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Sorting Out the Anomaly: Non-Appearance Crimes in Light of *Azeez v. State*

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*Azeez v. State*¹ was handed down by the Texas Court of Criminal Appeals on March 5, 2008. In a foray into an area of law that impacts the lives of hundreds, if not thousands, of defendants in Texas local trial courts on a daily basis, the Court delineated failure to appear and violate promise to appear and effectively put everyone on notice that the two offenses are not interchangeable. In order to “sort out this anomaly,”² the Court reversed the judgment of every prior court that had come in contact with the case: the Fourteenth Court of Appeals, County Court at Law No. 12 of Harris County, and Houston Municipal Court No. 8.

While the headlines were replete with hype surrounding *Crook v. State*, handed down by the Court one month earlier, with the exception of one attorney-commentator, the opinion flew below the radar of legal commentators and journalists in the Texas media.

While the headlines could have read:

Misinterpretation of Commonly Prosecuted Laws Result in Untold Thousands of Defendants Overpaying Millions in Fines While State Loses Millions in Court Costs Designated for Funding Trauma Care Facilities

Rather, the sole attorney-commentator wrote the following about the impact of *Azeez*:

All of this litigation over a maximum \$500 fine. So, if you fail to appear on a speeding ticket, you get the equivalent of a speeding ticket. That should get everyone’s attention.³

While it is unlikely that any opinion from an appellate court is going to get everyone’s attention, the implications of the *Azeez* decision are, in fact, worthy of the attention of every Texas criminal law practitioner and court of criminal jurisdiction.

I. *Azeez v. State*: From Municipal Court to Court of Criminal Appeals

Sheriff K. Azeez was stopped and issued a citation for speeding by a Houston police officer on June 19, 2003. In signing the citation, Azeez promised to appear before the Houston Municipal Court no later than July 21, 2003.

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AROUND THE STATE

To the Editor of *The Recorder*:

The reunion of TMCA old-timers held in Seabrook on March 16, 2008 was a mixed success. Attendance was slightly less than we had hoped for but we were honored by the attendance of such early warhorses as JOHN WILDENTHAL, CARL MIKLITZ, SAM ALFANO, RONNIE BEYLOTTE, BOB KUBENA, and others. The food was excellent, the wine was provided by friends, and the camaraderie was unbeatable. There was an unanimous decision to hold another reunion and possibly make it an annual affair.

The driver of the reunion was, aside from the recognition of father time’s reduction of our ranks, a desire to determine just who was the small group that took on the task of founding the TMCA (or its forerunner). We had some success in that the Hon. Gene Frohbeiter, of Jersey Village, recalled the names of four of the individuals who sat down in the Old Capital Club of the Rice Hotel in Houston in 1974 and started the formation of the Gulf Coast Association of Judges, Clerks, and Prosecutors, later to become the Texas Municipal Courts Association. They are, according to Judge Frohbeiter’s memory, RODNEY PARROTT and LARRY MILLER of Houston, STEVE HEBERT of Baytown, and PETE RUMAN of one of the cities in the Houston area. He believes there were one or two more but he could not remember the others off hand.

Our purpose is to not let the history of this remarkable organization slip away. We also had difficulty locating people. We were particularly interested in locating RODNEY PARROTT, last known to be on the Texas Attorney General’s staff. No help there.

We are going to have another reunion but next time we will be better organized. One man efforts are not always the best.

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Subsequently, he failed to appear, and was charged by complaint with “unlawfully and knowingly fail[ing] to appear . . . in accordance with the terms of his release after having been lawfully released from custody on condition that he subsequently appear in said court.”⁴

A year later Azeez was tried for this offense in Houston Municipal Court No. 8, and was convicted by a jury and fined \$400. He appealed his conviction to the County Criminal Court at Law No. 12 of Harris County, which affirmed his conviction. He next appealed his conviction to the Fourteenth Court of Appeals, which likewise affirmed his conviction, albeit “for different reasons” than those given by the County Criminal Court at Law.⁵

On the day of trial in municipal court, before jury selection commenced, Azeez’s defense attorney moved to quash the complaint, arguing that, whereas it charged Azeez with an offense in the express terms of the Penal Code’s bail jumping and failure to appear⁶ (which carries a maximum penalty of a fine not to exceed \$500), instead of under the Transportation Code’s violation of promise to appear,⁷ which he contended is the more specific offense and carries a maximum fine not to exceed \$200.

The assistant city attorney prosecuting the case responded that the complaint had not charged the appellant of either offense, but rather with violating City of Houston Ordinance 16-47.⁸ The defense answered that Azeez could not be charged under the ordinance because the city “cannot legislate in areas [where] there is a controlling State law, so that’s void - even if he is under that ordinance.”⁹ Alternatively, Azeez argued that, in light of the city ordinance, he should not have been charged by a complaint couched in terms of a Penal Code’s bail jumping and failure to appear. The municipal court denied his motion to quash.

As the Court of Criminal Appeals observed that the events at trial seemed to bear out the appellant’s claim that he had been charged under the Penal Code offense (bail jumping and failure to appear). Beginning in voir dire and concluding with the court’s written jury charge references were made to the fine range of \$1 and \$500 (consistent with the Penal Code and city ordinance offenses, but inconsistent with the range of punishment for the Transportation Code offense).

“During her final summation to the jury, the prosecutor read out loud to the jury part of the speeding citation that the appellant had signed, containing a warning that in the event he should fail to appear as promised, a warrant would issue for his arrest and he would be subject to an

‘ADDITIONAL CHARGE FOR FAILURE TO APPEAR WITH A FINE OF \$200.’ She then urged the jury to ‘[a]ssess what fine you deem appropriate.’ The jury quickly found the appellant guilty and assessed a fine of \$400. The appellant filed a motion for new trial in which he argued, *inter alia*, that the trial court erred in failing to grant his motion to quash the complaint on the basis that it charged him with the broad Penal Code offense rather than the more specific offense under the Transportation Code. The trial court denied the motion. The appellant reiterated this argument in his appeal to the County Criminal Court at Law, which ruled in a one-page opinion that he had ‘waived’ this and all of his other challenges to the complaint because he had ‘made his objections after the start of voir dire.’”¹⁰

The Fourteenth Court of Appeals likewise affirmed the appellant’s conviction, but opted to ignore the procedural-default rationale. Rather, the court of appeals concluded that the defendant was in fact charged with violation of promise to appear (VPTA) although the complaint alleged the mental state for bail jumping and failure to appear. It explained, “[t]he 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.”¹¹

The Court of Criminal Appeals disagreed with the court of appeals holding that the court of appeals erred in two significant respects. First, in holding that Azeez was actually charged with the Transportation Code offense (VPTA), the court of appeals ignored (1) the express language of the complaint itself, (2) the fact that the court’s charge instructed the jury to convict Azeez (if at all) under the express language of the Penal Code provision (FTA), and (3) the fact that the jury was authorized to, and did in fact, assess a fine in excess of that which is permitted for the Transportation Code offense. Second, in the process of holding that the Transportation Code provision and the Penal Code provision are not *in pari materia* (such statutes that relate to the same matter or subject are to be construed together), “the court of appeals misconstrued the scope of Section 38.10(a) of the Penal Code. We hold that the two provisions should, in fact, be construed *in pari materia*, and that the trial court erred to allow the appellant to be prosecuted and punished under the Penal Code provision instead of the Transportation Code provision.” Accordingly, the case was remanded to the municipal court for further proceedings not inconsistent with the court’s opinion.

II. How the Little Things Add Up

While Mr. Azeez was fined \$400, under either the Penal Code's bail jumping and failure to appear statute or the non-appearance city ordinance offense he could have been fined \$500. The rub, of course, is that under the Transportation Code's violation of promise to appear (VPTA), the maximum fine he could have been assessed is \$200. In other words, Azeez's fine was erroneously double the maximum fine. In an age of four dollars a gallon gasoline and politicians promoting "stimulus packages" and "gas tax holidays," are there any readers out there who believe that a fine that is more than double the amount allowed by law is no big deal?

Certainly, the Court of Criminal Appeals understood that this was not simply a case about misallocation of petty cash nor did the Court make its decision based solely on the principle of the matter. In the Court's own words, "[B]ecause the appellant was prosecuted under the Penal Code, and assessed a fine in excess of what was allowable for the Transportation Code offense, he suffered a violation of due process."¹²

The preceding statement by the Court begs the obvious question: how many other defendants have currently, and since these two offenses have coexisted in state law, been denied due process? How many have been excessively fined?

In light of the Azeez opinion, one can only wonder exactly how many millions of dollars defendants in Texas municipal and justice courts have erroneously paid in the form of excessive fines. In terms of collecting and remitting the state traffic fine (STF),¹³ which has been a required court cost since 2003 for all Rules of the Road violations (including VPTA), one third of the money collected from this cost is used by the Texas Department of Health to fund designated trauma facilities, county and regional emergency medical services, and trauma care systems.¹⁴

There is no way of knowing exactly how many millions of dollars were not collected and remitted to the Comptroller when, in a perfect world, they should have been.

III. Consideration of Non-Appearance Crimes in Light of Azeez

The Texas Municipal Courts Education Center in its publications and through its continuing education programs has asserted that it is inappropriate to charge

every non-appearing defendant under Section 38.10, Penal Code (bail jumping and failure to appear). The rationale for such instruction remains rooted in accepted rules of statutory code construction, the same rules of code construction cited by the Court of Criminal Appeals.¹⁵

Despite such considerable instruction efforts, many local governments either inadvertently failed to appreciate or intentionally ignored the substantive differences in the provisions of the Penal Code and Transportation Code (purpose, culpable mental states, fine range, court costs, etc.). The Azeez opinion provides an excellent opportunity for readers to reexamine the general subject matter of non-appearance crimes and the different species that exist in Texas law. Accordingly, the purpose of this article and the chart that accompanies it is to introduce each offense and to illustrate how each offense is different.

A. Failure to Appear (FTA)

§ 38.10. Bail Jumping and Failure to Appear¹⁶

(a) *A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release.*

(b) *It is a defense to prosecution under this section that the appearance was incident to community supervision, parole, or an intermittent sentence.*

(c) *It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release.*

(d) *Except as provided in Subsections (e) and (f), an offense under this section is a Class A misdemeanor.*

(e) *An offense under this section is a Class C misdemeanor if the offense for which the actor's appearance was required is punishable by fine only.*

(f) *An offense under this section is a felony of the third degree if the offense for which the actor's appearance was required is classified as a felony.*

Observations:

1. The origins of confusion surrounding this Penal Code statute begin with its very name. Rarely if ever, do people refer to this statute by its complete and proper name (bail

jumping and failure to appear). Somehow in the vernacular of local trial courts, this offense has been reduced to three simple letters - FTA.

2. Sloppy truncation has likely resulted in many users losing sight of why bail jumping and failure to appear “is on the books” and how it is different than VPTA and other non-appearance crimes. As we have seen in other instances involving terms commonly misused in municipal and justice court; similar does not mean the same.¹⁷

3. While the Fourteenth Court of Appeals concluded that Section 38.10(a) was inapplicable, because Azeez was “arrested” for speeding rather than “pursuant to a court order,” the Court of Criminal Appeals shoots down this assertion and reminds readers that the statutory definition of “custody,” provided by Section 38.01(1)(A) means “under arrest by a peace officer *or* under restraint by a public servant pursuant to an order of a court of this state or the United States.”¹⁸ Thus, due to the definition of “custody,” Section 38.10 is broader in utility than VPTA contained in the Transportation Code.

4. For those who had lingering questions about whether the issuance of a citation constitutes an arrest under Texas law,¹⁹ the Court seemingly puts those questions to rest.²⁰

5. In the context of citations filed in municipal and justice courts, Section 38.10, Penal Code is the appropriate charge when a peace officer issues a citation for an offense **other than those** contained in the Rules of Road defined in Title 7, Subtitle C, of the Transportation Code.

6. But what about a situation where an alleged Rules of the Road offender appears in court to enter a plea but subsequently fails to appear pursuant to a court order? Which offense should be charged in such instances? The correct answer is Section 38.10(a). The question remains: are local trial courts able to document that the defendant is under any obligation to reappear? Remember, even under the definition of “custody” in Section 38.01, there must be an “order of a court of this state.”

7. Administrative idea: in light of the “order” requirement, courts should consider making it standard operating procedure to require all defendants who appear, plead “not guilty,” and request a trial to post bail in the form of a personal recognizance bond. Article 45.016, Code of Criminal Procedure states “the judge or justice may require the defendant to give bail to secure the defendant’s appearance in accord with this code. If the defendant fails to give bail, the defendant may be held in custody.” Courts are understandably divided on the utility of this statute. Many judges are reluctant to require defendants, once they appear in person or by mail, to post

bail to secure their appearance. While rationales vary, many believe that mandating the defendant to post bond potentially creates the appearance that the court is using bail to discourage defendants from requesting their constitutional right to trial. Alternatively, it’s easy to imagine how a rogue court could use bail as a pretext to incarcerate an indigent defendant who lacks the funds to post bail. While the spectrum of such issues are understandably concerning, such concerns are alleviated when defendants are only asked to sign a personal recognizance bond. Though it is not statutorily required, utilizing Article 45.016 in some manner seems like the missing link in the bail jumping and failure to appear riddle.

8. Courts and prosecutors alike will benefit from knowing the kinds of situations subsequent to a defendant’s initial appearance where appellate courts have deemed Section 38.10 the appropriate charge for non-appearance in circumstances other than non-appearance for trial:

- After bond forfeiture has been declared;²¹
- After pleading guilty but failing to appear for a sentencing hearing;²²
- Where evidence established that the defendant knowingly and intentionally engaged in conduct designed to prevent his or her receiving notice of pretrial hearing.²³

9. Courts and prosecutors alike will benefit from remembering that Section 38.10 is not a strict liability offense and that successful prosecution poses some unique evidentiary requirements.

- The State must prove that the appellant’s failure to appear in accordance with the terms of his release was intentional or knowing.²⁴
- Proof of the underlying offense for which the defendant failed to appear is an essential element of the offense.²⁵
- Where witness testimony establishes that the defendant had no actual notice of the hearing, and when the “instanter”²⁶ bond did not name the court in which the defendant was to appear, there was sufficient evidence that the defendant did not knowingly and intentionally fail to appear in accordance with the terms of his release.²⁷

- If a jury believed or had a reasonable doubt that an ordinary and prudent person in the same or similar position as the defendant would have failed to make a court appearance in reliance on the advice of counsel, and if the jury believed or had a reasonable doubt that the defendant actually received such advice, then the defendant had a reasonable excuse for his failure to appear and the jury should find him not guilty.²⁸

B. Violation of Promise to Appear

§ 543.009. Compliance with or Violation of Promise to Appear

(a) A person may comply with a written promise to appear in court by an appearance by counsel.

(b) A person who wilfully violates a written promise to appear in court, given as provided by this subchapter, commits a misdemeanor regardless of the disposition of the charge on which the person was arrested.

Observations:

1. *Azeez* is the first case to examine the intricacies of VPTA as it relates to other non-appearance crimes. In comparison to FTA, the Court explains that VPTA is narrower in scope.²⁹
2. In *Azeez* the Court held that defendants in municipal and justice court have a due process right to be prosecuted for VPTA when the defendant is initially accused of a Rules of the Road violation.
3. Though a complaint is the charging instrument in municipal and justice court, the signing of a written promise to appear by a motorist has been deemed by the Eastland Court of Appeals to constitute colorable invocation of jurisdiction for purposes of judicial immunity where a motorist sued a local trial court judge for false arrest after the judge issued an arrest warrant for VPTA.³⁰
4. VPTA is the appropriate charge **only** when a peace officer issues a citation for an offense contained in the “Rules of Road” defined in Title 7, Subtitle C, of the Transportation Code, and the accused subsequently does not appear pursuant to the written promise to appear.
5. “Wilfully”³¹ is not a culpable mental state acknowledged or defined by the Penal Code.

Accordingly, prosecutors pursuant to Section 6.02(c), Penal Code presumably must prove intent, knowledge, or recklessness.

6. Unlike bail jumping and failure to appear, VPTA is a traffic offense and is reported on the defendant’s driving record.

7. While the maximum fine for VPTA is lower than FTA (\$200 versus \$500), the court costs for VPTA are actually greater than for FTA. The base court costs for FTA is \$52 in contrast to \$85 for VPTA. Why the difference of \$33? The Local Traffic Fund (\$3.00)³² and the State Traffic Fine (\$30.00).³³

C. City Ordinance Violations

As state law only authorizes peace officers to issue citations, many municipalities have adopted local ordinances authorizing non-peace officers, such as code enforcement personnel, to issue “citations.” In large cities where the number of code violations would easily overwhelm local peace officers and in small towns where local law enforcement may be nonexistent or limited by interlocal agreements with county government, the adoption of such an ordinance may be essential to effectively enforce ordinances relating to public safety and maintain quality of life. Ostensibly, such ordinances are adopted pursuant to Section 51.001 of the Texas Local Government Code, 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.”

Some cities that have given non-peace officers the authority to issue a citation pursuant to an ordinance have also adopted ordinances making it an offense to fail to appear in court as promised.

Observations:

1. Non-peace officers (e.g., fire marshals, code enforcement personnel, etc.) have no authority to issue a citation unless an ordinance has been adopted authorizing their issuance.³⁴
2. Both FTA and VPTA are inapplicable in instances where **non-peace officers** are involved in the issuance of citations for local ordinance violations (see the earlier definition of “custody”).

3. Has your municipality adopted an ordinance authorizing non-peace officers to issue citations? More importantly, does your city have an ordinance creating a non-appearance offense?

4. Ideally, an ordinance based non-appearance offense should be distinct from either FTA or VPTA to avoid arguments that such ordinances are pre-empted by state law.³⁵

5. The base court costs for an ordinance violation is \$52. The Local Traffic Fund and State Traffic Fine are not collected for such violations.

6. Now that the Court has announced its opinion in *Azeez*, it is a good time for city attorneys to review local non-appearance and related ordinances in light of *Azeez* and to remedy any potential pre-emption problems.

D. Other Non-Appearance Offenses

While municipal and justice courts are most likely to come into contact with FTA, VPTA, or ordinance violations, there are a few other statutes of the same genus species that deserve brief mention.

1. Article 45.0215(d), Code of Criminal Procedure Establishes a Class C misdemeanor for a parent who has been served a summons and order to appear with his or her child who does not appear as ordered.

2. Sections 31.125 and 31.127, Parks and Wildlife Code – Though presumably unnecessary and likely to only be filed in justice court, the Parks and Wildlife Code contains provisions authorizing the issuance of citations and warrants for non-appearance.

3. Article 45.060, Code of Criminal Procedure – On or after a defendant's 17th birthday, if the court has used all available procedures in Chapter 45 to secure the individual's appearance to answer allegations made before the individual's 17th birthday, the court may issue a notice of continuing obligation to appear by personal service or mail to the last known address of the individual. The notice, in addition to specific statutory language, must order the individual to appear at a designated time, place, and date to answer the allegations detailed in the notice. Failure to comply with this notice to appear, or violation of the continuing obligation to appear (VCOA) is a Class C misdemeanor that is independent of FTA and VPTA. It is the only status offender non-appearance crime of its kind in Texas, in that a person cannot be accused of the offense until reaching his or her 17th birthday.

Conclusion

The *Azeez* decision will not likely benefit those whose judgments are final and who have paid excessive fines, but "all of this litigation over a maximum \$500 fine"³⁶ may result in thousands of defendants for untold years into the future to keep millions of dollars in their pockets while simultaneously increasing monies for uninsured children with traumatic head injuries. To this end, the Court of Criminal Appeals through the *Azeez* decision has issued an opinion that not only stays true to the interest of justice but through its aggregate implications will have substantial positive economic implications. Move over "gas tax holiday."

¹ *Azeez v. State*, 248 S.W.3d 182 (Tex.Crim.App. 2008).

² *Azeez* at 184. Legislative history reveals that the potential for confusion in this area of substantive criminal law has developed during its 91 year history. As automobiles became common place at the turn of the last century, the Texas Legislature did not hesitate to pass criminal laws relating to their use. As early as 1917, the Legislature created Section 803, Penal Code, extending the authority of peace officers to arrest for traffic offenses (now codified as Sec. 543.001 Tex. Transp. Code). Using language similar to Sections 543.006 and 543.009 of the current Transportation Code, the Legislature in 1923 created the offense of violation of promise to appear and limited law enforcement's ability to detain and imprison after arresting and releasing the driver. *Montgomery v. State*, 170 S.W.2d 750, 752 (Tex.Crim.App 1943.) As this statute preceded the need for a Transportation Code, it was originally codified as Sec. 792, Penal Code. (VPTA once was part of the Penal Code). In 1947, VPTA was repealed from the Penal Code and recodified as Article 6701d, Sections 148-149 (1947 Texas Laws, Ch. 421, (HB 172). Uniform Act Regulating Traffic on Highways). Such provisions became part of the Transportation Code in 1995. As recently as 1966, confusion regarding VPTA and FTA appears to exist. See, Tex. Atty. Gen. Op. C-645 (1966). ³ E-mail from Texas District and County Attorney Association, TDCAA Weekly Case Summaries 3/6/08 (March 7, 2008 12:00 p.m. CST) (copy on file with author).

⁴ "This language expressly tracks language of Section 38.10(a) of the Penal Code." *Supra* note 1 at 185.

⁵ *Azeez v. State*, 203 S.W.3d 456, 460 (Tex.App.-Houston [14th] 2006).

⁶ Tex. Penal Code § 38.10 (2007).

⁷ Tex. Trans. § 543.009(b) (2007).

⁸ "It shall be unlawful for any person knowingly to fail to appear for the trial of any charge against the person pending in the municipal courts of the city." This offense is punishable by "a fine not exceeding \$500.00; provided, however, that no penalty shall be greater or less than the penalty provided for the same or a similar offense under the laws of the state." Houston, Tex. Ordinances § 1-6(a).

⁹ *Supra* note 1 at 185.

¹⁰ *Supra* note 1 at 186.

¹¹ *Supra* note 5 at 462 (citations omitted).

¹² *Supra* note 1 at 193.

¹³ Tex. Transp. Code § 542.4031.

¹⁴ *Id.* 67 percent is deposited to the undedicated portion of the general revenue fund of the State of Texas.

¹⁵ See the Court's reference to Tex. Gov't Code § 311.026 (2007). *Supra* note 1 at 192.

¹⁶ Tex. Penal Code (2007).

¹⁷ "Deferred disposition" is not "deferred adjudication", "truancy" is not "failure to attend school", the attorneys statutorily authorized to represent the State of Texas in municipal court does not include "municipal prosecutor."

¹⁸ *Supra* note 1 at 188. (emphasis added). Note that the Court in calling into question the court of appeals interpretation of the "custody" in the Penal Code goes into substantial analysis. *Supra* note 1 at 188-190.

¹⁹ See discussion of issuance of citation when offense is not on-view. Texas District and County Attorney Association.<http://tdcaa.infopop.net/2/Opentopic?a=tpc&s=347098965&f=157098965&m=5471071351>.

²⁰ *Supra* note 1 at 190-191.

²¹ *Kombudo v. State*, 2005 Tex. App. LEXIS 9261 (Tex. App. Houston 14th Dist. Nov. 8 2005), opinion withdrawn by 2006 Tex. App. LEXIS 287 (Tex. App. Houston 14th Dist. Jan. 12, 2006).

²² *Luce v. State*, 101 S.W.3d 692, 2003 Tex. App. LEXIS 2021 (Tex. App. Texarkana 2003).

²³ *Etchison v. State*, 880 S.W.2d 191 (Tex. App. Texarkana 1994).

²⁴ *Richardson v. State*, 699 S.W.2d 235, 238 (Tex. App. — Austin 1985, writ ref'd).

²⁵ *Hutchins v. State*, 650 S.W.2d 412 (Tex. Crim. App. 1983).

²⁶ *Instanter* is an archaic synonym for instantly. *Black's Law Dictionary*, 799 (6th ed. 1990); A Dictionary of Modern Legal Usage, 303 (1987). Read literally, such a bond would require that the defendant proceed directly to the courthouse and remain there until prosecuted. However, Texas courts have not read "instanter bonds" so strictly. See *Yarbrough v. State*, 703 S.W.2d 645, 647 (Tex.Crim.App. 1985) (treating "instanter" as equivalent to "as called").

²⁷ *Fish v. State*, 734 S.W.2d 741 (Tex. App. Dallas 1987).

²⁸ *Gallegos v. State*, 828 S.W.2d 577 (Tex. App. Houston 1st Dist. 1992).

²⁹ *Supra* note 1 at 193.

³⁰ *Tedford v. McWhorter*, 373 S.W.2d 832 (Civ.App. 1963 - ref. n.r.e.).

³¹ No, "wilfully" is not misspelled, just archaic.

³² Tex. Transp. Code § 542.403.

³³ *Supra* note 13.

³⁴ Ryan Kellus Turner, Citations – Part I (Tickets are for Concerts and Sporting Events), *The Recorder: The Journal of Texas Municipal Courts* (March 2007) at 13.

³⁵ See, for example, Houston Tex. Ordinances § 1-6(a), *supra* note 8. It is the author's opinion that ordinances, such as this, that overlap with subject matter specifically addressed by state law are pre-empted by state law.

³⁶ *Supra* note 3.

Comparison of State Law Non-Appearance Offenses in Texas Municipal Courts

	Bail Jumping and Failure to Appear	Violation of Promise to Appear
Statute	Section 38.10, Penal Code	Section 543.009(b), Transportation Code
Offense	Offense occurs when a person is lawfully released from "custody" and fails to appear in accordance with the terms of release	Offense occurs when a person arrested has secured their release by signing a written promise to appear and subsequently fails to appear.
Scope	Broad – "Custody" means either when people are either (1) arrested and released with or without bail (including when a person is arrested and released pursuant to signing a citation for a Class C misdemeanor excluding offenses defined in Title 7, Subtitle C "Rules of the Road" Offenses (Chapters 541-600) and public intoxication, or (2) under restraint pursuant to a court order). (See, Sec. 38.01(1) Penal Code)	Narrow – Applies only to written promises to appear alleging offenses defined in Title 7, Subtitle C "Rules of the Road" Offenses (Chapters 541-600).
Culpable Mental State	"intentionally or knowingly" (See, Section 6.03(a)-(b), Penal Code)	"wilfully" – undefined
Penalty	It is a defense to prosecution that the person had a reasonable excuse for failing to appear in accordance with the terms of release.	The offense is punishable by a fine of not less than \$1 or more than \$200 (Sec. 542.401, Transportation Code).
Defenses	The offense is a Class C misdemeanor (fine not to exceed \$500) if the offense for which the person's appearance was required is punishable by fine-only	None specific to statute
Application to Non-Appearance for Alleged Ordinance Violations	Inapplicable unless defendant is arrested/ arrested released with citation by a peace officer or makes an initial appearance and is "held over for trial" (e.g., Art. 45.016 – bail) and subsequently fails to appear in accordance with terms of the order of the court.	Inapplicable
Base Court Costs	\$52	\$85
Reporting	DPS code 3337	DPS code 3333 (appears on driving record)

2008 Warrant Roundup

Congratulations to the 191 agencies that participated in the 2008 Warrant Roundup conducted in February 2008. Although the final count is not complete, the Roundup has cleared over 13,500 arrest warrants totaling over \$30 million dollars! A list of participating agencies may be downloaded from the TCCA web site: <http://www.texasclerk.org>.

Denying Bail in Family Violence Offenders

Texas prosecutors have a tremendous new tool to protect victims of family violence. Wading through the steps will be well worth it.

**By Dana Nelson
Assistant District Attorney in Travis County**

Effective January 1, 2008, a family violence offender may be denied bail after violating a protective order or bond condition in a family violence (FV) case.¹ Other changes to PC §25.07 (Violation of Protective Order) and CCP art. 17.292 dramatically broaden the scope of the option for no-bail requests and is a major change for trying family violence cases.²

Many prosecutors have been scratching their heads about how to use this new tool; every path to a no-bail ruling requires a hearing, but when and what rules apply is confusing. Practical application of the new no-bail statutes will require some ingenuity and good judgment on our part.

No-bail requests will not be appropriate for every family violence defendant; we must exercise this option carefully and consider which defendants have the highest potential to inflict lethal harm. Also remember that not every defendant requires a setting of no-bail to remain in custody.

Changes to CCP art. 17.292: Emergency Protective Orders

Defendants accused of committing sexual assault or aggravated sexual assault may now be subject to an Emergency Protective Order (EPO). As with stalking defendants, there is no relationship requirement between the defendant and victim for an EPO. Now the protective order process for victims of sexual assault parallels the process for victims of family violence. After an offense occurs, an EPO that is criminally enforceable can be entered while a victim decides whether to pursue a civil protective order.³

EPOs are also available for victims of sexual assault of a child. One concern for these victims is including their names and personal information in the public record and providing a defendant with more information than he or she already has about the child. If Child Protective Services is involved and pursuing other legal remedies, then avoid working at cross-purposes by considering

other alternatives, such as a bond condition, that afford similar protection without the formality of an order.

Changes to PC §25.07: Violations of a Protective Order (VPO)

Bond conditions in a family violence case (if they relate to the safety of the victim or community) and Temporary Ex Parte Civil Protective Orders (TExPOs) have been added to the list of protective orders (POs) whose violations can be criminally enforceable under Penal Code §25.07. The TExPO must have been served on the defendant to be enforceable.⁴

New CCP art. 17.152: Denial of Bail⁵

Every defendant who violates a PO is eligible to be denied bail. The statute requires a magistrate to consider everyone from the first-time criminal defendant who drives by his or her victim's workplace, to the offender with multiple FV convictions who commits aggravated assault for a denial of bail. The beauty of this broad expanse of defendants is that the first defendant may be the most appropriate for no-bail based on the circumstances.

A defendant must have committed an act prohibited by PC §25.07 to trigger C.C.P. Article 17.152 to make no-bail an option. A denial of bail can occur only after a hearing. There are three categories of conduct that must be proven to deny bail. Each category of conduct—how the defendant committed the violation—requires a different showing at the hearing. The burden for all hearings under C.C.P. Article 17.152 is a preponderance of the victim.

The categories are:

1. If the defendant committed a VPO offense under PC §25.07 by violating a bond condition in a FV case, then the State must show that the bond has been revoked or forfeited for this violation, that the defendant violated the bond condition, and that the bond condition was related to

the safety of the victim (of the family violence case) or the safety of the community.

2. If the defendant committed VPO other than by violating a bond condition, then the State must prove that new VPO offense.

3) If the defendant committed VPO, including violating a bond condition, by going to or near a protected place (home, work, or school), then the State must prove the conduct and prove that the defendant went to the place with the intent to threaten or commit family violence or stalking.

An example of the first category is a defendant on bond for a Class A misdemeanor family violence assault with a condition to stay away from and have no contact with the victim. If the defendant calls the victim, he or she violates the “no contact” bond condition. The State would have to prove (1) that the bond was revoked for this violation (Note: The State would have to file that motion and get the order before making this motion for no-bail); (2) that the defendant violated the bond condition; **and** (3) that the bond condition was related to the safety of the victim **or** community. This category will be most helpful when there are no other protective orders in place.

An example of the second category is a defendant who is subject to a PO and violates that order by possessing a firearm. The State would have to prove the elements of that VPO: (1) the defendant was subject to a PO; (2) the defendant possessed a firearm; (3) possessing a firearm violated the order; and 4. the defendant knew possessing a firearm violated the order.

An example of the third category is a defendant who is subject to a PO and appears at the residence of the protected person. The State would have to prove the VPO as in example No. 2 (above) **and** prove that the defendant went there with the intent to commit family violence or stalking. “Commit family violence” is a new phrase in our statutes, so we return to Family Code Section 71.004 to determine its meaning. Simply put, the defendant went to the protected person’s home to assault or threaten to assault him or her. The State could alternatively show that the defendant went there with the intent to commit stalking; however, proving stalking adds a lot of elements to this example. (Remember that when a PO is in place, an accumulation of misdemeanor VPOs usually meets the elements of VPO by stalking.)

Now let’s consider a more realistic example. The defendant is on bond for misdemeanor assault (FV) with a

condition to stay away from and have no contact with the victim. The victim has applied for a PO, and the defendant has been served with the TExPO. The defendant goes to the victim’s home, assaults him or her, and threatens to kill the children.

1. For going to the residence, the defendant may be charged with either VPO of the bond condition or VPO of the TExPO, both Class A misdemeanors. While PC 25.07(c), P.C. permits the same conduct to be charged as two offenses, it is more practical and conservative to allege these facts as one offense or the other to avoid double jeopardy implications.⁶

2. For the assault, the defendant may be charged with violation of the TExPO by assault, a third-degree felony.

3. For the threat to the victim’s children, the defendant may be charged with either, (but not both, for the same reason in No. 1, above), VPO of bond condition (to have no contact) **or** VPO of TExPO (no threatening or harassing communication), also both Class A misdemeanors.⁷

The category with the fewest facts to prove at a no-bail hearing is a plain VPO, not the bond condition or the “go to or near” violation. In this scenario we have the VPO by assault and the VPO for threatening or harassing communication. These should be the simplest to prove and have no additional facts for the judge to find before issuing a no-bail ruling.

The No-Bail Hearing: When and How

Hearings requesting no-bail are not new. These hearings will be like those prosecutors already conduct to deny bail for bail jumping, committing a particular type of offense, or commission of a subsequent felony. The rules of evidence, including the 6th Amendment (and all of the difficulties it may present in a FV case) will apply. Article 17.152(e) lists what the magistrate may consider: the order or condition of bond, circumstances of the offense, relationship of the defendant and victim, and the defendant’s criminal history. The list includes a catch-all for “any other facts or circumstances” relevant to the defendant being an imminent threat.

A victim testifying in this circumstance can be daunting for many reasons. The victim may not be cooperative or may already have recanted. The victim may also be truly afraid of the defendant. If the State seeks to enter otherwise admissible hearsay, the declarant must be available for cross-examination unless the hearsay is non-

testimonial or the defendant has forfeited his or her other right by wrongdoing.⁸ If the declarant must testify at this hearing, it may satisfy the defendant's right to confrontation at trial if the defendant has an opportunity to cross-examine the declarant. Many prosecutors are already using this tactic in bond-reduction hearings to great advantage.

The most difficult section of this statute to put into practice is the timing of the hearing. Subsection (f) instructs the magistrate that any person arrested for an offense under PC Section 25.07 "shall without unnecessary delay ... conduct the hearing and make the determination required." The statute requires the hearing to be conducted not later than 48 hours after arrest, and the court is required to notify the State and defense counsel before the hearing. Yikes!

The statute seems to contemplate that the magistrate will do this automatically without a motion from the State. Will law enforcement request it? The bright side may be that there seems to be no prohibition on making a motion later even if a magistrate already set bail. Also, the defendant whom the prosecution wants to be held without bail might be in the prosecutor's sights before he or she is arrested for the eligible offense because the prosecutor is probably already working with law enforcement and may be looking for the defendant on other warrants.

Procedure

Prosecutors should start with a written motion alleging the facts making the defendant eligible for a denial of bail and attaching any public records, such as the probable cause affidavit for the new offense, to the motion. Prosecutors should provide notice to opposing counsel. Both sides should receive a setting for the hearing. At the hearing, the State will have the burden of proof, so witnesses should be ready and any certified public records needed, such as the protective order or the bond that set the condition that was violated.⁹ After the State has established the protective order or bond condition that was violated, the conduct committed by the defendant that violated the PO or bond condition must be proven. Witnesses may include the victim, law enforcement officers, or civilian witnesses. For "go to" or "go near" violations, an aerial photograph to scale will help show that the defendant was within the 200-yard radius of the protected area. (Remember that if Google Earth is used, permission should be requested to use the copyrighted material and there may be a fee. Most large urban counties already pay for access to satellite photos.)

Other factors the judge may consider include the relationship of the defendant and victim and the defendant's criminal history. To prove the relationship of the defendant to the victim, the prosecutor is not limited to the victim's testimony. A family member or friend may be called to show the relationship. For criminal history, the judgments from the defendant's prior convictions may be presented just as in the punishment phase of a trial. A fingerprint expert for comparison of the prints is needed if the defendant will not stipulate to those prior convictions. For a defendant with many charges but no convictions, present the booking prints, arrest sheets, and charging instruments from the priors. Other information, such as the defendant's jail calls, visitors, and mail, can be introduced.

All in all, this new tool will be just the right remedy for just the right defendant and victim, so keep an eye out for these motions as a possibility.

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¹ Credit for these changes goes to Rep. Joe Straus (R-San Antonio) and Sen. Jeff Wentworth (R-San Antonio), who filed and passed HB 3692 and HJR 6 at the request of Bexar County Criminal District Attorney Susan Reed.

² "Family violence" has the meaning in the Family Code §71.004: "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures." It includes dating relationships.

³ Remember that C.C.P. Article 7A permits a victim of sexual assault to pursue a civil protective order under Chapter 85 of the Family Code in the criminal case, regardless of the relationship between the defendant and victim. C.C.P. Article 7A.07 permits these orders to have a lifetime duration if the court finds there was a threat that reasonably places the victim in fear of further harm from the defendant.

⁴ I hope you are served by a great constable like we have in Travis County; he has real-time postings on his website and email notification of when TEXPOs and POs are served.

⁵ This statute is enabled by amendments to the Texas Constitution Article I, Section 11b for violating bond conditions, and Section 11c for violating a protective order.

⁶ *Bigon v. State*, 2008 Tex.Crim. App. LEXIS I (No. PD-1769-06, January 16, 2008) (because multiple convictions for the same conduct violate double-jeopardy, only one conviction may be upheld).

⁷ An interesting idea, particularly if no other felony VPO is available, would be to consider this incident stalking because the defendant placed the victim in fear of serious bodily injury or death for another person. Add this incident with another (to satisfy the requirement that this conduct occurs "on two or more occasions"), and the defendant could be charged with VPO by stalking, a third-degree felony.

⁸ *Crawford v. Washington*, 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington and Hammon v. Indiana*, 547 US __, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

⁹ As with trials for a Violation of Protective Order, the State must prove the defendant had been served with the PO and knew that this conduct violated the order. See *Harvey v. State*, 78 S.W.3d 368 Tex. Crim. App. 2002). Particularly for violation of a TEXPO, the State must prove the defendant was served. If there is no public record on file yet, then call the officer who completed service as a witness.

Mysterious Hearing Powers: The Municipal Judge as Presiding Officer at Driver's License Suspension Hearings

By Mark Goodner
TMCEC Program Attorney

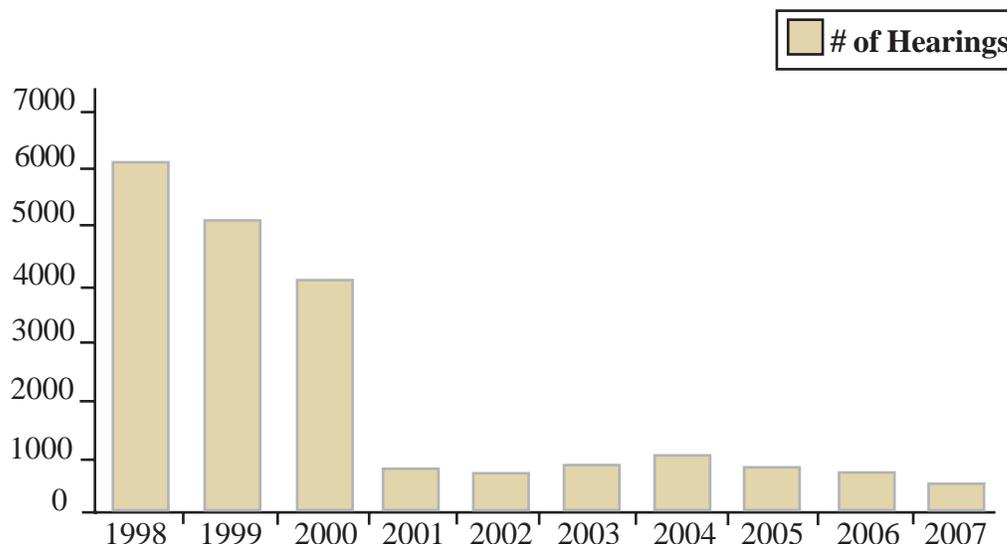
Every month when filling out your OCA monthly report, you may wonder what a driver's license suspension hearing is, but you probably fill in the usual goose egg and move on. We wondered as well. What is a driver's license suspension hearing and why do municipal courts have to report them? This sounds like it does not live in our comfortable world of Class C misdemeanors and city ordinance violations. However, these hearings are something municipal courts should know about and properly report every month.

As municipal judges and clerks, you are probably well aware of the fact that, in Texas, drivers have their licenses suspended or revoked for many reasons. When a person is notified of a suspension or a revocation, they may request a hearing to determine whether the grounds for suspension or revocation are true. What may come as a shock to you is that municipal courts are one of the two venues in which this hearing may take place. I stumbled upon this procedure while researching a question received on our 800 line about license revocations. These hearings

are required after a timely request, and they must occur either in municipal court or justice court in the county in which the person requesting the hearing resides. Amazingly, only 293 of these hearings were reported in municipal courts in 2007. Ten years ago, however, over 6,000 hearings were reported in municipal courts. It is not clear why the number of these reported hearings has dropped so precipitously in the last decade. It could be because of a shift from municipal court hearings to justice court hearings. Hopefully, it is not due to errors in reporting.

If you are unclear about these suspension hearings and how they work, don't worry—you aren't the only one. After speaking with the Texas Department of Public Safety, it has become clear that these hearings very often occur in courts that have been conducting them for a long time and still conduct them on a regular basis. In other words, there is usually a standing arrangement between DPS and these courts. If you have not been conducting these hearings, odds are that you may never have to.

Municipal Court Safety Responsibility and Driver's License Suspension Hearings 1998-2007



However, things can change, and if you are appointed or elected in certain municipal courts, it may be a part of your regular duties.

In the next few paragraphs, I hope to provide a brief overview of this hearing process.

Leading up to the Hearing

Sections 521.292 and 521.294 of the Transportation Code require the Department of Public Safety to suspend or revoke licenses in certain instances.¹ Section 521.292 provides nine grounds for license suspension, and Section 521.294 lists seven instances in which licenses are to be revoked. If the Department of Public Safety makes a determination that a license is to be suspended or revoked under one of these two sections, the department must notify the person by first class mail.² Notice is considered received on the fifth day after the notice is mailed.³ In the notice of suspension or revocation, the department must provide information about the person's right to a hearing and how they can request one.⁴ Hearings shall be held if the department receives a hearing request no later than the 15th day after the person received notice of the suspension or revocation.⁵

A hearing requested under Section 521.298 of the Transportation Code shall be held at the earliest practical date, but not earlier than the 11th day after the person requesting the hearing is notified of the hearing.⁶ Hearings can also be continued on a motion of the requesting person, the department, or to accommodate the docket of the presiding officer.⁷ A request for a hearing stays a suspension or revocation of a person's license until the presiding officer makes a final decision.⁸ If a person requests a hearing under Subchapter N of Chapter 521 and fails to appear without just cause, the person waives the right to a hearing, and the department's determination is final.⁹

The Hearing

At a hearing in a municipal court, the municipal judge acts as the presiding officer.¹⁰ A presiding officer may administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant books and documents.¹¹ The central issue that the presiding officer is concerned with is whether the department has proved by a preponderance of the evidence that the grounds for suspension or revocation stated in the notice are true.¹² If the presiding officer finds that the grounds are, indeed, true, then the suspension or revocation is sustained.¹³ However, if the presiding officer determines that the department has failed

to carry its burden of proof, then the department may not suspend or revoke the person's license.¹⁴ A decision of the presiding officer is final when issued and signed.¹⁵

Hopefully, this has explained the character of this mysterious hearing that you must report on every month, and that you are more prepared if you are ever called upon to preside over one. However, if you are distressed about the possibility of taking on this responsibility, fret not for you are statutorily entitled to receive a fee for hearing the case.¹⁶ The fee may not be more than \$5, and shall be paid from the general revenue fund of the county.¹⁷

¹ Tex. Transp. Code §§ 521.292, 521.294.

² Tex. Transp. Code § 521.295.

³ *Id.*

⁴ Tex. Transp. Code § 521.296.

⁵ Tex. Transp. Code § 521.298.

⁶ Tex. Transp. Code § 521.299(a).

⁷ Tex. Transp. Code § 521.299(b).

⁸ Tex. Transp. Code § 521.299(c).

⁹ Tex. Transp. Code § 521.302.

¹⁰ Tex. Transp. Code § 521.300(a).

¹¹ Tex. Transp. Code § 521.300(c).

¹² Tex. Transp. Code § 521.301(a).

¹³ Tex. Transp. Code § 521.301(b).

¹⁴ Tex. Transp. Code § 521.301(d).

¹⁵ Tex. Transp. Code § 521.301(e).

¹⁶ Tex. Transp. Code § 521.300(b). The fee must be approved and set by the commissioners court of the county in which the person requesting the hearing resides.

¹⁷ *Id.*

Certification Testing

June 20, 2008 El Paso Camino Real Hotel--
Sponsored by TMCEC. Registration form is
available on www.tmcec.com

June 27, 2008 Missouri City Municipal Court--
Sponsored by the Gulf Coast Chapter of TCCA.
Registration form is available on
www.texasclerk.org.

July 2, 2008 Dallas Omni Park West-- Sponsored by
TMCEC. Registration form is available on
www.tmcec.com

Resources for Your Court

Our Town, Texas

The Texas City Management Association has created a set of interactive lessons on local government in Texas for distribution in local schools. Separate educational materials for K-1, 2-5, and middle school – including teacher’s guide and activity handouts – are available on CDs. Visit www.ourtowntexas.org for more information and call the TML office at 512.231.7400 to order the CD.

Use of Statistical Information

Judges and court support personnel are often asked to participate in local forums, panel discussions, training seminars, and school education programs to discuss traffic safety and municipal courts. Sometimes, these requests are received after a community tragedy, such as a car crash involving a high school student who was driving while intoxicated. Statistical information can be very helpful in describing and emphasizing the dangers and risks that they thought would never happen to anyone they know.

The National Highways Traffic Safety Administration (NHTSA), National Center for Statistical Analysis (NCSA), and Mothers Against Drunk Driving (MADD) all provide statistical data on issues ranging from driver alcohol involvement in fatal crashes by age group and vehicle type, drivers involved in fatal crashes by age group, traffic fatalities by age group and blood alcohol concentration, motorcycle and helmet use statistics, school transportation-related crashes, seat belt use and speeding, and more. The Texas Department of Transportation and the Texas Department of Public Safety can also provide statistics by state and local community.

Check out the following web sites for information to help make impaired driving something that your audience can understand:

MADD: www.madd.org

NCSA: www.nrd.nhtsa.dpt.gov/departments/nrd-30/nca

NHTSA: www.nhtsa.gov

TDPS: www.txdps.state.tx.us

TXDOT: www.txdot.gov

CTC11

The NCSC’s Court Technology Conference brings together more than 2,500 court professionals from around the world for three days of learning, training and networking. CTC participants learn how to use the latest advances in court technology in ways that help them improve court operations and better serve the public. The conference is planned for Sept. 22-24, 2008 in Denver. For more information, go to <http://www.ctc11.org>. Materials from the CTC10 Educational Program, held October 2-4, 2007 at the Tampa Convention Center in Tampa, Florida are available from <http://www.ctc10.org/sites/S69/index.php?p=781>.

Court Solutions

This three-day conference was created in response to the community’s demand for answers to today’s court realities. The program will be offered in Baltimore, Maryland on September 8-10, 2008 at the Marriott Inner Harbor Hotel at Camden Yards. It is a program of the National Center for State Courts.

Courses will include: *Self-Represented Litigation; Effective Practices for Courts; Delivering Court Interpreter Services; and Survival by Service Redesign.* For more information, go to <http://www.courtsolutions.com>.

2008 Save a Life Summit

TxDOT is planning its *Save a Life Summit* for August 20-22, 2008 at the Sheraton Hotel and Spa in Fort Worth. Its purpose is for federal and state highway safety professionals, law enforcement officers, traffic safety advocates, prosecutors, and judges to share insights and best practices while thinking of new ways to collaborate to make Texas roadways safer. For more information, go to <http://www.registrationassistant.com/savealife/2008>.

Public Outreach

Driving on the Right Side of The Road (DRSR)

A grant from the Texas Department of Transportation has provided funding for a curriculum for grades 4, 7, and high school government on traffic safety issues. The project is collaboration between the State Bar of Texas (Law-Related Education Department), Law Focused Education, Inc., Texas Municipal Courts Education Center, Texas Municipal Courts Association, regional education service centers, and teachers in local school districts. Over 400 teachers will be trained in summer workshops offered in conjunction with the regional education service centers. For dates and sites, please call or email Linda DeLeon at the State Bar of Texas (ldeleon@texasbar.com or 800.204.2222 ext 1821).

Many of the activities and lessons are designed for use by a resource person, such as a municipal judge, in the classroom to provide information and answer the many questions that will arise. The Texas Municipal Courts Association is setting up a speakers' bureau to support teachers' requests for resource persons. Email tmcec@tmcec.com if you are willing to speak in local classrooms.

The TMCEC website (www.tmcec.com) will contain sample presentations and power points, as well as information sheets to help resource persons develop their presentations.

Shown below are brief summaries of the lessons. There are also two on-line instructional games that are informative, yet fun. Generally the materials are only available to teachers who attend the summer training, although sample lessons will be made available on the TMCEC web site, at the TMCEC regional programs in FY 09, and in *The Recorder*.

4th Grade Social Studies and Language Arts

A Map of Do's and Don'ts: Students will use the colorful map of "Our Town" to identify safe and unsafe behaviors involving traffic issues. After a guided discussion of each, students will then create a wristband advocating a traffic safety issue and a map of their own neighborhood. Map size is approximately 2" x 3". Note: TMCEC has a limited number of these poster-sized maps that judges can use in local classrooms. The maps are excellent at generating

discussion about traffic safety. Email tmcec@tmcec.com for copies.

A Decision for the City Council: This simulation of a city council meeting emphasizes the need for safety requirements for small motorized vehicles, such as mopeds, ATVs, and mini-motorbikes. A mock city council hearing is held on a proposed ordinance. The ordinance is written to generate discussion. The lesson will teach not only about the need for safety, but how ordinances are made and how city government works and decisions are made.

Safety Match-Up: After reviewing the statistics of injuries involving bicycles, in-line skating, and skateboards, students will play a concentration-type game showing safe and unsafe practices involving children's recreation equipment that involve traffic safety issues. Students will play the game in groups of three or four, then create a bumper sticker encouraging safety in one of the areas studied.

7th Grade Social Studies – Texas History and Government

X Car O: This game is similar to the television show "Hollywood Squares" in which students answer questions on traffic safety while studying graphs and charts on unsafe driving behaviors.

In the Driver's Seat: Students will review traffic safety rules using the *Texas Driver's Handbook*. They will be able to describe the graduate licensing system through a classroom simulation of obtaining a drivers' license.

Rules of the Road: Students will play a board game to make wise decisions about activities on "their" road to the shopping mall. Transportation issues affecting their daily activities (riding in cars, bicycles, in-line skates, pedestrians, pick-up trucks) will be reviewed to encourage safe behaviors in the community.

High School Government

Just Breathe: This simulation of a legislative committee allows students to debate the proposed changes to a law

Public Outreach continued on page 21

LICENSE TO DRIVE - FRAMING THE PROBLEM

Learning Objectives: Students will:

1. Analyze the social and economic consequences caused by unsafe driving behaviors.
2. Use technology and research skills for information on the Transportation Code.
3. Synthesize information in the form of a symbol.
4. Evaluate appropriate penalties for unsafe driving behaviors.

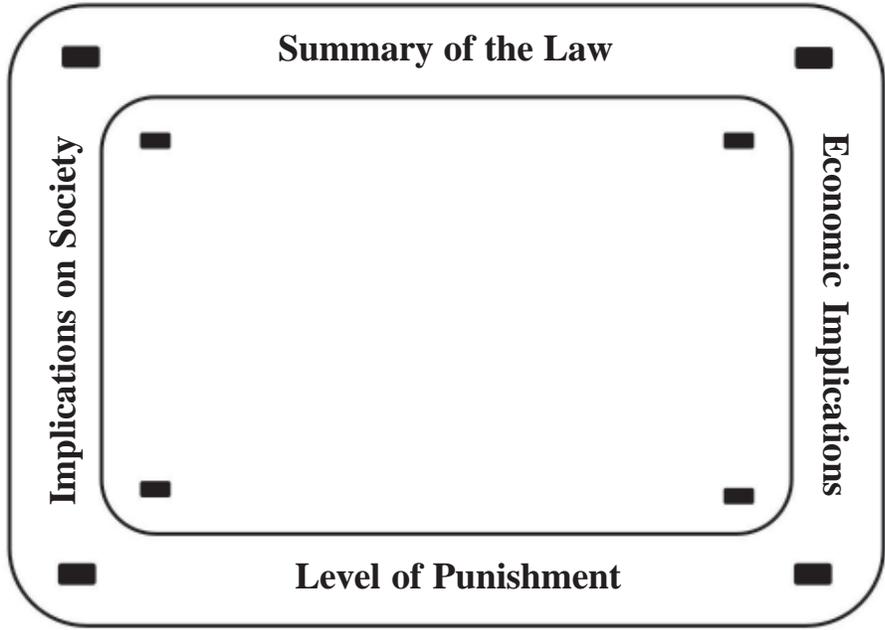
TEKS: Govt 15 A-D; Govt 22 A-D; Govt 23 A-B; Eco 1.B; Eco 21 A; Eco 23.A

Materials Needed: A copy of the license plate frame for each group of three or four students; access to the Transportation Code from the Texas Legislature Online at the following website:

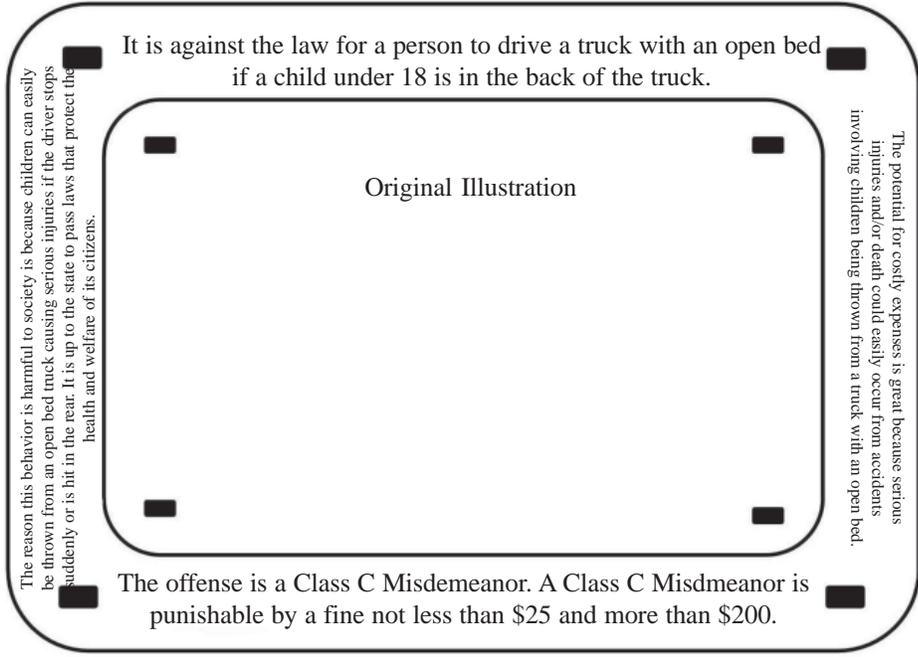
www.capitol.state.tx.us/statutes.html.

Teaching Strategy:

1. Brainstorm unsafe driving behaviors (the teacher should list them on the board as students identify the behaviors).
2. Divide the class into groups of approximately four and give each group one of the unsafe driving behaviors previously identified.
3. Have the group research the driving behavior assigned to them, using the Transportation Code on the www.capitol.state.tx.us/statutes.html website.
4. Additionally, students should research the social and economic consequences caused by their assigned driving behavior.
5. Using their research, students will complete the license plate frame. The sides of the frame will be words:
 - Top Side of the Frame—Summary of the law
 - Right Side of the Frame—Implications on the economy from drivers exhibiting the behavior
 - Left Side of the Frame—Implications on society from drivers exhibiting the behavior
 - Bottom Side of the Frame—Punishment for people convicted of the unsafe driving behavior
6. In the center, students should create an illustration that summarizes the social and economic implications of the law and its punishment.
7. Have each group share its license plate frame. Discuss with the class the reasons why this is considered unsafe driving behavior. Have students discuss the clarity and fairness of the law and its punishment.



EXAMPLE FOR LICENSE PLATE



Extension for AP/GT:

Students will investigate the effect of unsafe driving habits on insurance. What happens to the driver's insurance premiums after a crash or traffic ticket? Why does this happen? Look at this issue from both the perspectives of the insurance industry and the driver's.





Municipal Traffic Safety Initiatives: News You Can Use

Information Sheet: *Distracted Driving*

The National Highway Traffic Safety Administration has estimated that driver distractions are responsible for 25% to 30% of the 63 million vehicle crashes each year. That is 4,300 per day. People using cell phones have a 34% higher risk of a collision than those who do not talk and drive.¹

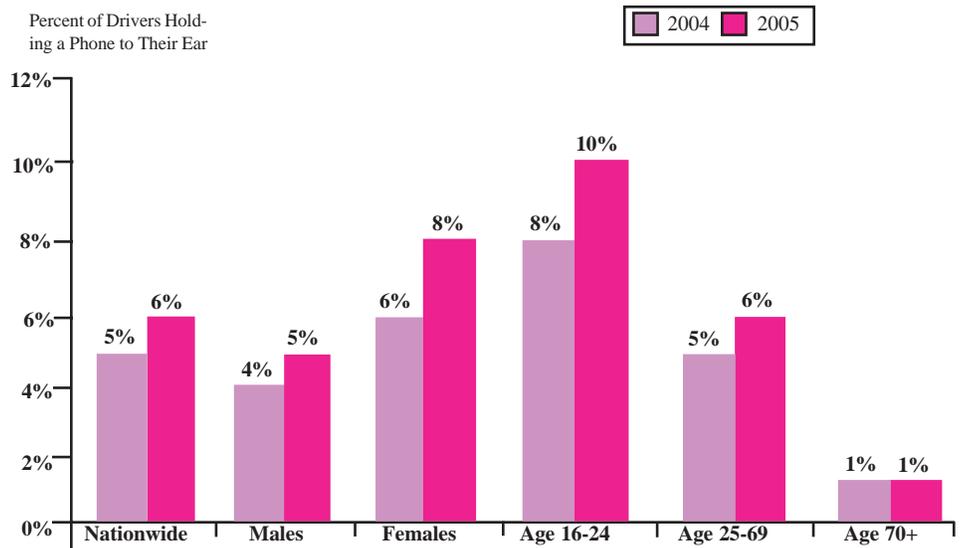
Common distractions include:

- Adjusting the radio, cassette, or CD player
- Passengers
- Moving objects in vehicle
- Using/dialing a cell phone
- Eating and drinking while driving
- Personal grooming
- Adjusting vehicle controls
- Smoking while driving

Outside distractions include:

- Crashes
- Vehicles stopped by police
- Friends in other vehicles
- Roadside advertising
- New construction

The Percent of Drivers Holding Phones to Their Ears

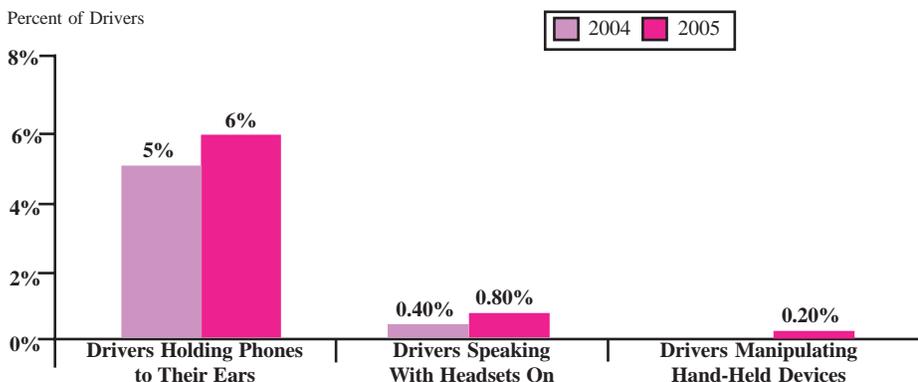


Source: National Occupant Protection Use Survey, NHTSA's National Center for Statistics and Analysis, 2004-2005

Rules of the Road

- In Texas, certain restrictions are placed on drivers under the age of 18 for the first six months after receiving a driver's license.² During this time period, a person may not operate a motor vehicle while using a wireless communications device.³ Additionally, the person may not operate a vehicle with more than one passenger under the age of 21 who is not a family member.⁴

Various Distraction Behaviors, 2004-2005



- A ban on driving while talking on a hand-held cellular phone is in place in six states (California, Connecticut, New Jersey, New York, Utah, and Washington) and the District of Columbia. Utah has named the offense careless driving. Under the Utah law, no one commits an offense when speaking on a cell phone unless they are also committing some other moving violation other than speeding.

- Localities are allowed to ban cell phone use in six states (Illinois, Massachusetts, Michigan, New Mexico, Ohio, and Pennsylvania).⁵

- In Texas, a motor vehicle may be equipped with video equipment only if the equipment is located so that the video display is not visible from the operator’s seat unless the vehicle’s transmission is in park or the vehicle’s parking brake is applied.⁶
- The following chart shows some driving offenses that might occur when driving while distracted.

NAME OF OFFENSE	SECTION OF CODE	PUNISHMENT	COMMENTS
Following Too Closely	545.062(a), T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver must maintain enough distance in between his or her vehicle and the one in front so that he or she can safely stop without colliding with the vehicle or veering into another vehicle, object, or person on or near the roadway.
Failed to Keep Right on Mountain Road	545.405, T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver moving through a canyon or mountain road must hold the vehicle under control and as near the right-hand edge of the highway as possible.
Drove on Wrong Side of Divided Highway	545.063, T.C.	Class C misdemeanor punishable by a fine of up to \$200	On a highway with two or more roadways separated by a space, barrier, or clearly indicated dividing section, a driver must drive on the right roadway unless directed or permitted to use another roadway by an official traffic-control device or police officer.
Failed to Use Due Care for Pedestrian	552.008, T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver of a vehicle must exercise due care to avoid colliding with a pedestrian on a roadway, give warning by sounding the horn when necessary, and exercise proper precaution when they see a child or an obviously confused or incapacitated person on a roadway.
Failed to Signal Lane Change; Failed to Signal Required Distance Before Turning	545.104, T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver shall use a turn signal to indicate an intention to turn, change lanes, or start from a parked position. A driver intending to turn must signal continuously for not less than the last 100 feet of movement before the turn.
Failed to Yield at Stop Intersection	545.151(a); 545.153, T.C.	Class C misdemeanor punishable by a fine of up to \$200	An operator approaching an intersection must stop, yield, and grant immediate use of the intersection in obedience of stop light or stop sign.
Speed Under Minimum	545.363, T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver may not drive so slowly as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law. If signs are erected giving notice of a minimum speed limit, a driver may not drive more slowly than the limit except when necessary for safe operation or in compliance with law.

Changed Lane when Unsafe	545.060, T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver on a roadway divided into two or more clearly marked lanes for traffic may not move from the lane unless that movement can be made safely.
Failed to Drive in Single Lane	545.060, T.C.	Class C misdemeanor punishable by a fine of up to \$200	A driver on a roadway divided into two or more clearly marked lanes for traffic must drive as nearly as practical entirely within a single lane.
Failed to Stop for Approaching Train— Hazardous Proximity	545.251 (a)(4), T.C.	Class C misdemeanor punishable by a fine of up to \$200	An operator approaching a railroad grade crossing shall stop at least 15 feet (and not further than 50 feet) from the nearest rail if an approaching train is plainly visible and is in hazardous proximity to the crossing.
Reckless Driving	545.401, T.C.	Class B Misdemeanor punishable by a fine up to \$200, 30 days in county jail, or both	A person commits reckless driving if the person drives a vehicle in willful or wanton disregard for the safety of persons or property.
Assault with Motor Vehicle	22.01, P.C.	Class A Misdemeanor punishable by a fine up to \$4,000, confinement in jail for up to a year, or both; 3 rd degree felony in some cases punishable by 2-10 years imprisonment and a fine up to \$10,000	A person commits assault if the person intentionally, knowingly, or recklessly causes bodily injury to another. Assault is also committed if a person intentionally or knowingly threatens another with imminent bodily injury.
Aggravated Assault with Motor Vehicle	22.02, P.C.	2 nd degree felony punishable by imprisonment up to 20 years and a fine up to \$10,000; 1 st degree felony in some cases punishable by imprisonment up to 99 years and fine up to \$10,000	A person commits aggravated assault if he or she commits an assault and causes serious bodily injury or uses or exhibits a deadly weapon during the commission of the assault. A car can be considered a deadly weapon: “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.”
Criminally Negligent Homicide with a Motor Vehicle	19.05, P.C.	State jail felony punishable by up to 2 years in jail and a \$10,000 fine; may be punished as a 3 rd degree felony in some cases	A person commits an offense if he or she causes the death of an individual by criminal negligence.

On the Safe Side

- Pull off the road and stop in a safe place before using the cell phone.
- When the cell phone rings, let voice mail pick up the call.
- Ask passengers to adjust controls, such as air conditioning and volume.
- Pull over if you need to reach something in the back seat or to get something out of the bottom of your purse or back pack.
- Be sure that all passengers are buckled up with a book or game to occupy them during a long trip.
- Use pet carriers or portable kennels if traveling with pets.
- Avoid arguments and minimize distracting emotional conversations.
- Passengers should not distract the driver with shouting out directions, covering their eyes, wrestling with or tickling them or other passengers, egging the driver to do something stupid, singing/dancing, or overcrowding the car.
- If driving alone, take advantage of normal stops to make adjustments.
- Texas highways have more than 100 rest stops where motorists can take regular safety breaks. Some now even offer free wireless internet access.

For More Information

Traffic Safety Facts: Driver Cell Phone Use in 2005 – Overall Results, NHTSA DOT HS 809 967.

<http://www.t-driver.org/main.stm>

http://fcs.tamu.edu/safety/passenger_safety/youth_traffic_safety.php

http://www.tmcec.com/tmcec/programs/webinars/archived_webinar

¹ Tex. Transp. Code Ann. § 545.424.

² Tex. Transp. Code Ann. § 545.424(a)(3).

³ Tex. Transp. Code Ann. § 545.424(a)(2).

⁴ <http://www.iihs.org/laws/cellphonelaws.aspx>

⁵ <http://www.iihs.org/laws/cellphonelaws.aspx>

⁶ Tex. Transp. Code § 547.611(a).

⁷ *Road Tips*, Texas Department of Transportation.

Continued from page 15

requiring the use of ignition interlock devices (IID) for automobiles. Students represent different constituencies and individuals in the role play of the committee hearing for and against mandatory IIDs.

Safe Driver – It's in the Cards: This card game allows students to analyze the role of various levels of government (national, state, and local) in traffic safety issues. To win the game, students must obtain the cards that contain the powers from the same level of government. The lesson reinforces the study of federalism.

License to Drive – Framing the Problem: This activity asks students to create a visual representation of the social and economic consequences of bad driving behaviors. After researching behaviors, students will present the information on a graphic of a license plate frame. The center of the license plate will create a visual representation of the consequences. A copy of this lesson is included in this issue of *The Recorder* – see pages 16-17.

On-line Instructional Games

The online games can be accessed via the web site of Law Focused Education, Inc. (<http://www.texaslre.org>).

Teachers, students, or resource persons can download the game onto their computer or it can be played online.

Pick-Six: This simulation asks students to select jurors for a DUI case in municipal court. Students select six jurors from a venire panel and are scored based on the inferences they draw as to how each individual might rule in a case involving possession of alcohol.

How a Bill Becomes a Law: The simulation begins with a scenario that sets the stage for the steps necessary in passing a bill into law in the Texas Legislature. Background information on the Texas Legislature is given at the beginning. As the game progresses through the process, students are required to answer multiple choice questions in which their answer determines the progress of the bill. The topic of the bill is the use of electronic devices in automobiles.

Additional Materials

TMCEC has requested additional funding from TxDOT for FY 09, FY 10, and FY 11 to develop materials for grades 5, 8, and high school government. TMCEC also hopes to develop a mock trial packet on a traffic safety issue in municipal court. Stay tuned for more information!



From the Center

Bailiff & Warrant Officer Programs

TMCEC will offer its 12-hour conference for bailiffs, warrant officers, and marshals on June 30 – July 2, 2008 at the Omni Dallas at Park West. The registration fee is \$50. There is an optional pre-conference on *CPR/AED Training* on June 30th which offers an additional four hours of TCLEOSE credit. The 12-hour program begins on July 1st and includes the following courses: *Legislative Update, Texas Data Exchange System, Emergency Management, Case Law & A.G. Update, Creating a Marshal's Office, Juvenile Now Adults, Drug Recognition & Identification, Foreign Drivers, TPCA State Recognition Program, Gang Awareness, Ethics, Law Enforcement & the Court, and Violence in the Courtroom*. Participants must attend the entire 12 hour program for TCLEOSE credit – no partial credit is given. A brochure may be downloaded from the TMCEC web site or you may use the registration form on page 23 of this *Recorder*.

Clinics

TMCEC is planning a series of clinics at TMCEC offices in Austin. These programs are eligible for CLE credit and certification credit. The program begins at 10:00 a.m. and end at 3:00 p.m. Lunch is provided. Class size is limited to 20. If enrollment is larger, every effort will be made to secure a nearby hotel to accommodate the group. Registration fee is \$20 – checks payable to TMCEC. TMCEC does not make hotel reservations nor pay for housing or travel expense. Please use the registration form on page 23 of this *Recorder* to register.

- June 25, 2008 (Wednesday): *Culpable Mental States*
- July 23, 2008 (Wednesday): *Local Rules & Standing Orders*
- August 20, 2008 (Wednesday): *Juvenile Primer: Status Offenses*

Webinars

TMCEC is planning a series of summer webinars. The dates and times are shown below:

- July 29, 2008, Tuesday: *Dismissal versus Defenses to Prosecution*, Lois Wright, TMCEC Program Director
- August 6, 2008, Wednesday: *Juvenile Primer: Status Offenses*, Mark Goodner, TMCEC Program Attorney

- August 14, 2008, Thursday: *Red Light Cameras & Appeals*, Judge Staci Williams, Dallas Municipal Court
- August 22, 2008, Friday: *Citations for A & B Misdemeanors*, Ryan Turner, TMCEC General Counsel & Director of Education

Participants will need a computer, an Internet connection, and a telephone line for the teleconferencing. All levels of computer users are encouraged to attend. Upon registration, you will receive more instructions on how to participate. **There is no charge to participate.** To begin the registration process, email tmcec@tmcec.com with your name, title, court, and which program you want to enroll in or visit the Webinar page of the TMCEC website. TMCEC will then send you an email with instructions. *Webinars do NOT fulfill the mandatory requirements for judicial education for judges. Participation DOES count towards continuing education for the clerk's certification program. MCLE credit will be applied for with the State Bar of Texas.*

TMCEC Summer Seminars for Clerks

TMCEC is planning a series of three summer seminars in Dallas, Houston, and Austin. Clerks who have not yet had training from TMCEC in FY 08 will be given priority in enrollment. The registration fee is \$50 and includes one night's housing, breakfast, lunch, and course materials. Housing is available for those traveling more than 30 miles or 30 minutes away on the night before the seminar. Topics to be discussed include *Legal Update, Court's Authority to Dismiss, Non-Appearance Crimes, Technology Today*, and *Non-Contested Cases*.

The first summer seminar will be held on June 2, 2008 at the Omni Mandalay Hotel in Irving from 8:00 to 5:00 p.m. To register, download the brochure on the TMCEC web site or fill out the registration form found on page 23 of this *Recorder*. Two additional programs will be offered in Austin and Houston – dates and sites to be determined. Watch for a brochure that will be sent to your court in June or the TMCEC web site for information.

Clerks in the certification program that need to meet the 12-20 hours on minimum education are encouraged to register. The eight hours for this program can be supplemented with hours from the webinars or clinics.

**TEXAS MUNICIPAL COURTS EDUCATION CENTER
2008 REGISTRATION FORM**

Conference Date: _____
Conference Site: _____

Check one:

- Bailiff/Warrant Officer* (\$50 fee)
- Clinic (\$20 fee)
- Summer Series (\$50 fee)
- Clerk/Court Administrator (\$50 fee)

Name (please print legibly): Last Name: _____ First Name: _____ MI: _____
 Names you prefer to be called (if different): _____ Female Male
 Position held: _____ Date appointed/Hired/Elected: _____ Years experience: _____
 Emergency contact: _____

HOUSING INFORMATION:

TMCEC will make all hotel reservations from the information you provide on this form. TMCEC will pay for a single occupancy room at all seminars: four nights at the 32-hour seminars, three nights at the 24-hour seminars/assessment clinics, two nights at the 12-hour seminars, and one night at the 8-hour court interpreters seminar. To share with another seminar participant, you must indicate that person's name on this form.

- I need a private, single-occupancy room.
- I need a room shared with a seminar participant. [Please indicate roommate by entering seminar participant's name: _____ (Room will have 2 double beds.)]
- I need a private double-occupancy room, but I'll be sharing with a guest. [I will pay additional cost, if any, per night]
I will require: 1 king bed 2 double beds
- I do not need a room at the seminar.

Arrival date: _____ Smoker Non-Smoker

Municipal Court of: _____ Email Address: _____
 Court Mailing Address: _____ City: _____ Zip: _____
 Office Telephone #: _____ Court #: _____ FAX: _____
 Primary City Served: _____ Other Cities Served: _____

STATUS (Check all that apply):

- Full Time Part Time
- Presiding Judge
- Court Administrator
- Bailiff/Warrant Officer/Marshal*
- Attorney Non-Attorney
- Associate/Alternate Judge
- Court Clerk
- Prosecutor
- Justice of the Peace
- Deputy Court Clerk
- Licensed Court Interpreter*
- Mayor (ex officio Judge)
- Other: _____

***Bailiffs/Warrant Officers/Marshals/Court Interpreters:** Municipal judge's signature required to attend Bailiff/Warrant Officer/Marshal/Court Interpreter programs.

Judge's Signature: _____ Date: _____
 Municipal Court of: _____

I certify that I am currently serving as a municipal judge, prosecutor, or court support personnel in the State of Texas. I agree that I will be responsible for any costs incurred if I do not cancel five working days prior to the conference. I will first try to cancel by calling the TMCEC office in Austin. If I must cancel on the day before or day of the seminar due to an emergency, I will call the TMCEC registration desk at the conference site IF I have been unable to reach a staff member at the TMCEC office in Austin. If I do not attend the program, TMCEC reserves the right to invoice me or my city for meal expenses, course materials and, if applicable, housing (\$85 plus tax per night). I understand that I will be responsible for the housing expense if I do not cancel or use my room. If I have requested a room, I certify that I live at least 30 miles or 30 minutes driving time from the conference site. Participants in the Assessment Clinics must cancel in writing two weeks prior to the seminar to receive a refund. **Payment is due with the registration form. Registration shall be confirmed only upon receipt of registration form and payment.**

Participant Signature (May only be signed by participant)

Date

PAYMENT INFORMATION:

- Check Enclosed (Make Checks Payable to TMCEC.)
 - Credit Card (Complete the following. \$2.00 will be added for each payment made by credit card.)
Credit Card Payment: (Please indicate clearly if combining registration forms with a single payment.)
Credit Card Type: _____ Credit Card Number _____ Expiration date _____
 - Mastercard
 - Visa Name as it appears on card (print clearly): _____
- _____
Authorized Signature

Please return completed form with payment to TMCEC at 1609 Shoal Creek Boulevard, Suite 302, Austin, TX 78701, or fax to 512.435.6118.

Thank You for Your 2008 Contribution!

TMCEC Board of Directors and the staff members express great appreciation to the following contributors to the TMCEC 501(c)(3) foundation. These funds will be used to support judicial education for municipal judges and court support personnel in Texas.



Judge Stephen Ballantyne, Terrell Hills
Judge Ninfa Mares, Fort Worth
Judge Robert C. Richter, Missouri City
Judge Donna Starkey, Alvin

TMCEC is a 501(c)(3) non-profit organization. Contributions are tax deductible on the donor's federal income tax return. TMCEC received a "Letter of Determination" in 2006, after making application to become a 501(c)(3). If you wish to contribute, please send checks payable to the Texas Municipal Courts Education Center, 1609 Shoal Creek Blvd., Suite 302, Austin, Texas 78701. Please indicate in bottom left hand corner of check or in a cover letter that this is a contribution to the 501(c)(3). Thank you.

When you receive this TMCEC *Recorder*, please make copies of it and distribute them to members of your court. TMCEC only sends one copy to each court and we rely on those who receive it to distribute it. Thank you for your help.

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TMCEC MISSION STATEMENT

To provide high quality judicial education, technical assistance and the necessary resource material to assist municipal court judges, court support personnel and prosecutors in obtaining and maintaining professional competence.

Change Service Requested