation"?

a. Black Law Dictionary defines the terms as meaning "An order, issued by the police, to appear before a magistrate or a judge at a later date. A citation is commonly used for minor violations (e.g. traffic violations); thus avoiding having to take the suspect into immediate physical custody."

b. Section 703.001 of the Texas Transportation Code states that the term's meaning is assigned by Article II, Section (b) of the Nonresident Violator Compact of 1977 which provides: "any summons, ticket, or other official document issued by a police officer for a traffic violation containing an order which requires the motorist to respond."

c. Chapter 543 of the Transportation Code does not use the term "citation" but rather "written notice to appear in court."

d. Commentary: Citations are wonderful time saving devices that to a certain extent substitute for (1) full custodial arrest (2) notice of charges (3) release on recognizance

## 2. What does the law require be printed on a citation?

a. Section 543.003 of the Transportation Code states that the written notice to appear in court must contain
   i. The time and place the person is to appear
   ii. The offense charged
   iii. The name and address of the person charged, and
   iv. If applicable, the license number of the person's vehicle

b. Article 14.06 of the Texas Code of Criminal Procedure states that a citation must contain
   i. Written notice of the time and place the person must appear before a magistrate
   ii. Name and address of the person charged
   iii. The offense charged

c. Other statutes:

i. **10 Days Rule: Transportation Code § 543.006. TIME AND PLACE OF APPEARANCE.**

1. (a) The time specified in the notice to appear must be at least 10 days after the date of arrest unless the person arrested demands an earlier hearing.
2. (b) The place specified in the notice to appear must be before a magistrate having jurisdiction of the offense who is in the municipality or county in which the offense is alleged to have been committed.
3. Note: There is no parallel rule for citations issued under the Code of Criminal Procedure.

ii. **Transportation Code § 543.007. NOTICE TO APPEAR: COMMERCIAL VEHICLE OR LICENSE.** A notice to appear issued to the operator of a commercial motor vehicle or holder of a commercial driver's license or commercial driver learner's permit, for the violation of a law regulating the operation of vehicles on highways, must contain the information required by department rule, to comply with Chapter 522 and the federal Commercial Motor Vehicle Safety Act of 1986 (Title 49, U.S.C. Section 2701 et seq. - this provision was renumbered as Title 49, U.S.C. Section 31302).

1. The proposition that a citation issued to the holder of a CDL must contain the social security number of the driver is widely accepted but not expressly stated in federal or state law. Section 31308(4)(B) of the he Federal Commercial Motor Vehicle Act of 1986 requires that the license contain the social security account number or other number the Secretary of Transportation determines is necessary to identify the driver. Section 543.201 of the Transportation Code requires courts to keep records reflecting that a person is charged with a law violation relating to the operation of a motor vehicle on a highway. Section 543.202 requires "the record must be made on a form or by a data processing method acceptable to the department and must included, among other things, the person's social security number, if the person was operating a commercial motor vehicle or was the holder of a commercial driver's license or commercial driver's learning permit. Since such license holders are not required by law to make an appearance in court, and because such information is still manually reported by court to DPS via the citation, the only was that this information can be recorded and reported by the courts is if it is collected by a peace officer at the time the citation is issued.

iii. **Transportation Code § 543.010. SPECIFICATIONS OF SPEEDING CHARGE.** The complaint and the summons or notice to appear on a charge of speeding under this subtitle must specify:(1) the maximum or minimum speed limit applicable in the district or at the location; and (2) the speed at which the defendant is alleged to have driven.

iv. **Transportation Code § 601.233. NOTICE OF POTENTIAL SUSPENSION.** (a) A citation for an offense under Section 601.191 issued as a result of Section 601.053 must include, in type larger than other type on the citation, except for the type of the statement required by Section 708.105, the following statement: "A second or subsequent conviction of an offense under the Texas Motor Vehicle Safety Responsibility Act will result in the suspension of your driver's license and motor vehicle registration unless you file and maintain evidence of financial responsibility with the Department of Public Safety for two years from the date of conviction. The department may waive the requirement to file evidence of financial responsibility if you file satisfactory evidence with the department showing that at the time this citation was issued, the vehicle was covered by a motor vehicle liability insurance policy or that you were otherwise exempt from the requirements to provide evidence of financial responsibility."

v. **Chapter 702, Transportation Code – "Contract for Enforcement of Certain Arrest Warrants"**; Section 702.004(b) "The warning must state that if the person fails to appear in court as provided by law for the prosecution of the offense or fails to pay a fine for the violation, the person might not be permitted to register a motor vehicle in this state." (This is often referred to as the Failure to Appear Program. DPS's vendor for this program is Omnibase Services.)

vi. **Transportation Code § 706.003. WARNING; CITATION.** (a) If a political subdivision has contracted with the department, a peace officer authorized to issue a citation in the jurisdiction of the political subdivision shall issue a written warning to each person to whom the officer issues a citation for a violation of a traffic law in the jurisdiction of the political subdivision. (b) The warning under Subsection (a): (1) is in addition to any other warning required by law;(2) must state in substance that if the person fails to appear in court as provided by law for the prosecution of the offense or if the person fails to pay or satisfy a judgment ordering the payment of a fine and cost in the manner ordered by the court, the person may be denied renewal of the person's driver's license; and (3) may be printed on the same instrument as the citation.

vii. **Transportation Code § 708.105. NOTICE OF POTENTIAL SURCHARGE.** (a) A citation issued for an offense under a traffic law of

this state or a political subdivision of this state must include, in type larger than any other type on the citation, the following statement: "A conviction of an offense under a traffic law of this state or a political subdivision of this state may result in the assessment on your driver's license of a surcharge under the Driver Responsibility Program." (b) The warning required by Subsection (a) is in addition to any other warning required by law.

viii. **Data for Racial Profiling.** Article 2.132 of the Code of Criminal Procedure provides the each law enforcement agency in this state shall adopt a detailed written policy on racial profiling. One of the seven requirements requires "collection of information relating to traffic stops in which a citation is issued and arrests resulting from those traffic stops, including information relating to: (A) the race and ethnicity of the individual detained; and (B) whether a search was conducted and, if so, whether the person detained consented to the search." The data is then submitted to the local governing body as part of an annual report on racial profiling.

ix. **Right to a Driving Safety Course or Motorcycle Operators Course.** Article 45.0511(q) of the Code of Criminal Procedure states "A notice to appear issued for an offense to which this article applies must inform a defendant charged with an offense under Section 472.022, Transportation Code, an offense under Subtitle C, Title 7, Transportation Code, or an offense under Section 729.001(a)(3), Transportation Code." The required boilerplate language reads: "You may be able to require that this charge be dismissed by successfully completing a driving safety course or a motorcycle operator training course. You will lose that right if, on or before your appearance date, you do not provide the court with notice of your request to take the course."

x. **"The Address Obligation":** Article 45.057(h) of the Code of Criminal Procedure imposes and obligation of a child and/or parent to keep the court informed of the child's current address. For the obligation to become effective, notice must be provided to the child, parent, or both. One of the three ways that a person may be placed under such an obligation is by being provided with a copy of the language of the subsection at the time they are issued a citation.

**Special Rule for Commercial Motor Vehicles:** Section 16.100 of the Texas Administrative Code states: A traffic citation issued to a person driving a commercial motor vehicle (CMV), or who is the holder of a commercial driver's license or commercial driver's learner's permit, for a violation of any law regulating the operation of vehicles on highways, must be on a form that contains the following information: (1) the name, address, physical description, and date of birth of the party charged; (2) the number,

if any, of the person's driver's license; (3) the registration number of the vehicle involved; (4) whether the vehicle was a CMV as defined in Texas Transportation Code, Chapter 522; (5) whether the vehicle was involved in the transporting of hazardous materials; and (6) the date and nature of the offense, including whether the offense was a serious traffic violation as defined in Texas Transportation Code, Chapter 522.

3. **Who is responsible for compiling and manufacturing of a citation?**

4. **Does Texas statutory law consider a person "under arrest" at the time they are issued a citation?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**References:**

Section 543.003, Transportation Code:

Article 14.06 of the Code of Criminal Procedure

5. **Does the "investigatory stop" of motorist constitute a "seizure" under the 4th Amendment?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**References:**

a. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

   i. A "seizure" occurs when (1) a suspect's freedom is of movement is restricted and (2) the suspect is brought under the officer's control either by either a submission to a show of legal authority or physical restraint.

b. "Investigatory stops" and "arrests" are both seizures. But, not all "investigatory stops" are "arrests."

   i. An "investigatory stop" is a seizure of limited scope and duration in which a peace officer is required to have reasonable suspicion that the suspect is involved in criminal activity.

   ii. An "arrest" is a seizure of broader scope that exceeds the boundaries of an "investigatory stop."

c. Despite popular misconception, peace officers do not have the authority to stop motorists at random without reasonable suspicion to see their driver's license or vehicle registration. *Delaware v. Prouse*, 440 U.S. 648 (1979). The narrow exception to this rule involves checkpoint stops that are governed by special rules.

d. Section 521.025(b) of the Texas Transportation Code states that a peace officer may stop and detain a person operating a motor vehicle to determine if the person has a driver's license. While this statute by itself could be read to authorize exactly what *Prouse* prohibits, the statute should be read in light of case law. The Court of Criminal Appeals, though refusing to apply it retroactively, acknowledged *Prouse* as it relates to 521.025(b) *Luckett v. State*, 586 S.W.2d 524 (Tex.Crim.App. 1979). Most subsequent case law can be distinguished because the stop was coupled with probable cause for another offense. The Court of Criminal Appeals has generally not responded positively to peace officers' efforts to use 521.025(b) as a subterfuge to stop drivers. *McMillian v. State*, 609 S.W.2d 784 (Tex.Crim.App. 1980). More recent cases tend to involve the intermediate courts examining the alleged existence of such "subterfuge" by law enforcement.

**6. Who has the legal authority to issue a citation?**

_____

_____

_____

**7. Under state law, who has the authority to issue citations for city ordinance violations?**

_____

_____

_____

**References:**

Presumably this is pursuant to Texas Local Government Code Section 51.001 which states that a "City has general authority to adopt an ordinance or police regulation that is for the good government, peace or order of the City and is necessary or proper for carrying out a power granted by law to the City."

Caution: such citations must be distinguished from those issued by peace officers. "While the actions of 'Code Enforcement Officers' in stopping people ... and questioning them may not *per se* constitute arrests, very little more force may be necessary before such a situation become one in which a 'persons liberty of movement is restricted or restrained.' *Amores v. State*, 816 S.W.2d. 407, 411 (Tex.Crim.App. 1991)" Texas Attorney General Letter Opinion No. 95-027 (1995).

**8. May a peace officer issue a citation for offenses other than fine-only offenses?**

**ANSWER: YES NO IT DEPENDS**

**9. Are peace officers required to issue citations for most fine-only offenses?**

**ANSWER: YES NO IT DEPENDS**

**References:**

Section 543.004, Transportation Code

*Atwater v. City of Lago Vista*, 532 US 318 (2001).

**10. What happens if a peace officer fails to comply with the "release with promise to appear" provisions of the Transportation Code?**

**Reference:** 543.008, Transportation Code

**11. Under what circumstances is a peace officer legally authorized to issue a citation?**

_____

_____

_____

As all arrests require probable cause, the peace officer must have probable cause that the suspect has committed a Class C misdemeanor or offense otherwise punishable upon conviction by the imposition of a fine-only.

Probable cause must be coupled with one of the following statutory exceptions contained in the Texas Code of Criminal Procedure:

1. Offense within presence or view if "classed as an offense against the public peace" (Article 14.01(a))

2. Any offense committed in his presence or within his view (Article 14.01(b))

3. Within view of magistrate (Art. 14.02)

4. The "cacophony of confusion" (Art. 14.03(a)(1))
    a. Suspicious Places
    b. Disorderly Conduct
    c. Threatened or attempted offenses.

5. Class C offense involving family violence (Article 14.03(a)(4))

6. Preventing consequences of theft (Article 18.16)

**12. Are there any circumstances where a peace officer is not authorized to issue a citation?**

Yes.

a. _____

Art. 14.031, Code of Criminal Procedure provides that the individual may be released if:

i. The officer believes that incarceration is unnecessary for the protection of the individual or others; and

ii. Either the individual is either (1) released to the care of an adult who agrees to assume responsibility for the individual, or (2) verbally consents to voluntary chemical dependency treatment and is admitted for treatment in a program in a treatment facility licensed by the Texas Commission on Alcohol and Drug Abuse (TCADA).

iii. Presumably such individuals are to be charged by the filing of a sworn complaint.

b. **Private roadways**. A peace officer has no authority to issue a citation for a traffic offense on the private streets, and if such a citation is issued, it may not be prosecuted. Article III, section 52 and article XI, section 3 of the Texas Constitution prohibit the use public monies to enforce state and municipal traffic laws on its private streets. Texas Atty.Gen. Op. No. JC-0016 (1999).

**13. What happens if a person refuses to sign a citation?**

The 1st Court of Appeals (Houston) in *Berrett v. State*, 152. S.W.3d 600 (2005) stated, in the context of seat belt violation, that there is no discrepancy between Article 14.06(b) and the requirement of Chapter 543 of the Transportation Code. Rather the two provisions should be read in unison and that Chapter 543 merely builds upon the framework of Article 14.06(b).

Alternatively, the peace officer or another person with knowledge may file a sworn complaint in court and upon a request from a prosecuting attorney the defendant may be summonsed to appear in court. See, Article. 45.018 and 23.04, Code of Criminal Procedure.

**14. Does the law authorize citations to be issued via mail?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**Reference:** *Carson v. State*, 65 S.W.3d 774 (Tex.App.-Fort Worth 2001).

**15. Is a person's obligation to appear in court following the issuance of a citation in anyway effected by the addition of protest words, e.g. "forced to sign under threat, duress, and coercion?"**

**ANSWER: YES NO IT DEPENDS**

**16. If an individual is arrested and taken to jail, can the citation alone serve as probable cause for the defendant's arrest?**

**ANSWER: YES NO IT DEPENDS**

**References:**

In *Gerstein v. Pugh,* 420 U.S. 103 (1975) the U.S. Supreme Court held that a suspect arrested without a warrant is entitled under the 4th Amendment to a prompt determination of probable cause.

In *Sanders v. City of Houston,* 543 F.Supp. 694 (S.D.Tex 1982) the court held that a probable cause determination must occur at the Article 15.17 presentation before a magistrate. It enjoined the City of Houston for detaining arrested persons for longer than 24 hours.

In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the U.S. Supreme Court created a right to have probable cause determined generally within 48 hours of a warrantless arrest.

Probable cause determinations during the presentation before a magistrate have become a matter of local practice (Dix and Dawson, Texas Practice Series – Sec. 15.04). Article 15.17 of the Code of Criminal Procedure does not, however, contain any such requirement

As part of the Texas Fair Defense Act of 2001, Article 17.033(b) of the Code of Criminal Procedure was amended to require that misdemeanants be released on a $5,000 personal recognizance bond if probable cause has not be determined by a magistrate within 24 hours of arrest. While this amendment is not part of Article 15.17, to a certain degree it codifies the essence of *Gerstein* and its progeny.

**17. Without more, can a citation be the basis for issuing an arrest warrant?**

**ANSWER: YES NO IT DEPENDS**

**References:**

a. The citation can be the basis from which an affiant may attest to information that may suffice as probable cause and justify the issuance of a warrant. *State v. Martin*, 833 S.W.2d 129 (Tex.Crim.App. 1992).

b. Remember the confusion over the word "complaint" that is unique to Texas criminal law. The confusion surrounding the statutory use of the word "complaint" was noted in *Ex Parte Greenwood,* 165 Tex.Crim. 349, 307 S.W.2d 586 at 587 (1957) when the Court said, "an examination of [the relevant Articles] will disclose that the complaint by which prosecutions in the corporation are commenced is not the same as the affidavit or complaint which supports an information." For additional information, see "Complaints, Complaints, Complaints: Don't Let the Language of the Law Confuse You," *Municipal Court Recorder*, Vol. 13, No. 6 (July 2004) at 6.

**18. If the issuance of a citation is an "arrest and release," can a peace officer search a person's automobile?**

**ANSWER: YES NO IT DEPENDS**

**References:**

*Knowles v. Iowa*, 525 U.S. 113 (1998)

**19. Is a citation an "arrest" for 5th Amendment self-incrimination purposes?**

**ANSWER: YES NO IT DEPENDS**

**Reference:** *Berkemer v. McCarty*, 468 U.S. 420 (1984)

**20. Is it legal for an issuing agency to "void" a citation?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**References;**

In *City of Houston v. Cotton*, 171 S.W.3d 541(Tex.App. [Houston] 14th Dist. 2005), the Court held that a former sanitarian's alleged ticket fixing scheme did not constitute a whistleblower action because she failed to provide substantial proof that a violation of law occurred. In dicta, the court accepted the proposition that if the sanitarian's supervisor or any other person "destroyed" a citation once it was "in the system," there would have been a violation of the law. In this instance, however, citations were being "voided" and placed in a folder for voided citations. One witness testified, and the court did not disagree, that a document was officially designated a "government document" once "it goes through the system." Accordingly, under the unambiguous language of Section 37.10 of the Penal Code (tampering with a governmental document), if managers in the City of Houston Health Department, in the course of their official duties, marked citations as void or decided not to pursue them further, without destroying, concealing, removing, or otherwise impairing the verity, legibility, or availability of the citations, their conduct would not violate Section 37.10.

While a plain reading of the Section 37.10 of the Penal Code reveals other possible ways that a citation could possibly be the basis of an alleged violation of the statute (e.g., selling, stealing, or otherwise fraudulently using citations), the Court of Criminal Appeals decision in *State v. Vasilas*, 187 S.W.3d 486 (Tex.Crim.App. 2006) rejected the notion that a "governmental record" excludes documents filed with courts. Debatably, this lends credence to the notion that a citation is government record when filed in municipal court. It should not, however, be construed to mean that a document, such as a citation, cannot be a governmental record until it is filed in court.

**21. Is a citation a formal charging instrument?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**Reference:** *Huynh v. State*, 901 S.W.2d 480, 482 n.3 (Tex. Crim. App. 1995)

**22. Under any circumstances, can a citation serve as a complaint?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**References:**

Article 27.14(d), Code of Criminal Procedure

*Bass v. State*, 427 S.W.2d 624 (Tex.Cr.App. 1968)

While the Code of Criminal Procedure has dedicated provisions relating to when an indictment is "presented" (Article 12.06) and when an information is "presented," it contains no similar provisions relating to when a complaint is presented. Professors Dix and Dawson note their treatise: "There is no parallel provision for the presentment of a complaint, but presumably it is considered presented when it is filed with the court." 40 Texas Practice Series § 3.44. See, Article 45.019(c) Code of Criminal Procedure stating, "a complaint filed in municipal court must alleged that the offense was committed in the territorial limits of the municipality in which the complaint is made."

**23. Does the filing of a citation toll the statute of limitations?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

The Texas Code of Criminal Procedure does not state that the filing of a citation tolls the statute of limitations. Nor does it, however, expressly state that the filing of a sworn complaint tolls the statute of limitation.

Article 12.02 of the Code of Criminal Procedure states "An *indictment* or *information* for any misdemeanor may be presented within two years from the date of the offense, and not afterward."

Review of case law is not conclusive:

Despite the statute that contemplates only indictments and informations, the Court of Criminal Appeals in a justice court case stemming from the conviction of a man accused of illegal gaming and fined $10, the Court held that the complaint was barred by the two year statute of limitations. *Ex parte Hoard*, 140 S.W. 449 (Tex. Crim. App. 1911).

More recently, however, the Court of Criminal Appeals has stated that "in absence of a statute there is no period of limitation barring prosecution because of the lapse of time. *Vasquez v. State*, 557 S.W.2d 779, 781 (Tex.Cr.App. 1977). Furthermore, the Court has already once refused to read references to "indictments" and "informations" to also imply complaints. *Huynh v. State*, 901 S.W.2d 480 (Tex. Crim. App. 1995). The Court's decision in Huynh brought about the statutory language that is now Article 45.019(f).

**24. Do defects in a citation invalidate a criminal charge?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

The question is who is going to be the complainant? TMCEC commonly receives phone calls from clerks who are given citations that are defective or ambiguous in stating an offense. Ethically, court clerks should not be expected by peace officers to "fill in the blanks." Peace officers or prosecutors should remedy defects.

**References:**

*Gordon v. State*, 801 S.W.2d 899 (Tex.Crim.App. 1990)

*State v. Mungia*, 119 S.W.3d 814 (Tex.Crim.App. 2003).

The Court of Criminal Appeals has acknowledged that a court has the power to dismiss a case without the State's consent in certain circumstances including defect in the charging instrument. *State v. Johnson*, 821 S.W.2d 609, 612 footnote 2 (Tex. Crim. App. 1991). Presumably, however, it would be inappropriate for a court to dismiss a defective citation without giving the State an opportunity to be heard or remedy since under Article 27.14(d) a citation is intended only an interim complaint and time saving device.

If the defendant waives the right to be charged by a formal complaint and elects that the prosecution proceed on the written notice of the charged offense, pursuant to Article 27.14(d), Code of Criminal Procedure, the defects in the citation could prove fatal to a prosecution (e.g., instances where the citation states the wrong day, month, year, location, etc.).

**25. Can a citation be admitted to evidence at trial?**

**ANSWER:** **YES** **NO** **IT DEPENDS**

**References:**

Texas Rules of Evidence, Rule 803

*Cole v. State*, 839 S.W.2d 798, 805-806 (Tex.Crim.App. 1990).

*Jefferson v. State*, 900 S.W.2d 97, 101-102 (Tex.App.-Houston [14th Dist.] 1995).

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# COURT SECURITY

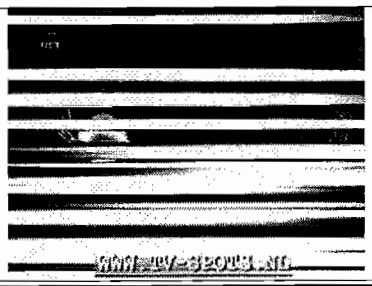
By the end of the session, judges will be able to:

- Determine the provisions necessary for an court security ordinance;
- Identity how funds collected under a properly enacted court security ordinance may be used; and,
- Identify and understand rulings in key cases and Texas Attorney General Opinions regarding appropriate court security expenditures.

# COURT SECURITY

Presented by:
Meichihko Proctor
Program Attorney & Deputy Counsel
Texas Municipal Courts Education Center

## Scout and Paws



## CCP Article 102.017

- The governing body of a municipality may create a municipal court building security fund and may require a defendant convicted of a misdemeanor offense to pay a $3 security fee as a cost of court.

## What Does "Convicted" Mean?

- A sentence is imposed on the person;
- The person receives community supervision, including deferred adjudication; or
- The court defers final disposition of the person's case.

## What do you do with the $$?

- The clerk shall collect the costs and pay them to the municipal treasurer, or to any other official who discharges the duties commonly delegated to the municipal treasurer, for deposit in a courthouse security fund.

## How Can You Use the $$?

- May be used **ONLY** to finance security personnel for the court, or to finance items when used for the purpose of providing security services for buildings housing the municipal court.

## Examples Include:

- The purchase or repair of X-ray machines and conveying systems;
- Handheld & walkthrough metal detectors;
- Identification cards and systems;
- Electronic locking and surveillance equipment;
- Bailiffs, deputy sheriffs, deputy constables, or contract security personnel.

# COURT SECURITY

Presented by:
Meichihko Proctor
Program Attorney & Deputy Counsel
Texas Municipal Courts Education Center

**TMCEC NOTE: This sample ordinance is provided for the benefit of city attorneys and prosecutors. Drafting an ordinance is a legislative function. Accordingly, members of the judiciary should not engage in such an activity.**

ORDINANCE NO. _____

**AN ORDINANCE PROVIDING FOR A "MUNICIPAL COURT BUILDING SECURITY FUND" PROVIDING FOR ASSESSMENT AND COLLECTION OF A MUNICIPAL COURT BUILDING SECURITY FEE: PROVIDING FOR SEVERABILITY: PROVIDING FOR PUBLICATION AND EFFECTIVE DATE: AND ORDAINING OTHER PROVISIONS RELATED TO THE SUBJECT MATTER HEREOF.**

**Whereas** the 74th Legislature of the State of Texas, meeting in Regular Session, passed Senate Bill 349, which *inter alia,* amended Article 102.017 of the Code of Criminal Procedure to provide for (i) the establishment of a Municipal Court Building Security Fund and (ii) the assessment and collection of a Municipal Court Building Security Fee;

**Whereas,** Governor George W. Bush approved Senate Bill 349 after passage thereof,

**Whereas,** Senate Bill 349 took effect on or about September, 1995; and

**Whereas,** on the ____ day of the month of _____ in the year 200__, the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas called for public hearings on the establishment of a "Municipal Court Building Security Fund" and the imposition of a Municipal Court Building Security Fee as set forth in Article 102.017, as amended, of the Code of Criminal Procedure;

NOW, THEREFORE, BE IT ORDAINED BY THE *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* OF _____, TEXAS

SECTION 1: That Chapter _____, Section _____, of the Code of Ordinances, *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas to read as follows:

A. Municipal Court Building Security Fund.

1. There is hereby created and established a Municipal Court Building Security Fund (the "Fund") pursuant to Article 102.017 of the Code of Criminal Procedure.

2. The Municipal Court of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas (the "Municipal Court") is hereby authorized and required to assess a Municipal Court Building Security Fee (the "Fee") in the amount of $3.00 against all Defendants convicted of a misdemeanor offense by the Municipal Court. Each misdemeanor conviction shall be subject to a separate assessment of the Fee.

3. A person is considered to have been convicted in a case if:
   - judgment, sentence, or both are imposed on the person;
   - the person receives deferred disposition; or
   - the Court defers final disposition or imposition of the judgment and sentence.

4. The Municipal Court Clerk is hereby authorized and required to collect the Fee and to pay same to the treasury of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas. All Fees so collected and paid over to the treasury of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas shall be segregated in the Fund.

5. The Fund shall be used only for the purpose of financing the purchase of security devices and/or services for the building or buildings housing the Municipal Court of the City of _____, Texas. "Security devices and/or services" shall include any and all items described in Article 102.017(d) of the Code of Criminal Procedure.

6. The Fund shall be administered by or under the direction of the City Council of the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas.

SECTION 2: If any provision, section, subsection, sentence, clause, or phrase of this ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void, or invalid (for any reason unenforceable), the validity of the remaining portions of this ordinance or the application to such other persons or sets of circumstances shall not be affected thereby, it being the intent of the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas in adopting this ordinance, that no portion thereof or provision contained herein shall become inoperative or fail by any reason of unconstitutionality or invalidity of any other portion or provision.

SECTION 3: All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed to the extent of the conflict.

SECTION 4: This ordinance shall be published and become effective in accordance with state law.

READ, CONSIDERED, PASSED, AND APPROVED ON FIRST READING by the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas at a regular meeting the ___ day of 200__, at which a quorum was present.

READ, CONSIDERED, PASSED, AND APPROVED ON SECOND AND FINAL READING by the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas at a regular meeting the ___ day of 200__, at which a quorum was present.

PASSED, APPROVED, and ADOPTED on the ____ day of _____, 200__.

_____
Mayor

Attest:

_____
City Secretary

CODE OF CRIMINAL PROCEDURE

CHAPTER 102. COSTS PAID BY DEFENDANTS

SUBCHAPTER A. GENERAL COSTS

Art. 102.017. COURT COSTS; COURTHOUSE SECURITY FUND; MUNICIPAL COURT BUILDING SECURITY FUND; JUSTICE COURT BUILDING SECURITY FUND. (a) A defendant convicted of a felony offense in a district court shall pay a $5 security fee as a cost of court.

(b) A defendant convicted of a misdemeanor offense in a county court, county court at law, or district court shall pay a $3 security fee as a cost of court. A defendant convicted of a misdemeanor offense in a justice court shall pay a $4 security fee as a cost of court. The governing body of a municipality by ordinance may create a municipal court building security fund and may require a defendant convicted of a misdemeanor offense in a municipal court to pay a $3 security fee as a cost of court.

(c) In this article, a person is considered convicted if:

(1) a sentence is imposed on the person;

(2) the person receives community supervision, including deferred adjudication; or

(3) the court defers final disposition of the person's case.

(d) Except as provided by Subsection (d-1), the clerks of the respective courts shall collect the costs and pay them to the county or municipal treasurer, as appropriate, or to any other official who discharges the duties commonly delegated to the county or municipal treasurer, as appropriate, for deposit in a fund to be known as the courthouse security fund or a fund to be known as the municipal court building security fund, as appropriate. A fund designated by this subsection may be used only to finance security personnel for a district, county, justice, or municipal court, as appropriate, or to finance items when used for the purpose of providing security services for buildings housing a district, county, justice, or municipal court, as appropriate, including:

(1) the purchase or repair of X-ray machines and conveying systems;

(2) handheld metal detectors;

(3) walkthrough metal detectors;

(4) identification cards and systems;

(5) electronic locking and surveillance equipment;

(6) bailiffs, deputy sheriffs, deputy constables, or contract security personnel during times when they are providing appropriate security services;

(7) signage;

(8) confiscated weapon inventory and tracking systems;

(9) locks, chains, alarms, or similar security devices;

(10) the purchase or repair of bullet-proof glass; and

(11) continuing education on security issues for court personnel and security personnel.

(d-1)(1) This subsection applies only to a justice court located in a county in which one or more justice courts are located in a building that is not the county courthouse.

(2) The county treasurer shall deposit one-fourth of the cost of court collected under Subsection (b) in a justice court described by Subdivision (1) into a fund to be known as the justice court building security fund. A fund designated by this subsection may be used only for the purpose of providing for a justice court located in a building that is not the county courthouse security services as described by Subsection (d).

(e) The courthouse security fund and the justice court building security fund shall be administered by or under the direction of the commissioners court. The municipal court building fund shall be administered by or under the direction of the governing body of the municipality.

Added by Acts 1993, 73rd Leg., ch. 818, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 764, Sec. 2, eff. Aug. 28, 1995; Subsecs. (a), (b), (d) amended by Acts 1997, 75th Leg., ch. 12, Sec. 1, eff. Sept. 1, 1997; Subsec. (d) amended by Acts 1999, 76th Leg., ch. 110, Sec. 1, eff. May 17, 1999; Subsec. (d) amended by Acts 2005, 79th Leg., ch. 83, Sec. 2, eff. Sept. 1, 2005; Art. heading amended by Acts 2005, 79th Leg., ch. 1087, Sec. 1, eff. Sept. 1, 2005; Subsecs. (b), (d), (e) amended by Acts 2005, 79th Leg., ch. 1087, Sec. 2, eff. Sept. 1, 2005; Subsec. (d-1) added by Acts 2005, 79th Leg., ch. 1087, Sec. 2, eff. Sept. 1, 2005.

# Court Technology and the Court Technology Fund

Presented by: Meichihko Proctor

## CCP Article 102.0172

- The governing body of a municipality may, by ordinance, create a municipal court technology fund and may require a defendant convicted of an offense to pay a technology fee not to exceed $4.

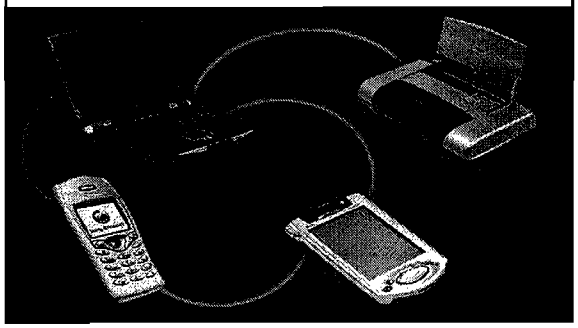
## What Does "Convicted" Mean?

- A sentence is imposed on the person;
- The person is placed on community supervision, including deferred adjudication community supervision;
- The court defers final disposition of the person's case.

## What Do You Do With The $$

- The municipal court clerk shall collect the costs and pay the funds to the municipal treasurer, or to any other official who discharges the duties commonly delegated to the municipal treasurer, for deposit in a municipal court technology fund.

## How May the $$ Be Used?



## Examples Include

- Computer Systems
- Computer Networks
- Computer Hardware/Software
- Imaging Systems
- Electronic Kiosks
- Electronic Ticket Writers
- Docket Management Systems

**Court Management Software**

- Why Automate?

- The Purchase of a Package

## Fine Collection

- Photo Imaging
- Payment by Credit Card by Telephone
- Quick Collect
- Kiosks
- DPS/FTA Program

## Court Technology and the Court Technology Fund

Presented by: Meichihko Proctor

**TMCEC NOTE: This sample ordinance is provided for the benefit of city attorneys and prosecutors. Drafting an ordinance is a legislative function. Accordingly, members of the judiciary should not engage in such an activity.**

ORDINANCE NO. _____

**An ordinance of the** *(insert type of entity that the municipality is known as, such as City, Town, or Village)* **of** _____, **Texas, establishing a Municipal Court Technology Fund; providing for the assessment and collection of a municipal court technology fee; providing for severability; providing for publication and effective date; providing for expiration date.**

**Whereas,** Article 102.0172 of the Code of Criminal Procedure provides for the establishment of a Municipal Court Technology Fund.

**Be it Ordained by the** *(insert name of governing body: City Council, Board of Alderman, or City Commission)* **of the** *(insert type of entity that the municipality is known as, such as City, Town, or Village)* **of** _____, **Texas:**

**Section 1: Establishment of Municipal Court Technology Fund**

A. There is hereby created and established a Municipal Court Technology Fund, here-in-now known as the Fund, pursuant to Article 102.0172 of the Code of Criminal Procedure.

B. The Fund may be maintained in an interest bearing account and may be maintained in the general revenue account.

**Section 2: Establishment of Amount of the Fee and Assessment and Collection**

A. The fee shall be in the amount of *(up to four dollars).*

B. The fee shall be assessed and collected from the Defendant upon conviction for a misdemeanor offense in the Municipal Court as a cost of court. A Defendant is considered convicted if:
   (1) judgment, sentence, or both are imposed on the person;
   (2) the person is placed on deferred disposition; or
   (3) the court defers final disposition or imposition of the judgment and sentence.

C. The fee shall be collected on conviction for an offense committed on or after September 1, 1999 *(or for convictions on offenses committed on or after ordinance is adopted).**

D. The Clerk of the Court shall collect the fee and pay the fee to the municipal treasurer or *(other official who discharges or performs the duties of the treasurer)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas, who shall deposit the fee into the Municipal Court Technology Fund.

**Section 3: Designated Use of the Fund and Administration**

A. The Fund shall be used only for the purpose of financing the purchase of or to maintain technology enhancements for the Municipal Court of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas. "Technology enhancements" shall include any ald all items described in Article 102.0172 of the Code of Criminal Procedure.

* Fee may only be assessed and collected on offenses occurring on or after September 1, 1999. The fee may not be assessed or collected retroactively if Fund is established at a later date than September 1, 1999.

B. The Fund shall be administered by or under the direction of the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas.

**Section 4. Severability**

If any provision, section, subsection, sentence, clause or phrase of this ordinance, or the application of same to any person or set circumstances for any reason is held to be unconstitutional, void or invalid or for any reason unenforceable, the validity of the remaining portions of this ordinance of the application thereby shall remain in effect, it being the intent of the *(insert name of governing body: City Council, Board of Alderman, or City Commission)* of the *(insert type of entity that the municipality is known as, such as City, Town, or Village)* of _____, Texas in adopting this ordinance, that no portion thereof or provision contained herein shall become inoperative or fail by any reason of unconstitutionality or invalidity of any portion or provision.

**Section 5. Repealing Conflict**

All ordinances and parts of ordinances in conflict with the ordinance are hereby repealed to the extent of conflict with this ordinance.

**Section 6. Publishing and Effective Date**

This ordinance shall be published in accordance with the requirement of publishing all ordinances and becomes effect in accordance with state law upon passage, but no earlier that September 1, 1999.

**Section 7. Administration of Fund**

The purpose of the use of any funds remaining in the fund shall continue to be used and administered as required by this ordinance and for that purpose this ordinance remains in effect.

**Passed, Approved, and Adopted on this the _____ day of _____, 200___.**

Attest:

*(insert type of entity that the municipality is known as,such as City, Town, or Village)* of _____, Texas

_____
City Secretary

_____
Mayor

Art. 102.0172. COURT COSTS; MUNICIPAL COURT TECHNOLOGY FUND. (a) The governing body of a municipality by ordinance may create a municipal court technology fund and may require a defendant convicted of a misdemeanor offense in a municipal court or municipal court of record to pay a technology fee not to exceed $4 as a cost of court.

(b) In this article, a person is considered convicted if:

(1) a sentence is imposed on the person;

(2) the person is placed on community supervision, including deferred adjudication community supervision; or

(3) the court defers final disposition of the person's case.

(c) The municipal court clerk shall collect the costs and pay the funds to the municipal treasurer, or to any other official who discharges the duties commonly delegated to the municipal treasurer, for deposit in a fund to be known as the municipal court technology fund.

(d) A fund designated by this article may be used only to finance the purchase of or to maintain technological enhancements for a municipal court or municipal court of record, including:

(1) computer systems;

(2) computer networks;

(3) computer hardware;

(4) computer software;

(5) imaging systems;

(6) electronic kiosks;

(7) electronic ticket writers; and

(8) docket management systems.

(e) The municipal court technology fund shall be administered by or under the direction of the governing body of the municipality.

(f) Repealed by Acts 2003, 78th Leg., ch. 502, Sec. 2, eff. Sept. 1, 2003.

Added by Acts 1999, 76th Leg., ch. 285, Sec. 1, eff. Sept. 1, 1999; Subsec. (d) amended by Acts 2003, 78th Leg., ch. 502, Sec. 1, eff. Sept. 1, 2003; Subsec. (f) repealed by Acts 2003, 78th Leg., ch. 502, Sec. 2, eff. Sept. 1, 2003.

Art. 102.0173. COURT COSTS; JUSTICE COURT TECHNOLOGY FUND. (a) The commissioners court of a county by order shall create a justice court technology fund. A defendant convicted of a misdemeanor offense in justice court shall pay a $4 justice court technology fee as a cost of court for deposit in the fund.

(b) In this article, a person is considered convicted if:

(1) a sentence is imposed on the person; or

(2) the court defers final disposition of the person's case.

(c) The justice court clerk shall collect the costs and pay the funds to the county treasurer, or to any other official who discharges the duties commonly delegated to the county treasurer, for deposit in a fund to be known as the justice court technology fund.

(d) A fund designated by this article may be used only to finance:

(1) the cost of continuing education and training for justice court judges and clerks regarding technological enhancements for justice courts; and

(2) the purchase and maintenance of technological enhancements for a justice court, including:

(A) computer systems;

(B) computer networks;

(C) computer hardware;

(D) computer software;

(E) imaging systems;

(F) electronic kiosks;

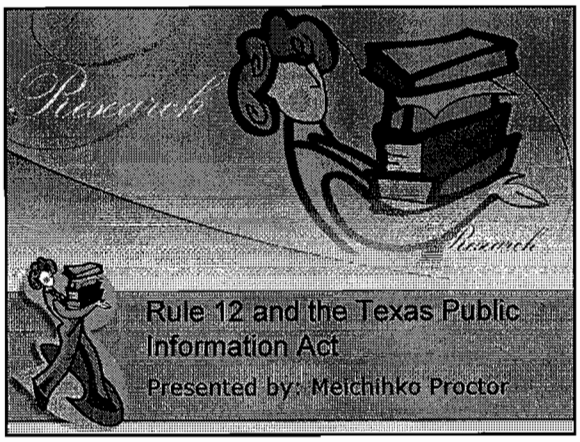
(G) electronic ticket writers; and

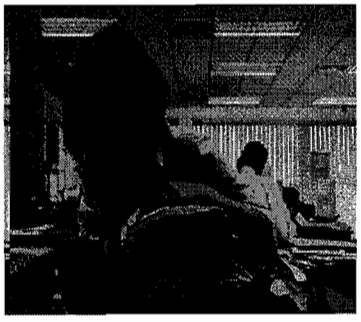
(H) docket management systems.

(e) The justice court technology fund shall be administered by or under the direction of the commissioners court of the county.

(f) Repealed by Acts 2005, 79th Leg., ch. 240, Sec. 3.

Added by Acts 2001, 77th Leg., ch. 977, Sec. 1, eff. Sept. 1, 2001. Subsecs. (a), (d) amended by Acts 2005, 79th Leg., ch. 240, Sec. 1, eff. Sept. 1, 2005; Subsec. (f) repealed by Acts 2005, 79th Leg., ch. 240, Sec. 3, eff. Sept. 1, 2005.



## The Case of the Helpful Judge...

- "You did beautifully. Really. We both know you would out-prepare the other side. And you did. It showed through on the presentation. Presentation of the law was a killer."
  - Married judge to female attorney with a case in his court.

## The Story Continues....

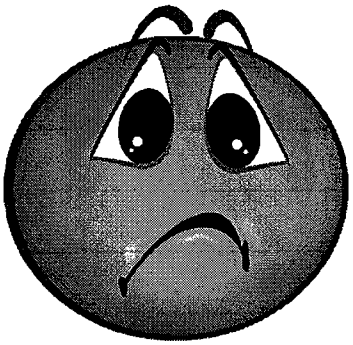
- "Those guys are so bad, who knows what they are capable of???!!!," a reference to the opposing attorneys.
  - Female attorney to the married judge

## And Continues...

- "I used to think that (one of the opposing attorneys) was sometimes a partial idiot; now he may have proven himself to be a COMPLETE one."
  - Married judge to female attorney.

## And Contains Attachments!

- With notes such as:
  - "Hoping and anticipating that you might be wanting this and interested in it."
  - "I would like to specially request time tomorrow for something special." Finishing this one with a smiley face, the judge added: "Hope you are amenable."



## Rule 12

- Effective April 1, 1999 – Rules of Judicial Administration
- Designed to define public access to judicial records.
- Does NOT apply to records pertaining to the court's adjudicative function, which are cases filed in the court.

## What Does This Mean?

## What is a "Judicial Record?"

- *Judicial record* means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record. A record is a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission.

## Requests

- Must be in Writing
- Must Include Sufficient Information to Reasonably Identify Record Requested
- Sent to the Records Custodian

## Time for Inspection

- As soon as practicable – and not more than 14 days – after actual receipt of a request.

# Applicability

- Does NOT apply to:
  - Records or information to which access is controlled by: a state or federal court rule, including a rule of civil or criminal procedure; a rule of appellate procedure; a rule of evidence; a rule of administration; a state or federal court order; the Code of Judicial Conduct; Chapter 552 of the Government Code.

# Applicability

- Does NOT apply to:
  - Records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by: a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or common law, court order, judicial decision, or another provision of law.
  - Elected officials other than judges.

# Exemptions

- Judicial Work Product (and drafts)
- Security Plans
- Personnel Information
- Home Address and Family Information
- Applicants for Employment/Volunteers
- Internal Deliberation

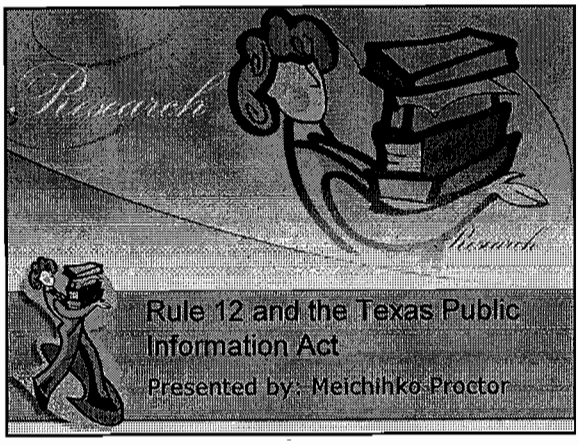
# Exemptions

- Judicial Calendar Information
- Information Confidential Under Law
- Litigation/Settlement Negotiations
- Investigations of Character or Conduct
- Examinations
- Court Law Library Information

## Public Information Act

- Government Code Chapter 552
- Judicial Exclusion under the Act.
- Access to information collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules. 552.0035

- **Q: Are judicial officials and employees required to obtain open government training?**
- **A:** Judicial officials and judicial employees do not need to attend Public Information Act training, but may be responsible for completing Open Meetings Act training.
- Judicial officials and employees do not need to obtain training regarding the Public Information Act because public access to information maintained by the court system is governed by Rule 12 of the Judicial Administration Rules of the Texas Supreme Court and by other applicable laws and rules. (see Govt. Code 552.0035). However, if a judge or judicial employee serves as a member of a governmental body subject to the Open Meetings Act, we advise that they should comply with the Open Meetings Act training requirements. If you are unsure if the open government training requirement applies to you, please consult with the Office of the Attorney General or the Office of Court Administration.


Research
Research
Rule 12 and the Texas Public Information Act
Presented by: Meichihko Proctor

# RULE 12
# PUBLIC ACCESS TO JUDICIAL RECORDS

Effective April 1, 1999

**12.1 Policy.** The purpose of this rule is to provide public access to information in the judiciary consistent with the mandates of the Texas Constitution that the public interests are best served by open courts and by an independent judiciary. The rule should be liberally construed to achieve its purpose.

**12.2 Definitions.** In this rule:

(a) *Judge* means a regularly appointed or elected judge or justice.

(b) *Judicial agency* means an office, board, commission, or other similar entity that is in the Judicial Department and that serves an administrative function for a court. A task force or committee created by a court or judge is a "judicial agency".

(c) *Judicial officer* means a judge, former or retired visiting judge, referee, commissioner, special master, court appointed arbitrator, or other person exercising adjudicatory powers in the judiciary. A mediator or other provider of nonbinding dispute resolution services is not a "judicial officer".

(d) *Judicial record* means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced or filed in connection with any matter that is or has been before a court is not a judicial record. A record is a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission.

(e) *Records custodian* means the person with custody of a judicial record determined as follows:

(1) The judicial records of a court with only one judge, such as any trial court, are in the custody of that judge. Judicial records pertaining to the joint administration of a number of those courts, such as the district courts in a particular county or region, are in the custody of type judge who presides over the joint administration, such as the local or regional administrative judge.

(2) The judicial records of a court with more than one judge, such as any appellate court, are in the custody of the chief justice or

presiding judge, who must act under this rule in accordance with the vote of a majority of the judges of the court. But the judicial records relating specifically to the service of one such judge or that judge's own staff are in the custody of that judge.

(3) The judicial records of a judicial officer not covered by subparagraphs (1) and (2) are in the custody of that officer.

(4) The judicial records of a judicial agency are in the custody of its presiding officer, who must act under this rule in accordance with agency policy or the vote of a majority of the members of the agency.

**12.3 Applicability.** This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence; or

(D) a rule of administration;

(2) A state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct; or

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decisions, or another provision of law.

**12.4 Access to Judicial Records.**

**(a) Generally.** Judicial records other than those covered by Rules 12.3 and 12.5 are open to the general public for inspection and copying during regular business hours. But this rule does not require a court, judicial agency, records custodian to:

(1) create or retain a judicial record for a specific period of time, other than to print information stored in a computer;

(2) retain a judicial record for a specific period of time;

(3) allow the inspection of or provide a copy of information in a book or publication commercially available to the public; or

(4) respond to or comply with a request for a judicial record from or on behalf of an individual who is imprisoned or confined in a correctional facility as defined in section 1.07a, Penal Code, or in any other such facility in any state, federal, or foreign jurisdiction.

**(b) Voluntary disclosure.** A records custodian may voluntarily make part or all of the information in a judicial record available to the public, subject to Rule 12.2(e)(2) and 12.2(e)(4), unless the disclosure is expressly prohibited by law or exempt under this rule, or the information is confidential under law. Information voluntarily disclosed must be made available to any person who requests it.

**12.5 Exemptions from Disclosure.** The following records are exempt from disclosure under this rule:

**(a) Judicial work product and drafts.** Any record that relates to a judicial officer's adjudicative decision making process prepared by that judicial officer, by another judicial officer, or by court staff, an intern, or any other person acting on behalf of or at the direction of the judicial officer.

**(b) Security plans.** Any record, including a security plan or code, the release of which would jeopardize the security of an individual against physical injury or jeopardize information or property against theft, tampering, improper use, illegal disclosure, trespass, unauthorized access, or physical injury.

**(c) Personnel information.** Any personnel record that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

**(d) Home address and family information.** Any record reflecting any person's home address, home or personal telephone number, social security number, or family members.

**(e) Applicants for employment or volunteer services.** Any records relating to an applicant for employment or volunteer services.

**(f) Internal deliberations on court or judicial administration matters.** Any record relating to internal deliberations of a court or judicial agency or among judicial officers or members of a judicial agency, on matters of court or judicial administration.

**(g) Court law library information.** Any record in a law library that links a patron's name with the material requested or borrowed by that patron.

**(h) Judicial calendar information.** Any record that reflects a judicial officer's appointments or engagements that are in the future or that constitute an invasion of personal privacy.

**(i) Information confidential under other law.** Any record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute or common law, including information that relates to:

(1) a complaint alleging misconduct against a judicial officer, if the complaint is exempt from disclosure under chapter 33, Government Code, or other law;

(2) a complaint alleging misconduct against a person who is licensed or regulated by the courts, if the information is confidential under applicable law; or

(3) a trade secret or commercial or financial information made privileged or confidential by state or judicial decision.

**(j) Litigation or settlement negotiations.** Any judicial record relating to civil or criminal litigation or settlement negotiations:

(1) in which a court or judicial agency is or may be a party; or

(2) in which a judicial officer or members of a judicial agency is or may be a party as a consequence of the person's office or employment.

**(k) Investigations of character or conduct.** Any record relating to an investigation of any person's character or conduct, unless:

(1) the record is requested by the person being investigated; and

(2) release of the record, in the judgment of the records custodian, would not impair the investigation.

**(l) Examinations.** Any record relating to an examination administered to any person, unless requested by the person after the examination is concluded.

**12.6 Procedures for obtaining access to judicial records.**

**(a) Request.** A request to inspect or copy a judicial record must be in writing and must include sufficient information to reasonably identify the record requested. The request must be sent to the records custodian and not to a court clerk or other agency for the records custodian. A

requestor need not have detailed knowledge of the records custodian's filing system or procedures in order to obtain the information.

**(b) Time for inspection and delivery of copies.** As soon as practicable and not more than fourteen days after actual receipt of a request to inspect or copy a judicial record, if the record is available, the records custodian must either:

(1) allow the requestor to inspect the record and provide a copy if one is requested; or

(2) send written notice to the requestor stating that the record cannot within the prescribed period be produced or a copy provided, as applicable, and setting a reasonable date and time when the document will be produced or a copy provided, as applicable.

**(c) Place of inspection.** A records custodian must produce a requested judicial record at a convenient, public area.

**(d) Part of record subject to disclosure.** If part of a requested record is subject to disclosure under this rule and part is not, the records custodian must redact the portion of the record that is not subject to disclosure, permit the remainder of the record to be inspected, and provide a copy if requested.

**(e) Copying, mailing.** The records custodian may deliver the record to a court clerk for copying. The records custodian may mail the copy to a requestor who has prepaid the postage.

**(f) Recipient of request not custodian of record.** A judicial officer or a presiding officer of a judicial agency who receives a request for a judicial record not in his or her custody as defined by this rule must promptly attempt to ascertain who the custodian or the record is. If the recipient of the request can ascertain who the custodian of the requested record is, the recipient must promptly refer the request to that person and notify the requestor in writing of the referral. The time for response prescribed in Rule 12.6(b) does not begin to run until the referral is actually received by the records custodian. If the recipient cannot ascertain who the custodian of the requested record is, the recipient must promptly notify the requestor in writing that the recipient is not the custodian of the record and cannot ascertain who the custodian of the record is.

**(g) Inquiry to requestor.** A person requesting a judicial record may not be asked to disclose the purpose of the request as a condition of obtaining the judicial record. But a records custodian may make inquiry

to establish the proper identification of the requestor or to clarify the nature or scope of a request.

**(h) Uniform treatment of requests.** A records custodian must treat all requests for information uniformly without regard to the position or occupation of the requestor or the person on whose behalf a request is made, including whether the requestor or such person is a member of the media.

**12.7 Costs for Copies of Judicial Records; Appeal of Assessment.**

**(a) Costs.** The costs for a copy of a judicial record is either:

(1) the costs prescribed by statute, or

(2) if no statute prescribes the costs, the actual costs, as defined in section 111.62, Title 1, Texas Administrative Code, not to exceed 125 percent of the amount prescribed by the General Services Commission for providing public information under Title 1, Texas Administrative Code, sections 111.63, 111.69, and 111.70.

**(b) Waiver or reduction of cost assessment by records custodian.** A records custodian may reduce or waive the charge for a copy of a judicial record if:

(1) doing so is in the public interest because providing the copy of the record primarily benefits the general public, or

(2) the cost of processing collection of a charge will exceed the amount of the charge.

**(c) Appeal of cost assessment.** A person who believes that a charge for a copy of a judicial record is excessive may appeal the overcharge in the manner prescribed by Rule 12.9 for the appeal of the denial of access to a judicial record.

**(d) Records custodian not personally responsible for costs.** A records custodian is not required to incur personal expense in furnishing a copy of a judicial record.

**12.8 Denial of access to a judicial record.**

**(a) When request may be denied.** A records custodian may deny a request for a judicial record under this rule only if the records custodian:

(1) reasonably determines that the requested judicial record is exempt from required disclosure under this rule; or

(2) makes specific, nonconclusory findings that compliance with the request would substantially and unreasonably impede the routine operation of the court or judicial agency.

**(b) Time to deny.** A records custodian who denies access to a judicial record must notify the person requesting the record of the denial within a reasonable time not to exceed fourteen days after receipt of the request, or before the deadline for responding to the request extended under Rule 12.6(b)(2).

**(c) Contents of notice of denial.** A notice of denial must be in writing and must:

(1) state the reason for the denial;

(2) inform the person of the right of appeal provided by Rule 12.9; and

(3) include the name and address of the Administrative Director of the Office of Court Administration.

**12.9 Relief from denial of access to *Judicial* Records.**

**(a) Appeal.** A person who is denied access to judicial record may appeal the denial by filing a petition for review with the Administrative Director of the Office of Court Administration.

**(b) Contents of petition for review.** The petition for review:

(1) must include a copy of the request to the record custodian and the records custodian's notice of denial;

(2) may include any supporting facts, arguments, and authorities that the petitioner believes to be relevant; and

(3) may contain a request for expedited review, the grounds for which must be stated.

**(c) Time for filing.** The petition must be filed not later than the 30th day after the date that the petitioner receives notice of a denial of access to the judicial record.

**(d) Notification of records custodian and presiding judges.** Upon receipt of the petition for review, the Administrative Director must promptly notify the records custodian who denied access to the judicial record and the presiding judge or each administrative judicial region of the filing of the petition.

**(e) Response.** A records custodian who denies access to a judicial record and against whom relief is sought under this section may within fourteen days of receipt of notice from the Administrative Director

submit a written response to the petition for review and include supporting facts and authorities in the response. The records custodian must mail a copy of the response to the petitioner. The records custodian may also submit for in camera inspection a record, or a sample of records, to which access has been denied.

**(f) Formation of special committee.** Upon receiving notice under Rule 12.9(a)(3), the presiding judges must refer the petition to a special committee of not less than five of the presiding judges for review. The presiding judges must notify the Administrative Director, the petitioner, and the records custodian of the names of the judges selected to service on the committee.

**(g) Procedure for review.** The special committee must review the petition and the records custodian's response and determine whether the requested judicial record should be made available under this rule to the petitioner. The special committee may request the records custodian to submit for in camera inspection a record, or a sample of records, to which access has been denied. The records custodian may respond to the request in whole or in part but is not required to do so.

**(h) Considerations.** When determining whether the requested judicial record should be made available under this rule to petitioner, the special committee must consider:

(1) the text and policy of this Rule;

(2) any supporting and controverting facts, arguments, and authorities in the petition and the response; and

(3) prior applications of this Rule by other special committees or by courts.

**(i) Expedited review.** On request of the petitioner, and for good cause shown, the special committee may schedule an expedited review of the petition.

**(j) Decision.** The special committee's determination must be supported by a written decision that must:

(1) issue within sixty days of the date that the Administrative Director received the petition for review;

(2) either grant the petition in whole or in part or sustain the denial of access to the requested judicial record;

(3) state the reasons for the decision, including appropriate citations to this rule; and

(4) identify the record or portions of the record to which access is ordered or denied, but only if the description does not disclose confidential information.

**(k) Notice of decision.** The special committee must send the decision to the Administrative Director. On receipt of the decision from the special committee, the Administrative Director must:

(1) immediately notify the petitioner and the records custodian of the decision and include a copy of the decision with the notice; and

(2) maintain a copy of the special committee's decision in the Administrative Director's office for public inspection.

**(l) Publication of decisions.** The Administrative Director must publish periodically to the judiciary and the general public the special committees' decisions.

**(m) Final decision.** A decision of a special committee under this rule is not appealable but is subject to rule by mandamus.

**(n) Appeal not exclusive remedy.** The right of review provided under this subdivision is not exclusive and does not preclude relief by mandamus.

**12.10 Sanctions.** A records custodian who fails to comply with this rule, knowing that the failure to comply is in violation of the rule, is subject to sanctions under the Code of Judicial Conduct.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 00-001

**RESPONDENT:** J. B. Marshall, Jr., Presiding Judge, Pflugerville Municipal Court

**DATE:** February 4, 2000

**SPECIAL COMMITTEE:** Judge Pat McDowell, Judge Olen Underwood, Judge B. B. Schraub, Judge Darrell Hester, Judge Ray D. Anderson

The applicant is an individual who has requested that the Pflugerville Municipal Court allow him to view traffic citations for research he is conducting regarding "how the city of Pflugerville does business regarding traffic citations." The presiding judge of the municipal court has refused access to the traffic citation records on the ground that they are exempt under the provisions of Rule 12.5(d) of the Rules of Judicial Administration. The applicant has filed a petition for review of this denial of access.

The threshold issue in a Rule 12 appeal is whether the records are "judicial records," which are defined by Rule 12.2(d) as follows:

"*Judicial record* means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record."

Traffic citation records pertain to the municipal court's adjudicative function and are created, produced, and filed in connection with matters that are or have been before the municipal court. Thus, they are not judicial records within the meaning of Rule 12, and we cannot decide the question of whether they are exempt from disclosure. Accordingly, we can neither grant the petition in whole or in part nor sustain the denial of access to the requested record. Nevertheless, we will explain the duties of a court in relation to public access to case records of this type.

As previously discussed, Rule 12 is a new rule designed to define public access to judicial records, which are those records *not* related to a court's adjudicative function. Other records, which *are* related to a court's adjudicative function, are subject to other rules or laws. For purposes of this discussion, we will call those records "court records."

Rule 76a of the Texas Rules of Civil Procedure governs public access to civil court records. It provides that civil court records "are presumed to be open to the general public." They may be sealed only upon a showing of "a specific, serious and substantial interest which clearly outweighs . . . this presumption of openness; [and] any probable adverse effect that sealing will have upon the general public health or safety; [and that] no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted."

Public access to criminal court records, such as those at issue here, are governed by common law and constitutional law. The common law right to public access was articulated by the United States Supreme Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.C t. 1306, 1312 (1978), as follows:

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies . . . ."

The constitutional law relating to public access to criminal court records was summarized by the court in *Express-News Corp. v. MacRae*, 787 S.W.2d 451, 452 (Tex. App.-San Antonio 1990), as follows:

"The public's right to public trials under the First and Fourteenth Amendments to the United States Constitution includes a presumption that judicial records will be open to inspection by the press and public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.C t. 1306, 1312 (1978). This presumption of openness may be overcome by a countervailing interest, such as the defendant's right to a fair trial, but the reason for closure or sealing must be apparent and clearly articulated. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581, 100 S.Ct. 2814, 2829-30 (1980); *Houston Chronicle Publishing Co. v. Hardy*, 578 S.W.2d 495, 499 (Tex. App.-Corpus Christi, 1984), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754 (1985)."

In *Star-Telegram, Inc. v. Walker,* 834 S.W.2d 54, 57 (Tex. 1992), the court conditionally granted a writ of mandamus against a trial court which had prohibited a newspaper from publishing the identity of a rape victim which had already been disclosed in an indictment, a motion in limine, and a charge to the jury. The court held that once they are filed with the court, court records become public records.

Although court records are not records covered by the Public Information Act (formerly "Open Records Act"), Texas Government Code §552.001 *et seq.*, several attorney general open records letters have discussed the issue, and found a right to public access. OR99-1825 (traffic citations are subject to disclosure under common-law right to copy and inspect court records and statutory law governing municipal courts); OR99-2611 (personal information such as place of employment, work and home telephone numbers of the accused which are found in traffic citations maintained by police department are not exempt from disclosure); OR99-0766 (traffic citations maintained by city are subject to Public Information Act); OR99-3698 (distinguishing between records maintained solely by municipal court and those also maintained by city).

For the reasons stated, this review committee can neither grant the petition in whole or in part nor sustain the denial of access to the requested records.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 02-003

**RESPONDENT:** Michael O=Neal, Administrative Judge of the Municipal Court for the City of Dallas

**DATE:** June 28, 2002

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Kelly Moore, Judge David Peeples

The applicant requested Aall records intended to instruct, assist or guide judges in the exercise of their contempt power@ from the administrative judge of the municipal court of the City of Dallas. The judge never responded to the request for records or to our letter informing him of the filing of the petition for review and of his right to file a response.

Rule 12.2(d) and (e) define a judicial record and a records custodian as follows:

> AJudicial record means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record. . . .
>
> ARecords custodian means the person with custody of a judicial record . . . . Judicial Records pertaining to the joint administration of a number of those courts, such as the district courts in a particular county or region, are in the custody of the judge who presides over the joint administration, such as the local or regional administrative judge.@

We have been given no assistance in this matter by the administrative municipal judge. The requested records appear to be judicial records related to the administration of the Dallas municipal court with its many individual judges. Accordingly, pursuant to Rule 12.9(j), we grant the petition.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 02-004

**RESPONDENT:** Lawrence Dee Shipman, Judge of the 211th Judicial District Court

**DATE:** November 6 , 2002

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Jeff Walker, Judge Olen Underwood

The applicant requested from Judge Lawrence Dee Shipman copies of the oaths of office and anti-bribery statements signed in accordance with Article XVI, Section 1 of the Texas Constitution. He also asked why a judge other than Judge Shipman conducted a hearing in a particular case. Through the district attorney, Judge Shipman replied that he was not the custodian of records for the copies requested and that they were in the custody of the Secretary of State. He also replied that his reasons for not conducting the hearing were exempt from disclosure under Rule 12.5(a). The applicant filed this petition for review and requested expedited review on the ground that he needs the records in order to determine whether Judge Shipman was disqualified to act as a judge in a case involving his client, and that the client is scheduled to be executed on November 21, 2002.

We grant the request for expedited review.

Pursuant to Article XVI Section 1 of the Texas Constitution, the sworn statements of district judges are filed and maintained with the Secretary of State. Pursuant to 1 Texas Administrative Code Section 73.71, the oaths of office of district judges also are filed and maintained by the Secretary of State. Judge Shipman told the applicant that he did not have custody of the records requested and that he could obtain copies from the Statutory Documents Section of the Secretary of State=s Office. He gave the name, phone number, and address of a contact person in that office. Judge Shipman satisfied his duties under Rule 12, and we therefore deny the petition for review regarding these documents.

Regarding the request to provide the reasons for Judge Shipman=s recusal or disqualification in a particular case, this is not a request for records, but is a request for reasons. If it were a request for records, it would be a request for records pertaining to the court=s adjudicative function, and would therefore not be a request for Ajudicial records@ within the definition of Rule 12.2(d). Accordingly, we deny the petition for review regarding the reasons for Judge Shipman=s decision.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 02-005

**RESPONDENTS:** J. B. Marshall, Jr. and Diana Jean Orton, Pflugerville Municipal Court Judges; and Jerry B. Jennison and Guillermo C. Serna, Tom Green County Justices of the Peace

**DATE:** December 23, 2002

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Stephen B. Ables, Judge Dean Rucker

The applicant requested from the Pflugerville municipal court and from the Tom Green County Justice of the Peace courts the names, addresses, and completion dates of individuals who have received citations for moving violations and who have already been granted permission to attend a defensive driving course for a certain time period. The courts either responded that the information was not subject to the Public Information Act or that portions of the information requested were exempt from disclosure under Rule 12.5(d).

While the records are in the custody of the courts, they are records relating to cases pending in those courts. Thus, they are not subject to the Public Information Act, and they are not subject to Rule 12 of the Rules of Judicial Administration. *Rule 12 Decision 00-001.* Public access to criminal court records, such as those at issue here, are governed by common law and constitutional law, and such law dictates a presumption of openness. *Id.* Generally, traffic citations are subject to disclosure under the common-law right to copy and inspect court records. *Office of the Attorney General OR99-3698.* However, this committee has no power to enforce any right to access not governed by Rule 12.

Because these records are records related to cases in the respondent courts, they are not judicial records subject to Rule 12, and we accordingly deny the petition for review.

# Before the Presiding Judges of the Administrative Judicial Regions

## Supplemental Per Curiam Rule 12 Decision

**APPEAL NO.:** 03-002

**RESPONDENTS:** Elaine M. Timberlake, City of Houston Municipal Court Judge

**DATE:** August 18, 2003

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Olen Underwood, Judge Jeff Walker

After our first decision was issued in this matter, the Respondent raised the issue that the complainants' home addresses, home or personal telephone numbers, social security numbers, and family member information were contained in the requested complaint records. The Respondent alleged that those portions of the record were exempt from disclosure under Rule 12.5(d), and requested that they be allowed to deny access to those exempt portions by redacting them.

We agree that the portions of the requested records that reflect any person's home address, home or personal telephone number, social security number, or family members are exempt from disclosure under Rule 12.5(d). Accordingly, we reaffirm our earlier decision granting the petition for access to the complaint records. However, the municipal court should produce those records only after redacting information that reflects any person's home address, home or personal telephone number, social security number, or family members.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 03-003

**RESPONDENT:** City Secretary for City of Richardson Municipal Courts

**DATE:** August 18, 2003

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Stephen B. Ables, Judge Dean Rucker

The applicant requested access to "all court or case records, judicial records, and public records (for the last five years) of misdemeanor convictions, if any stemming from violations of the City of Richardson Parks Department rules and regulations held by the City of Richardson Municipal Court." The city agreed to provide copies of the records with confidential information redacted, provided the requester paid the costs of the copying and redacting. The requester filed this petition for review under Rule 12 of the Rules of Judicial Administration.

When records of misdemeanor convictions are in the custody of the municipal court, they are records pertaining to the municipal court=s adjudicative function and are created, produced, and filed in connection with matters that are or have been before the municipal court. As such, they are not judicial records within the definition of Rule 12.2(d). *See* Rule 12 Decisions 00-001; 02-002, and 02-005. Accordingly, we deny the petition for review.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 03-004

**RESPONDENT:** Cam McCabe, City of Tyler Municipal Court Administrator

**DATE:** August 18, 2003

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Kelly G. Moore, Judge David Peeples

The applicant requested from the Tyler municipal court the names and addresses of individuals who have signed up to take a defensive driving course for ticket dismissal. The court responded that the addresses were exempt from disclosure under Rule 12.5(d), so that the court was prohibited from voluntarily providing the information under Rule 12.4(b). The applicant filed this petition for review. The court has informed this committee that it wants to disclose the information, but believes it is prohibited from doing so by the cited provisions of Rule 12.

The records requested in this matter are records relating to cases pending in the municipal court. Case records are not subject to the Public Information Act, and they are not subject to Rule 12 of the Rules of Judicial Administration. *Rule 12 Decisions 00-001; 02-005.*

Because the records are not judicial records subject to Rule 12, we deny the petition for review.

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 03-006

**RESPONDENT:** Louie Ditta, Justice of the Peace, Harris County

**DATE:** October 21, 2003

**SPECIAL COMMITTEE:** Judge John Ovard, Judge B. B. Schraub, Judge Darrell Hester, Judge Dean Rucker, Judge Stephen Ables

On September 2, 2003, the applicant requested copies of documents from the Respondent, who had been acting as the administrative judge for the Harris County justices of the peace. The documents she requested were: (1) the signed and filed oaths of office for two visiting judges to Precinct 5 Place 1 for 2003, and (2) "listed appointments for visiting/special judges for 2003, and all bonds and oaths of office for the same, which should have been filed with Commissioner's Court Clerk." On September 3, Judge Ditta responded that the request for copies of the oaths of office for the Precinct 5 Place 1 visiting judges had been forwarded to Judge Russ Ridgeway, who was the current justice of the peace for that court. Judge Ditta also responded that the request for copies of the appointments for special judges for 2003 "must be directed to each Justice of the Peace."

The applicant filed her Rule 12 appeal on September 15. On September 23, Judge Ridgeway sent a response to the applicant stating that the oaths of office for the two special judges who had served Precinct 5 Place 1 would be made available for viewing at the court during normal business hours, and that he had waived the charge for copies of the records, which totaled 25 pages. On September 26, Judge Ditta sent his response to the Rule 12 appeal. He stated that because the request about all special judges for 2003 was unclear, he had directed the applicant to make further requests relative to the sixteen justices of the peace in Harris County to those particular justices, as each judge was required to maintain the records of his or her office.

After reviewing the petition for review, the responses of Judge Ditta and Judge Ridgeway, the applicant's reply to those responses, and all the supporting documents, we conclude that the applicant has not been denied access to the requested records. Judge Ditta complied with Rule 12 when he forwarded the request for documents about Precinct 5 Place 1 to the custodian of those documents, and that custodian has granted the access to the documents required by Rule 12.4(a). Judge Ditta's initial response to the applicant about the other "listed appointments" and oaths of office was cursory, but it was adequate to comply with the requirements of Rule 12.6(f). Accordingly, we deny the petition for review.