Shades of Grey:

Sometimes the Letter of the Law Exists Somewhere Between Black and White

On a scale of one to 10 (10 being clear as a blue sky on a beautiful spring day and one being clear as mud), how clearly is legislation written? When this question was posed to a group of judges and clerks over the course of several judicial education seminars, the responses varied from a low of zero (with some already thinking outside of the box) to a high of seven, along with a few chuckles and groans. The statutes are there; we can read them in black and white. Unfortunately, an analysis of many statutes is not as black and white as the text with which the statutes are printed. Often, we must rely on our abilities to interpret those words. As the Texas Legislature is hard at work drafting, tweaking, and repealing laws, this is a perfect to time to examine some of the statutes that are not so clearly written. Perhaps American songsmith Billy Joel said it best:

> *Shades of grey wherever I go*
> *The more I find out the less that I know*
> *Black and white is how it should be*
> *But shades of grey are the colors I see.*[1]

No, this is not part four to a bestselling adult book franchise, but rather an opportunity to dissect and discuss some of the statutes affecting municipal courts, where interpretation creates areas that do not fit squarely into the black or the white. Instead, we are left to navigate through the shades of grey.

To Accept or Not to Accept: A Payment by Mail

Municipal and justice courts operate under special (more specific) rules, within an entire chapter in the Code of Criminal Procedure: Chapter 45. However, other rules exist outside of Chapter 45 and relate only to cases involving fine-only misdemeanors. One of these rules allows a defendant to send in payment of a fine and costs by mail, without entering a plea otherwise.[2]

Consider the following scenario. A defendant is cited with a moving violation. The amount listed on the citation as acceptable to the court is $197.10. The defendant sends in $125. How can this be handled? Let us look to a portion of Article 27.14 of the Code of Criminal Procedure for some guidance.

> PLEA OF GUILTY OR NOLO CONTENDERE IN MISDEMEANOR.
> (c) In a misdemeanor case for which the maximum possible punishment is by fine only, payment of a fine or *an amount accepted by the court* constitutes a finding of guilty in open court as though a plea of nolo contendere had been entered by the defendant and constitutes a waiver of a jury trial in writing. (emphasis added)

If you receive a lesser amount than that listed as acceptable to the court, can you interpret it as a nolo contendere plea, convict the defendant, and then seek the remainder of the balance? Or are you limited to either rejecting the payment or accepting it as full payment? Reasonable minds disagree. Two well-respected municipal judges were asked for their thoughts on this situation. One said you could indeed accept it and convict the defendant, and then give notice that they still owe $72.10. The other treated

the situation in a way consistent with the notions of accord and satisfaction in civil practice—that if what is offered is accepted by the court, it is in satisfaction of the entire debt. Nonetheless, many municipal judges balk at the idea of treating a defendant's payment as a settlement offer of sorts.

To accept means to receive something with approval and intention to keep it.[3] Some think that if a lesser amount is accepted, then it is an amount "acceptable" to the court and nothing else is owed. Others rely on the common meaning of accept as merely taking a payment, with the remainder still owed. The grey exists in the definition of "accepted" and how judges interpret the statute.

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To Appear or Not to Appear: For a Minor Alcohol Offense

It is a general rule that child defendants must appear in open court to enter a plea.[4] This can be problematic when the child defendant does not reside in the area where the case is pending; however, child defendants may, with leave of the court, enter their plea before a judge in the county of their residence.[5]

In another far off code, exists a statute made up of just 18 words that has caused quite a bit of frustration to judges, especially in college towns and vacation spots. Chapter 106 of the Alcoholic Beverage Code governs minor alcohol offenses[6] and the sentencing guidelines for minors charged with such offenses. Section 106.10 provides:

> PLEA OF GUILTY BY MINOR.
> No minor may plead *guilty* to an offense under this chapter except in open court before a judge. (emphasis added)

Presumptively, this provision is meant to parallel the one in Article 45.0215 of the Code of Criminal Procedure, requiring the personal presence of a child defendant, before the judge, to enter a plea. Why might the Legislature desire for child defendants to personally appear before the judge? Most likely, it is so the judge has the opportunity to talk to the child and attempt to curb any potential gateway behavior. Minors charged with alcohol offenses, unfortunately, often end up committing drug or higher alcohol-related offenses, so it makes sense that the Legislature would also want judges to have the opportunity to counsel minors (defendants under 21 years of age who are charged with minor

alcohol offenses) rather than just allow the defendant to enter a plea by mail and never go before a judge. Requiring a personal appearance encourages the minor to take responsibility for his or her actions and, through the inconvenience of having to appear in court, take the charge more seriously.

Nonetheless, compare Section 106.10 to Article 45.0215. Note that in the Code of Criminal Procedure, the child must enter *a plea* in open court, but under the Alcoholic Beverage Code, the minor must only enter a *plea of guilty* in open court. Does this mean that a minor can enter a plea of not guilty or no contest through some means other than in person in open court, say through appearance by an attorney or even by mail?

Consider a spring break hypothetical. Olive Tudrink, a 20-year-old Texas Tech student, is on her college spring break trip in South Padre Island where she is ticketed for minor in consumption of alcohol. Her court date is set for three weeks later, but by that time, she is back in Lubbock and knee-deep in studying for finals. Must Olive really travel back to South Padre Island to enter a plea to the alcohol charges? Is the court really unable to proceed on this case until Olive can physically appear all the way across Texas? According to Section 106.10, Olive cannot plead guilty except in open court before the judge. But can she plead no contest through the mail or by hiring an attorney to appear on her behalf in the South Padre Island Municipal Court?

A strict interpretation of the statute seems clear that, yes, Olive can plead no contest through the mail or hire an attorney to appear on her behalf. But does that interpretation accomplish the purpose behind the statute of requiring a minor to appear before a judge for sentencing? Consider too that judges are required to impose certain sanctions on minors convicted of or put on deferred for certain alcohol-related offenses, including awareness classes and community service. Because we are talking about minors (those under 21 years of age charged with minor alcohol offenses), the provision in Chapter 45 allowing a child defendant to enter a plea in the county of his or her residence does not apply, as children are minors, but not all minors are children (i.e., those who are 17- to 20-years old).

So what is a judge to do? The answer is not so clear, and the practice varies across the state, with some judges requiring a personal appearance and many defense attorneys making big business off these cases in beach, vacation, or college towns.

Bill to Watch

H.B. 310: if enacted would help resolve the problem of requiring a personal appearance by those minor defendants who live out of the area. The bill would make an exception to the requirement in Section 106.10 that a plea of guilty be entered in open court for those minors who live outside of the county where the offense is alleged to have been committed, as long as they are not charged with driving under the influence and have not been previously convicted of a Chapter 106 Alcoholic Beverage Code offense. The bill would not resolve the issue of whether a plea other than guilty can be entered without a personal appearance.

UPDATE: H.B. 310 was left pending in committee

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To Collect or Not to Collect: The $20 Fee on an Expired Inspection Sticker

Vehicles are required to be annually inspected, with limited exceptions, and display a valid inspection sticker on the front windshield. It is an offense to operate a vehicle with an expired inspection sticker.[7] Nevertheless, Section 548.605 of the Transportation Code provides a compliance dismissal allowing a charge of driving with an expired inspection certificate to be dismissed if the defendant remedies the defect. Let us go directly to the statute:

> DISMISSAL OF CHARGE; ADMINISTRATIVE FEE.
> (a) In this section, "working day" means any day other than a Saturday, a Sunday, or a holiday on which county offices are closed.
> (b) The court shall:
> (1) dismiss a charge of driving with an expired inspection certificate if:
> (A) the defendant remedies the defect within 20 working days or before the defendant's first court appearance date, whichever is later; and
> (B) the inspection certificate has not been expired for more than 60 days; and
> (2) assess an administrative fee not to exceed $20 when the charge of driving with an expired inspection certificate has been remedied.
> (c) Notwithstanding Subsection (b)(1)(B), the court may dismiss a charge of driving with an expired inspection certificate that has been expired for more than 60 days.[8]

Interpretation of this statute essentially results in two compliance dismissals: one for those stickers expired 60 days or less and another for those expired more than 60 days. For those expired 60 days or less, the defendant is *entitled* to a dismissal, meaning the court shall dismiss,[9] if the defendant gets the vehicle inspected and pays the administrative fee. If the sticker has been expired more than 60 days, the defendant is no longer entitled to a dismissal but it is at the court's discretion and no fee is authorized to be assessed.[10]

The statute seems clear enough, but many judges and clerks have questioned why a defendant would have to pay an administrative fee when driving on an inspection sticker that was expired only one month, but not have to pay a fee when driving on an inspection sticker that was a year out of date.

Although it is firmly established that a court cannot assess a fee against a defendant without the express statutory authority to do so,[11] does Section 548.605 prohibit a court from assessing an administrative fee on a dismissal for an inspection sticker more than 60 days expired? The long-held belief is yes, but a closer look at the statute reveals the answer is not so black and white. Subsection

(b) says that the court must dismiss the charge if (1)(A), (1)(B), and (2) are all met. Those requirements are that the defect is remedied by a certain time, the inspection sticker has not been expired more than 60 days, and the defendant pays the administrative fee, respectively. Subsection (c) provides that notwithstanding Subsection (b)(1)(B), the provision regarding the 60-day expiration, the court may dismiss the charge. Subsection (c) simply changes the *shall* (mandatory dismissal) to a *may* (discretionary dismissal) if the certificate was expired more than 60 days; it does nothing to affect subsection (b)(2)−the assessment of an administrative fee.

Some have argued that Subsection (c) stands on its own; therefore, if no fee is authorized in Subsection (c), then no fee can be assessed. However, under this rationale, the deadline for a defendant to remedy the defect (at the later of 20 working days or the first court appearance) would also not apply. Can it really be that a defendant would have an unspecified amount of time in which to remedy the defect and still possibly be eligible for a dismissal? Moreover, if Subsection (c) truly stands on its own, then a court could dismiss a charge for an expired inspection sticker that had been expired more than 60 days without even obtaining compliance! Certainly the Legislature did not intend this.[12]

An unofficial poll of several well-respected municipal judges and court administrators revealed that several courts do assess an administrative fee when the sticker was expired more than 60 days; however, they do not promote that fact. A few judges do not assess the fee because the statute is vague enough to cause concern. Other courts simply do not grant the discretionary compliance dismissal for those long-overdue inspections to avoid any question of whether an administrative fee is authorized.

Bills to Watch

S.B. 790: if enacted, would correct this issue by explicitly adding a provision to Subsection (c) providing that the court shall assess an administrative fee of $20 when dismissing a charge under Subsection (c) (the discretionary dismissal for those stickers expired more than 60 days). The bill would also create a flat $20 administrative fee for all compliance dismissals, resolving some of the other confusion surrounding compliance dismissals.

UPDATE: S.B. 790 was never heard in committee.

H.B. 2890 and S.B. 1350: if enacted would repeal Section 548.605 altogether, in an effort to combine the registration sticker and inspection sticker into one.

UPDATE: S.B. 1350, though it passed the Senate, never received a floor vote in the House. H.B. 2890 was never heard in committee.

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To Clear or Not to Clear: an OmniBase Hold

Arguably the most valuable passive enforcement tool at the courts' disposal is the Failure to Appear/Failure to Pay OmniBase program. In a nutshell, the program allows courts to flag a person's license, denying renewal to those defendants who have failed to appear or have failed to pay for any offense in the municipal court's jurisdiction. Overall, courts feel it is a wonderful program that works well and clearly.[13] There are, however, a few of shades of grey lurking in the statutes. Consider the following situation:

An angry defendant calls you. Last year, he missed two appearance dates. He was flagged in the Failure to Appear/OmniBase program that holds the renewal of his license. He has since moved to Arkansas, and cannot get his license there either as a result of this OmniBase hold. He owes $500, and he would like to be put on a payment plan. Generally, you approve payment plans, but you have some hesitation with this one as he is now an out of state defendant. You tell him that he can indeed pay over time, but you will not release the OmniBase hold until his judgment is paid in full. This makes practical sense, because with the hold, there is an incentive to pay; but once the hold is lifted and the defendant gets his license, the incentive to pay disappears. Furthermore, if the defendant makes one payment, gets his license in Arkansas, and then stops paying, OmniBase will no longer apply to him as an Arkansas resident. The defendant is upset because he needs and wants his license in Arkansas.

So the question becomes: can OmniBase holds be cleared this way when dealing with payment plans? What do the statutes say? Let us look to part of Section 706.005 of the Transportation Code.

> CLEARANCE NOTICE TO DEPARTMENT.
> (a) A political subdivision shall immediately notify the department that there is no cause to continue to deny renewal of a person's driver's license based on the person's previous failure to appear or failure to pay or satisfy a judgment ordering the payment of a fine and cost in the manner ordered by the court in a matter involving an offense described by Section 706.002(a), on payment of a fee as provided by Section 706.006 and:
> (1) the perfection of an appeal of the case for which the warrant of arrest was issued or judgment arose;
> (2) the dismissal of the charge for which the warrant of arrest was issued or judgment arose;
> (3) the posting of bond or the giving of other security to reinstate the charge for which the warrant was issued;
> (4) the payment or discharge of the fine and cost owed on an outstanding judgment of the court; or
> (5) other suitable arrangement to pay the fine and cost within the court's discretion.

Reading Section 706.005(a) and (a)(5), we can see courts shall immediately lift the hold on payment of the fee and a "suitable arrangement" to pay the fine. The arrangement has to be "suitable" within the court's discretion, and it is important to note that a judge never *has* to offer a defendant a payment plan. Many judges have interpreted this statute to provide that the court could say the only "suitable" arrangement is for the OmniBase fee to be paid and the hold lifted only upon the last and final

payment. Others feel that if they are going to accept a payment plan and the OmniBase fee has been paid, then the court must lift the hold on acceptance of the agreement.

Bill to Watch Regarding the OmniBase Program

H.B. 2890: if enacted would reduce the administrative fee from $30 to $10.

UPDATE: H.B. 2890 was never heard in committee.

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OmniBase Discharge

Another issue related to OmniBase is the discharge of the $30 administrative fee. Consider the following scenario. A defendant is convicted, but the judge finds her to be indigent and she satisfied her judgment through community service. Does this satisfaction through community service apply to the OmniBase fee as well?

Refer once again to Section 706.005 (printed above), which requires the city to immediately send a clearance notice upon payment of the $30 OmniBase fee and the "payment or discharge" of the fine and costs of court. Upon reading the statute, one could easily interpret it to mean that the OmniBase fee is clearly separate from the fines and costs of the case as they are mentioned in separate clauses. However, an equally reasonable interpretation would be that the OmniBase fee is a cost of court, and it is possible to discharge through community service. After all, if a defendant is indigent and cannot afford to pay the fine and court costs, it makes little sense that they could afford to pay this administrative fee to release the hold. As courts can no longer engage in the "pay or lay system," an indigent person always has to be offered an alternate means of discharge other than payment of money.[14] An alternate means is to offer the indigent an alternative to jail if they cannot pay, and a defendant should never be jailed for an unpaid OmniBase fee. However, the OmniBase statutes never contemplate what happens when the court does not collect actual money from the defendant, whereas the statutes governing third party collections contracts−another useful collections tool−do contemplate the growing number of defendants who discharge payment of fines and court costs through community service. One can see the black and white begin to blur and gaps start to surface.

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To Move or Not to Move: to Dismiss

When statutes are drafted, there can be exceptions, defenses, and affirmative defenses to its application; each carries a different burden. It is up to the defendant to raise the existence of a defense at trial. A defense to prosecution is not a compliance dismissal. Rather, if a defense is raised, one of two things should happen: the issue is turned over to the fact finder at trial to result in an acquittal[15] or the prosecutor can make a motion to dismiss that the court can grant. The court may not sua sponte dismiss a case just because the defendant introduces evidence of a defense.

There are a few common defenses to prosecution that raise the question: is a motion from the prosecutor required for a court to dismiss the charge? This comes up especially when the defendant brings in proof of financial responsibility, proof of a driver's license, or proof of a child safety seat.[16]

Let us start with the defense to the charge of Failure to Maintain Financial Responsibility[17] (FMFR) contained in Section 601.193 of the Transportation Code.

> DEFENSE: FINANCIAL RESPONSIBILITY IN EFFECT AT TIME OF ALLEGED OFFENSE.
> (a) It is a defense to prosecution under Section 601.191 or 601.195 that the person charged produces to the court one of the documents listed in Section 601.053(a) that was valid at the time that the offense is alleged to have occurred.
> (b) After the court verifies a document produced under Subsection (a), the court shall dismiss the charge.

The statute clearly says proof of financial responsibility is a defense to prosecution, which would ordinarily require evidence at trial and an acquittal or the granting of a motion to dismiss from the prosecutor. However, Subsection (b) contemplates the court dismissing the charge, and, as some argue, gives the court authority to unilaterally dismiss the charge following verification of the proof.

How many courts require the prosecutor to make a motion to dismiss each individual FMFR charge after the defendant has brought in, for example, proof of valid insurance? How many prosecutors are even involved with a case at this stage? Technically, to dismiss such a charge, following evidence of a defense, the court would need a motion to dismiss from the prosecutor. For those judges who read the

statute this way, prosecutors commonly file a standing motion to dismiss all cases in which the defense statute would apply. The standing motion is the easiest solution to bridge the grey area between the competing interpretations that, on one hand, the prosecutor must make a motion to dismiss for the court to so order, and on the other hand, that the court is given the authority to dismiss from the confusing language in the statute.

The defense to prosecution for not having a valid driver's license in one's possession while operating a vehicle is more problematic. Section 521.025 provides, in part:

> LICENSE TO BE CARRIED AND EXHIBITED ON DEMAND; CRIMINAL PENALTY.
> (d) It is a defense to prosecution under this section if the person charged produces in court a driver's license:
> (1) issued to that person;
> (2) appropriate for the type of vehicle operated; and
> (3) valid at the time of the arrest for the offense.
> (f) The court may assess a defendant an administrative fee not to exceed $10 if a charge under this section is dismissed because of the defense listed under Subsection (d).

Clearly, it is a defense to prosecution to bring in proof of a valid driver's license; it is not a compliance dismissal. However, Subsection (f) reads more like a compliance dismissal with the assessment of an administrative fee. Note, though, that the court may assess the administrative fee *if* the case is dismissed; it does not contemplate the fee being assessed *prior* to the case being dismissed. On what authority can a court assess fees against a defendant *after* a dismissal?

Again, there is disagreement in how judges interpret this statute, with some requiring a motion to dismiss from the prosecutor and others treating this more like a compliance dismissal not needing a prosecutor's involvement. Many courts, in an effort to avoid any claims of improper assessment, decline to assess the administrative fee post-dismissal. A standing motion from the prosecutor helps to bridge the gap between the competing interpretations.

Lastly, the common and controversial defense to prosecution available to a person charged with a child passenger safety seat offense is found in Section 545.4121 of the Transportation Code.

> DEFENSE; POSSESSION OF CHILD PASSENGER SAFETY SEAT SYSTEM.
> (a) This section applies to an offense committed under Section 545.412.
> (b) It is a defense to prosecution of an offense to which this section applies that the defendant provides to the court evidence satisfactory to the court that the defendant possesses an appropriate child passenger safety seat system for each child required to be secured in a child passenger safety seat system under Section 545.412(a).

This defense is more in line with the traditional defense to prosecution, as contemplated in the Penal Code definition. Notice how the defendant must provide evidence that is satisfactory to the court. This contemplates some sort of trial proceeding where the court rules on the defense. However, it does not then authorize the court to dismiss the charge; rather, the court would then acquit the defendant. For a dismissal, the court would need to rule on a motion to dismiss. Nevertheless, because of efficiency concerns, the lack of prosecutorial involvement prior to a plea being entered, and the use of standing orders, many courts, process these cases as dismissals. Although technically improper, the statutes are just vague enough to fall in the grey area.

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When is Enough Proof of Financial Responsibility Enough?

There are many instances in the law when a driver must provide proof of financial responsibility. Drivers must provide evidence of financial responsibility when asked for it by a law enforcement officer, when involved in an accident, when registering a vehicle or getting it inspected, or when renewing a driver's license. However, there are two common times when courts are faced with establishing a driver's financial responsibility.

First, if a person has been charged with Failure to Maintain Financial Responsibility (FMFR) under Section 601.191 of the Transportation Code, they can get the charge dismissed if they utilize the defense in Section 601.193, laid out below.

> DEFENSE: FINANCIAL RESPONSIBILITY IN EFFECT AT TIME OF ALLEGED OFFENSE.
> (a) It is a defense to prosecution under Section 601.191 or 601.195 that the person charged produces to the court one of the documents listed in Section 601.053(a) that was valid at the time that the offense is alleged to have occurred.
> (b) After the court verifies a document produced under Subsection (a), the court shall dismiss the charge.

Additionally, courts receive evidence of financial responsibility when granting a driving safety course under Article 45.0511 of the Code of Criminal Procedure. Subsection (b)(6) of the article requires the defendant to "provide evidence of financial responsibility as required by Chapter 601, Transportation Code."

In both of these instances the evidence that must be provided is outlined in Section 601.053 of the Transportation Code, which reads as follows.

> EVIDENCE OF FINANCIAL RESPONSIBILITY.
> (a) As a condition of operating in this state a motor vehicle to which Section 601.051 applies, the operator of the vehicle on request shall provide to a peace officer, as defined by Article 2.12, Code of Criminal Procedure, or a person involved in an accident with the operator evidence of financial responsibility by exhibiting:
> (1) a motor vehicle liability insurance policy covering the vehicle that satisfies Subchapter D or a photocopy of the policy;
> (2) a standard proof of motor vehicle liability insurance form prescribed by the Texas Department of Insurance under Section 601.081 and issued by a liability insurer for the motor vehicle;
> (3) an insurance binder that confirms the operator is in compliance with this chapter;

(4) a surety bond certificate issued under Section 601.121;
(5) a certificate of a deposit with the comptroller covering the vehicle issued under Section 601.122;
(6) a copy of a certificate of a deposit with the appropriate county judge covering the vehicle issued under Section 601.123; or
(7) a certificate of self-insurance covering the vehicle issued under Section 601.124 or a photocopy of the certificate.

The vast majority of drivers provide financial responsibility through an insurance policy. As seen above in Subsections (a)(1) and (a)(2), a person shows evidence by showing a policy of a standard insurance form that covers the vehicle. But what type of policy covers the vehicle? Many (although not most) courts have policies in place requiring insurance that covers the specific driver by name in the policy along with coverage of the car. These court policies appear to go further than the law requires.

Chapter 601 only requires coverage of the vehicle, but this can be confusing. What if the person does not have a vehicle? What if the person does not drive regularly? Do we need to see coverage for the car he or she was driving at the time of the citation or a car that he or she will drive during the time they will be completing the driving safety course? These questions have arisen time and time again. The law only requires coverage of the vehicle. The only vehicle the court has knowledge of is the one listed on the face of the citation. If the defendant can show coverage for that car, presumably they have met the requirement set forth in Chapter 601. There is no requirement that they be named on the policy. In fact, Section 601.076 of the Transportation Code includes within the required terms on an owner's policy that it cover a vehicle and pay on behalf of the named insured *or another person* who uses the vehicle with express or implied permission. This is extensive coverage, and would apply to someone driving with permission (as long as they are not specifically excepted from the policy). Likewise, Section 601.054 states that evidence from an owner shall be accepted for a driver that is an employee of the owner or that is a member of the owner's immediate family or household. These sections reveal a lower threshold of evidence that must be presented than many courts think exists. Keeping these statutes in mind may not clear up all of the shades of grey regarding insurance and financial responsibility, but it may save some heartache and hassle for both courts and defendants.

Bill to Watch Regarding Liability Insurance Policies

H.B. 1773: if enacted would prohibit named driver policies, and only allow excluded drivers if by name and not by class.

Update: Though it passed the House, H.B. 1773 was never heard in the Senate committee.

H.B. 1810: if enacted would prohibit permissive driver exclusion policies.

Update: H.B. 1810 never received a floor vote.

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To Administer or Not to Administer: the Oath

One of the requirements for a municipal court complaint−the charging instrument−is that the complaint be sworn to before an appropriate officer. The question becomes: who can be this officer and administer the oath to the affiant?

Article 45.019(d) provides that "a complaint may be sworn to before any officer authorized to administer oaths." Those persons authorized to administer an oath in Texas are outlined in Section 602.002 of the Government Code, and include:

> (1) a judge, retired judge, or clerk of a municipal court;
> (2) a judge, retired judge, senior judge, clerk, or commissioner of a court of record;
> (3) a justice of the peace or a clerk of a justice court;
> (4) an associate judge, magistrate, master, referee, or criminal law hearing officer;
> (5) a notary public;
> (6) a member of a board or commission created by a law of this state, in a matter pertaining to a duty of the board or commission;
> (7) a person employed by the Texas Ethics Commission who has a duty related to a report required by Title 15, Election Code, in a matter pertaining to that duty;
> (8) a county tax assessor-collector or an employee of the county tax assessor-collector if the oath relates to a document that is required or authorized to be filed in the office of the county tax assessor-collector;
> (9) the secretary of state or a former secretary of state;
> (10) an employee of a personal bond office, or an employee of a county, who is employed to obtain information required to be obtained under oath if the oath is required or authorized by Article 17.04 or by Article 26.04(n) or (o), Code of Criminal Procedure;
> (11) the lieutenant governor or a former lieutenant governor;
> (12) the speaker of the house of representatives or a former speaker of the house of representatives;
> (13) the governor or a former governor;
> (14) a legislator or retired legislator;
> (15) the attorney general or a former attorney general;
> (16) the secretary or clerk of a municipality in a matter pertaining to the official business of the municipality; or
> (17) a peace officer described by Article 2.12, Code of Criminal Procedure, if:
>> (A) the oath is administered when the officer is engaged in the performance of the officer's duties; and
>> (B) the administration of the oath relates to the officer's duties.

This list is pretty extensive and provides the authority for a peace officer to swear out a complaint in front of another, a common practice amongst police officers. However, immediately following Subsection (d) of Article 45.019 comes the following provision:

> (e) A complaint in *municipal court* may be sworn to before:
>> (1) the municipal judge;
>> (2) the clerk of the court or a deputy clerk;
>> (3) the city secretary; or
>> (4) the city attorney or a deputy city attorney.
>> (emphasis added.)

How can one reconcile the provision in Subsection (d) allowing anyone in Section 602.002 of the Government Code to administer the oath with the provision in Subsection (e) providing only four categories of persons that may administer the oath in municipal court?

The Code Construction Act only contributes to the confusion. Specific provisions prevail over general provisions.[18] In this case, Subsection (e) provides a specific provision for municipal courts, while Subsection (d) provides a general provision. Because Chapter 45 governs procedures in both justice and municipal courts, one interpretation is that that the list of those who can administer the oath in the Government Code applies to complaints in justice court, but the limited list in Subsection (e) applies to complaints in municipal court. On the other hand, the two subsections can be reconciled because Subsection (e) actually adds to the list contained in the Government Code; neither the (deputy) clerk of the court nor the (deputy) city attorney is mentioned in the Government Code list. But why repeat the judge or city secretary? The Code Construction Act also provides that effect should be given to all provisions.[19]

Notice that both Subsection (d) and (e) use the word *may*, which the Code Construction Act provides creates a discretionary authority or grants a permission or power. Thus, those person mentioned in Subsection (e) are granted the authority to administer an oath. The provision does not state that the complaint *must* be sworn to before one of those persons.[20]

So what is the court to do? One city attorney has opined that if possible, have the complaints be sworn to before one of the persons listed in Subsection (e). If not possible, then move to one of the parties listed in Section 602.002 of the Government Code. At this time, the author is not aware of any case law challenging the use of an officer not authorized under Subsection (e). However, a complaint is defective if it does not contain a proper jurat. If the jurat shows that the affidavit was sworn before someone who had no authority to administer the oath, the complaint is invalid. This is one shade of grey that has no black or white answer, but could carry extreme consequences.

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Conclusion

Continuing with Billy Joel's lyrics from the song *Shades of Grey*:

> *Now with the wisdom of years*
> *I try to reason things out*
> *And the only people I fear*
> *are those who never have doubts.*

Ideally, all legislation would be written so as never to warrant interpretation; however, realistically, judges are tasked with deciding issues of law and interpreting what statutes mean, require, or prohibit. Statutes can be confusing and interpretations may conflict, but many courts rely on these grey areas to tailor procedures that most appropriately satisfy the needs of their court and community. At the very least, thinking about these shades of grey helps us all to better attempt to effectuate the letter of the law. And besides, if everything were black and white, what fun would that be?

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[1] Lyrics and performance by Billy Joel, *Shades of Grey*, from the *River of Dreams* album (1993).
[2] Article 27.14(c), Code of Criminal Procedure.
[3] Definition from www.dictionary.law.com. *See also,* Section 311.011(a) of the Government Code, regarding the common usage of words.
[4] Article 45.0215(a)(1) of the Code of Criminal Procedure requires that in any case against a child (defined as a person under the age of 17 who has not had the disabilities of minority removed), the municipal judge or justice of the peace must take the defendant's plea in open court. The statute also provides that a person charged with "sexting" must enter a plea in open court. Article 45.0215(a)(2), Code of Criminal Procedure.
[5] Article 45.0215(c), Code of Criminal Procedure.
[6] Minor alcohol offenses are: minor in consumption, minor in possession, minor driving under the influence, purchase of or attempt to purchase alcohol by a minor, or misrepresentation of age by a minor.
[7] Section 548.602, Transportation Code.
[8] Note that this statute parallels the compliance dismissal for an expired handicap parking placard that is found in Section 681.013 of the Transportation Code.
[9] *See,* Section 311.016(2), Government Code.
[10] *See,* Section 311.016(1), Government Code.
[11] *See,* Articles 103.002 and 45.203(d), Code of Criminal Procedure.
[12] A review of the legislative history on Section 548.605 reveals that the original statute was a discretionary dismissal if the defendant remedied the defect within 10 working days and allowed the court to assess an administrative fee not to exceed $10. A 1999 amendment created the two dismissals, one mandatory and one discretionary, and a 2007 amendment increased the time frame in which the defendant had to comply and the amount of the administrative fee. Nowhere in the bill analysis for any of the amendments is it stated or implied that a fee cannot be charged for a discretionary dismissal. *See also,* Section 311.023(5), Government Code.
[13] *See,* Chapter 706, Transportation Code. *See also*, Regan Metteauer, "Omnibase Services of Texas: No Show, No Pay, No Problem?" *The Recorder* (May 2013) at 15.
[14] *See,* Ryan Kellus Turner, "Pay or Lay: *Tate v. Short* Revisited," *The Recorder* (March 2003) at 1.
[15] *See,* Section 2.03, Penal Code.
[16] See the defenses available in Section 601.193, Section 521.025(d) and (f), and Section 545.4121 of the Transportation Code, respectively.
[17] Section 601.191, Transportation Code.
[18] *See*, Section 311.026(b), Government Code.
[19] *See*, Section 311.021(2), Government Code.
[20] *See*, Section 311.016(3) of the Government Code, which provides that the term "must" creates or recognizes a condition precedent.