TEXAS MUNICIPAL COURTS EDUCATION CENTER

COURSE MATERIAL
Houston
Prosecutors Program
May 23-24, 2007

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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

14th Annual Municipal Prosecutor Conference

Omni Houston Hotel at Westside
13210 Katy Freeway
Houston, TX 77079
Telephone: 281.558.8338

May 22-24, 2007
Agenda

TUESDAY, MAY 22, 2007	3.0 MCLE
2:00 – 5:15 p.m.	OPTIONAL PRE-CONFERENCE SESSION: **Basic Trial Skills in Municipal Court** Recommended for attorneys with limited trial experience. Pre-registration required.
3:00 – 5:00 p.m.	**Registration**

WEDNESDAY, MAY 23, 2007	8.0 MCLE
6:45 – 8:00 a.m.	**Registration and Breakfast**
8:00 – 8:05 a.m.	**Announcements** Course Director: Carolyn Espeseth, Assistant City Attorney, Austin
8:05 – 9:20 a.m.	**Possession: Care, Custody & Control** Lowell Thompson, Criminal District Attorney, Navarro County
9:20 – 9:30 a.m.	**Break**
9:30 – 10:45 a.m.	**Citations: Tickets Are for Concerts and Sporting Events** Meichihko Proctor, Program Attorney & Deputy Counsel, TMCEC
10:45 – 11:00 a.m.	**Break**
11:00 – 12:00 p.m.	**Ethics: The Role of the Court in Identifying Attorney Misconduct** *(1 hr ethics)* Ross Fischer, City Attorney, Seguin
12:00 – 1:00 p.m.	**Lunch**
1:00 – 2:05 p.m.	**Case Law & Attorney General Opinion Update** *(.25 hr ethics)* Ryan Kellus Turner, General Counsel & Director of Education, TMCEC
2:10 – 3:05 p.m.	**Custom Deferred Disposition for At-Risk Drivers** Robert Barfield, Municipal Prosecutor, Texas City

	Breakout 1	Breakout 2
3:10 – 4:00 p.m.	**Fraud & Identity Issues in Municipal Court** Meichihko Proctor, Program Attorney & Deputy Counsel, TMCEC	**Jury Charges** Patricia Nasworthy, Assistant City Attorney, Grand Prairie
4:10 – 5:00 p.m.	**Older Drivers** Linda Frank, Chief Prosecutor, Arlington	**A Protocol for Conducting Dangerous Dog Hearings** Brian Holman, City Prosecutor, Cities of Justin and Northlake

WEDNESDAY, MAY 23, 2007 *continued*

5:05 – 6:00 p.m.	**Q & A / Optional Debriefing Session** *(.75 CLE; .25 hr ethics)* TMCEC Staff

THURSDAY, MAY 24, 2007 **4.0 MCLE**

6:45 – 8:00 a.m.	**Breakfast**
8:00 – 9:15 a.m.	**Pretrial Appeals** Ryan Kellus Turner, General Counsel & Director of Education, TMCEC
9:15 – 9:30 a.m.	**Break**
9:30 – 11:00 a.m.	**What Prosecutors Must Know About Recusal and Disqualification** *(1.5 hrs ethics)* Robb Catalano, Assistant Criminal District Attorney, Tarrant County
11:00 – 12:15 p.m.	**Red Light Camera Enforcement** Lois Wright, Program Attorney, TMCEC
12:15 p.m.	**Adjourn**

Houston Prosecutor Seminar-May 2007
Houston - Omni Houston Westside
May 23 - 24, 2007

Full Name	Company	ADDRESS	City	Zip	Phone Numer
Yvette Aguilar	Corpus Christi	226 Enterprise Parkway, Ste. 1	Corpus Christi	78405	(361) 826-4014
Floyd M. Akers	Pflugerville	PO Box 679	Pflugerville	78691	(512) 670-5526
Daryl R. Atkinson	White Oak	906 S. White Oak Rd.	White Oak	75693	(903) 759-2061
Alberto M. Avila	El Paso	810 E. Overland	El Paso	79901	(915) 546-2990
Ruben Baeza	Austin	P.O. Box 2135	Austin	78768	512-974-1248
R Ivan Bland	Arlington	200 West Abram	Arlington	76004	(817) 459-6878
Jesse E. Branick	Nederland	P.O. Box 967	Nederland	77627-0967	(409) 729-3444
Beth L. Bronstein-Nock	Jersey Village	165001 Jersey Drive	Jersey Village	77040	(713) 594-4041
Natasha L. Brooks	Midland	406 E. Illinois	Midland	79702	(432) 685-7307
Mike Bucek	Corinth	3300 Corinth Pkwy	Corinth	76208	(940) 498-3283
Jerry W. Bussell	Hedwig Village	955 Piney Point	Hedwig Village	77024	(713) 465-6009
Wynetta D. Chaney	Houston	1400 Lubbock, Room 133	Houston	77002	(713) 247-5474
Candace Chappell	Irving	305 N. O'Connor Road	Irving	75601	(972) 721-3600
Tim Choy	Fort Worth				(817) 392-7629
Jan Clark	San Marcos	630 E. Hopkins	San Marcos	78666	(512) 393-8150
Amanda K. Cooper	Houston	1400 Lubbock,k #133	Houston	77002	(713) 247-5474
Yolanda D. Coroy	South Houston	1019 Dallas	South Houston	77587	(713) 947-7700
Mildred Eileen Cox	Bonham	301 E. 5th	Bonham	75418	(903) 583-7555
Robert M. Crain	West University Place	3800 University Blvd.	West University Place	77005	(713) 662-5825
Michael E. Cropper	Houston	1400 Lubbock, Room 133	Houston	77002	(713) 247-5474
Sam H. Deane	Spring Valley	1025 Campbell Road	Houston	77055	(713) 528-5581
James H. Densford	Odessa	201 N. Grant	Odessa	79761	(432) 335-3301
Rusty Drake	Pasadena	1001-A Shaw Ave	Pasadena	77506	(713) 475-7876
Carolyn Espeseth	Austin	Post Office Box 2135	Austin	78768-2135	(512) 974-1254
Adam C. Falco	College Station	1101 Texas Ave.	College Station	77842	979-764-3507
Marvin Farek	Rockdale	Post Office Box 1310	Rockdale	76567	(512) 446-3439
Meitra F. Farhadi	Austin	P.O. Box 2135	Austin	78768	(512) 974-1253
Richard Y. Ferguson	Anahuac	Post Office Box 578	Anahuac	77514	(409) 267-6682
Jo Ann Flores	San Antonio	401 S. Frio	San Antonio	78207	(210) 207-7355
Linda R. Frank	Arlington	City Attorney's Office	Arlington	76004-0231	(817) 459-6878
Rebecca A. Froman	Waller	Po Box 41	Waller	77484	(936) 372-5614
James M. Gallay	Houston	1400 Lubbock, Room 133	Houston	77002	(713) 247-5474
Byron "Ford" Hamilton	Baytown	3200 N. Main	Baytown	77521	(281) 420-5851
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Robert K. Hensley	Austin	PO Box 2135	Austin	78768	(512) 974-1249
Heather B. Hersh	Amarillo	201 SE 4th Avenue	Amarillo	79105-1366	(806) 378-9392
Don N. High	Wylie	2000 HWY 78 North	Wylie	75098-6043	(972) 826-8558
Joel T. Howard	Lubbock	1015 9th Street	Lubbock	79401	(806) 775-2464
Stephen C. Howard	Orange	Post Office Box 520	Orange	77631	(409) 883-1063
Cynthia L. Humphries	Cumby	P.O. Box 349	Cumby	75433	(903) 395-2210
Deborah L. Jones	Texarkana	Post Office Box 1967	Texarkana	75504-1967	(903) 798-3956
Susan E. Keller	Carrollton	2001 E. Jackson Road	Carrollton	75006	(972) 466-3014
Kevin Kolb	Seguin	660 S. Hwy 46	Seguin	78155	(830) 303-1099
Donald Kubicek	Sinton	217 E. Market Street	Sinton	78387	(361) 364-3100
Christine D. Lacy	San Antonio	401 S. Frio	San Antonio	78207	(210) 207-7355
Lora Lenzsch	Richmond	402 Morton	Richmond	77469	(281) 342-5456
Patricia L. Link	Austin	P. O. Box 1088	Austin	78767	(512) 974-4804
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Lara H. Mansfield	Houston	1400 Lubbock	Houston	77002	(714) 247-5474
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Mike McCullough	University Park	3800 University Blvd.	University Park	75225	(214) 365-9000
Carolyn McDaniel	Needville	Post Office Box 527	Needville	77461	(979) 793-4253
Karyn Meinke	San Antonio	401 S. Frio Street	San Antonio	78207	(210) 207-7355
Charlotte R. Melder	Austin	Post Office Box 2135	Austin	78768-2135	(512) 974-1246
Michael F. Miller	Galveston	P.O. Box 16252	Galveston	77552-6252	(409) 797-3530

Houston Prosecutor Seminar-May 2007
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Full Name	Company	ADDRESS	City	Zip	Phone Numer
Bobby Mills	Tarrant County	401 W. Belknap	Fort Worth	76196	(817) 884-1497
Royal Mullins	Greenville	P.O. Box 1049	Greenville	75403	(903) 457-3129
Pamela C. Oglesby	Austin	PO Box 2135	Austin	78768	(512) 974-1255
Steven M. Pena	Cotulla	117 N. Front Street	Cotulla	78014	(830) 879-2367
Forrest Phifer	Rusk	408 N. Main Street	Rusk	75785	(903) 683-4730
Gaffney Phillips	Livingston	200 W. Church	Livingston	77351	(936) 327-5145
Tara S. Primeaux	Wills Point	PO Box 546	Wills Point	75169	(903) 873-4530
Lawrence G. Provins	Pearland	3519 Liberty Drive	Pearland	77581	(281) 652-1664
Mack P. Reinwand	Arlington	PO Box 90231 MS 02-0200	Arlington	76004	(817) 459-6878
Michele Ritter	Irving	305 N. O'Connor Rd.	Irving	75061	(972) 721-3600
Sherri Russell	San Marcos	630 E. Hopkins	San Marcos	78666	(512) 393-8150
James Saint	Arlington	PO Box 90403	Arlington	76004	(361) 886-2525
Humberto Saldana	Elmendorf	Post Office Box 247	Elmendorf	78112	(210) 225-4600
Patricia C. Sanders	Fort Worth		Fort Worth		(817) 392-7629
Robert S. Sharp	Marlin	101 Fortune	Marlin	76661	(254) 883-3373
Heather Stebbins	Kerrville	429 Sidney Baker St.	Kerrville	78028	830-258-2388
Michael P. Summers	Austin	Post Office Box 2135	Austin	78768-2135	(512) 974-4804
Patrick Summers	Austin	PO Box 2135	Austin	78768	(512) 974-4804
Mike Szynkarski	Houston	1400 Lubbock, RM 133	Houston	77002	(713) 247-5474
Jefferson P. Tatum	Midland	PO Box 1152	Midland	79702	(432) 685-7305
Julian W. Taylor, III	Freeport	P.O. Box 3073	Freeport	77541	(979) 233-2411
Horace Teague	Houston	1400 Lubbock, Room 133	Houston	77002-	(713) 247-5474
George C. Thomas	Austin	Post Office Box 1088	Austin	78767	(512) 974-4804
Stephanie Valdez	Dallas	133 N Industrial Blvd	Dallas	75207	(214) 653-3710
Darrell C. Vogel	Beaumont	Post Office Box 3827	Beaumont	77701	(409) 833-0555

Total Count: 82

ANNOUNCEMENTS

FOR

Annual Prosecutors' Seminar Attendees

I

Welcome to the Seminar

II

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.

III

MCLE Credit

The Center's continuing education programs for judges and prosecutors are approved by the State Bar of Texas for the purpose of fulfilling mandatory Minimum Continuing Legal Education requirements.

Attendance

The Texas Municipal Courts Association Board of Directors has adopted the following policy: **All judges and prosecutors at the TMCEC seminars must attend and fully participate during all hours as designated by the schedule.**

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.

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 indicate your choice for each concurrent session on the selection sheet 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 you attend every year.

You must fill in and sign 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 sleeping rooms for participants 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.

Smoking

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.**

Meals

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

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 of 12:30 p.m. Please insure that you do not go beyond this time. Extra-day charges imposed by the hotel will be your responsibility.

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FACULTY ROSTER

Prosecutors and Court Interpreters Programs
April 23-24, 2007
Omni Houston Westside

Ms. Carolyn Espeseth
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Honorable Robert J. Barfield
Municipal Judge
City of El Lago
and Texas City Prosecutor
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Chief Municipal Court
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Honorable Bonnie Goldstein
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Cities of Cockrell Hill & Dallas
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Honorable Brian S. Holman
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ABOUT THE SPEAKERS

CAROYLN ESPESETH

Carolyn Espeseth attended South Texas College of Law in Houston. She worked as a law clerk for Justice of the Peace Judge Tom Lawrence in Humble for a year and then worked two years for Abramowitz & Loftus as a defense attorney in the many traffic courts in the Houston area. She then moved to Corpus Christi to serve as a prosecutor where she became the Chief Prosecutor for the municipal court. Ms. Espeseth remained in Corpus Christi until 1997. She is now employed as assistant city attorney for the City of Austin and assigned to the Austin Municipal Court.

Ms.Espeseth has given speeches for TCADA on MIP cases. She served as secretary for the Corpus Christi Bar Association Lawyer magazine and wrote articles published in the monthly magazine. Ms. Espeseth also served three years on the State Bar Law Focused Education Committee.

ROBERT J. BARFIELD

Robert J. Barfield was born and raised in Pasadena, Texas. He is a graduate from Harvard College (1991) and the University of Houston Law Center (1993). He currently maintains a criminal defense practice focusing on Class C misdemeanors. Mr. Barfield is a Municipal Judge in the City of El Lago. He also serves as a Prosecutor for the Texas City Municipal Court.

ROBB D. CATALANO

Robb Catalano is an assistant district attorney in Tarrant County. He is a former municipal judge for the City of Fort Worth. He began his legal career prosecuting cases in municipal court as an Assistant City Attorney for the City of Dallas. He has also served as a prosecutor in the Fort Worth Division of the United State Attorney's Office.

He received his B.A. in Criminal Justice from St. Edward's University in Austin and a J.D. from St. Mary's School of Law in San Antonio.

ROSS FISCHER

Ross Fischer, a native Texan, is currently the City Attorney for Seguin. Prior to that, Mr. Fischer served as the Assistant Chief Disciplinary Counsel for the State Bar of Texas, where he was responsible for enforcing ethical standards for attorneys in 45 Texas Counties. In July 2005, Mr. Fischer was appointed by Governor Rick Perry to serve on the Texas Ethics Commission, which is responsible for administering and enforcing laws concerning political contributions and expenditures, political advertising, lobbyist activity and the conduct of state officers and employees. He was reappointed to a full term in February 2006.

Prior to coming to the State Bar, Mr. Fischer spent four years as Kendall County Attorney, where he served as both the county's prosecutor and civil counsel. As County Attorney, he developed one of the state's most recognized crime victim assistance programs.

Mr. Fischer is a frequent lecturer at seminars dealing with criminal law, ethics, and the legislative process. He continues to teach judges and prosecutors throughout the state. Fischer is a graduate of St. Edward's University and the University of Texas School of Law, both in Austin. He resides in Kendalia with his wife Michelle and daughter Claire.

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.

BRIAN S. HOLMAN

Brian Holman is the Presiding Judge for the City of Lewisville as well as the Assistant City Attorney for the Town of Northlake and the City of Justin. Prior to taking the bench full-time, he had a solo law practice for 12 years in Denton, Texas, with an emphasis in family law and criminal defense. Judge Holman is currently serving as the President Elect for the Texas Municipal Courts Association and has been on the faculty of the Texas Municipal Courts Education Center since 2001.

Judge Holman was born and raised in San Diego, California and attended Brigham Young University where he received a B.A. in Political Science. He went on to receive his Law degree from the University of Arkansas. While living in Spain, Judge Holman developed a fluency in the Spanish language which he continues to use as judge. He currently resides in Denton with his wife and two daughters.

TRISH NASWORTHY

Patricia (Trish) Nasworthy is an Assistant City Attorney for the City of Grand Prairie. She obtained a Bachelor of Arts in Spanish from Texas Tech University and a Juris Doctor from South Texas College of Law in January. Her 22 years legal experience began in 1981 as an Assistant District Attorney for the Harris County District Attorney's Office. In 1986, she was special prosecutor on an aggravated sexual assault/kidnapping case, which was tried in San Angelo, Texas, on a change of venue from Brewster County, TX. She worked for a plaintiff's personal injury firm for one year before opening her own office as a criminal defense attorney.

Ms. Nasworthy is an adjunct professor in criminal justice program at Dallas Baptist University. She is also fluent in Spanish and holds a Texas court interpreter license. As a member of the Dallas Bar Association, Ms. Nasworthy was awarded the 2002 distinguished Pro Bono Award, and has written a number of articles, and presented at various seminars and trainings in the Dallas Area.

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.

LOWELL THOMPSON

R. Lowell Thompson is Criminal District Attorney for Navarro County. He is a former municipal judge for the City of Corsicana, a position he was elected to in 2001. Prior to taking the bench, Mr. Thompson served as an Assistant Criminal District Attorney for Navarro County. He received his bachelor's degree from Baylor University and his juris doctor from Texas Tech University School of Law. Prior to law school, he was employed by the Texas Youth Commission. He is a native of Corsicana where he resides with his wife Brandy and their two children.

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!

TEXAS MUNICIPAL COURTS ASSOCIATION
TEXAS MUNICIPAL COURTS EDUCATION CENTER
OFFICERS AND DIRECTORS - FY 2006-2007

President
Hon. Robin A. Ramsay
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POSSESSION: CARE, CUSTODY AND CONTROL

Presented by

Lowell Thompson
Criminal District Attorney
Navarro County

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.

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. 66.006(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.

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CITATIONS: TICKETS ARE FOR CONCERTS AND SPORTING EVENTS

Presented by

Meichihko Proctor
Program Attorney and Deputy Counsel
TMCEC

By the end of the session, participants 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.

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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ETHICS: THE ROLE OF THE COURT IN IDENTIFYING ATTORNEY MISCONDUCT

Presented by

Ross Fischer
City Attorney
Seguin

By the end of the session, participants 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

Ross Fischer
City Attorney of
Seguin, TX

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

Answer: NO!
No statutory authorizations
Bail jumping & VPTA apply only to defendants

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 Deniel, 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

CJC No. 02-0676-MU

AMENDED PUBLIC REPRIMAND

HONORABLE
MUNICIPAL COURT JUDGE
GARDEN RIDGE, COMAL COUNTY, TEXAS

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 Garden Ridge, 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, Judge law partner, , 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 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 Richard 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

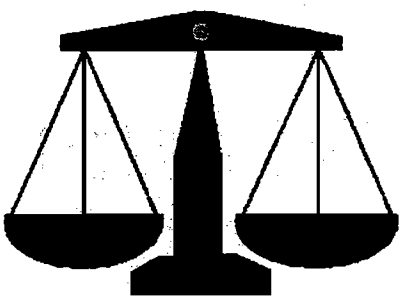
Honorable Joseph B. Morris, Chair
State Commission on Judicial Conduct

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.

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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.

INDEX

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, participants 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

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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.

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CUSTOM DEFERRED DISPOSITION FOR AT-RISK DRIVERS

Presented by

Robert Barfield
City Prosecutor
Texas City

By the end of the session, participants 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.

Custom Deferred Orders

For At Risk Drivers

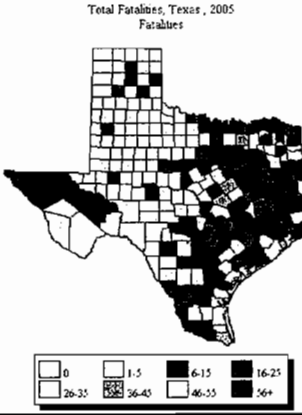
Robert J. Barfield

El Lago Municipal Court Judge

Why Should We Care?

- **In 2005, there were 6,159,000 police-reported traffic crashes**
- **43,443 people were killed and 2,699,000 people were injured**
- **4,304,000 crashes involved property damage only.**

2005 NHTSA Traffic Safety Facts Data



Possible At Risk Drivers

- **Young Drivers**
- **Old Drivers**
- **Aggressive Drivers**
- **Drivers with Medical Conditions**
- **Impaired Drivers (Alcohol / Drugs)**

Young Drivers

- Motor vehicle crashes are the leading cause of death for 15 to 20 year-olds (based on 2003 figures, latest mortality data currently available from the National Center for Health Statistics).
- In 2005, 3,467 15 to 20 year-old drivers were killed and an additional 281,000 were injured in motor vehicle crashes
- In 2005, 12.6 percent of all the drivers involved in fatal crashes were between 15 and 20 years old.

NHTSA Traffic Safety Facts 2005 Data "Young Drivers"

Older Drivers (Over Age 65)

- In 2005, older people accounted for
  - 15% of all traffic fatalities
  - 20% of all pedestrian fatalities
  - 14% of all vehicle occupant fatalities

NHTSA Traffic Safety Facts 2005 Data "Older Population"

Aggressive Drivers

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**

Drivers with Medical Conditions

- Vision Problems
- Auditory Problems
- Fine Motor Control Issues
- Seizures / Blackouts

Impaired Drivers

- Alcohol
  - Minor DUI Charges
  - Open Container Charges
  - Minor in Possessions/Public Intoxication charges where minor has driver's license
- Drugs
  - Drug Paraphernalia Charges

How Do You Identify an At-Risk Driver?

- Evaluate the Charge/Defendant in front of you.
  - Do they fit in an at-risk category?
  - What type of violation are they charged with?
  - What is their prior driving history?
  - Other Factors?
- How do you find out about other factors?
  - Ask questions / take evidence on the matter.

What Can A Judge Do?

- Use 45.051 Code of Criminal Procedure (The Deferred Disposition Statute) to Order

- Professional Counseling under (b)(3)
- Diagnostic testing for alcohol or drugs under (b)(4)
- Psychosocial assessment under (b)(5)
- Alcohol or Drug abuse treatment program under (b)(6)
- A DSC or other course under (b)(7)
- Any other reasonable condition (b)(8)
  - Related to crime committed & not violating defendant's rights
  - Be drafted in an unambiguous manner
  - Be determined by only the judge
  - Should not require defendant to contribute to charity

Reasonable Conditions

- Limit Scope of Driving Time / Distance
- Put Electronic Monitor on Car (see autochip as example)
- Have Driver Keep Log of Driving
- Order retest of Driving Test
- Order Drug Tests / Other Relevant Test
- Aggressive Driving or Other Classes

Scenario #1

- 19 Year Old College Student
- Charged with Speeding 15 miles over
- Charged with Possession of Drug Paraphernalia
- Driving Record Shows No Prior Traffic Convictions
- Driving Record Shows 2 DSC Courses in Last 3 years

Scenario #2

- 27 Year Old Male
- Charged with Unsafe Lane Change and Speeding
- Officer Notes indicate multiple unsafe lane changes but only charged with one violation
- Prior Convictions for Fail to Control Speed and Speeding in the last 6 months

Scenario #3

- 72 Year Old Woman
- Charged with Speeding 10 mile over in a School Zone
- Driving Record show only one driving safety course in last 3 years.

Scenario #4

- 72 Year Old Woman
- Charged with Speeding 10 mile over in a School Zone
- Driving Record shows only one driving safety course in last 3 years.
- Defendant Admits that she just didn't see the school zone sign and hasn't had an eye exam in the last 5 years.

Scenario #5

- 17 Year Old Driver
- Charged with Speeding 10 over
- Defendant is not eligible to take DSC (has taken DSC in last year for a speeding charge)
- Defendant is currently on Deferred in another court for speeding
- Defendant has one moving violation on his record for speeding

Remember!

- All Young Drivers are not at-risk
- All Old Drivers are not at- risk

- Evaluate the Driver / Charge in front of you and make appropriate decisions.

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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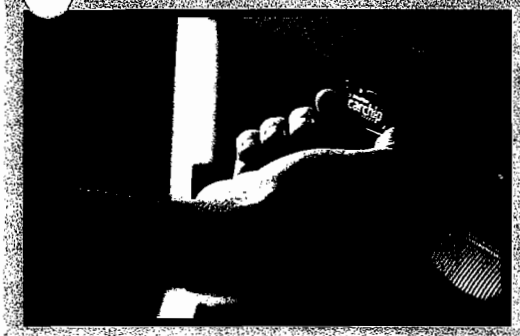
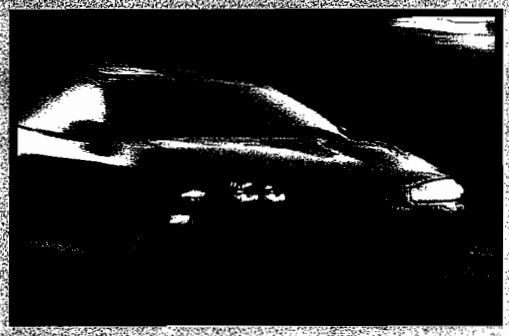
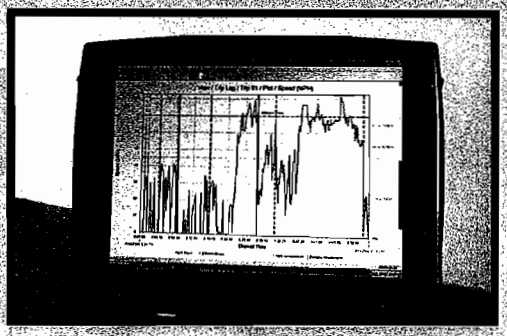
All-in-One Driving & Engine Performance Monitor



1. Plug



2. Drive



3. Download

#8211
$139

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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$179

CarChipE/X

- 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.

#8225
$199

CarChipE/X with Alarm

- 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:

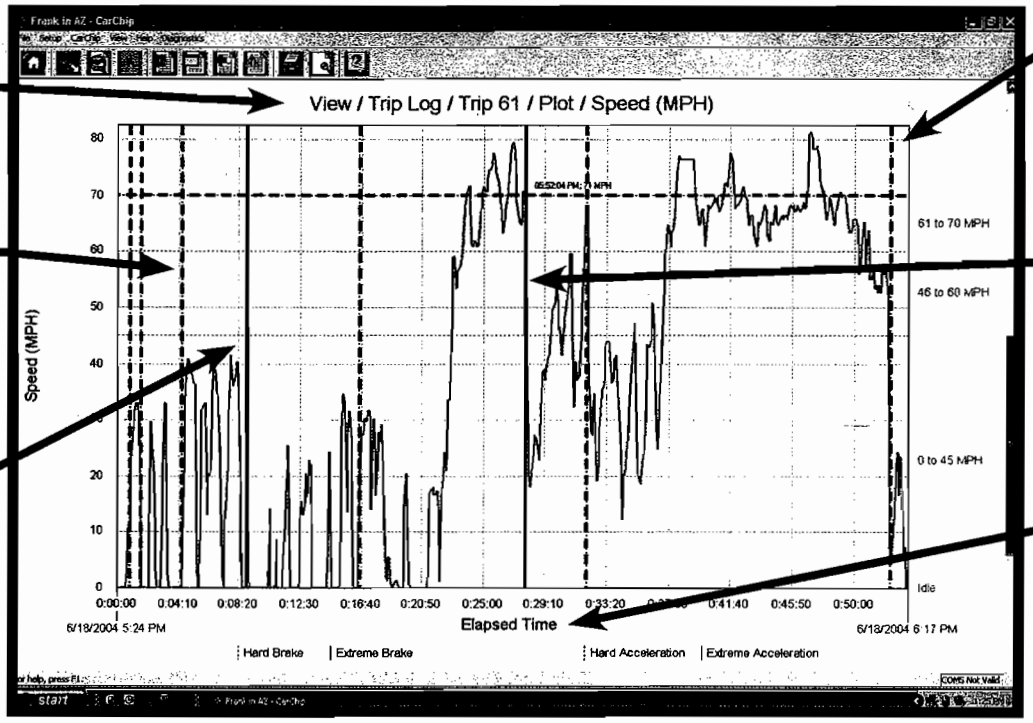
- CarChip data logger.
- Software on CD.
- USB cable for downloading data.

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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JURY CHARGES

Presented by

Trish Nasworthy
Assistant City Attorney
Grand Prairie

By the end of the course, participants 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.

Components of the Jury Charge

Basic Components

- **Introduction**
- **Law**
- **Standardized paragraphs**
- **Elements of the charge; charging language**
- **Defenses, if any**
- **Standardized concluding paragraphs**
- **Judge's signature block**

Specific Components (15)

- 1. Caption
- 2. Salutation
- 3. Commencement
- 4. Abstract Paragraph
- 5. Definitions
- 6. Application Paragraph
- 7. Converse Instruction
- 8. Evidentiary Instructions
- 9. Defenses

Specific Components con't

- 10. Presumptions
- 11. Range of Punishment
- 12. Instruction on Bad Acts and Unadjudicated Offenses as relate to Punishment
- 13. Burden of Proof
- 14. General Instructions
- 15. Verdict Form

1. Caption

CAUSE NUMBER _____

STATE OF TEXAS	)(	IN THE MUNICIPAL COURT
	)(	
v.	)(	OF THE CITY OF _____
	)(	
JOE SPEED DEMON	)(	_____ COUNTY, TEXAS

2. Salutation

CHARGE TO THE JURY

MEMBERS OF THE JURY:

3. Commencement

- A simple, concise statement of who, what, when, where and how. It states the defendant's name, the name of the crime, the city, county, and state in which it is alleged to have occurred, the date, and the plea entered by the defendant.

- The defendant, Joe Speed Demon, stands charged by complaint with the offense of speeding, it being alleged that the offense was committed within the corporate limits of the City of Speed Trap, Swift Justice County, Texas, on or about the 15th day of January, 2007, to which charge the Defendant has pleaded Not Guilty. You are instructed that the law applicable to this case is as follows:

4. Abstract Paragraph

- Contains the text of the statute as applicable to the offense charged
- Must set out every element of the offense
- No error results from setting entire statute so long as the application paragraph restricts the jury's consideration to the method of commission alleged in the complaint.

- However, using the specific allegation is better because it is less confusing to the jury and focuses their attention on the specific portion of the law alleged to have been violated.

General Allegation

- A person commits an offense if the person: (1) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or (2) 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.

Specific Allegation

- A person commits the offense of assault 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.

What are your sources for what to put into the Abstract paragraph?

Sources

State Statutes

- Texas Transportation Code
- Penal Code
- Alcohol & Beverage Code
- Education Code

City Ordinances

5. Definitions

- Include only definitions that are existing in statutes
- All others are left to common understanding

Definitions (con't)

- Examples
  - Culpable mental state
  - Public place
  - Highway
  - Terms defined in ordinances, i.e. person
  - "Secured" in a seat belt case

Including Definitions can be very helpful to your case

- Can refer to them in your final argument and say "The judge told you..."
- Can alleviate questions jury might be having
- Can keep jurors from using their own definitions
- Not including definition is error

6. Application Paragraph

- Applies the law to the facts of the case
- Court tells the jury what the State must prove
- Normally done by tracking the language in the complaint
- Must apply all elements of the law to the offense
- If complaint has any conjunctive language, change to disjunctive
  - Conjunctive "and"
  - Disjunctive "or"

Conjunctive v. Disjunctive

- Interesting recent case is Dolkart v. State, 197 S.W.3d 887 (Tex.App. – Dallas 2006).

- Now therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, _____, on or about the _____ day of _____, ____, within the corporate limits of the City of _____, _____ County, Texas, did then and there intentionally cause physical contact with _____ by (set out facts alleged in the complaint), when said defendant should have reasonably believed that (name of complainant) would regard the contact as offensive, you will find the defendant guilty of the offense of assault.

7. Converse Charge

- Application paragraph must conclude with general converse instruction requiring an acquittal if the jury does not believe or has a reasonable doubt thereof.

- But if you do not believe or have a reasonable doubt thereof you will acquit the defendant and say by your verdict not guilty.

8. Evidentiary Instructions

- Include only when issues have arisen during the trial
- Examples:
  - Limiting instructions
  - Illegally obtained evidence

9. Defenses

- Include only when raised by the evidence
- Must apply it to the facts
- Examples
  - Necessity
  - Self-defense
  - Provocation in Disorderly Conduct 42.01(a)(4) (abuse or threaten a person in a public place in an obviously offensive manner)

It is a defense to 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.

10. Presumptions

- Allows trier of fact to believe something not directly proven in the evidence
- Must include all language in Penal Code 2.05
- Example: FMFR 601.053(b) – driver who does not provide police officer with FR is presumed to have violated the requirement of having FR

It is presumed that...

Regarding this presumption, you are instructed as follows:

(a) That the facts giving rise to the presumption must be proven beyond a reasonable doubt

(b) That if such facts are proven beyond a reasonable doubt, the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find,

c) that even though the jury may find the existence of such element, the State must prove beyond a reasonable doubt each of the other elements of the offense charged; and

d) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

11. Range of punishment

- Check wording in statute
  - Transportation Code 542.401 says "...a fine of not less that $1 nor more than $200.
  - Penal Code 12.23 for a Class C misdemeanor "...a fine not to exceed $500."

Range of Punishment (con't)

- First state the fine range in the abstract and then as an application:

An individual adjudged guilty of speeding shall be punished by a fine not less than $1.00 nor more than two hundred ($200) dollars.

Range of Punishment applied to the case

- Therefore, if you find the defendant guilty you shall assess punishment by a fine of not less than $1 nor more than $200.
- I believe it to be acceptable to state the range of punishment in the abstract portion of the charge and then apply it in the application paragraph.

Punishment in Application paragraph

- "…you shall find the defendant guilty as charged and assess punishment by a fine not less than $1.00 nor more than $200.00."

12. Bad Acts/Unadjudicated Offenses

- This relates to unadjudicated offenses that are relevant and admissible in the punishment phase of trial under CCP 37.07 Sec. 3.
- Basically instructing jury that may consider those acts in assessing punishment if they find beyond a reasonable doubt that the defendant engaged in those acts

Bad Acts con't

- Need to include a limiting instruction such as:
- If you believe beyond a reasonable doubt that the defendant is guilty, and you further find beyond a reasonable doubt that the defendant engaged in conduct offered into evidence by the State, you may consider it when deciding what punishment to assess. Otherwise, you may not consider such evidence in determining the guilt or innocence of the defendant or for any other reason.

13. Burden of Proof

- No longer define "reasonable doubt"
- Parties may agree to include it
- Remainder of the charge on burden of proof is the same
- See Paulson v. State, 28 S.W.3d 570 (Tex.Crim.App. 2000).

14. Standardized Concluding Paragraphs

- Known as "General Instructions"
- Includes instructions on:
  - considering only evidence from the witness stand
  - that they are not to separate until reaching a verdict,
  - that they must select a foreman, and
  - that the verdict must be unanimous

15. Verdict Page

- Include a form on a separate page that contains a place for the jury to fill in its verdict and fine and for the foreman to sign

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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:

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.

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.

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 Example National Bank 22 Main Street 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

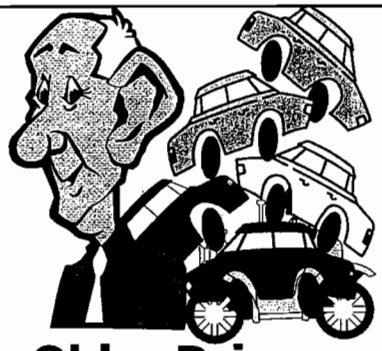
OLDER DRIVERS

Presented by

Linda Frank
Chief Prosecutor
Arlington

By the end of the session, participants 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.



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.

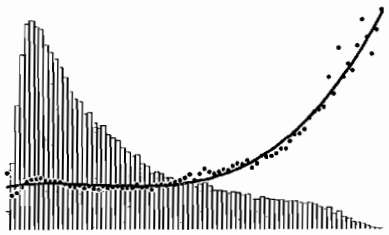
65+ year olds are 1.78 times as likely to die
75+ year olds are 2.59 times as likely to die
85+ year olds are 3.72 times as likely to die

Older Driver Issues

- **Fragility**
- **Illness**
- **Perceptual Lapses**
- **Left Turns**

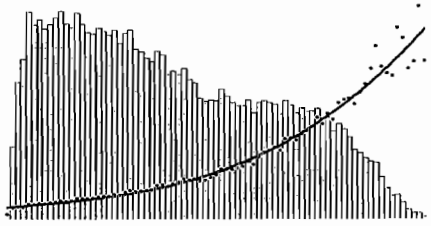
Older Driver Issues

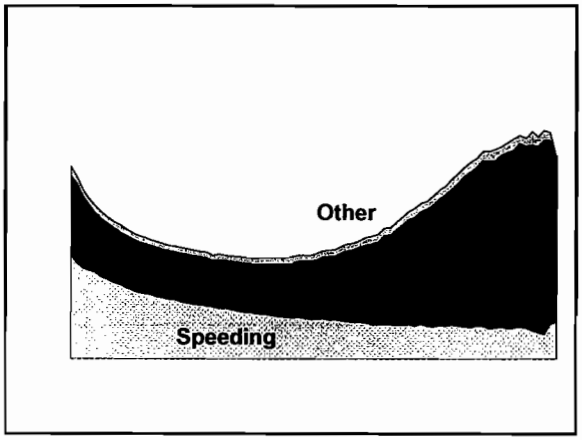
- Slowdown in Response Time
- Loss of Clarity in Vision and Hearing
- Loss of Muscle Strength and Flexibility
- Possible Drowsiness
- Reduction in Ability to Concentrate
- Lower Tolerance for Alcohol

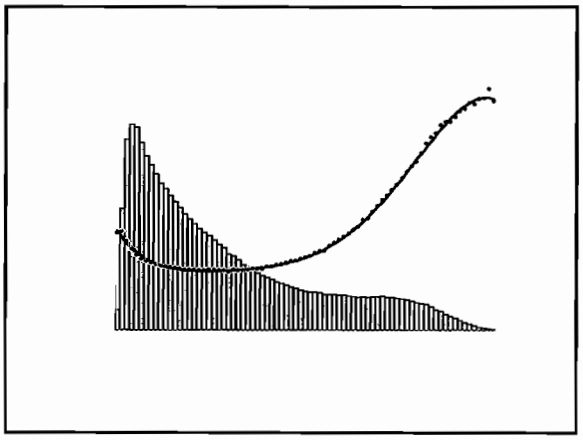


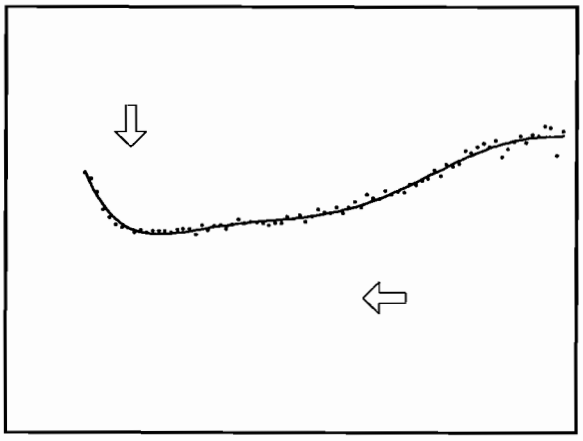
Likelihood of Older Drivers Dying When Compared to a 55-64 Year Old Reference Group and Controlling for:

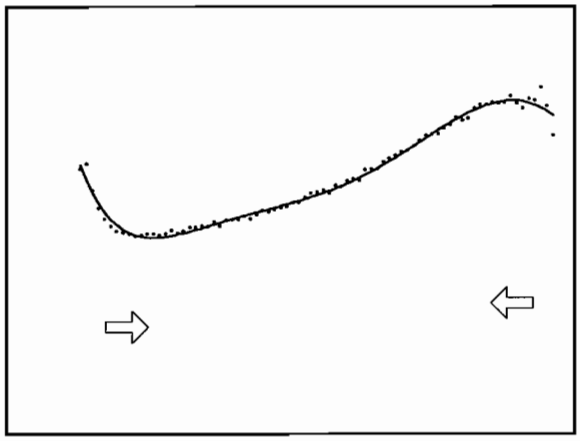
- Crash Type (SVA vs. MVA)
- Population (Rural vs. Urban)
- Driver Sex (Male vs. Female)
- Light Condition (Daylight vs. Dark)
- Intersection Related (Yes vs. No)




Other
Speeding







What Can You Do?

American Bar Association

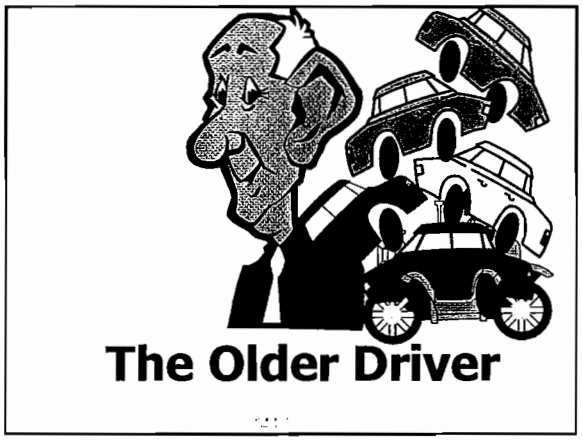
Capacity is task specific, not global.
Capacity is contextual.
Capacity is situational.

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.



The Older Driver

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1609 SHOAL CREEK BOULEVARD, SUITE 302 AUSTIN, TEXAS 78701
TELEPHONE (512) 320-8274
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FAX (512) 320-0996

A PROTOCOL FOR CONDUCTING DANGEROUS DOG HEARINGS

Presented by

Brian Holman
City Prosecutor
Cities of Justin and Northlake

By the end of the session, participants 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.

A Protocol for Conducting Dangerous Dog Hearings

Presented by Brian Holman
Prosecutor for City of Justin
and Town of Northlake

Man's Best Friend?

No. 1 Question

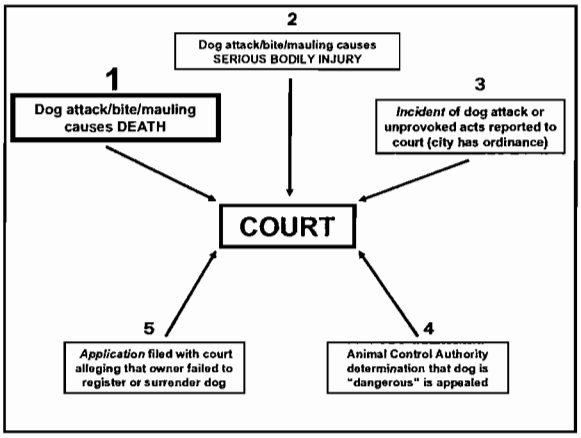
Do I have to be there?

A Side-by-Side Comparison

- 7000 venomous bites requiring medical attention annually
- ☠ 15 deaths

- Over 4.7 million bites annually
- 800,000 bites require medical attention
- Half are children
- Half require ER treatment
- ☠ 15 deaths

Source: Centers for Disease Control, National Center for Injury Prevention and Control



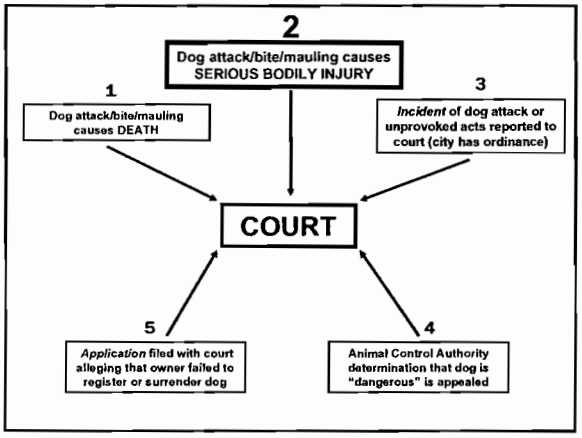
Dog Attack, Bite, or Mauling that Causes Death

- H&SC 822.002 & 822.003
- *Any 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, and to person who made complaint
- Any *interested* person may present evidence
- Did <u>that</u> dog attack the person?
- Did attack, bite or mauling cause person's death?

  ☑ If YES, court MUST order destruction
  ☑ If NO, court MUST release 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 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.

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.)

822.003 (f)(1)

Court MAY NOT order destruction if:

(1) Dog used for protection of person or property AND

- attack occurred in dog's secure enclosure,
- enclosure provided notice of dog
- Injured person was at least 8, and
- trespassing when attack occurred

Serious Bodily Injury (cont.)

822.003 (f)(2)

Court MAY NOT order destruction if:

(2) Dog used for protection of person or property AND

- victim was at least 8, and
- trespassing in dog's enclosure at time of attack

Serious Bodily Injury (cont.)

822.003 (f)(3&4)

Court MAY NOT order destruction if:

(3) Attack occurred during arrest or other action of peace officer while using the dog for law enforcement purposes

(4) Dog was defending person from assault or person's property from damage/theft by injured person

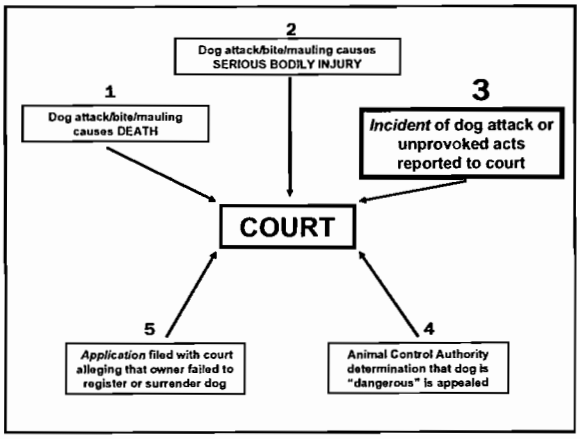
Serious Bodily Injury (cont.)

822.003 (f)(5)

Court MAY NOT order destruction if:

(5) Victim was younger than 8,

- **Attack occurred in dog's enclosure**
- **Enclosure was reasonably certain to keep person younger than 8 from entering.**



Incident of Attack or Unprovoked Acts Reported to Court

- H&SC 822.041(2), 822.0422, 882.0423
- 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

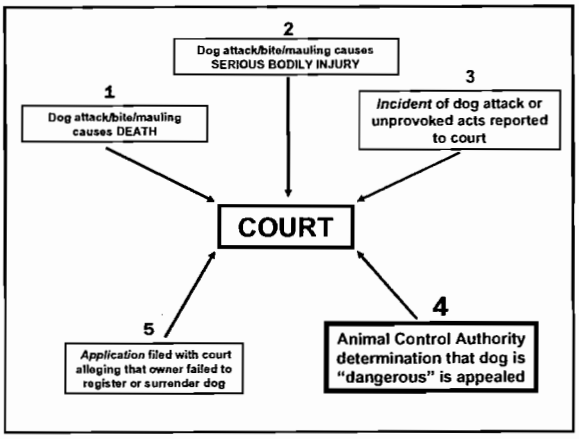
Incident of Attack or Unprovoked Acts is Reported (cont.)

- 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*



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

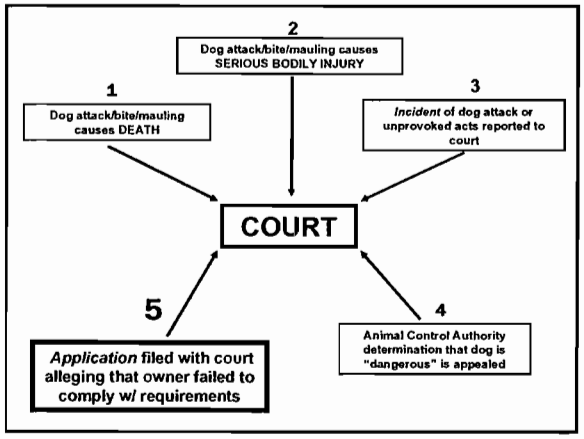
Owner Appeals Animal Control Determination (cont.)

(H&SC 822.0421)

- Person "reports incident" to animal control authority
- Animal control may investigate
  - sworn statements of *any witnesses*
- Animal control finds "dangerous dog" & notifies owner

Owner Appeals Animal Control Determination (cont.)

- Owner may appeal determination w/in 15 days of date notified dog is "dangerous"
- Court makes decision
- Owner may appeal court's decision in same manner as appeal of other cases



Requirements for Owner of a "Dangerous Dog"

- H&SC 822.042
- W/in 30 days of learning is dog dangerous, Owner must:
  - Register dog with animal control authority,
  - Restrain dog at all times (leash/secure enclosure),
  - Establish financial responsibility of min. $100,000, and
  - Comply with municipal/county dangerous dog restriction
- In lieu of compliance, owner MUST deliver dog to animal control by 30th day after learning dog is "dangerous"

Application Filed Alleging Owner Failed to Comply or Surrender Dog

- H&SC 822.042(c) and 822.0423
- Only *criminal* action under this Section
- 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, may present evidence
- If court finds noncompliance, SHALL order dog seized and 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

A Protocol for Conducting

Dangerous Dog Hearings

Presented by Brian Holman
Presiding Judge
Lewisville Municipal Court

Acknowledgement

I would like to acknowledge my appreciation and gratitude to Judge Marianne Moseley of the Coppell Municipal Court and Judge Adrianna Martinez Goodland of the Frisco Municipal Court for their generous permission to essentially plagiarize their paper, "Developing a Procedural Protocol for Dangerous Dog Hearings". The structure of their paper made it unnecessary to formulate my own.

Introduction

Every year in the United States, almost 5 million people are attacked or suffer some form of dog bite. As a result, more and more cases are being brought against dog owners there is a good chance that a case involving a dog attack causing serious injuries or even death of a person will end up in municipal court. This paper will examine the Texas statute on 'dangerous dogs" and the laws that govern this type of case and will offer alternatives to the traditional fine and costs. This paper will also review the components of a dangerous dog hearing and some of the potential pitfalls to prosecution of a dog owner charged with violating the state statute or a city ordinance.

Dog attack or bite cases are governed by the Health & Safety Code Chapter 822 which 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.[1]

[1] See H&S 822.001

However, the term "dangerous dog" is often used more broadly and may refer to various situations where a municipal court is called upon to conduct different types of 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 deals with **County Registration and Regulation of Dogs**. Subchapter D addresses statutorily defined "**Dangerous Dogs**". Subchapter E regulates **Dangerous Wild Animals**.[2] This paper will discuss five different types of hearings under Subchapters A and D.[3]

1. Dog Attacking, Biting, or Mauling Causes the Death of a Person

Subchapter A of Chapter 822 is invoked when a dog attack has resulted in Death or Serious Bodily Injury to a person. A hearing conducted under Section 822.003 is not concerned with a formal determination of whether a dog is "dangerous" by definition. Rather, the court must determine if there has been a dog attack on a person, and if so, the nature of the injury. With an attack causing death or serious bodily injury, the dangerous nature of the animal is already clear, and the court must determine the dog should be destroyed. While the procedures for seizing the animal and the subsequent hearing follow a similar format, the permissible outcomes of each hearing can vary, depending on whether the court is dealing with death or with serious bodily injury.[4] Therefore, Death and Serious Bodily Injury cases are addressed separately.

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[2] Subchapters B, C, and E addressing registration and other animals are beyond the scope of this paper, and will not be further addressed.

[3] See Appendices A.

[4] With few exceptions, 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.

A dangerous dog case involving the death of a person is initiated by the filing of a sworn complaint. The complaint may be filed by *any person* (including a county attorney, city attorney, or a peace officer) and it must set forth information indicating that a dog caused the death of a person by attacking, biting, or mauling the person. The complaint must also establish probable cause that a specific dog caused the person's death. If both prerequisites are satisfied, the court, pursuant to Section 822.002, "shall order the animal control authority to seize a dog and shall issue a warrant authorizing the seizure."[5] The local animal control authority must seize the dog pursuant to the order and provide for the dog's impoundment in secure and humane conditions until the court orders the disposition of the animal.

If the seizure warrant was issued by a justice or county court, the municipal court's involvement will not begin until the local animal control authority notifies the court clerk of the attack and the seizure. Regardless of who ordered the seizure, a hearing **must** be held not later than the tenth (10^{th}) day after the date on which the warrant was issued. Because the ten-day time period may begin to run on a day other than the date the court became aware of the warrant, the clerk must carefully determine when the applicable warrant was signed, and set the hearing date accordingly.

There is little statutory guidance regarding how this type of dog hearing should proceed. 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;[6] and

(2) the person who made the complaint.[7]

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[5] 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.

[6] Because of the potential ramifications of an affirmative finding, some have recommended that the court attempt to notify *both* the owner *and* the person from whom the dog was seized if the two are different.

Although the statute imposes no obligation, it is suggested that the notice provided to the owner or person from whom the dog was seized and the person who made the complaint include language designed to alert the parties what the hearing may entail and that, at the conclusion of the hearing, the court may order that the dog be destroyed. The individuals may choose to employ counsel, and they may present evidence at the hearing.

Any *interested party*, including the county attorney or city attorney is entitled to present evidence at the hearing. However, the statute does not define who is an 'interested' party or how an interested party is to receive notice of the hearing. "Interested parties" may 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*, notice to all the potential "interested parties" is problematic and in most situations impractical. The animal control official or the county or city attorney may help to ensure that *interested* parties are aware of the hearing date and time.

Another ancillary issue relates to the type and nature of the evidence to be presented at the hearing. While the statute provides that "any interested party ... is entitled to present evidence at the hearing", it is silent as to whether the rules of evidence apply. Because the proceeding is in the nature of a property hearing, there is some justification for the argument that administrative rules control rather than a strict application of the rules of evidence. If this is the case, prosecution of the case is made much easier. Section 822 is silent with respect to many procedural components of the hearing and case law provides very little guidance. However, one issue that has been determined in case law is that the nature of the hearing is *not criminal.*[8]

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[7] 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 of the person filing the complaint with the clerk.

[8] In Timmons v. Pecorino, 977 S.W.2d 603 (Tex.Crim.App. – 1998), the Texas Court of Criminal Appeals determined that, although a hearing to determine the disposition of a dog who had caused serious bodily injury to a child was held in municipal court and handled by the municipal court prosecutor, 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

Perhaps most important for the prosecution 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. As a result of the Timmons v. Pecorino case, the court will likely apply a "preponderance of the evidence" standard. However, given that it is unusual for a municipal court to hear civil matters, other than for administrative appeals or bond forfeitures cases, it is unlikely that the court will be overly familiar with the Rules of Civil Procedure. A pre-trial inquiry into the procedural aspects of the case may be of assistance to both the court and the parties.

Another important question 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? Because it is not a criminal offense, the State of Texas is not the petitioner. Therefore, a case may best be styled, "In Re Dog" without the "State of Texas versus Defendant" language normally seen in criminal cases.

The code is also silent on the issue of the recording of the hearing. In a non-record court, it is not an issue as any appeal will be a trial *de novo*. However, in a court of record, the reporter's record would be critical for any appeal. Unfortunately, Subsection A does not address nor provide for any appellate procedures. Due process concerns would suggest that the right to appeal applies to this type of case. Yet, this is a civil matter and unless expressly provided for, there may be no right to appeal the ruling of the court.

There is no "correct" protocol for a hearing of this nature. There are, however, a few common expectations at such a hearing. First, expect to have emotions run high on both sides. Keep in mind that one party has lost a family-member, friend, and neighbor. Also remember that

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offense. While the Government Code appears to grant only criminal jurisdiction to municipal courts, the "Court of Criminal Appeals ha[d] no jurisdiction over this dispute, which *remain[ed] a civil matter*."

the other party stands to lose what they may consider to be a family member and friend. The hearing may be less traumatic if the court downplays the adversarial aspects of the hearing. Of course, the owner should be warned that if the facts show that the dog caused the person's death, the court will order that the dog be destroyed.

As the hearing is not a criminal proceeding, there will be no 'prosecutor.' Nevertheless, the City has an interest in making sure its neighborhoods are safe. Therefore, a city attorney should attend the hearing to help present evidence and determine the order of the witnesses. If "final argument" is allowed after the testimony is presented, the city attorney will handle this matter as well.

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. Even when a police dog is involved, if the attack results in the death of a person, the court is statutorily obligated to order its destruction. 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 the court finds that the dog attack *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. Regardless of the outcome of the case, the judgment should be reduced to a written order.

2. Dog Attacking, Biting, or Mauling Causes Serious Bodily Injury to a Person

Subchapter A of Section 822 also applies to dog attacks causing Serious Bodily Injury to a person. As mentioned above, the prerequisites of a sworn complaint and probable cause are necessary before the court can order the seizure of the dog, issue a seizure warrant, and hold a disposition hearing. The hearing must be held within ten (10) days from the date the warrant is issued and all of the procedural and evidentiary issues previously discussed pertain to this class of hearing as well. However, because the law dealing with a dog attack causing serious bodily injury of a person provides for different remedies, it is discussed here separately.

Section 822.001(2) of the Health & Safety Code 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' differs from that in the Penal Code. It covers a broad range of injury and grants to the court considerable discretion to determine whether the injury suffered would cause a reasonably prudent person to seek medical treatment. This determination may be difficult without the benefit of expert medical testimony and the judge will have to make the decision based on the nature of the injury. The city attorney should consider offering testimony of the medical professional who treated the victim of the attack

At the hearing, the city attorney must establish two things. First, does the injury to the person meet the statutory definition of "serious bodily injury."[9] Second, did the dog attacking, biting, or mauling cause the serious bodily injury. If the court finds that the injury was *not* a serious bodily injury, the dog must be released to its owner, to the person from whom it was

[9] The statute does not describe a specific number of bites or wounds necessary to constitute "serious bodily injury." A single bite or puncture, if it hits a vital organ or blood supply, may suffice.

seized, or to any other person authorized to take possession of the dog. If the court determines that the victim did in fact suffer serious bodily injury, but the dog was not the direct cause of the injury, the result is the same – the dog must be released.

If it can be shown that the victim suffered serious bodily injury, *and* that the injury occurred as a result of the dog attacking or biting or mauling, the court has two options. First, it *may* order that the dog be destroyed. Yet, the court may **not** order the dog destroyed if the court finds that any one of five conditions or "defenses" applies. Section 822.003(f) provides that that dog may not be destroyed if 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 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 sections applies, the destruction of the animal is prohibited. On the other hand, if none are found, the judge must determine whether or not to order destruction.

Unfortunately, Section 822.003(e) fails address the situation in which a court finds that the dog caused serious bodily injury but declines to order destruction. Presumably, the court may fashion an order allowing the owner to keep the dog while still protecting the public welfare. A sample order releasing a dog to its owner with conditions can be found in the appendices.

"Traditional" Dangerous Dog Hearings

A determination that a dog is "dangerous" may be an issue where neither death nor serious bodily injury has resulted. Health & Safety Code Subchapter D, entitled "DANGEROUS DOGS", addresses dog hearings which are more likely to be heard in municipal courts.

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 certain acts by a dog meet the statutory requirements. A "dangerous dog" is defined under Section 822.041(2) as 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 Subchapter D, the municipal court may be called upon to conduct a hearing to make the initial determination that a dog is "dangerous." Or the initial determination that the dog is a "dangerous dog" may have been made by the local animal control authority under Section 822.0421(a), or by a justice or county court under Section 822.0422(d). In addition, the municipal court may be called upon to hold a hearing on acts allegedly committed by a dog that

has been previously determined to be "dangerous." Each of these hearings is slightly different, and therefore, each will be addressed separately.

3. Animal Control Authority Makes Dangerous Dog Determination and Owner Appeals

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[10], or of a dog's unprovoked acts causing a person to think the dog will attack[11]. 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.[12] After considering these statements, the animal control authority is authorized to determine whether the dog is a "dangerous dog" under the statutory definition. If a "dangerous dog" determination is made, the animal control authority shall notify the owner of that determination. Although the section 822.0421(a) does not specify the form of this notice, the city attorney should work with the animal control officials to ensure written notice via regular and certified mail. Alternatively, personal service by the animal control official with the owner's signature acknowledging receipt would be sufficient.

Once the animal control officer notifies the owner of the "dangerous dog" determination, the owner must comply with the conditions of section 822.042(a) within thirty (30) days from the date of notice. These conditions are as follows:

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[10] Section 822.041(2)(A)
[11] Section 822.041(2)(B)
[12] The statute is silent regarding the format of the sworn statements. Presumably, a notarized written statement will suffice for the purposes of this investigation.

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.

If the owner fails to comply with these conditions, pursuant to Section 822.042(b), the owner 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 the 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.

The statute does not provide for an additional hearing in order for the court to make this determination, nor does it address whether the animal control authority must 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. 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. Once the matter is appealed to the

next level, jurisdiction is lost, with any ability to monitor or enforce an order. The statute is silent regarding the city's right to appeal a negative finding on appeal.

Upon receipt of the appeal from the animal control authority's determination, the court may 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 appeal hearing should be held as soon as possible. A significant defect in the statute is that section 822.0421 does not provide for impoundment of the dog pending the appeal of the animal control authority's determination, or any subsequent appeals from the court's ruling.

The judge will either uphold or overrule the animal control officer's determination that the dog is a "dangerous dog." If the court affirms the determination that the dog is dangerous, section 822.042(g)(2) requires the court to provide "notice" to the owner of the responsibility to comply with the requirements in Section 822.042(a). All decisions should be reduced to a written order including the date of the order so as to start the thirty-day period for compliance by the owner. Further, 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 city attorney should also request that the owner sign the order to acknowledge receipt. A sample order is included in appendices.

If the judge overrules an animal control officer's determination, presumably the dog must be released to its owner. The city attorney should request that this determination be reduced to a written order to ensure a proper record if an appeal is taken.

4. Application filed in Court – Owner's Failure to Comply with Requirements

Under Section 822.042(g), a person learns that he 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.

Once the owner learns he owns a "dangerous dog," he must, within thirty (30) days, comply with registration, restraint, insurance and statutory requirements (hereafter the "822.042(a) conditions"), which are:

(1) registration of the dog with the local animal control authority, and
(2) restraint of the dog at all times, and
(3) establishment of $100,000 financial responsibility for damages suffered in the of an attack, and
(4) compliance with an applicable 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 822.042(b).

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.

Unlike the other types of dangerous dog hearings, a compliance hearing under Section 822.0423 is criminal in nature because of the possibility fines and, in some cases, jail time. 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. Because noncompliance is a criminal charge, the burden on the "prosecutor" is to prove that the owner had notice that the dog was a "dangerous dog," pursuant to Section 822.042(g). If it is proven that the owner was on notice that he owned a "dangerous dog", at the hearing, the prosecutor must establish three things: first, that the owner was on notice of the 822.042(a) conditions; second, that the owner failed to comply with the 822.042(a) conditions; and third, that the owner failed to surrender the dog to animal control. If the state proves that the owner failed to comply with any of these requirements, the judge shall order that the animal control authority seize the dog and shall issue a warrant authorizing the seizure. A sample Affidavit and Warrant are provided in the attached Appendices.

The owner will then have one final opportunity to comply in order to secure the dog's release. If the owner complies with all the 822.042(a) conditions before the eleventh (11^{th}) day after the date on which the dog was seized, the court must 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. This section is silent regarding a final appeal of the court's decision but, presumably, there is a right to appeal the judge's decision in the manner provided for the appeal of cases from the municipal, justice, or county court.

5. Court Receives Report of an Incident Under Section 822.0422

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. Based on the most recent information available, Harris County (3.7 million)[13] is the only county that meets the 2.8 million population threshold. Whether or not the commissioner's court or the municipality has elected to be governed by this section is a question for the individual jurisdiction.

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.

A complaint under this section 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

[13] Texas State Data Center and Office of the State Demographer, 2006 estimate

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 has 5 days once the owner receives notice that the incident report has been filed with the court to deliver the dog to the animal control authority. If the owner fails to deliver the dog to the animal control authority within the 5 days, 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 requirement of a sworn complaint or showing of probable cause before the court orders the seizure of the dog. The dog shall remain impounded until the court orders disposition of the dog.[14]

Section 822.0423 governs the hearing and the same components are involved. The court must conduct a hearing to determine if the dog is a "dangerous dog" under the statutory definition not 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. 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 of section 822.042(a).

The owner will have the opportunity to secure the dog's release by complying with these requirements. Compliance must occur not later than the 30^{th} day after the court notifies the owner his/her dog is dangerous. Failure to comply with section 822.042(a) results in the humane

[14] 822.042 (c) imposes on the owner the responsible for paying all costs incurred in seizing the dog. Presumably, this would include impound fees to the time of final disposition of the dog by the court. There is no specific statutory authority for a cost bond, but the City Attorney may consider requesting a minimal bond to cover the expected costs.

destruction of the animal. In the interim, the court should order that the dog remain in the custody of the animal control authority. As with other cases, the dog owner may appeal the court's decision in the same manner as any other type of case from the municipal, justice, or county court.[15]

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 additional requirements for the making of an incident report. A sample ordinance from the City of Frisco is included in the Appendices to illustrate how a local ordinance may expand upon the state law.

If an ordinance provides for remedies and timelines that are inconsistent with the provisions of the Health & Safety Code, an important factor to consider is the potential for preemption by applicable state law. A discussion of ordinance preemption is beyond the scope of this paper. However, Judge Stephen Crane's paper on Ordinances is a good reference.[16]

6. Attack by "Dangerous Dog"

An owner of a "dangerous dog" may appear in the court yet again. If a dog that has been previously determined to be a 'dangerous dog" makes an unprovoked attack on another person outside its enclosure, causing bodily injury, its owner may be charged with a Class C misdemeanor under 822.044(b). The State will have to establish a prior finding of "dangerousness" as an element of the charge. For this reason, a final written order is critical and

[15] That the appeal is handled as any other appeal would be 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).

[16] See 2005-06 12-Hour TMCEC Judge's School. Additionally, the City of Richardson vs. Responsible Dog Owners of Texas case, which discusses pre-emption, is included in the appendices.

should be anticipated for future prosecution of the owner. If an owner is found guilty, the court **may** order that the dog be destroyed under Section 822.044(c). Because there has already been a "dangerous" finding, an additional hearing is unnecessary and the court may enter such an order.

Conclusion

Although Section 822 of the Health and Safety Code provides guidance for processing of dangerous dog cases, many questions remain and legislative changes to this section would provide additional clarity on some issues. In the last special session of the State Legislature, 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. Further, various city councils throughout the State are reconsidering their dog ordinance.[17] If initiatives like these pass, procedures in the municipal court could change locally or statewide.

Because of the inherent stress and emotionality of these cases, a city attorney/prosecutor must be innovative in his or her approach to these hearings. The suggested protocols in this paper will not work in every situation but they should provide a framework upon which to build. Given the gravity of a dog attack and the potentially permanent consequences to the victims, these cases should have a priority in the court. The state's attitude towards prosecution of these cases will, in many instances, set the tone for the entire community. This is one area where the prosecutor can make a big difference in the safety of a City's neighborhoods.

[17] See appendices

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)

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"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	§	**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.

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 compluint 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-

Please see **DOGS** on Page 8A

PLUS

■ Wild dog packs are a constant concern for animal control workers.

— Page 1B

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.

Online at: http://www.khou.com/news/local/stories/khou060813_cd_dogbites.4e90699.html

"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)	822.0421(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

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PRETRIAL APPEALS

Presented by

Ryan K. Turner
General Counsel and Director of Education
TMCEC

Pre-Trial Appeals

Texas Municipal Courts Education Center
14th Annual Municipal Prosecutor Conference
Ryan Kellus Turner
General Counsel and Director of Education

I. Article 44.01, Code of Criminal Procedure and Related Case Law

(a) "The Laundry List"

(1) Dismissal of Complaints

State v. Stanley, 201 S.W.3d 754 (Tex.Crim.App. 2006) – When can a pre-trial appeal be an appeal during a trial?

State v. McKinney, 803 S.W.2d 374 (Tex.App. Houston 14th – 1990) – Art. 44.01(a)(1) trumps Sec. 4.03 limiting appeal when the fine is less than $100.

(2) Judgment Problems

State v. Morse, 903 S.W.2d 100, (Tex.App. – El Paso 1995) – County court reversing municipal court of record judgment.

(3) New Trial

Remember:

Article 45.038 – Defendant's request is untimely (non-record court)
Article 45.039 – Defendant is only entitled to one.
Sec. 30.00014 Govt. Code – Appeals in municipal courts of record

(4) Improper Double Jeopardy Ruling

(5) Suppression of Evidence

State must:
Certify not for delay
Be of substantial importance

State v. Cullen, 195 S.W.3d 696 (Tex.Crim.App. 2006) – Losing party on motion to suppress may request the trial court to state its "essential findings"

Finding of fact – Conclusion drawn by trial court from facts without exercise of legal judgment. A determination of a fact by the court, averred by one party and denied by the other, and founded on evidence in case.

Conclusion of law – Statement of court as to law applicable on basis of facts. Finding by court as determined through the application of rules of law. Propositions of law which judge arrives at after, and as a result of, finding certain facts in cases tried without jury or an advisory jury and as to these he must state them separately in writing.

(6) DNA Issues

(b) Illegal Sentences

Remember 45.201(d)

State v. Boise, 981 S.W.2d 204 (Tex.Crim.App. 1998) – No application to last minute change in election of punishment

Jamshedji v. State, No. 14-05-551-CR, 2006 WL2035549 (Tex. App.—Houston [14th Dist.] July20, 2006, pet. ref'd) – No right to appeal revocation of deferred disposition.

,

(c) Questions of Law on Defendant's Appeal of Guilt

Applies only to municipal courts of record

(d) The 15 Day Window

State v. Carson, 13 S.W.3d 811, (Tex.App. – Ft. Worth 2000) Even if appeal began in county court, the State cannot extend deadlines for filing notice of appeal in the Court of Appeals by attempting to file for a new trial or a motion for rehearing. See, also Sec.30.00027, Govt. Code,

(e) Entitlement to Stay

(f) "The court of appeals shall give precedence.."

Alley v. State, 158 S.w.3d 485 (Tex.Crim.App. 2005) – Must read this section in context with Arts. 4.08 and 45.042.

(g) Defedant Entitled to Bail

(h) TRAP at TCCA

(i) "Prosecuting Attorney"

No reference to assistants
No reference to city attorney
See, Article 45.201, C.C.P., below

(j)-(l) inapplicable

II. Article 45.201, Code of Criminal Procedure and Related Case Law

(a) No such thing as City Prosecutor

Note: Only express duty of city attorney is in Art. 45.201
Ch. 30, Gov. Code reference assistant city attorney
Art. 2.07(g) acknowledge attorney pro tem in municipal court

(b) County Attorney = Authority but no Duty of $$$ to Prosecute in Municipal Court

Aguire v. State, 22 S.W.3d 463 (Tex.Crim.App. 1999) – City attorney has express duty in municipal court.

(c) Consent of County Attorney to Pursue Appeals

Thornton v. State, 778 S.W.2d 149 (Tex.App.-Eastland 1989) – Criminal district attorney may consent in lieu of county attorney.

Boseman v. State, 830 S.W.2d 588 (Tex.CrimApp. 1992) – Assistant city attorney cannot give notice of appeal pursuant to 44.01(i).

State v. Blankenship, 146 S.W.3d 218 (Tex.Crim.App. 2004) – Personal ratification rejected. Amended notice of appeal stating that county attorney consented to assistant city attorney pursuing appeal is sufficient.

(d) Do justice

Pretrial Appeal Statutes

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CODE OF CRIMINAL PROCEDURE
TITLE 1. CODE OF CRIMINAL PROCEDURE OF 1965
APPEAL AND WRIT OF ERROR
CHAPTER 44. APPEAL AND WRIT OF ERROR

➡Art. 44.01. [812] [893] [871] Appeal by state

(a) The state is entitled to appeal an order of a court in a criminal case if the order:

(1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint;

(2) arrests or modifies a judgment;

(3) grants a new trial;

(4) sustains a claim of former jeopardy;

(5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case; or

(6) is issued under Chapter 64.

(b) The state is entitled to appeal a sentence in a case on the ground that the sentence is illegal.

(c) The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment.

(d) The prosecuting attorney may not make an appeal under Subsection (a) or (b) of this article later than the 15th day after the date on which the order, ruling, or sentence to be appealed is entered by the court.

(e) The state is entitled to a stay in the proceedings pending the disposition of an appeal under Subsection (a) or (b) of this article.

(f) The court of appeals shall give precedence in its docket to an appeal filed under Subsection (a) or (b) of this article. The state shall pay all costs of appeal under Subsection (a) or (b) of this article, other than the cost of attorney's fees for the defendant.

(g) If the state appeals pursuant to this article and the defendant is on bail, he shall be permitted to remain at large on the existing bail. If the defendant is in custody, he is entitled to reasonable bail, as provided by law, unless the appeal is from an order which would terminate the prosecution, in which event the defendant is entitled to release on personal bond.

(h) The Texas Rules of Appellate Procedure apply to a petition by the state to the Court of Criminal Appeals for review of a decision of a court of appeals in a criminal case.

(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.

(j) Nothing in this article is to interfere with the defendant's right to appeal under the procedures of Article 44.02 of

this code. The defendant's right to appeal under Article 44.02 may be prosecuted by the defendant where the punishment assessed is in accordance with Subsection (a), Section 3d, Article 42.12 of this code, as well as any other punishment assessed in compliance with Article 44.02 of this code.

(k) The state is entitled to appeal an order granting relief to an applicant for a writ of habeas corpus under Article 11.072.

(l) The state is entitled to appeal an order entered under:

(1) Subchapter G or H, Chapter 62, that exempts a person from complying with the requirements of Chapter 62; and

(2) Subchapter I, Chapter 62, that terminates a person's obligation to register under Chapter 62.

Current through the end of the 2006 3rd Called Session of the 79th Legislature.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CODE OF CRIMINAL PROCEDURE
TITLE 1. CODE OF CRIMINAL PROCEDURE OF 1965
JUSTICE AND MUNICIPAL COURTS
CHAPTER 45. JUSTICE AND MUNICIPAL COURTS
SUBCHAPTER D. PROCEDURES IN MUNICIPAL COURT

➡ Art. 45.201. [869] Municipal Prosecutions

(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.

Current through the end of the 2006 3rd Called Session of the 79th Legislature.

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

WHAT PROSECUTORS MUST KNOW ABOUT RECUSAL AND DISQUALIFICATION

Presented by

Robb Catalano
Assistant District Attorney
Tarrant County

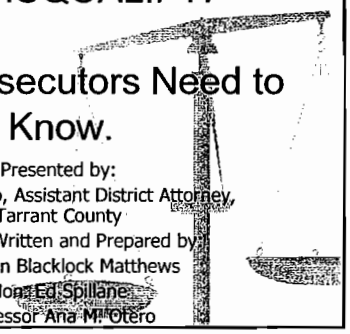
By the end of the session, participants will be able to:

- 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 RECUSE OR DISQUALIFY:

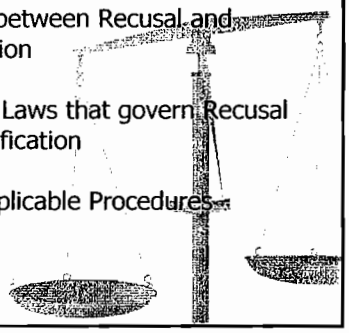
What Prosecutors Need to Know.

Presented by:
Robb Catalano, Assistant District Attorney
Tarrant County
Primarily Written and Prepared by:
Hon. Jan Blacklock Matthews
Hon. Ed Spillane
Professor Ana M. Otero



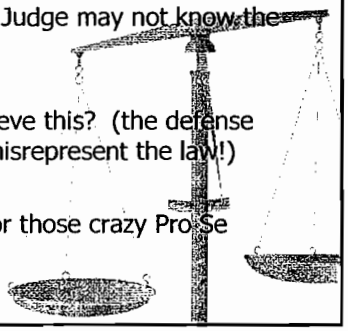
OUR OBJECTIVES

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



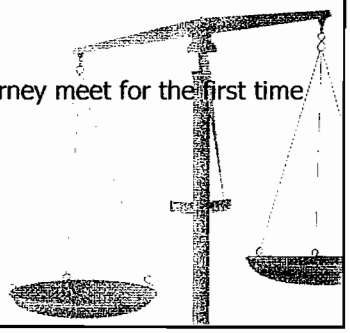
What's in it for me?

- 1) Shhhh... the Judge may not know the law!
- 2) Can you believe this? (the defense attorney may misrepresent the law!)
- 3) Watch out for those crazy Pro Se Defendant's!



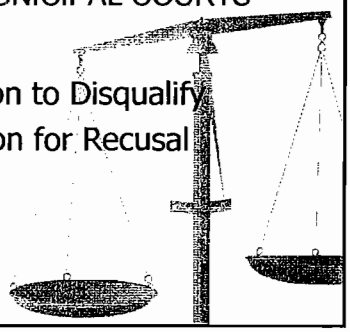
My Cousin Vinny

- Video Clip #1:
- Judge and Attorney meet for the first time



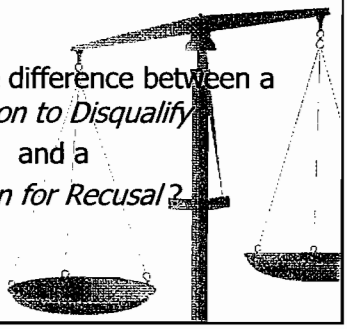
APPLICABLE TO TEXAS MUNICIPAL COURTS

- Motion to Disqualify
- Motion for Recusal



DISTINGUISHING DISQUALIFICATION AND RECUSAL

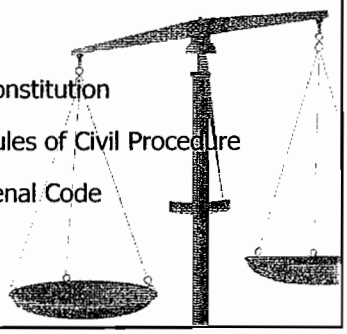
What is the difference between a *Motion to Disqualify* and a *Motion for Recusal*?



GROUNDS FOR DISQUALIFICATION

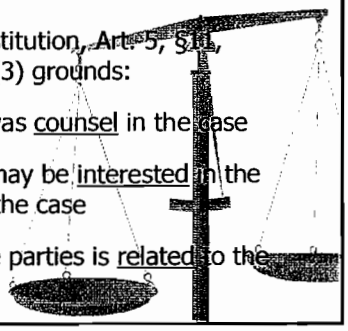
The Law:

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



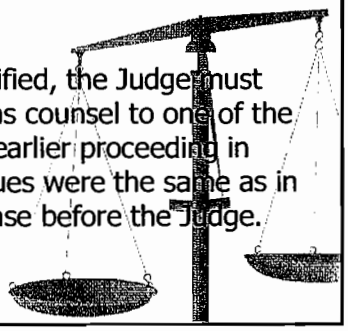
GROUNDS FOR DISQUALIFICATION
THE TEXAS CONSTITUTION

- 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



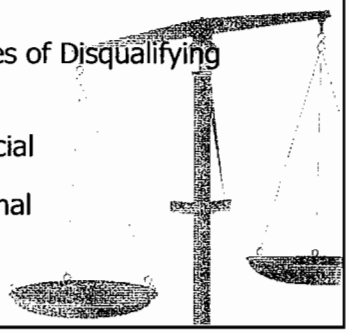
DISQUALIFICATION #1
JUDGE WAS COUNSEL IN THE CASE

- 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.



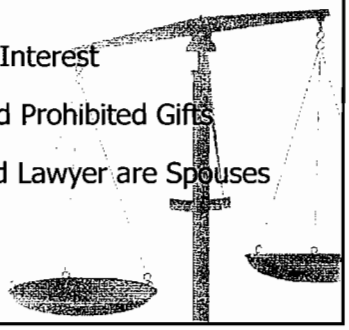
DISQUALIFICATION #2
JUDGE MAY BE INTERESTED IN THE OUTCOME OF THE CASE

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



DISQUALIFYING FINANCIAL INTERESTS

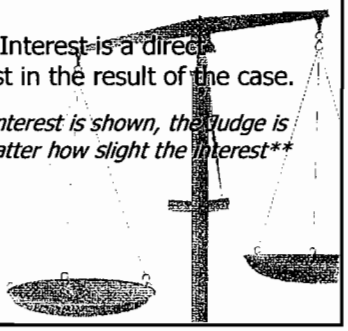
1) Fiduciary Interest
2) Bribes and Prohibited Gifts
3) Judge and Lawyer are Spouses



DISQUALIFYING PERSONAL INTERESTS

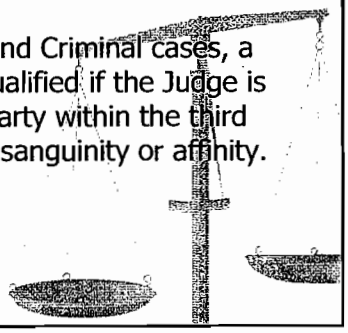
- A Disqualifying Interest is a direct personal interest in the result of the case.

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



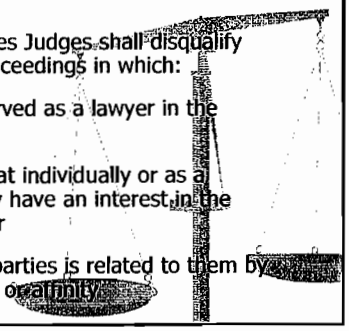
DISQUALIFICATION #3
RELATED TO A PARTY

- 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.



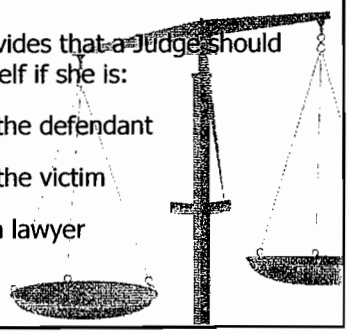
GROUNDS FOR DISQUALIFICATION
TEXAS RULES OF CIVIL PROCEDURE

- 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



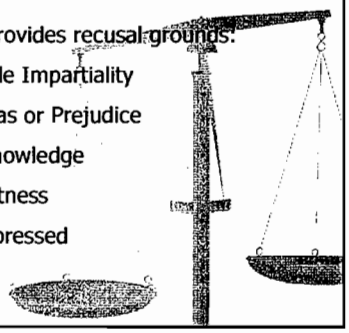
GROUNDS FOR DISQUALIFICATION
CODE OF CRIMINAL PROCEDURE

- 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



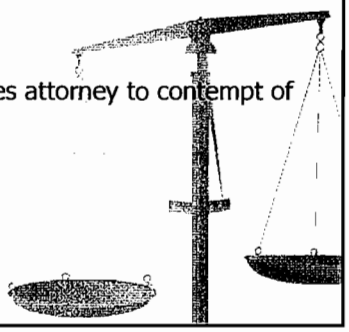
GROUNDS FOR RECUSAL
TEXAS RULES OF CIVIL PROCEDURE

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



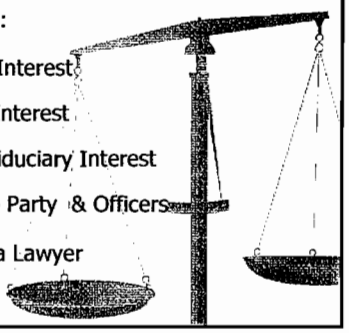
My Cousin Vinny

- Video Clip #2
- Judge introduces attorney to contempt of court



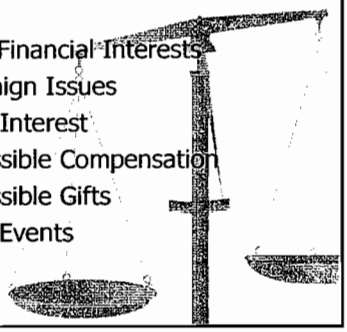
GROUNDS FOR RECUSAL

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



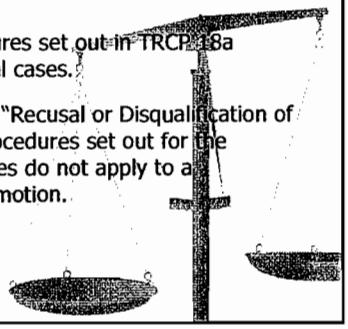
RELATIONSHIPS THAT DO NOT REQUIRE RECUSAL

- 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.

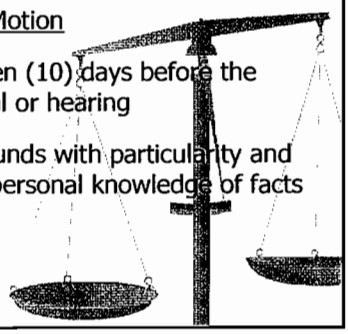


PROCEDURES TO RECUSE UNDER TRCP 18a

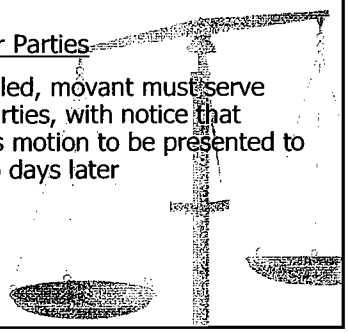
- File a Verified Motion

  -- 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



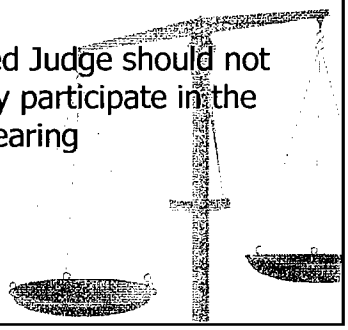
PROCEDURES TO RECUSE UNDER TRCP 18a



- Notice To Other Parties

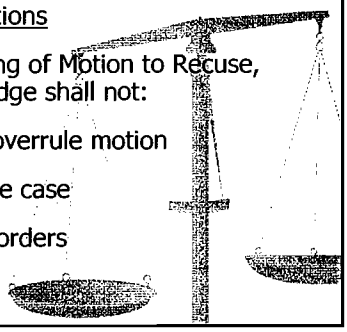
  -- On date filed, movant must serve copies on all parties, with notice that movant expects motion to be presented to Judge three (3) days later

PROCEDURES TO RECUSE UNDER TRCP 18a



- 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:

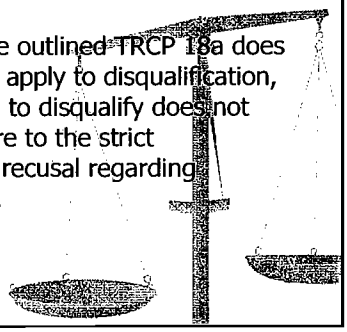
  ignore or overrule motion

  transfer the case

  enter any orders

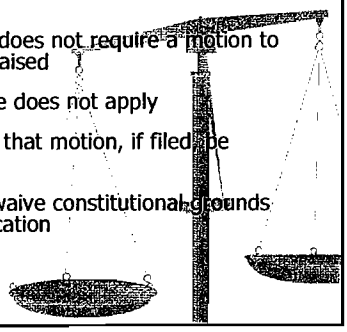
COMPARING PROCEDURE TO RECUSE WITH DISQUALIFICATION

- 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.



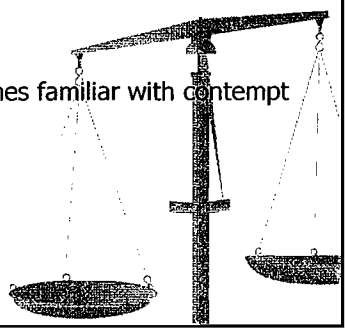
COMPARING PROCEDURE TO RECUSE WITH DISQUALIFICATION

- 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



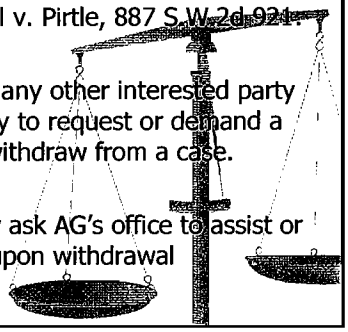
My Cousin Vinny

- Video Clip #3
- Attorney becomes familiar with contempt of court



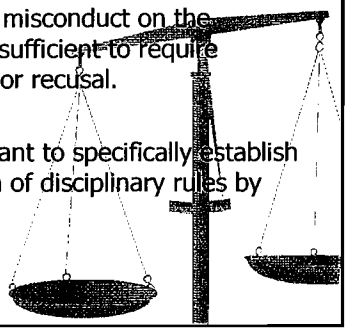
When Can a Prosecutor be Thrown Off the Case?

- State ex rel. Hill v. Pirtle, 887 S.W.2d 921.
- A defendant or any other interested party has no authority to request or demand a prosecutor to withdraw from a case.
- Prosecutor may ask AG's office to assist or handle a case upon withdrawal



State ex rel. Hilbig v. McDonald

- Merely alleging misconduct on the prosecutor is insufficient to require disqualification or recusal.
- Burden on movant to specifically establish a clear violation of disciplinary rules by prosecutor.

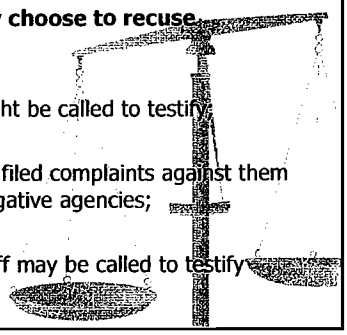


My Cousin Vinny

- Video Clip #4
- Judge and Attorney just don't get along

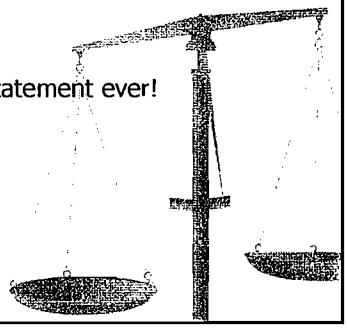
Examples:

- **Prosecutor may choose to recuse themselves:**
- 1) when they might be called to testify;
- 2) defendant has filed complaints against them with state investigative agencies;
- 3) when their staff may be called to testify



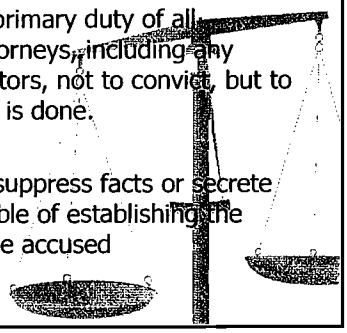
My Cousin Vinny

- Video Clip #5
- Best opening statement ever!



C.C.P. Art. 2.01

- It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.
- They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused



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

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Presented by:
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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)

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[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.

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[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). 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. **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. **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 **OR**	Tex. R. Civ. P. 18b(2)(f) (2006) (This is a more detailed definition than that given for disqualification). Note: Officers, directors, and trustees of a party are included in this definition. 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. **OR**	
☐ 3. Is known by the judge to be a likely material witness in the proceeding. **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).

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RED LIGHT CAMERA ENFORCEMENT

Presented by

Lois Wright
Program Attorney
TMCEC

Since 2003, the use of red light camera enforcement has increased significantly in Texas most populated cities. Vendors in the last year have continued soliciting such technology across the state, and the use of cameras has been the source of increased controversy.

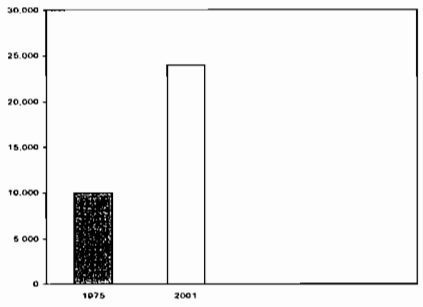
By the end of the session, participants will be able to:

- Described the legislative history of red light cameras in Texas;
- Identify arguments utilized by proponents of red light camera technology; and
- Identify arguments utilized by opponents of red light camera technology.

Red-Light Camera Enforcement

Lois Wright
Program Attorney
Texas Municipal Courts Education Center

Number of red-light related traffic injuries and fatalities in Texas



SB 1184

- Allowed cities additional power to regulate traffic on their roads and issue civil citations for violations that previously had been punishable only as criminal offenses.
- Noncommissioned employees under the department's supervision now have greater authority to stop and detain vehicles.
- Does NOT specifically prohibit or allow the use of red light cameras.

Why, then, red-light cameras?

- Mixed findings nationwide about the effectiveness of camera evidence

Texas Law Regarding Red-Light Cameras

JC-0460: cities are allowed to use red light cameras, but may not issue civil citations for them

An ordinance creating a civil penalty against red-light runners, using camera evidence:

1) imposes a penalty on the owner of the vehicle rather than the driver
2) is civil rather than criminal
3) penalty ranges differ

GA-0440: June 23, 2006

- Red-light cameras are allowed on state roads, to be installed by either municipalities or TxDot "for the purpose of enforcing traffic laws on state highways" and for public safety.
- Noted TxDOT's broad authority over the state highway system and the current use of red light cameras for traffic and emergency purposes

Studies Pro

- Transportation Research Board (2003)
- Federal Highway Administration (2005)
- Insurance Institute for Highway Safety (2002)

Studies Con

- Minnesota District Court (2006)
- Virginia Legislature (2005)
- Washington Post (2005)
- Urban Transit Institute (2003)
- Hawaii Legislature (2002)
- Florida AG (1997)

Legal and ethical issues

- Equity of Punishment
  - Civil vs. Criminal
- Equality of Enforcement
  - Sixth Amendment right to confront your accuser
- Safety
  - For officers, for drivers
- Revenue
  - Is it all about the money?
- Privacy
  - Big Brother

HOUSE
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Texas House of Representatives

focus REPORT

July 31, 2006

Red-light Cameras in Texas: A Status Report

This report reviews current law, examines state and national data, and explores some of the legal and ethical questions raised by the use of red-light cameras.

Accidents caused by Texas drivers who run red lights are extremely costly in human and economic terms. The Texas Department of Public Safety (DPS) crash database shows injuries and fatalities stemming from red-light crashes grew from 10,000 annually in 1975 to 24,000 per year in 2001, and a recent Federal Highway Administration study identified Texas as one of the worst states for red-light running. The financial costs of these accidents in Texas have been estimated at between $1.4 billion and $3 billion annually in medical, insurance, and related expenses. Red-light accidents often are among the worst because they generally involve vehicles crashing directly into the driver or passenger side of another car at high speeds.

The use of photographic traffic signal enforcement systems – or "red-light cameras" – by Texas municipalities has exploded since the 78th Legislature enacted SB 1184 by Deuell, which included a provision granting cities additional powers to regulate traffic on their roads and issue civil citations for violations that previously had been punishable only as criminal offenses. Since 2003, at least a dozen Texas cities have contracted with vendors to catch and fine red-light runners, and a number of others are considering establishing programs of their own.

Although several municipalities have interpreted the language in SB 1184 to mean that Texas law permits the use of red-light cameras, the Legislature has not enacted legislation that specifically allows or prohibits their use. A recent attorney general opinion provides clear guidance for the use of cameras on state roads, allowing municipalities to install red-light cameras under a partnership with the Texas Department of Transportation (TxDOT). But Texas has not explicitly addressed the use of cameras on non-state roads.

Red-light cameras have been controversial since they first were installed in New York City in 1993, and their use has sparked debate for many years in Texas and around the country. Some states have banned the cameras outright while others have granted complete approval for the use of cameras. Still others allow the cameras but limit their use, and a few states

– including Texas – have not codified the use of red-light cameras even as cities create and operate their own programs.

The fact that different states have adopted diverse red-light camera policies is a reflection on the mixed findings that have emerged from research into the effectiveness of these cameras. A recent federal study found economic benefits associated with red-light camera use, and many cities in Texas and nationally that use cameras have seen reductions in crashes and violations. But a number of studies suggest that the use of red-light cameras may actually increase the number of car accidents.

This report summarizes current law and reviews the legislative history concerning the use of red-light cameras in Texas. It examines state and national data on red-light camera efficacy, describes how the cameras work, and reports which Texas cities are operating or planning red-light programs. Finally, the report explores some of the legal and ethical questions raised by the use of red-light cameras.

Red-light camera legislation in Texas

Current law. Texas has no law that explicitly addresses the use of red-light cameras, but several Texas cities have taken their cues from recent legislative action and guidance from the Attorney General's Office.

In February 2002, then-Atty. Gen. John Cornyn issued an opinion on red-light cameras at the request of the city of Richardson and Rep. Tony Goolsby of Dallas. Richardson had inquired about whether state law would allow the city to use the cameras and issue civil violations in lieu of criminal citations for red-light runners caught on film. In Opinion No. JC-0460, the attorney general determined that cities were allowed to use the cameras but could not issue civil citations for red-light violations.

Cities have home-rule authority to enact traffic regulations unless they conflict with state law. Atty. Gen. Cornyn found that an ordinance creating a civil penalty against the owner of a vehicle running a red light, as evidenced by a photo taken by a red-light camera, conflicted with state law imposing a criminal penalty for running a red light in three ways:

1) the penalty would be imposed on the owner of the vehicle rather than the driver;
2) it would be a civil rather than a criminal offense; and
3) the penalty would be $75 rather than a criminal fine ranging from $1 to $200.

Atty. Gen. Cornyn did leave the door open for future use of the cameras to issue civil citations by pointing out that an "ordinance could be adopted by the city if the legislature amended state law so as to expressly permit it or otherwise eliminate the conflict" between civil and criminal punishment for the same violation.

Red-light camera advocates believe the enactment of SB 1184 by Deuell in 2003 eliminated this conflict. A House amendment to SB 1184 added the following language to Transportation Code, sec. 542.202, which covers the powers of local authorities over roads in their jurisdictions:

"'Regulating' means criminal, civil, and administrative enforcement against a person, including the owner or operator of a motor vehicle, in accordance with a state law or a municipal ordinance."

A bill that would have repealed that language and another that would have banned the cameras outright both failed during the regular session of the 79th Legislature. Supporters of the cameras point to those developments as a tacit endorsement by the Legislature of red-light camera use.

On June 23, 2006, following a request from TxDOT for legal guidance, Atty. Gen. Greg Abbott issued an opinion that use of red-light cameras is allowed on state roads. In Opinion No. GA-0440, noting TxDOT's broad authority over the state highway system and its current use of cameras for traffic and emergency purposes, the attorney general affirmed that the department can install the cameras and allow municipalities to do the same "for the purpose of enforcing traffic laws on state highways" and for the promotion of public safety. Atty. Gen. Abbott also cited Transportation Code, sec. 221.002, to show that municipalities and the Texas Transportation Commission currently are authorized to reach agreements that share the responsibility and liability associated with performing various duties on state roads. The opinion did not address whether local governments have the authority to use red-light cameras on non-state roads because this subject fell outside the scope of TxDOT's request.

To date, TxDOT has received requests from 14 cities regarding the installation of red-light cameras on state roads. By August, the agency expects to have drafted an agreement

on the legality of cameras, but red-light camera programs are operating in cities such as Phoenix, Toledo, and Knoxville. In total, more than 110 cities across the country employ red-light cameras.

Success stories and studies. Supporters of red-light cameras cite a number of government and private studies as demonstrating the benefits of employing the cameras. The federal Transportation Research Board found in its "Impact of Red Light Camera Enforcement on Crash Experience" survey conducted in 2003 that a majority of red-light camera jurisdictions reported decreases in accidents and violations as a result of the crashes, including:

- Charlotte, NC, where all crash types dropped by 19 percent and crash severity fell by 16 percent during a three-year period;
- Sacramento, CA, where red-light crashes decreased 39 percent during a one-year period; and
- Baltimore County, MD, where red-light crashes fell 30 percent during a one-year period.

The Federal Highway Administration in April 2005 reported "a modest to moderate economic benefit" to jurisdictions that installed the cameras, which yielded an average of $39,000 to $50,000 annually at each intersection where they were in use. Using data collected around the country at 132 intersections, the study found the cameras caused a reduction in right-angle crashes but an increase in rear-end collisions. Although the data for intersections with and without the cameras were nearly identical in terms of the total number of crashes, the study concluded that cameras can reduce costs because broadside crashes are more dangerous and cause greater damage than rear-end collisions.

The Insurance Institute for Highway Safety has conducted several studies across the nation, finding that cameras have reduced red-light running and crashes at intersections. Its 2002 study, which compared crash data from Oxnard, CA, with data from three similar cities where red-light cameras are not employed, showed an overall crash rate 7 percent lower in Oxnard and a rate of injury accidents 29 percent lower there than in the other cities. The study examined all intersections in Oxnard and concluded that the presence of cameras at some intersections creates a "halo effect" that prompts drivers to be more cautious at every intersection.

Rejected programs and opposing data. While studies and statistics have touted the success of red-light cameras, several states and municipalities have reached different conclusions.

In 2005, the Virginia Legislature opted not to continue that state's red-light program after the conclusion of a 10-year pilot project in several communities around Washington, D.C., and in Virginia Beach. Along with general concerns about civil liberties, legislators reached the decision after commissioning a study conducted by the Virginia Transportation Research Council – a group jointly sponsored by the Virginia Department of Transportation and the University of Virginia. Based on data from the Northern Virginia cameras, it concluded that the number of injury-causing crashes actually had increased while the intersections were under surveillance. Although the cameras reduced the number of accidents in which one or more of the drivers was charged with failing to obey the stop light, the analysis found an increase in rear-end crashes while revealing a possible decrease in crashes at an angle. While allowing that the severity of injuries incurred in these angled crashes could be greater than those resulting from rear-end collisions, researchers did not have data detailed enough to prove that hypothesis.

In 2002, Hawaii lawmakers canceled a traffic camera enforcement program that used cameras mounted in vans and radar to target speeders and red-light runners. Critics claimed that the program invaded the privacy of drivers and

Data from Garland

Of all the Texas cities using red-light cameras, only Garland has been operating a system long enough to have collected annual data on violations and citations. Since installing the cameras at the end of 2003, Garland has seen violations and citations drop in each successive calendar year.

The city launched its program with three cameras, added one a few months later, and installed a fifth camera in 2005. (The fifth camera has been excluded from the analysis because it malfunctioned during the final three months of 2005.) Program data show that average monthly violations per camera decreased 27 percent from 2004 to 2005, and average monthly citiations fell 14 percent over the same period.

that will allow TxDOT to authorize municipalities to place cameras on state highways and rights of way. The agency does not plan to turn down requests to install cameras but will review all applications to ensure that municipalities first have explored engineering options to reduce red-light running accidents. TxDOT will not charge municipalities to install the cameras and will not seek any revenue raised through their use. In addition, the agency will turn over all responsibility regarding the funding and operation of the cameras to the municipalities.

Legislative history. The Texas Legislature has considered legislation addressing red-light cameras in all but one of the last six regular sessions.

In 1995, SB 876 by Cain, which would have authorized municipalities to use red-light cameras, passed the Senate but failed in the House on second reading during the 74th Legislature.

The 76th Legislature in 1999 did not enact HB 1152 by Driver, which would have allowed a municipality in a county with a population of at least 150,000 or next to a county with a population of at least 150,000 to issue civil citations to traffic offenders caught by red-light cameras. The House tabled the bill after passing a number of floor amendments, including one that would have required a notice accompanying the cameras to read: "Big Brother is watching you!"

In 2001, HB 1115 by Driver died after two separate votes in the House ended in a tie. The bill would have allowed municipalities to impose civil penalties under the use of a "photographic traffic signal enforcement system."

Two bills that would have authorized red-light cameras failed to pass in the 78th Legislature during the 2003 regular session. HB 200 by Berman died in House committee, and HB 901 by P. King was defeated in the full House after two amendments restricted camera use to municipalities in counties with populations of 50,000 or less and then to counties with populations of 50 or less.

In enacting SB 1184 by Deuell, which deals with enforcing commercial motor vehicle standards, the 78th Legislature in 2003 approved an amendment by Rep. Harper-Brown of Irving that grants local authorities the power to regulate roads using "criminal, civil, and administrative enforcement" (Transportation Code, sec. 542.202(b)(3)). Red-light camera advocates point to SB 1184 as the legal justification for the municipal operation of red-light camera programs that issue civil citations to offenders. Opponents, however, believe that SB 1184 does not authorize cities to use red-light cameras and argue that Texas lacks a law specifically adressing this subject.

During its 2005 regular session, the 79th Legislature considered HB 259 by Elkins, which would have repealed Transportation Code, sec. 542.202(b)(3). It passed the House but died in the Senate after failing to get the two-thirds support needed to bring the bill to the floor. HB 1347 by Isett also passed the House but died in Senate committee. In addition to repealing sec. 542.202(b)(3), it would have prohibited local authorities from operating red-light cameras on their roads.

National red-light camera programs and data

A variety of state actions have mirrored the disparity in studies focused on red-light cameras. Some states and municipalities have banned their use outright or canceled programs based on evidence that the cameras are ineffective in enhancing safety. Other states and cities have cited different studies showing improvement in safety at intersections using red-light cameras.

Proponents of red-light cameras often point to the increased popularity of the devices as evidence of their success – cities would not use them unless they worked. Twelve states and the District of Columbia have enacted legislation allowing the use of red-light cameras. Many apply conditions to their use, such as posting signs to alert drivers that they could be photographed and cited if they run a red light. New York allows cameras to be used only in cities with populations of at least 1 million and caps at 100 the number of intersections at which any jurisdiction can employ the cameras. Certain cities in North Carolina and those with populations greater than 30,000 in Oregon can operate red-light cameras. California, Colorado, Delaware, Georgia, Illinois, Maryland, Pennsylvania, Rhode Island, and Washington also have laws allowing for photo enforcement at intersections (see *Table 1: Red-light camera programs in other states*, page 5).

In nine other states, including Texas, cameras are in use in the absence of any specific state statute authorizing or prohibiting them. Arizona, Iowa, Missouri, New Mexico, Ohio, Rhode Island, South Dakota, and Tennessee are silent

Table 1: Red-light camera programs in other states

State	Legal status of red-light cameras
Arizona	No state law; city programs include Phoenix and Scottsdale
Arkansas	Cameras banned unless law enforcement officer is present to issue citation
California	Cameras legal statewide; programs in at least 55 cities and two counties
Colorado	Cameras legal statewide; programs in at least six cities
Delaware	Cameras legal statewide; programs in at least five cities
District of Columbia	Cameras legal citywide
Florida	No state law; attorney general ruled camera evidence cannot be used to cite motorists
Georgia	Cameras legal statewide; programs in at least 15 cities and two counties
Hawaii	Program terminated in 2003
Illinois	Cameras legal in eight counties
Iowa	No state law; city programs include Council Bluffs and Davenport
Maryland	Cameras legal statewide; programs in at least 17 cities and 6 counties
Missouri	No state law; city programs include Arnold and Florissant
Minnesota	No state law; sole program in Minneapolis overturned by court
New Mexico	No state law; city program in Albuquerque
Nevada	Cameras banned unless operated by law enforcement agency
New York	Cameras legal in cities with at least 1 million residents; program in New York City
North Carolina	Cameras legal in select cities; many city programs suspended due to legal challenges
Ohio	No state law; city programs include Columbus, Dayton, and Toledo
Oregon	Cameras legal in cities with at least 30,000 residents; programs in at least three cities
Pennsylvania	State law authorizes Philadelphia program
Rhode Island	Cameras legal statewide; program in Providence
South Dakota	No state law; program in Sioux Falls
Tennessee	No state law; city programs include Germantown and Knoxville
Utah	Restricts cameras to low-speed roads where a police officer also has witnessed the violation
Virginia	Legislature did not renew program after 10-year pilot expired in July 2005
Washington	Cameras legal statewide; programs in at least three cities
West Virginia	Cameras banned statewide
Wisconsin	Cameras banned statewide

Source: National Conference on State Legislatures and HRO research

was unconstitutional because it assumed that the vehicle's owner was driving the car when the violation occurred. The governor ordered an end to the program during the first year of its three-year pilot phase, and subsequent efforts to revive the program have stalled.

Four other state legislatures, in Arkansas, Nevada, West Virginia, and Wisconsin, have banned automated red-light enforcement systems. Florida's attorney general ruled that evidence gleaned from red-light cameras could not be used to issue tickets, but three cities have engaged in a legal battle with the state by moving forward with red-light camera programs nonetheless.

In response to other studies that had been criticized for their simplicity or small sample sizes, the Urban Transit Institute at North Carolina A&T State University analyzed reported accidents at or near 303 intersections over a 57-month period that began more than two years before the introduction of red-light cameras. The October 2003 study, updated the following July, found that red-light cameras did not reduce crashes and that they may have led to increases in rear-end and other types of crashes. Accidents involving cars traveling in different directions did not change with the introduction of the cameras, according to the study. "In many ways," the authors concluded, "the evidence points toward the installation of [red-light cameras] as a detriment to safety."

Based on data from a District of Columbia intersection accident database over a seven-year period, the *Washington Post* in October 2005 determined that the number of crashes at intersections with cameras doubled from 1998 to 2005 and increased by 64 percent at intersections without 24-hour monitoring. Even fatal-and-severe-injury crashes and broadside crashes appear to have increased significantly at all intersections, which critics say contradicts the belief among red-light camera advocates that cameras are effective in preventing the deadliest accidents.

Problems with cameras. Technical and legal problems also have mitigated against the use of red-light cameras in several jurisdictions around the country.

In Minnesota, where no law specifically allows or prohibits red-light cameras, a county judge halted the Minneapolis red-light program, the only one in the state. Because state law makes drivers responsible for red-light violations and the city does not have the authority to establish an ordinance directed at the actual drivers, a Hennepin County District Judge in March 2006 struck down the city's ordinance because it conflicts with state law by shifting the burden of proof to vehicle owners instead of requiring ticketing authorities to prove violations.

North Carolina's courts also have effectively undercut red-light programs there. In May 2006, the North Carolina Court of Appeals found the program unconstitutional because it does not give 90 percent of the money collected from every traffic citation to local school systems as mandated by the state constitution. More than two dozen cities and towns operate cameras there, and some have suspended their programs during the appeals process. Because the cost of paying red-light camera vendors is much higher than the 10 percent portion of the ticket that jurisdictions can keep for themselves, cities will have to decide whether to pay for their programs through other means or kill them entirely.

Los Angeles also had difficulty with its program after 20 percent of its photographed violations were dismissed due to lack of clear evidence. The city briefly stopped its program, terminated its vendor, and contracted with a new company to install the cameras at as many as 32 intersections by the end of 2006.

Legal and ethical debates

Red-light cameras bring with them the potential of increased safety and revenue, but they also have generated a number of ethical and legal dilemmas. Opponents of the cameras express concerns about privacy and the rise of a surveillance state, along with other complaints about the unfairness of punishments issued by for-profit companies in lieu of law enforcement agencies. Advocates say that many improvements have been made to the systems since they began operating in dozens of cities around the country, nullifying many of these concerns.

Equality of punishment. A vehicle running a red light in a community with red-light cameras can be subject to unequal punishments, critics say, depending on who catches the violator. A driver caught by a red-light camera faces a civil citation and a fine that in most Texas communities using the cameras is lower than the one issued by a uniformed officer. Also, because an officer-issued ticket is a criminal citation, it can add points to a driver's record and potentially raise that person's insurance rates.

How a red-light camera program works

Several companies operate red-light cameras under contract with municipalities. Most companies use digital cameras mounted above the corners of an intersection pointing in all four directions of traffic. The cameras are connected by computer to both the traffic signal and to underground electrical wires that activate the cameras when a driver runs a red light. The systems utilize a "passive sensor" that switches on the cameras only when a vehicle enters the intersection after the light has turned red; a vehicle already in the intersection, such as one waiting to turn left just as the light turns red, would not trigger the red-light camera.

When a vehicle runs a red light, the computer triggers the camera to take two overhead pictures to document the violation – a shot of the vehicle entering the intersection after the light turns red and another picture of the vehicle moving through the intersection while the light is red. A separate camera takes a photograph of the vehicle's license plate. After taking the pictures, the computer superimposes data on the image to include the time and date of the infraction, the location of the intersection, the speed of the car (calculated by the distance and time documented in the photos), and the elapsed time between when the light turned red and when the car entered the intersection. Some systems also employ a video camera to show a 12-second bloc of time surrounding the infraction. The vendor then weeds out any blurred or otherwise unusable photos before forwarding the completed images to the contracting municipality.

The Garland model. Most Texas cities employ the following model, pioneered by the city of Garland, to issue and adjudicate the citations. Upon receiving the images from the vendor, the city removes any that it believes would not stand up to a challenge based on incomplete or inconclusive data. Images that document a valid reason for a car to run a red light, such as a funeral procession or a police officer manually directing traffic at the intersection, also are discarded. The police department then issues a civil violation – rather than a criminal violation that must be witnessed by a police officer – to the vehicle's registered owner. As a civil violation, the offense is not included on the owner's driving record. In Garland and many Texas cities, the fine for the offense is $75 but can increase to $200 for a driver who has received at least two red-light camera citations in the previous 12 months.

Upon receiving a citation, the owner of the vehicle has three options: pay the fine, request an administrative hearing, or provide evidence to show that someone else was driving the vehicle at the time of the infraction. Such evidence may include, for example, a police report showing that the vehicle had been stolen prior to the red-light offense or a bill of sale demonstrating that the car had been sold prior to the infraction but had not yet been registered by the new owner. In such cases, the police department dismisses the original ticket and, when possible, reissues it in the name of the actual driver.

A person challenging the ticket before an administrative hearing officer also may introduce mitigating evidence that an officer on the scene might have taken into account, such as weather conditions that would have made a sudden stop unsafe. In addition, if a driver received for the same offense a civil citation in the mail and a ticket from an officer on the scene, the city would dismiss the civil citation.

When motorists fail to respond to civil citations by the deadline printed on the back of the ticket, some cities have begun turning over delinquent payments to collections agencies. Indefinite failure to pay the fine could result in the inclusion of outstanding debt on the driver's credit report, as opposed to failure to respond to a criminal citation for which penalties include denial of a driver's license renewal, denial of a vehicle registration renewal, and/or an additional criminal charge of failure to appear accompanied by a warrant for the driver's arrest.

Most companies sign multi-year agreements to run red-light cameras at selected intersections. The companies maintain and own the cameras themselves and generally charge a monthly fee per camera in service. Some companies still receive a certain percentage of each ticket assessed but this practice has declined due to the perception that companies and cities have an incentive to issue as many tickets as possible. Although terms vary, each contract allows the city to terminate the program if the Legislature or the courts deem the use of red-light cameras illegal. Most contracts allow municipalities to opt out if they do not make enough money to recoup their costs, although there generally are expenses associated with dismantling a red-light camera operation.

Supporters of red-light cameras point out that repeat offenders would eventually face more severe punishment under the program that Garland and most Texas cities have established because those receiving more than two tickets in a 12-month period face larger fines. The cameras are not installed at every intersection, and police officers monitoring those stop lights likely would catch drivers who consistently run afoul of the law. Moreover, supporters say, the fee for a civil penalty is equivalent to that paid by people who take defensive driving or deferred adjudication to dispose of criminal citations.

Equality of enforcement. Opponents of the cameras believe they violate a citizen's Sixth Amendment right to confront his or her accuser. Unlike an officer on the scene, a camera cannot testify as to what happened, and an accused motorist cannot offer a defense against a machine that may have malfunctioned and snapped a picture when the light was not red. Further, opponents say, cameras cannot exercise the discretion an officer on the scene might use in choosing not to cite a motorist running a red light due to bad weather or participation in a funeral procession, for example.

Supporters argue that the use of red-light cameras does not violate the Constitution because the municipality itself becomes the accuser. A person who receives a ticket via camera also has the opportunity to explain the case to an administrative hearing officer, who can exercise the same discretion to dismiss a ticket that a police officer might.

Safety. Many police departments in Texas are strong supporters of red-light cameras because they say the technology allows them to allocate manpower more efficiently. Assuming a police officer takes about 15 minutes to pull over and ticket a motorist, the officer could cite no more than four offenders per hour. In addition, these supporters say, a lone officer monitoring red-light runners at a given intersection can only watch traffic moving in one direction and would miss a majority of that traffic while citing offenders. Red-light cameras have no such limitations, supporters say. In fact, some cameras can photograph up to four violators moving in one direction at the same time.

Opponents, however, point to what cameras cannot do – remove reckless or drunk drivers from the road. They also fear that the cameras simply will evolve into a replacement for uniformed traffic officers who will either be reallocated or reduced in force as a result of downsizing.

Red-light camera advocates are skeptical of such claims, citing several examples of cities with cameras that are using proceeds to hire additional officers. Although drunk and reckless drivers are a safety concern, so is a police officer who places other drivers in danger by running a red light to apprehend a car that ran a red light. Besides, supporters say, the cameras would actually free more officers to remove habitually dangerous drivers from the road.

Camera supporters also argue that drivers in areas without cameras know there are only so many officers on the road and would drive more carefully if they knew intersections were monitored around the clock. Further, they say, cameras are valuable in helping police departments document the causes of accidents, especially those that occur without witnesses, and preventing traffic problems such as gridlock caused by cars that block intersections.

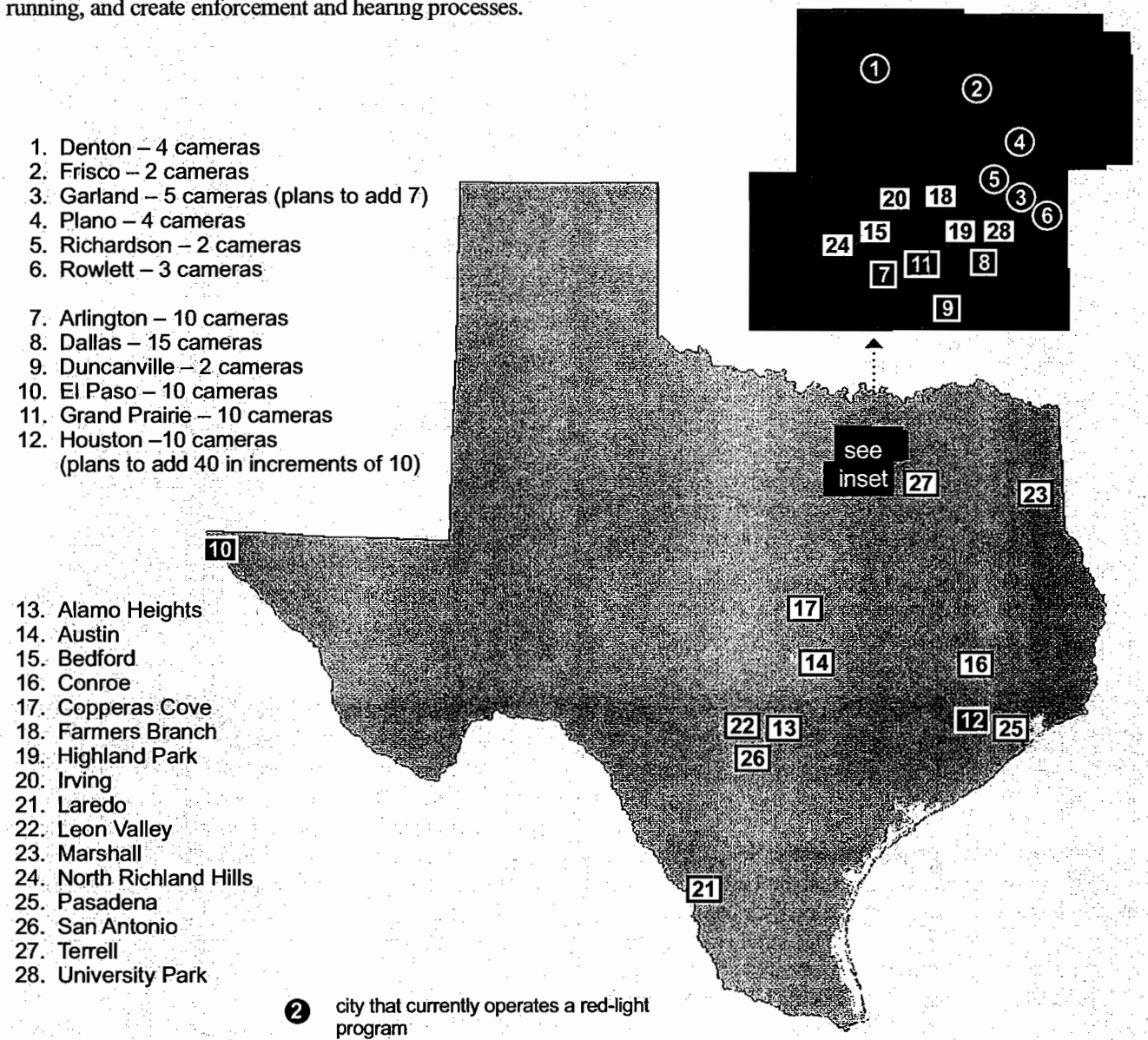
Revenue. Some opponents of red-light cameras worry that cities with red-light camera programs may be more interested in raising revenue than in promoting public saftety. They point to San Diego as "exhibit A" of a system run amok. The city contracted with Lockheed Martin Co. to operate a red-light camera program, giving the company $70 for each $271 citation it issued. But according to the Red Light Camera Defense Team, a group of area attorneys, the city and Lockheed chose to monitor not the most dangerous intersections but those with short yellow-light times and heavy traffic volumes. Three months after the city suspended the program in June 2001, a California judge dismissed almost 300 citations because he found Lockheed had too much discretion over the program's implementation.

Red-light camera advocates observe that San Diego's program is up and running again in partnership with Affiliated Computer Services, which had acquired Lockheed's red-light camera division in the interim. Instead of a per-ticket fee, the company charges a monthly rate, and every Texas city operating a red-light program has implemented a similar system. Neither red-light vendors nor police departments can sequence the traffic lights, which are controlled by state or local traffic departments in accordance with state and federal regulations.

In addition, supporters say, many Texas cities have specifically earmarked profits made from the cameras for use in enhancing public safety. Garland, for example, has used red-light money to replace all signal lights with bigger

Figure 1: Red-light camera programs in Texas cities

Although Richardson was the first city in Texas to establish a red-light camera pilot and seek state approval for the program, the city of Garland since has taken the lead in exploring and testing its legal authority to use red-light cameras. In September 2003, Garland became the first city to install and run a permanent red-light camera program following the enactment of SB 1184. Since then, the legal framework used in Garland has been mirrored in at least a dozen Texas communities that have passed ordinances to establish programs, impose civil penalties for red-light running, and create enforcement and hearing processes.



and brighter light-emitting diode (LED) lights, along with replacing all school-crossing signs with high-visibility fluorescent green signs and re-striping all intersections.

Privacy. With a nod to the totalitarian government depicted in George Orwell's futuristic novel *Nineteen Eighty-Four*, some critics believe the municipal use of red-light cameras is akin to Big Brother spying on the drivers of Texas. Already, they say, the proliferation of surveillance equipment in our society is excessive, with public and private cameras installed on many streets and buildings to monitor traffic and guard against break-ins. Red-light camera programs, they argue, violate the Fourth Amendment's protection against unreasonable search and seizure. City governments unreasonably deploy cameras on public roads without probable cause to believe that any particular motorist will violate the law.

Camera supporters contend that privacy claims brought by drivers on public roads have been rejected by courts around the country. The fact that cameras already are used widely in Texas, including at toll booths, with little public complaint proves they are not only effective but also relatively noninvasive, supporters say. This is especially true given that red-light cameras in Texas photograph only the vehicle and license plate but not the driver. In addition, supporters say, the cameras are not constantly running – they are triggered to take photos only after a motorist has run a red light.

Other options

Advocates on both sides of the debate point to several reasons why Texas needs a statute that explicitly allows or prohibits the use of red-light cameras by cities to issue civil citations.

Authorizing red-light cameras. Supporters of red-light camera programs argue that the Legislature should enact legislation explicitly authorizing their use. Based on experiences with red-light cameras in other states as well as concerns about problems that could arise from the patchwork of programs that has emerged in Texas, they urge lawmakers to consider the following ideas as they move forward with such legislation:

Protection from litigation. In Minnesota, the lack of a state law authorizing red-light cameras enabled courts there to invalidate programs on constitutional grounds. While no legal challenge to a red-light camera program in Texas is underway today, litigation on this front is always a possibility absent a state law expressly authorizing such programs.

Breadth of current authorizing language. The language in the Transportation Code that municipalities have used as legal authority to install the cameras on non-state roads allows local authorities to use criminal, civil, or administrative penalties against a motorist for violating a state law or municipal ordinance. While municipalities thus far have used this language only to operate red-light camera programs, it could be construed to govern a variety of other actions not explicitly covered by state law, such as prohibiting the use of a cell phone while driving. By directly authorizing red-light camera programs in statute, the Legislature could strike sec. 542.202(b)(3) to ensure that cities did not use this language in the future to conduct activities that lawmakers had not intended to allow.

Regulation and oversight. Although most Texas cities with red-light camera programs have followed the Garland model (see *How a red-light camera program works*, page 7), they currently are not bound by any state regulations when establishing their systems. State law mandates that cities must set criminal fines for red-light running that range between $1 and $200, but there is no corresponding guideline if the violation is deemed a civil offense. Writing red-light camera programs into law would allow the Legislature to set limits on everything from the number of cameras a city could install to the amount it could fine violators.

Revenue direction. Many Texas cities that operate red-light cameras have dedicated the use of revenue generated from the program for public safety or other police functions. But cities are not required to use red-light violation dollars for any particular purpose, and there is evidence that certain cities, such as San Diego, have implemented red-light camera programs that emphasize revenue generation over public safety. A law that specifically authorizes the use of red-light cameras could require cities to use the revenue generated for the public good.

Eliminating unequal punishment. A Texas driver is subject to different punishment based on whether he or she is cited by an officer or a camera. Issues with unequal punishment do not exist in states such as Arizona and California where all red-light running offenses are criminal violations. In addition to photographing cars and license

plates, their camera systems also take pictures of actual drivers, supplying the evidence needed to cite the driver for a criminal offense.

Open records status. No statewide standard exists for the use and sharing of images by municipalities that operate red-light camera programs. Images captured by red-light cameras are considered open records subject to discovery under the Texas Open Records Act and can be subpoenaed by courts and insurance companies in traffic disputes. However, a party requesting the information must have key information such as the time, date, and location of the offense because cities that use red-light cameras do not necessarily file the images under the violators' names.

HB 901 by P. King, which the 78th Legislature did not enact in 2003, would have addressed the open-records status of red-light camera images. Except for a request by the cited motorist, the bill would have exempted the images from discovery under the Open Records Act. It also would have required municipalities to destroy all photos captured by red-light cameras within 30 days of payment of the civil penalty.

Double jeopardy. The Garland ordinance, which many Texas cities with red-light programs use as a model, includes a provision designed to prevent placing red-light violators in double jeopardy; i.e., imposing both a criminal and civil penalty for the same infraction. Under this provision, the city cannot impose a civil penalty on a motorist who has been cited or arrested for the same offense by a police officer.

In practice, Garland's police officers flag each criminal citation written for red-light running at intersections under photo enforcement, which notifies the department that motorists should not receive civil citations for those offenses. But many legal experts believe that a driver who received two citations for a single offense could pay the civil fine immediately and then successfully contest the criminal violation on the basis that the driver already had been punished for the offense.

The potential for placing offenders in double jeopardy likely will increase as more and larger cities begin operating red-light programs, and no statewide standard currently exists to ensure that city ordinances guard against double jeopardy.

Banning red-light cameras. Opponents of red-light camera programs believe that cities should use measures other than automated enforcement to improve traffic safety. They argue that the Legislature should explicitly prohibit red-light cameras and grant TxDOT and DPS the resources and authority to take the following steps:

Lengthen warning time prior to red lights. A March 2005 Texas Transportation Institute study of 181 Texas intersections during a three-year period found that increasing the length of yellow-light time by one second reduced violations by 53 percent and crashes by 40 percent. In addition, traffic signals in some European countries employ a countdown clock that shows how many seconds remain until the light will turn red. Supporters of this approach contend that drivers often run red lights simply because they misjudge how much time they have before a light turns red, although opponents argue that drivers who misjudge yellow lights today still will likely run red lights after the clock has run down.

Make lights more visible. A variety of technological solutions are available to improve the visibility of traffic lights from afar, including the use of larger signals and brighter lights.

Explore engineering alternatives. The use of cameras reduces incentives to determine the true causes of red-light running accidents, such as poorly designed intersections. Examples of improvements include installing dedicated turn arrows, trimming hedges and reducing other potential vision impairments, and installing traffic circles in addition to or instead of stop lights.

Improve lane markings. Intersections that are poorly marked can lead to accidents, particularly among drivers who are unfamiliar with the area. Restriping the lane markings helps to define clearly the boundaries of intersections, ensure that cars have ample room to execute turns, and reduce confusion among drivers.

– by Joel Eskovitz

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