

# Rights and Roles

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## INTRODUCTION

Municipal courts in Texas are state courts and primarily handle criminal offenses. It is important to remember, as with any level of criminal charge, that the defendant has important rights under both state and federal law. These rights govern most aspects of the defendant's interactions with the police and the state and extend to that person's appearance in court. This chapter will take a closer look at the rights of the accused. In addition, the chapter will discuss the role that the court plays with regard to the treatment of court users and the perception of the court.

### PART 1 RIGHTS

#### A. Rights of the Accused

Under our American system of criminal justice, all persons are presumed innocent until proven guilty. Both the U.S. and Texas Constitutions also require that the government provide due process of law to those accused of a crime. Due process of law is a legal concept embodied in the 5th and 14th Amendments that requires states to use fair procedures when depriving a person of life, liberty, or property. This includes a host of procedural protections, including notice as to a criminal charge, admonishments, and a right to be heard in open court. Following the requirements of due process prevents arbitrary, unreasonable decisions by the state. This is true not only at the trial level, but from the moment that a defendant encounters law enforcement.

##### 1. Rights upon Arrest

A law enforcement officer's decision to arrest a person does not terminate that person's due process rights. The law provides protections for those that have been arrested for a criminal offense. First, whether arrested on a warrant or without a warrant, the defendant must be taken before a magistrate without unnecessary delay, but not later than 48 hours after arrest. Arts. 14.06 and 15.17, C.C.P. The magistrate must, in accordance with Article 15.17 of the Code of Criminal Procedure, inform the defendant of the:

- charges against him or her;
- right to retain counsel;
- right to remain silent and, if the defendant decides to waive that right, that any statement made by the person arrested can be used against him or her;
- right to have an attorney present during interrogation;
- right to terminate any interrogation;
- right to the appointment of counsel if indigent, and if applicable, the procedures for requesting appointed counsel;
- right to file an affidavit under Article 17.028(f) (related to finances and bail decision); and
- right to an examining trial to determine whether probable cause exists.

If allowed by law, the magistrate then sets bail. As a general rule, bail may not be denied. There are exceptions to this general rule listed in the Texas Constitution, including capital cases, for violating a magistrate's order of emergency protection or a protective order; or for certain sexual offenses involving a child, among others. Art. 17.153, C.C.P.

Bail is “the security given by the accused that he will appear and answer before the proper court the accusation brought against him... .” Art. 17.01, C.C.P. The magistrate determines the amount of bail and may consider the following factors:

- that bail and any condition of bail shall be sufficient to give reasonable assurance that the undertaking will be complied with;
- that bail is not to be used as an instrument of oppression;
- the nature of the offense and the circumstances under which it was committed;
- evidence of the accused’s ability to make bail;
- the future safety of the victim of the alleged offense, law enforcement, and the community;
- the criminal history record of the defendant; and
- the citizenship status of the defendant. Art. 17.15, C.C.P.

Bail may be secured through a bail bond, cash bond, or a personal bond. In addition to setting the amount of bail, the magistrate may place certain conditions upon the defendant, such as a curfew or counseling. Art. 17.02, C.C.P.

## 2. Rights in Criminal Trials

In all criminal trials, the burden of proof to find a defendant guilty is “beyond a reasonable doubt.” It is ultimately up to the factfinder to decide whether the State has met this burden after considering the facts of the case. The defendant also has the right to representation by counsel. (although in fine-only misdemeanor cases, the defendant does not have the right to *appointed* counsel) and the right to remain silent and not be compelled to give evidence against himself or herself. Following trial, a defendant may seek a new trial or appeal the ruling of the court.

### Practice Note

For more than a hundred years, Texas courts did not require that a definition of “beyond a reasonable doubt” be provided to jurors. However, in *Geesa v. State*, the Court of Criminal Appeals held that a definition was mandatory. From 1991-2000, courts struggled with the definition offered in *Geesa*, with one comparing it to saying, “A white horse is a horse that is white.” Later, the Court decided in *Paulson v. State* to overrule the part of *Geesa* requiring the definition, leaving it up to jurors to decide what beyond a reasonable doubt means. Although it has now been almost 20 years since *Paulson*, courts may want to review old jury charges to ascertain whether the old definition lives on and should be struck.

### a. Due Process

The U.S. and Texas Constitutions provide that the defendant in a criminal case is entitled to due process of law. Due process of law is a broad concept, but it is easier to understand when it is divided into two types: procedural due process and substantive due process. Procedural due process requires states to use fair procedures in reaching decisions that deprive a person of life, liberty, or property. This means that fair procedures must be used to enforce the law. Substantive

due process requires the government to have adequate justification for such deprivation. In other words, it requires the law itself to be fair.

Procedural due process can be further divided into two areas: Notice and a Hearing. The defendant has the right to notice of a hearing or trial that adequately informs the accused of the charges against him or her. The right to a hearing or trial includes the right to present evidence on the accused person's behalf before an impartial judge or jury, the right to the presumption of innocence until proven guilty by legally obtained evidence, and the right to have the verdict supported by the evidence presented at trial.

## **b. Fair Trial**

### **(1) Notice of Charges**

In municipal courts, notice of charges is provided to the accused by either the issuance of a citation or the filing of a sworn affidavit called the complaint and subsequent service of a summons. As the charging instrument, a complaint alleges the act the defendant is said to have committed and that the particular act is unlawful. Art. 45.019(a)(4)/45A.101(a), C.C.P. The filing of the complaint puts the defendant on notice as to what criminal offense is charged and what the state must prove. The defendant, however, may waive the right to have a complaint made and may plead to or proceed to trial on the citation. Art. 27.14(d), C.C.P. Barring this affirmative waiver by the defendant, he or she is entitled to notice of the complaint not later than the day before the date of any proceeding in the prosecution of the defendant. Art. 45.018/45A.101(g), C.C.P.

The complaint must use plain and intelligible language to establish all of the elements of an offense. *Bynum v. State*, 767 S.W.2d 769 (Tex. Crim. App. 1989). Usually, language tracking the law or ordinance is sufficient. *Kaczmarek v. State*, 986 S.W.2d 287 (Tex. App.—Waco 1999, no pet.). The facts of the complaint must be specific enough to avoid double jeopardy, as the defendant can only be tried once for what is alleged in the complaint. Stated differently, the complaint must identify the conduct clearly enough that the defendant could defend himself or herself against another charge for the same violation of the law. There are many statutory requirements of the complaint contained in Article 45.019/45A.101 of the Code of Criminal Procedure.

If the defendant wants to object to any defects in the complaint, the defendant must do so before trial or any error is waived. Art. 45.019(f)/45A.102, C.C.P. The motion challenging the complaint is called a motion to quash.

### **(2) Speedy and Public Trial**

The 6th Amendment to the U.S. Constitution requires trials be “speedy and public.” The public and the press generally should never be directly excluded from open court. Art. 1.24, C.C.P. The court should avoid excluding the public by holding court at unusual places or times. The defendant has the right to a trial before memories fade and making a defense is hampered by the passage of time. Generally, a complaint must be filed within two years of the commission of an offense or the prosecution is barred by the statute of limitations (within three years for assault with family violence cases). Art. 12.02(b), C.C.P. Further, a general due process right exists to a speedy trial. The court should consider four factors in determining whether the defendant's right to a speedy trial is violated:

- length of delay from accusation to trial;
- State's reasons for the delay;

- effort made by the defendant to obtain a speedy trial; and
- prejudice to the defendant’s ability to defend himself or herself.

Mandatory deadlines set out by the Legislature to assure speedy trial in Chapter 32A of the Code of Criminal Procedure were declared unconstitutional. *Barker v. Wingo*, 407 U.S. 514 (1972); *Phillips v. State*, 650 S.W.2d 396 (Tex. Crim. App. 1983). The court need only consider the issue if raised by the defendant.

### **(3) Neutral and Detached Judge**

In order for a trial to be fair, the judge must be neutral and detached. This means that the judge should not favor one side or the other. It may also mean that the judge should not be connected to the case in some way that would tilt it in favor of one side or the other. Look at the requirements for disqualification and recusal of judges. Article V, Section 11 of the Texas Constitution provides three grounds for disqualifying a judge from sitting in any case:

- the judge was counsel in the case;
- the judge “may be interested” in the outcome of the case; or
- one of the parties is related to the judge.

Similarly, Article 30.01 of the Code of Criminal Procedure provides instances in which the judge is disqualified regardless of the judge’s discretion. The judge is disqualified as a matter of law when a judge:

- is the injured party;
- has been counsel for the State or the accused; or
- is connected to the accused or the party injured by consanguinity or affinity within the third degree as determined by Chapter 573 of the Government Code.

Disqualification is mandatory even if the judge did not know about the relationship. *Ex parte Vivier*, 699 S.W.2d 862 (Tex. Crim. App. 1985). While disqualification is mandatory, recusal lies in the judge’s honest appraisal of the individual situation. Judges must recuse themselves if they feel they have a conflict of interest that would affect their ability to be fair and impartial. While this determination can only be made in light of the specifics of a situation, Texas Rule of Civil Procedure 18b(2) states that a judge shall recuse when:

- the judge’s impartiality might reasonably be questioned;
- the judge has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
- the judge or a lawyer with whom the judge previously practiced law is a material witness;
- the judge 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;
- the judge, judge’s spouse, or a person within the 3rd degree of relationship to either the judge or judge’s spouse is:
- a party to the proceeding or an officer, director, or trustee of a party;

- known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- to the judge’s knowledge likely to be a material witness in the proceeding; or
- the judge, judge’s spouse, or a person within the 1st degree of relationship to either the judge or judges’ spouse is acting as a lawyer in the proceeding.

**(4) Impartial Jury**

The right to a trial by an impartial jury is found in the U.S. Constitution, the Texas Constitution, and the Code of Criminal Procedure. While federal law may limit the right to cases in which incarceration is a potential punishment, Texas law extends the right to all criminal proceedings, including proceedings in municipal courts. Art. 1, Sec. 15, Tex. Const. A failure to request a jury trial is not a waiver. If a jury trial is not desired, a written waiver of jury trial must accompany any plea before the court. Arts. 1.14 and 45.025/45A.155, C.C.P. Special rules apply to defendants who plea by mail: tendering the fine to the court by mail constitutes a plea and written waiver of a jury trial. Art. 27.14(c), C.C.P. If the defendant fails to properly waive a jury trial, a jury trial must be held. Art. 45.027(a)/45A.156(a), C.C.P.

True or False

1. In municipal courts all persons are presumed guilty until proven innocent. \_\_\_\_
2. Only when arrested without a warrant must a defendant appear before a magistrate without unnecessary delay. \_\_\_\_
3. Bail is the security given by an accused to guarantee the appearance of the accused before the proper court. \_\_\_\_
4. Bail may be secured only through a bail bond or a cash bond. \_\_\_\_
5. If a defendant requests a trial, the state must prove the defendant guilty beyond a reasonable doubt of an offense charged in the complaint. \_\_\_\_
6. A municipal judge may grant a new trial if the judge is persuaded that justice has not been done in a specific case. \_\_\_\_
7. Defendants have a right to appeal a conviction in a municipal court. \_\_\_\_

Short Answer

8. List two components of procedural due process. \_\_\_\_\_
9. What does the right to a fair hearing or trial include? \_\_\_\_\_  
\_\_\_\_\_

True or False

10. A complaint provides notice to a defendant of charges against him or her. \_\_\_\_
11. A defendant cannot waive the right to proceed to trial on a complaint. \_\_\_\_
12. If a complaint uses plain and intelligible language, it does not have to establish all the elements of the offense. \_\_\_\_

13. For a hearing to be fair, it must be conducted publicly and without needless delay. \_\_\_\_
14. Although the Texas speedy trial provision was declared unconstitutional, there is still a general due process right to a speedy trial. \_\_\_\_
15. A failure to request a jury trial is a waiver of the right to a jury trial. \_\_\_\_
16. What is the time limit under the statute of limitations for filing a complaint for speeding? \_\_\_\_
- Short Answer
17. When is a judge disqualified from hearing a case? \_\_\_\_\_

## (5) Right to Counsel

Two distinct issues are raised by the grant of the right to counsel by the U.S. and Texas Constitutions. The first involves the defendant's right to have an attorney appear for him or her in court and to have the advice and assistance of that attorney. The second part involves the right for persons without the means for employing counsel to have counsel appointed by the court.

While a defendant in a criminal case has no right to appointment of counsel under federal or state law when accused of a fine-only offense, the court may appoint counsel if it concludes the interests of justice requires representation. *Scott v. Illinois*, 440 U.S. 367 (1979); Art. 1.051(c), C.C.P. This, of course, includes all cases over which the municipal court has jurisdiction.

The right to representation by counsel is the right to have an attorney appear in court proceedings and assist the accused in decision-making including in cases involving fine-only misdemeanors. This right cannot be denied in the trial of fine-only misdemeanors and is recognized in the rules specifically governing proceedings in municipal courts. Art. 45.020/45A.160, C.C.P. The defendant may waive the right to counsel but must do so intelligently and knowingly. This means that the court must make sure the defendant understands his or her right to counsel and the disadvantage of proceeding pro se. *Johnson v. State*, 760 S.W.2d 277 (Tex. Crim. App. 1988). The court has the obligation to make sure a waiver of counsel is voluntarily and intelligently made by providing admonitions and questioning the defendant. *Blankenship v. State*, 673 S.W.2d 578 (Tex. Crim. App. 1984). Presuming waiver from a failure to request counsel is not permitted. *Carnley v. Cochran*, 369 U.S. 506 (1962).

The right to counsel does not extend to assistance or representation by an individual who is not an attorney licensed by the State Bar of Texas. To allow a non-attorney to assist a defendant or advise him or her at trial violates the law against unauthorized practice of law. As discussed in the Level I Study Guide, it is important to understand that the term "attorney at law" indicates a person authorized to practice law. This should not be confused with powers granted through a "power of attorney." A "power of attorney" cannot authorize a non-attorney to practice law, no matter the relationship to the defendant.

## (6) Right to Confront Witnesses

The defendant's rights at trial include the right to confront witnesses and the right to call witnesses. Confrontation necessitates the presence of the defendant at trial, the right to question witnesses, and the right to impeach witnesses. The right to confront witnesses is found in the U.S. Constitution, Texas Constitution, and Code of Criminal Procedure. This means that the defendant



has a right to cross-examine the witnesses against him or her when they testify at trial. The defendant may also present witnesses of his or her own. These witnesses would then be subject to cross-examination by the prosecutor.

Essential to the right to confront witnesses is also the right to be present at trial. In the trial of all cases, except fine-only misdemeanors, the defendant must be personally present. Art. 33.03, C.C.P. The exception to the rule requiring the defendant's presence is when the defendant appears and then is voluntarily absent during trial. In that instance, the trial may continue. In trials for fine-only misdemeanors, the defendant still has the right to be present but can waive that right and appear by counsel alone if the prosecutor agrees to the defendant's absence. Art. 33.04, C.C.P. The defendant can also lose the right to be present by disrupting the proceedings and being held in contempt of court. Even when the defendant is removed for misbehavior, he or she may be entitled to readmission on the promise of proper behavior. *Illinois v. Allen*, 397 U.S. 337 (1970).

The defendant's right to be present also includes the right to be competent at trial. *Pate v. Robinson*, 383 U.S. 375 (1966). The defendant must have the ability to consult with a lawyer and have a rational and factual understanding of the proceedings. *Dusky v. U.S.*, 362 U.S. 402 (1960).

### **(7) Right to Present Evidence**

In addition to the right to confront witnesses, a defendant has the right to call competent witnesses. Competence means being able to appreciate and take the oath and having personal knowledge of relevant evidence as required by the Code of Criminal Procedure and the Rules of Evidence. The evidentiary rules apply equally to defense witnesses. The procedures for obtaining witnesses in court are the same as the State's procedure. The law of subpoenas, subpoenas duces tecum, and attachment are available to the defense. The court should make sure that law enforcement gives equal consideration to serving legitimate defense subpoenas.

### **(8) Right to Object**

The defendant has the right to make objections to evidence and to obtain a ruling from the court. Failure to object in a court of record will cause any error to be waived during appellate review. *Gutierrez v. State*, 36 S.W.3d 509 (Tex. Crim. App. 2001); Rule 33.1(a), Rules of Appellate Procedure. The court may require objections to be made outside of the jury's hearing and may limit the time that an offer of proof is made.

### **(9) Right to Remain Silent**

A criminal defendant has the right to remain silent and not be a witness against oneself or to give evidence against oneself. Invoking the right against self-incrimination is often called "pleading the 5th" in reference to the 5th Amendment. Defendants do not need to invoke their right to remain silent; the State may not call the defendant as a witness. Witnesses must invoke their rights not to answer questions after being sworn, but if the witness voluntarily testifies about a matter, he or she may not plead the 5th during cross-examination on the same issue. *Draper v. State*, 596 S.W.2d 855 (Tex. Crim. App. 1980). Jurors should be instructed that the defendant's silence in a trial cannot be used against him or her as any evidence of their guilt. *Carter v. Kentucky*, 450 U.S. 288 (1981). The prosecutor should not be allowed to argue that it indicates guilt in any way. *Sanchez v. State*, 707 S.W.2d 575 (Tex. Crim. App. 1986).

## (10) Presumption of Innocence

No defendant may be convicted of a criminal offense unless the State proves every element of the case beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Since the State must prove each element, it necessarily follows that every defendant must be presumed innocent until proven guilty. It is important not only that the court adheres to this mandate, but that juries follow it as well. A court must instruct the jury to presume a defendant innocent until proven guilty and to find a defendant guilty only if persuaded by the evidence beyond a reasonable doubt.

### c. Search and Seizure

The 4th Amendment to the U.S. Constitution guarantees protection against “unreasonable searches and seizures.” The Texas Constitution and state law also make the same guarantee.

#### (1) Exclusionary Rule

Federal courts created a rule excluding from evidence the fruits of unreasonable searches. The U.S. Supreme Court made the rule applicable to state prosecutions in 1961. Some states, including Texas, have their own exclusionary rule as well. The courts, in order to deter police from making unreasonable searches and arrests, enforce this “Exclusionary Rule.” The right to be free from unreasonable searches and arrests is protected not by dismissal of the prosecution, but by exclusion of the evidence gathered by the unreasonable search or seizure. It is a remedy that is still debated today.

#### Practice Note

The “Exclusionary Rule” is the rule that excludes any evidence that is obtained in violation of the defendant’s constitutional rights. To understand the rule, it may help to consider real events. In one of the seminal cases on illegal search and seizure, police forced their way into a home without a warrant and confronted the occupant, Miss Mapp, inside her house. When she asked if there was a warrant, the police claimed a piece of paper was the warrant. Miss Mapp grabbed the paper and “placed it in her bosom.” The police then roughed up Miss Mapp and forced her into a bedroom, where they found obscene materials, which were later offered as evidence against her. The evidence was suppressed, with the court noting that “security of one’s privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty.” *Mapp v. Ohio*, 367 U.S. 643 (1961).

#### (2) Standing

Under the Exclusionary Rule, defendants must first establish that they were personally subjected to the unconstitutional conduct. This principle is called “standing.” A defendant must establish their interest or standing in order to object to the legality or reasonableness of the search or arrest. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). The defendant must show that he or she had a reasonable expectation of privacy in the property or person searched or seized to establish standing. *U.S. v. Salvucci*, 448 U.S. 83 (1980). Standing must also be established to invoke the statutory Exclusionary Rule found in Article 38.23 of the Code of Criminal Procedure. *Chavez v. State*, 9 S.W.3d 817 (Tex. Crim. App. 2000).

True or False

18. Defendants in municipal courts have the right to a court appointed attorney. \_\_\_\_
19. If a defendant does not request counsel, the defendant is presumed to have waived the right to counsel. \_\_\_\_
20. The municipal court can allow non-attorney friends and family members to legally represent defendants at trial. \_\_\_\_
21. In municipal courts, defendants can waive the right to be present at trial and appear by counsel only if the prosecutor agrees. \_\_\_\_
22. Before defendants can be tried in a municipal court, they must be competent and understand the proceedings. \_\_\_\_
23. In municipal courts, the defendant can ask the court to subpoena witnesses. \_\_\_\_
24. The defendant has both the right to testify and the right to choose not to testify. \_\_\_\_

Short Answer

25. What rules govern the presentation of evidence? \_\_\_\_\_
26. What does it mean when a defendant “pleads the 5th?” \_\_\_\_\_  
\_\_\_\_\_
27. What must the State prove for a jury or a judge to find a defendant guilty? \_\_\_\_\_  
\_\_\_\_\_
28. What does the 4th Amendment to the U.S. Constitution guarantee? \_\_\_\_\_  
\_\_\_\_\_
29. What is the “Exclusionary Rule?” \_\_\_\_\_  
\_\_\_\_\_
30. What is the principle of “standing?” \_\_\_\_\_  
\_\_\_\_\_

#### **d. Defendants with Disabilities**

It is imperative that judges and clerks ensure that defendants with disabilities are provided reasonable accommodations required by law and necessary to equal justice under law.

##### **(1) Interpreters for Deaf and Hard of Hearing**

Over 24 million Americans may have some form of hearing disability that ranges from mild hearing loss to profound deafness. It is important that judges and court personnel are aware of the wide variety of communication modes used by these individuals so that barriers to effective communication can be reduced in court. There are several recognized methods or modes of

communication used by individuals who are deaf or hard of hearing. These include speech reading (lip-reading), gesturing, written communication including computer-aided real-time transcription, and several kinds of sign language.

Sign language is the use of visual signs to convey information and ideas. There are three basic categories of sign language:

- independent languages such as American Sign Language (ASL);
- speech-equivalent signing systems; and
- finger-spelling systems.

These vary in complexity and range of utility. ASL, for example, uses 4,000 signs and has a completely different vocabulary, grammar, idiom, and syntax from English. ASL's linguistic units and structure consist of facial expressions, body posture, and the shape and movements of hands, arms, eyes, and head. Judges and court personnel should, for example, allow an interpreter's use of facial grammar or body shifting in court, as these are part of the grammatical structure of ASL. A verbatim or "word for word" translation is neither necessary nor possible and might lead to a distortion of meaning. The interpreter's job is to preserve the meaning of the speaker's statement without omissions and additions. This includes preserving the style and register of the speaker (tones, emotions, and language used).

Individuals who are hard of hearing and prefer speech reading as their chosen mode of communication may require "oral interpreters" who are trained to present information through mouth movements only. Only about 26 percent of speech is visible on the lips for those who rely on lip-reading (Deafness and Interpreting," New Jersey Department of Human Services, Division of the Deaf and Hard of Hearing (October 1991)). If lip-reading is relied upon in court, clear lines of vision between the speaker and listeners must be maintained. The distances between speakers and listeners should be between three and six feet.

#### **Practice Note**

"Minimally Language Competent" (MLC) refers to individuals who are deaf and have never made meaningful ties with either the culturally deaf or the oral language cultures. They have no systematic way of communicating ideas or feelings, but use idiosyncratic gestures often only understood by their family. In these instances, the court should contact relay or intermediate interpreters who are familiar with these individuals' home signs or are specially trained to interpret such communication.

Practical Techniques:

- Designate a staff person as an ombudsman who can become familiar with how the court can best serve this population.
- Purchase a text telephone (TDD or TTY) to permit this population to call the court.
- When persons who are hard of hearing appear in court, reduce environmental noise from fans, air conditioners, outside traffic or construction, and, if you still use a keyboard or adding machine in court, do all typing in an adjacent room, if possible.

- Make sure that assisted listening devices are fully charged and an extra set of batteries is available.
- When remodeling the court, consider using carpeting and padded walls to reduce noise in the courtroom.
- Suggest to the judge the adoption of a local rule requiring that attorneys who know that a witness or party has a special communication need to contact the court well in advance. A similar note can be placed on jury notices and witness subpoenas.
- If your court is small and there are budget constraints, locate a source to rent or borrow the equipment when needed.
- Writing out instructions for an individual who is hard of hearing is a simple, interim solution until the necessary equipment arrives.

A court procedure brochure will assist deaf persons, but it does not substitute for the services of an interpreter. The court must appoint an interpreter at all court proceedings if notified that the defendant is deaf or hard of hearing. Art. 38.31(a), C.C.P. An interpreter must be appointed to translate between counsel and the defendant. Art. 38.31(b), C.C.P. The interpreter must be able to use the language or means of communication used by the defendant. Art. 38.31(a), C.C.P. The interpreter must be sworn in by the judge, or by the clerk if so directed by the judge, before performing interpretation. Rule 604, Rules of Evidence. The interpreter is entitled to a fee determined by the court in consultation with the Commission for the Deaf and Hard of Hearing. If the interpreter is required to travel, all actual expenses of travel, lodging, and meals incurred must be paid at the same rate as state reimbursement. The court should establish a clear set of policies and procedures for how the court interpreter will be appointed for defendants and witnesses who are unable to hear.

If a defendant or witness is hard of hearing, Article 38.31 of the Code of Criminal Procedure requires the court to appoint a qualified interpreter and provide the auxiliary aids and services of their choice. “Qualified interpreter” is defined as an interpreter for the deaf who holds a current legal certificate issued by the National Registry of Interpreters for the Deaf or a current court interpreter certificate issued by the Board for Evaluation of Interpreters at the Department of Assistive or Rehabilitative Services.

Some cities have adopted a computer-aided real-time transcription (CART) device that requires skilled court reporters to key shorthand notes of the spoken language into a stenotype machine. This process concurrently translates the spoken words in court into English text. CART systems send the shorthand output from the stenotype machine directly into a personal computer that translates the shorthand instantaneously and displays it on a monitor or large screen where it can be read.

Chapter 57 of the Government Code contains many other provisions relating to the appointment of interpreters for deaf or hard of hearing individuals. A person who violates the requirements in Chapter 57 relating to deaf or hard of hearing interpreters commits a Class A misdemeanor offense and may be assessed an administrative penalty. Sec. 57.027, G.C.

True or False

- 31. All persons who are deaf and hearing impaired learn American Sign Language. \_\_\_\_
- 32. Court interpreters should always offer verbatim translations. \_\_\_\_
- 33. A court procedure brochure and signs explaining a defendant's rights are a proper substitute for the services of an interpreter. \_\_\_\_

Short Answer

- 34. What group constitutes the largest group of Americans with disabilities? \_\_\_\_\_  
\_\_\_\_\_
- 35. What are the three basic categories of sign language? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 36. Why is an oral interpreter sometimes needed for defendants who read lips? \_\_\_\_\_  
\_\_\_\_\_
- 37. Define minimally language competent persons. \_\_\_\_\_  
\_\_\_\_\_
- 38. Give three examples of environmental noise that should be reduced when hard of hearing persons appear in court. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 39. Explain how CART works. \_\_\_\_\_  
\_\_\_\_\_

## (2) Language Interpreters

Courts are required to appoint an interpreter when a defendant or witness does not understand the English language. Art. 38.30, C.C.P. The need for an interpreter may be raised by a motion of either party or by the court. The interpreter is required at any court proceeding, and is subject to subpoena or attachment like any other witness, but must be paid for interpreting. Art. 38.30, C.C.P. The defendant is not responsible for paying for an interpreter; rather, the interpreter's fee is paid by the city along with all actual expenses.

Chapter 57 of the Government Code contains an exception to this rule for "spoken language interpreters" in counties with a population of less than 50,000. Sec. 57.002(c), G.C. Under this exception, the interpreter must still be qualified under the Rules of Evidence, be over 18 years of age, and not be a party to the cause. Trial judges in counties with populations over 50,000 may appoint non-licensed interpreters when the language is one other than Spanish and the court makes

a finding that there are no licensed interpreters within 75 miles who can interpret in the language that is necessary. Sec. 57.002(d), G.C. These non-licensed interpreters are referred to as “spoken language interpreters.”

The role of the interpreter is to translate and explain the proceedings and to give the defendant a voice in the proceedings. Article 38.30(a-1) of the Code of Criminal Procedure authorizes the swearing in of a “qualified telephone interpreter” in any criminal proceeding before a judge or magistrate. Article 38.30(a-1) can only be used in instances where an interpreter is not available to appear in person or if the only interpreter available does not possess adequate skills for the situation or is unfamiliar with the use of slang.

#### **Practice Note**

Many courts employ clerks that are bilingual, and there may be a temptation to dispense with a licensed court interpreter for court proceedings. The Court of Criminal Appeals has cautioned, however, that “[o]ne is not necessarily competent to translate legal proceedings because he or she is bilingual. On the contrary, courtroom interpretation is a sophisticated art, demanding not only a broad vocabulary, instant recall, and continuing judgment as to the speaker’s intended meaning, but also the ability to reproduce tone and nuance, and a good working knowledge of both legal terminology and street slang.” *Garcia v. State*, 149 S.W.3d 135 (Tex. Crim. App. 2004).

Laws regulating court interpreters for persons who can hear but do not comprehend or communicate in the English language are found in Chapter 157 of the Government Code. The Judicial Branch Certification Commission provides oversight of the licensed court interpreter program. Chapter 157 provides for a licensing program for foreign language interpreters.

There are two designated levels of court interpreters: a basic level and a master level. An interpreter with a basic designation is authorized to interpret court proceedings in justice and municipal courts that are not courts of record, unless the judge is acting as a magistrate. A master level interpreter is permitted to interpret in all courts in Texas, including municipal and justice courts.

#### **Practice Note**

There are several resources available to courts regarding court interpreters. Comprehensive information on the Judicial Branch Certification Commission, including frequently asked questions, can be found at [www.txcourts.gov/jbcc.aspx](http://www.txcourts.gov/jbcc.aspx). The site has a link to significant information on court interpreters, located at [www.txcourts.gov/jbcc/licensed-court-interpreters/](http://www.txcourts.gov/jbcc/licensed-court-interpreters/). In addition, TMCEC maintains some links and secondary resources at [www.tmcec.com/programs/court-interpreters/](http://www.tmcec.com/programs/court-interpreters/).

True or False

40. Defendants must pay the costs of an interpreter. \_\_\_\_
41. Interpreters must be appointed by the court if a defendant or witness cannot understand English. \_\_\_\_
42. A family member or friend can be a language interpreter as long as he or she knows both English and the other language that requires interpreting. \_\_\_\_
43. An interpreter with a basic designation can interpret in a municipal court of record. \_\_\_\_

### (3) Mental Illness or Intellectual Disability

The Code of Criminal Procedure has special provisions for persons with mental illness or intellectual disability. During magistration, a magistrate who has reasonable cause to believe a defendant has a mental illness must order an interview by a qualified expert. Art. 16.22(a), C.C.P. A magistrate is required to release, on personal bond, a defendant with a mental illness if the defendant has not been charged with or previously convicted of a violent offense, such as murder or kidnapping, and has been examined by a mental health expert. The expert must conclude that the defendant is mentally ill, competent to stand trial, and make a recommendation for mental health treatment. The magistrate then determines if appropriate health services are available. The magistrate may require as a condition of release on personal bond that the defendant submit to outpatient or inpatient mental health treatment if the illness is chronic in nature or the ability to function independently will continue to deteriorate if the defendant is not treated. Art. 17.032, C.C.P.

Special protections are afforded persons with mental illness or intellectual or developmental disability because too often they forfeit their rights because of misplaced trust, limited vocabulary, difficulty reading or recalling facts, undue influence of authority figures, and a desire to avoid being labeled. For example, a judge may not accept a plea of guilty or nolo contendere from a defendant in open court unless it appears to the judge that the defendant is mentally competent and the plea is free and voluntary. Article 45.0241/45A.153, C.C.P.

The Texas Judicial Commission on Mental Health provides resources for courts (<https://www.texasjcmh.gov/>). TMCEC also maintains a Mental Health Resources Page (<https://www.tmcec.com/resources/mental-health/>).

### (4) Physical Disabilities (ADA)

The Americans with Disabilities Act (ADA) was enacted on July 26, 1990 to protect qualified individuals with disabilities from discrimination solely on the basis of their disability. 42 U.S.C, Sec. 12131, *et seq.* Its passage increased awareness of disability issues and reduced stereotypes and misrepresentations of the past. People living with disabilities continue to desire accurate portrayals that present a respectful, positive view of them as active participants of society.

The following are key terms and provisions that one must know to understand the ADA.

- *A person with a disability.* (1) An individual who has a physical or mental impairment that substantially limits one or more of the individual's major life activities (such as



walking, talking, or caring for oneself); (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C., Sec. 12102(2). Excluded from this definition are persons currently engaging in the illegal use of drugs. 42 U.S.C., Sec.12111(8).

- *A qualified individual with a disability.* An individual who regardless of their disability meets the essential requirements for the receipt of services or participation provided by the public entity. This includes defendants, witnesses, attorneys, and spectators.
- Title II prohibits state and local government from policies and practices that have the effect of barring persons who are disabled from participation in or access to public services, programs, and activities. These provisions cover all courts, regardless of size.
- Title III focuses on public accommodations and services operated by public entities.
- The ADA provisions are enforceable under the remedies set forth in the earlier enacted Section 505 of the Rehabilitation Act of 1973.

Title II went into effect in 1992 and requires state and local entities, including courts, to modify policies, practices, and procedures to prevent disability discrimination, remove architectural and communication barriers, and provide accessible services. Each program or service, when viewed in its entirety, must be readily accessible. Physical barriers must be removed, if necessary, to make services accessible. Extensive remodeling, however, is not necessary if programs can be made available in other ways. Alternatives include relocating services to other areas; providing an aide or personal assistant; moving services to an individual's home or other accessible site; and giving information by audiovisual means. Action is not required if it demands undue financial or administrative burden.

Court managers should examine closely the following physical and communication barriers in their courts.

- Access to the building—inaccessible parking spaces, high curb cuts, slippery exterior steps, lack of or poor ramps, and areas accessible only through service areas.
- Use of facilities—interior stairs; a lack of accessible elevators; slippery floors; high public counters; water fountains and telephones; narrow hallways; poor lighting; and inaccessible restrooms or law libraries.
- Participation in court—judges' benches, jury boxes, witness boxes, counsel table, and public seating too often cannot accommodate wheelchairs. Often there is an absence of technology to help individuals with vision, hearing, and cognitive impairments.
- Train staff in eliminating stereotypes and biased language towards persons with disabilities.
- Appoint a staff person to serve as the accessibility ombudsman to assist in arranging individualized accommodations.
- Make sure all court employees understand how to receive a relay call, where a person who is deaf calls a relay operator who serves as the speaker to the recipient of the call.

Local, state, and national groups are available to help courts become accessible. Contact local or state disability groups such as protection and advocacy agencies, mental health associations, elderly advocacy groups, and Alzheimer's associations to form a multi-disciplinary planning committee.

True or False

- 44. The law requires that a person with mental illness or intellectual or developmental disability be treated the same as those without disabilities when bond is set. \_\_\_\_
- 45. A municipal court must only comply with ADA requirements if it employs more than 15 persons. \_\_\_\_
- 46. The ADA protects jurors and witnesses, as well as court employees. \_\_\_\_
- 47. Even if it costs an excessive amount and poses an administrative hardship, a municipal court must accommodate the needs of one employee with a disability. \_\_\_\_

Short Answer

- 48. How does federal law define a person with a disability? \_\_\_\_\_  
\_\_\_\_\_
- 49. In the clerk’s area and the court’s window or counter, what accessibility problems often exist?  
\_\_\_\_\_  
\_\_\_\_\_
- 50. Within the courtroom, what areas must be accessible? \_\_\_\_\_  
\_\_\_\_\_
- 51. Give four examples of what an accessibility ombudsman might do in your court. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**B. Equal Protection and Discrimination**

The 14th Amendment to the U.S. Constitution provides that all persons be afforded equal protection of the law. Two major applications of this principle have developed since its adoption. Any law that applies unequally to the governed must have a rational basis. Any law that has a disparate impact on a protected class (racial minorities, religious groups, and other recognized protected classes) must satisfy a compelling state interest. Finally, the rights and recourses of the law cannot be denied to any person based on his or her belonging to a protected class of individuals.

**1. Bias or Prejudice**

Although perceptions of bias neither confirm nor disprove the actual existence of bias, all municipal courts should examine their policies and practices for evidence of bias. Unequal

treatment of court users may also be perceived as bias or prejudice. It is important to periodically review and assess court practices to ensure equal treatment of all court users. This may even include practices concerning defense attorneys and prosecutors as compared to pro se defendants. Court personnel can formally or informally conduct court assessments of how court users are treated in areas such as wait time at the window, access and placement on court dockets, and wait time to speak with the prosecutor. Questionnaires, court user surveys, or interviews can be used to determine if patterns of interaction reflect the same degree of courtesy to all that appear before the court. Exit interviews with employees may reveal perceptions or incidents of bias in the court.

In addition to awareness and sensitivity regarding cultural or ethnic bias, court personnel should also be aware of language used in references to persons with disabilities. Certain terms and phrases traditionally used to refer to persons with disabilities are now considered by some to be demeaning and hurtful. Part of maintaining decorum is correcting inappropriate language and actions, including expressions of bias. If the court fails to correct biased behavior, the courtroom audience might presume the court condones such behavior. The Commission on Judicial Conduct has publicly sanctioned a Texas judge for racially biased statements made during a trial. Judges and court personnel must protect the court from the appearance of impropriety as well as actual disparate treatment. Canon 3(B) of the *Code of Judicial Conduct* prescribes the elimination of biased behavior in court.

52. What policies or practices could be evaluated either formally or informally for evidence of potential bias occurring in the courts? \_\_\_\_\_

\_\_\_\_\_

## 2. Indigence

The law provides for the equal treatment of court users, no matter that person's ability to pay the fine or costs ordered by the court. The U.S. Supreme Court has declared that the Equal Protection Clause of the 14th Amendment mandates there is a "ceiling placed on imprisonment" that must be the same regardless of a person's economic or financial status. *Tate v. Short*, 401 U.S. 395 (1971). This means that there is unequal treatment where a person with financial means may simply pay a citation, while a person unable to pay is imprisoned without any alternative. Alternative methods of discharge include delayed payment, time payments, and community service. It is important to note, however, that equal protection goes both ways. Absolving those too poor to pay of any criminal liability simply because of their economic status also violates equal protection. As the court also pointed out in *Tate*, "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction."

The role of the clerk is to assist the judge with documentation regarding indigence. For example, if the judge offers the defendant the opportunity to use community service to discharge the fine, the clerk may be asked to provide the defendant with a list of approved non-profit organizations where the community service can be fulfilled. Or, if the defendant requests to pay over time, the

clerk will assist with the documentation needed for the transmittal of monthly or weekly payments. Judicial orders, defendants' requests, and any other documentation should be placed in the case file so that if a question arises, the record is well documented. In some cases where the defendant cannot pay and cannot do community service, the only alternative may be waiver of the fine or costs. Art. 45.0491/45A.257, C.C.P. In these cases, the clerk may also be asked to document the file.

Finally, approving or extending a time payment plan is a judicial duty, not a ministerial one that can be done by the clerk. If a defendant defaults on a payment agreement, he or she should be given an opportunity to explain the situation to the judge. The judge and clerk should develop a consistent plan to process persons who are indigent and must satisfy a judgment by a payment plan or community service. Importantly, judges should not have a schedule of payments that apply to all defendants who are indigent. The judge must practice judicial oversight and be able to individually consider the ability of each defendant that indicates possible indigence or lack of sufficient resources to pay what has been ordered.

### **C. Juveniles and Their Parents**

Under Texas law, juveniles are generally treated differently than adults. Title 3 of the Family Code creates juvenile courts that have jurisdiction over children ages 10 to 17. Usually, a juvenile enters the justice system for delinquent conduct or conduct in need of supervision. Delinquent conduct generally involves violations of the penal laws that are punishable by imprisonment or jail. Conduct in need of supervision refers to the lower grade of penal offenses and behaviors such as running away from home. Juvenile court proceedings are hybrid proceedings combining substantive criminal law with procedural civil law. The terminology is different. For example, an adjudication hearing for a juvenile is the equivalent of the sentencing phase for an adult. More juveniles are charged with fine-only offenses in municipal and justice courts, however, than go through juvenile courts for delinquent conduct or conduct indicating a need for supervision. Special rules also apply to juveniles in municipal courts. These rules are further discussed in the *Children and Minors* chapter of this book.

### **D. Rights of the Victim**

It is important to recognize that victims of crimes also have rights when it comes to the trial of criminal offenses. Although most people immediately think of assault victims, a victim could be anyone who is injured in some manner as a result of a crime. In municipal courts, this could also include a person that has suffered a property crime, such as theft or criminal mischief, or a driver involved in a traffic collision. Victims of property crimes will likely have an interest in getting their property back or repaired, while victims of assaults will likely have an interest in personal security. Whether the person is a victim of an assault or property damage, however, courts should be cognizant that a victim should be treated appropriately.

#### **1. Victims' Bill of Rights**

In 1989, the Legislature passed a resolution proposing a constitutional amendment relating to the rights of crime victims. This amendment was passed by voters the following November and became law on November 7, 1989. The "Victims' Bill of Rights" broadly outlines these rights:

The Texas Constitution

Article I, Section 30: Rights of Crime Victims

- (a) A crime victim has the following rights:
  - (1) the right to be treated with fairness and with respect for the victim’s dignity and privacy throughout the criminal justice process; and
  - (2) the right to be reasonably protected from the accused throughout the criminal justice process.
- (b) On the request of a crime victim, the victim has the following rights:
  - (1) the right to notification of court proceedings;
  - (2) the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim’s testimony would be materially affected if the victim hears other testimony at the trial;
  - (3) the right to confer with a representative of the prosecutor’s office;
  - (4) the right to restitution; and
  - (5) the right to information about the conviction, sentence, imprisonment, and release of the accused.

**Practice Note**

The statutory crime victims’ rights outlined in Chapter 56A of the Code of Criminal Procedure, by definition, generally includes higher level crimes, thus excluding cases heard in municipal courts; however, municipal courts and prosecutors may be well served to consider the rights spelled out in this article when working with crime victims in their courts. These include important safeguards, such as the right of victims to be provided with a waiting area separate from the defendant and relatives of the defendant before testifying in any proceeding, the right to prompt return of any property of the victim that is held by a law enforcement agency or attorney for the State as evidence when the property is no longer required for that purpose, and the right to have a magistrate take the safety of the victim or victim’s family into consideration as an element in fixing the amount of bail for the accused.

**2. Prosecutor’s Role**

As the representative of the State, it is the prosecutor’s role to secure witnesses for the case. This includes contacting and discussing the case with the victim. Often the victim and a police officer are the only witnesses in the case. Consequently, it is important that, while respecting the victim’s rights, court clerks maintain neutrality as with any other witness or court user. The Victims’ Bill of Rights outlines basic rights that involve a victim in the trial of his or her case, but it is not authorization for a court clerk to provide legal advice.

**3. Special Issues in Domestic Violence**

In recent years, the trend has shifted to a tougher stance against domestic violence. In fact, the definition of “family violence” has been expanded beyond the definition of spouses to include

partners in a dating relationship and former partners in a marriage or dating relationship. Secs. 71.0021 and 71.004, F.C. The system's traditional response had been one of non-intervention unless severe injury or death resulted. In the past, offenders were rarely arrested or convicted of their crimes, and victims were given little, if any, protection or support. Typically, a preoccupation existed with the victim's choices and responsibilities rather than those of the perpetrator. Arrests and prosecution of offenders are now more common. Increasingly, prosecutors are encouraging women to proceed with their cases, and fewer misdemeanor cases are being dismissed. Victim advocates serve as a link between the system and the victim.

Many of the cases involving domestic violence seen by municipal judges involve them in their capacity as magistrates. In this capacity, judges handle the warnings and clerks process the accompanying paperwork. If an individual has been arrested for a family violence offense, the magistrate may issue an order for emergency protection at the detention hearing. The order prohibits the arrestee from committing family violence or a stalking-related act; communicating directly with a member of the family or household in a threatening or harassing manner; posing a threat to a member of the family or household; or going near the residence, place of employment, business, child care facility, or school where the person protected under the order attends or resides. Pets or assistance animals can be included in the protection order. Sec. 85.021, F.C. Only a magistrate may sign such an order, although it may be initiated on the motion of the judge, prosecutor, victim, or law enforcement.

If a victim is not present when an emergency protection order is issued, the clerk is required to send a copy of the emergency protection order to the victim. Emergency protection orders may last between 31 to 61 days, or in cases of assault involving a deadly weapon, up to 91 days. Art. 17.292(j), C.C.P.

#### Practice Note

In November 2017, an individual shot and killed congregants at the First Baptist Church in Sutherland Springs, Texas. The individual should have been prohibited from possessing firearms due to a family violence conviction while in the military, but the conviction was never reported to the FBI by the military. The Texas Legislature then reviewed state practices the following session to determine how state courts were reporting such convictions. H.B. 1528, passed by the 86th Legislature, expanded reporting requirements to convictions for fine-only misdemeanors involving family violence. Article 45.0211/45A.151 of the Code of Criminal Procedure requires the judge to take a defendant's plea in open court if the person is charged with this type of assault. In addition, Article 66.252 of the Code of Criminal Procedure requires not only the fingerprints of those charged with fine-only misdemeanors involving family violence, but also the of case disposition reporting n by the court clerk.

#### Short Answer

53. Under Texas law, does the definition of family violence include "dating violence"? \_\_\_\_\_
54. What is an emergency protection order? \_\_\_\_\_
55. Who can make a motion for an emergency protection order? \_\_\_\_\_
56. Can a clerk issue an emergency protection order? \_\_\_\_\_
57. What must be done if the victim is not present when the emergency protection order is signed? \_\_\_\_\_

## E. Witnesses

Witnesses or jurors come to the courthouse not because they necessarily want to, but because they are issued a subpoena or summons requiring them to appear. Witnesses and jurors with disabilities must be protected under the ADA just as others with disabilities. Translation and physical accommodation are also necessary. The needs of the individual with disabilities must be balanced with the defendant's constitutional right to confront the witness or be tried by a jury of his or her peers. It is important to have a plan to handle these situations in advance.

## F. Jurors

Personal information about jury members is generally confidential and may not be disclosed by the court, prosecuting attorney, or defense attorney, with limited exception. Art. 35.29, C.C.P. This includes the following information that may have been collected during the jury selection process: juror's home address, home telephone number, social security number, and driver's license number. This does not include the jurors' names. Attorney General Opinion GA-0422 (2006). There is an exception for parties to the case, attorneys for the parties, the judge and court personnel, and possibly the media if there is good cause.

The clerk shall provide a jury handbook to each juror who is required to read it before jury service begins. Sec. 23.202, G.C. Copies of the handbook may be ordered from the State Bar of Texas. Not all rules listed in the handbook apply to municipal courts. If a juror is deaf or hearing impaired, the juror may request an auxiliary aid or service. The interpreter must be sworn in before performing interpretation. Rule 604, Rules of Evidence.

While deliberating, the jury may communicate with the court in writing via the presiding juror and bailiff. The court may answer in writing. In a court of record, if the juror disagrees as to the statement of the witness, the juror may apply to the court to have the statement read from the court reporter's notes. Other than in these two situations, no one may converse with the jury while it is deliberating. Jurors, too, should be free from harm or threat of harm due to their service. To harm or threaten to harm a juror because of their service is a second-degree felony. Sec. 36.06(c), P.C.

### Practice Note

The court may enforce decorum and proper dress to maintain an orderly court. Judges should be careful to separate their personal cultural familiarities or bias from the concept of court decorum. Decorum may be enforced by a posted rule, oral admonishment, reprimand, or in extreme cases, contempt.

True or False

58. Witnesses do not qualify for accommodation under the ADA. \_\_\_\_\_

59. There is a juror handbook that the clerk is responsible for providing to all jurors. \_\_\_\_\_

Short Answer

60. What type of crime is threatening or harming a juror? \_\_\_\_\_

61. A member of the militia requests the home addresses and telephone numbers of jurors who heard his or her traffic case. Do you release this information? \_\_\_\_\_

True or False

62. The clerk may sit in and converse with the jury during its deliberations. \_\_\_\_\_

## **PART 2 ROLE OF THE STATE**

Prosecutors represent the State of Texas and are responsible for preparing the case against criminal defendants. The prosecutor in a municipal court may be the city attorney, deputy city attorney, or the county attorney acting without compensation. Art. 45.201/45A.005, C.C.P. The prosecutor makes ultimate decisions on who to charge, matters concerning witnesses, and which cases to prosecute. The exact wording of complaints is within the providence of the prosecutor, as are decisions concerning the number and nature of complaints. The prosecutors must also decide which witnesses to subpoena and in which order they testify. Except where explicitly permitted by statute or rule of law, cases may not be dismissed without a motion by the prosecution.

Since the prosecutor represents the State, discussions by the prosecutor and court personnel about the merits of a case outside of the presence of the defendant or defense counsel are *ex parte* and unethical. The prosecutor represents the people of the State of Texas, not the judge or the court.

Attempts to control the prosecutor, outside of proper rulings on the law and requiring decorum, have led to public sanctions of judges. Although the State does not have the same rights that are accorded to a criminal defendant, the prosecutor does have the right to independence and the right to the judge's timely, patient, and well-studied rulings. Prosecutors, as attorneys, are also subject to the Texas Disciplinary Rules of Professional Conduct.

True or False

63. The prosecutor makes decisions about who to charge and what cases to dismiss. \_\_\_\_\_

64. Judges may dismiss cases anytime they determine it is necessary. \_\_\_\_\_

65. The prosecutor may discuss a case with a judge before trial. \_\_\_\_\_

## **PART 3 ROLE OF THE COURT**

### **A. Court Administration**

The role of the court, and its administration, is a unique one within the criminal justice system. Every one of the other parties mentioned above in the discussion of rights (defendants, victims, prosecutors) has a side and an adversarial viewpoint (i.e., a person's self interest, the interest of a person's client, or the interest of the State). The judge and court clerk, however, are tasked with administering a fair forum for all court users. This may sometimes be a tough task, and attention must be constantly paid to both due process and the fair treatment of court users. There is no "bill of rights" for court personnel or statutory definitions for court clerks to point to, but perhaps the



closest that the code comes to directly addressing this responsibility is in the objectives of the Code of Criminal Procedure. The four objectives listed in Article 45.001/45A.001 of the Code of Criminal Procedure are:

- 1) to provide fair notice to a person appearing in a criminal proceeding and a meaningful opportunity for that person to be heard;
- 2) to ensure appropriate dignity in court procedure without undue formalism;
- 3) to promote adherence to rules with sufficient flexibility to serve the ends of justice; and
- 4) to process cases without unnecessary delay.

## **B. Treatment of Court Users**

Some courts have adopted a management philosophy of treating all users of the court system as customers. This concept grew out of court efforts to reinvent government by improving public sector operations and customer service. As part of a quality management movement, staff members are trained to identify customers and their needs and are taught methods for improving court procedures. For a municipal court, customers or “end-users” include defendants, victims, witnesses, prosecutors, defense lawyers, bail bondsmen, and jurors. In offering those who appear in court the courtesy that a business might offer its clients or customers, a court clerk must be careful to never offer legal advice which might subject the city to liability and the clerk to charges of unauthorized practice of law.

### **Practice Note**

Satisfaction Guaranteed or Your Money Back? When one thinks of customer service, typically this slogan springs to mind. It is the idea that equates good customer service with a happy customer. This customer service philosophy, which was promoted in the late nineteenth century by retailer Montgomery Ward and later adopted by Sears Roebuck, implied that the customer should be made happy at any cost. Some cities have taken a similar approach when training employees. Courts should be cautious. A court clerk may be a city employee, but the court must be mindful of its proper role as the judiciary. Court users oftentimes are not happy with the result of court cases, even when the case result is favorable. That person may still have had to appear and may still have lost money and time. It is important to treat court users fairly and respectfully, but overly accommodating that person could get the court into trouble. Courts are simply unable to provide many things that would make a court “customer” happy, including legal advice, not appearing, or even their money back.

## **C. Liability and Immunity**

Liability and immunity are legal concepts that are most often litigated under Title 42 of the United States Code, Section 1983: Civil Action for Deprivation of Rights. This allows lawsuits to be brought against officials and employees of the states and their political subdivisions in federal or state court. There are four types of lawsuits that can be filed against judges and court personnel under Section 1983:

- A suit for money damages for past wrongs in an official capacity;
- A suit for money damages in an individual or personal capacity;
- A suit for injunctive or declaratory relief in an official capacity; and
- A suit for injunctive or declaratory relief in an individual or personal capacity.

A judgment against an officer or city employee in an official capacity imposes liability on the city as long as the city’s policy or custom was involved. For an aggrieved party to prevail and collect damages for an alleged violation of Section 1983, the party must establish: (1) that there is deprivation of a right, privilege, or immunity secured by federal law and (2) that the defendant committed the deprivation while acting under a statute, ordinance, regulation, or practice of a state or a political subdivision of the state including municipalities.

A judge under certain circumstances is afforded judicial immunity from personal liability for lawsuits brought against the judge in his or her individual capacity under Section 1983. As a general rule, judicial immunity is accorded only for “judicial acts” that are not clearly in excess of the judge’s jurisdiction. Administrative and ministerial acts, such as the hiring and firing of personnel, are not judicial acts and are not entitled to judicial immunity although some lesser immunity may apply.

66. List five end-users in municipal courts. \_\_\_\_\_  
 \_\_\_\_\_

True or False

67. Once a defendant has been found guilty, he or she should be treated as a criminal and no longer as a court customer. \_\_\_\_
68. Judicial immunity only covers judicial acts, not ministerial duties of the clerk. \_\_\_\_
69. Cities can be held liable for procedural errors made by court clerks following city policy. \_\_\_\_

## ANSWERS TO QUESTIONS

### PART 1

1. False (all persons are presumed innocent until proven guilty).
2. False (also when arrested with a warrant).
3. True.
4. False (or a personal bond).
5. True.
6. True.
7. True.
8. The right to notice of a hearing or trial that adequately informs the accused of the charges against him or her and the right to a hearing.
9. The right to a hearing or trial includes the right to present evidence on the accused person's behalf before an impartial judge or jury, the right to the presumption of innocence until proven guilty by legally obtained evidence, and the right to have the verdict supported by the evidence presented at trial.
10. True.
11. False.
12. False.
13. True.
14. True
15. False.
16. Two years from the date of the offense.
17. The judge is disqualified as a matter of law when a judge is the injured party; has been counsel for the State or the accused; or is connected to the accused or the party injured by consanguinity or affinity within the third degree as determined under Chapter 573 of the Government Code.
18. False.
19. False.
20. False.
21. True.
22. True.
23. True.
24. True.
25. The Texas Rules of Evidence.

26. The defendant is invoking the right against self-incrimination.
27. The State must prove each element of the offense charged beyond a reasonable doubt.
28. It guarantees protection against unreasonable searches and seizures.
29. This rule excludes evidence obtained from unreasonable searches and arrests.
30. A claim that a defendant was personally subjected to the unconstitutional conduct.
31. False.
32. False (it might lead to a distortion of meaning).
33. False.
34. Those with hearing disabilities.
35. Independent languages, such as American Sign Language; speech-equivalent-signing systems; and finger-spelling systems.
36. Only 26 percent of speech can be understood through lip-reading.
37. Persons who do not have a systematic way of communication and need relay or intermediary interpreters.
38. These may include reducing noise from fans, air conditioners, outside traffic or construction, and typing in an adjacent room.
39. A court reporter keys in the spoken language, which then can be read on a personal computer.
40. False.
41. True.
42. False.
43. False (a master designation is required for a court of record).
44. False (the magistrate is required to release on personal bond in most cases).
45. False (all municipal courts must comply).
46. True.
47. False (action is not required if it demands undue financial or administrative burden).
48. A person with a disability:
  - has a physical or mental impairment that substantially
  - has a record of such an impairment; or
  - is regarded as having such an impairment.
49. This answer may include high public counters, water fountains, and telephones; no accessible elevators; stairs instead of ramps; and inaccessible restrooms.
50. Judge's bench, jury boxes, witness boxes, counsel table, public seating, and microphones.

51. The accessibility ombudsman may assist in arranging reasonable individualized accommodations such as making physical changes to the work environment, restructuring jobs, modifying schedules, or providing qualified readers.
52. Court assessments of how court users are treated can be formally or informally conducted by court personnel in areas such as:
- wait time at the window;
  - access and placement on court dockets;
  - wait time to speak to the prosecutor.
53. Yes.
54. A court order that prohibits the arrestee from committing family violence, stalking, communicating directly with or threatening the victim or a member of her family, going near the residence, place of employment, business, child care facility, or school where the person protected under the order reside or attend. This is also called a MOEP (magistrate's order of emergency protection).
55. Any of the following: a victim; a guardian of the victim; a police officer; a prosecutor; or a magistrate. Art. 17.292, C.C.P.
56. No. This magisterial function must be performed by a judge or magistrate.
57. The clerk must mail him or her a copy.
58. False.
59. True.
60. Second degree felony.
61. No.
62. False.

## **PART 2**

63. True.
64. False.
65. False.

## **PART 3**

66. End-users include: defendants; victims; witnesses; prosecutors; defense lawyers; bail bondsmen; and jurors.
67. False.
68. True.
69. True.