

PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

CHAPTER 3	PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL
------------------	--

3-1	Dealing with the Pro Se Defendant Out of Court.....	73
3-2	Dealing with the Pro Se Defendant in Court Proceedings.....	74
3-3	Dealing with Defendants Represented by Counsel.....	77

CHAPTER 3 PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

Defendants in municipal court have a constitutional and statutory right to the assistance of counsel. However, with the exception of “interest of justice” appointments, per Article 1.051(c), Code of Criminal Procedure, even indigent defendants in municipal court do not have the right to a court appointed attorney. (For more information on “interest of justice” appointments, see, “The Oversimplification of the Assistance of Counsel in Class C Misdemeanors in Texas,” *The Municipal Court Recorder* 18:3 (January 2009). Most defendants accused of fine-only offenses appear in court pro se (unrepresented by counsel). This fact poses problems in ensuring that defendants are treated fairly. A court should have procedures for dealing with the pro se defendant in two settings: (1) outside the courtroom; and (2) in the courtroom during hearings.

1. Dealing with the Pro Se Defendant out of Court

Checklist 3-1	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Develop procedures and standing orders for support personnel for processing walk-in defendants. <ul style="list-style-type: none"> <input type="checkbox"/> a. Give walk-in defendants information on court proceedings: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Special attention should be paid to the right to a jury trial and the right to counsel; and <input type="checkbox"/> (2) Be aware that special procedures apply when dealing with a juvenile. <input type="checkbox"/> 2. Instruct support personnel not to give legal advice. They may inform individuals of the procedures, but not suggest or recommend a particular course of action. <input type="checkbox"/> 3. When a guilty plea is processed or fine paid, the clerk should verify it is being done by the defendant or person authorized to act for the defendant. 	<p>For a more complete discussion of a criminal defendant’s rights, see <i>TMCEC The Municipal Judges Book</i>: Chapter 4.</p> <p>See Chapter 4.</p> <p>See Chapter 13.</p> <p>A guilty plea is void when it is not entered by or authorized by the defendant. <i>Ex parte Super</i>, 175 S.W. 697 (Tex. Crim. App. 1915).</p>

CHAPTER 3 PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

2. Dealing with the Pro Se Defendant in Court Proceedings

Checklist 3-2	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Remind the defendant that conversations with the judge are “court” proceedings. <input type="checkbox"/> 2. Emphasize the right to retain counsel. Reasonable accommodations (by resetting appearance dates and/or granting continuances) should be provided to defendants who appear in court pro se but who after being advised of their right to counsel wish to seek the assistance of counsel. <input type="checkbox"/> 3. If the defendant chooses to represent himself or herself, inquire whether the defendant understands the consequences of proceeding without counsel. <ul style="list-style-type: none"> <input type="checkbox"/> a. There is no right to lay representation (except self-representation). <input type="checkbox"/> b. Allowing a lay person to act as an attorney representing anyone other than himself or herself permits unauthorized practice of law. This includes allowing a parent to represent his or her child. <input type="checkbox"/> 4. No special treatment is required for pro se defendants. <input type="checkbox"/> 5. The judge should be aware of the defendant’s ignorance of legal procedure and rules of evidence in maintaining order and decorum. 	<p>See Chapter 4 in this book for the complete procedure for appearances.</p> <p>A warning and waiver of the constitutional right to retain counsel is required. <i>Warr v. State</i>, 591 S.W.2d 832 (Tex. Crim. App. 1979).</p> <p><i>U.S. v. Wilhelm</i>, 570 F.2d 461 (3d Cir. 1978).</p> <p>An accused who elects to represent himself or herself cannot complain of the lack of effective assistance of counsel. The rules of evidence, procedure, and substantive law will be applied the same to all parties in a criminal trial whether that party is represented by counsel or appearing pro se. <i>Williams v. State</i>, 549 S.W.2d 183 (Tex. Crim. App. 1977). See TMCEC video <i>Pro Se Defendants in Municipal Court</i>.</p> <p>See <i>TMCEC The Municipal Judges Book</i>: Chapter 1.</p>

- 6. In the interest of fairness and orderliness, the court may inform the defendant of:
 - a. General procedure and steps in the trial;
 - b. Voir dire and jury selection;
 - c. Opening statement;
 - d. Right to confront and examine prosecution witnesses;
 - e. Right to present defenses and defense evidence;
 - f. Right to testify on own behalf;
 - g. Right to request jury instructions;
 - h. Closing argument; and
 - i. Right to appeal.
- 7. If the defendant wishes to testify, inform him or her of the privilege against self-incrimination and obtain waiver.
- 8. The judge must maintain control of proceedings.

Warning to testifying defendant:

“You have the constitutional right under the 5th Amendment not to testify and the fact that you do not testify cannot be held against you in any way. The prosecution is required to prove your guilt beyond a reasonable doubt, and you are not obliged to present any evidence. If you do testify, you may be cross-examined, that is, asked questions by the prosecution on any matter relevant to any issue in the case. Do you understand that?”

[If the defendant says “yes”:]
“Then, understanding that, it is your desire to testify on your own behalf?”

See *TMCEC Municipal Judges Book*: Chapter 4 for a more complete discussion of a defendant’s 5th Amendment rights.

- a. If the defendant is unruly and disruptive, consider warning, restraint, or threat of contempt.

Illinois v. Allen, 397 U.S. 337 (1970).
See Checklists 14-1 and 16-5.

CHAPTER 3 PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

3. Dealing with Defendants Represented by Counsel

While most defendants appearing in municipal court are pro se, the number of defendants retaining counsel continues to increase. Judges should welcome representation by counsel and foster an environment where it is understood that business of the court shall be conducted in accordance with the legal and ethical guidelines applicable to both the bench and the bar. The following are basic guidelines that municipal judges should keep in mind in dealing with attorneys.

Checklist 3-3	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. In municipal court, a defendant has the right to appear by counsel as in all other cases. <input type="checkbox"/> 2. In order to represent a defendant in any Texas court, an attorney must be licensed to practice law. <ul style="list-style-type: none"> <input type="checkbox"/> a. Upon proof of certain legal requirements and a motion by the Texas Board of Law Examiners, a person may be duly admitted and licensed by the Texas Supreme Court as an attorney and counselor at law and able to practice “in all Courts of the State of Texas.” <input type="checkbox"/> b. Attorneys licensed to practice law in other states may seek <i>pro hac vice</i> admission to practice in Texas courts. This requires the attorney to complete an application provided by the Texas Board of Law Examiners, paying fees, and filing a sworn motion pursuant to Rule XIX of the Rules Governing Admission to the Bar of Texas in the court where the attorney requests permission to participate in representation. The decision to grant or deny such a motion is not made by the Board of Law Examiners, but rather by the court in which the application is filed. <input type="checkbox"/> 3. Judges should be just as familiar with the Texas Disciplinary Rules of Professional Conduct (setting ethical guidelines for lawyer) as they are with the Texas Code of Judicial Conduct. Lawyers are obligated to conduct themselves in a manner consistent with the Disciplinary Rules of Professional Conduct in all Texas courts. 	<p>Art. 45.020, C.C.P.</p> <p>Individuals who engage in the unauthorized practice of law may be civilly enjoined. For additional information visit the Texas Unauthorized Practice of Law Committee at www.txuplc.org.</p> <p>To see if an attorney is licensed and active to practice law in Texas (and to determine whether the attorney has a disciplinary history) visit the State Bar of Texas at www.texasbar.com.</p> <p>For more information on <i>pro hac vice</i> admission, visit the Texas Board of Law Examiners at www.ble.state.tx.us.</p> <p>For more information visit the Texas Center for Legal Ethics and Professionalism at www.txethics.org.</p>

- ❑ 4. Attorneys engaged in misconduct cast discredit on the legal profession. Judges have a special duty to maintain the integrity of the legal system. Hence, judges also have a duty to prevent attorney misconduct. A judge who receives information clearly establishing that a lawyer has committed a violation of the Rules of Professional Disciplinary Conduct has an ethical obligation to “take appropriate action.” “A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Disciplinary Conduct that raises a substantial question as to a lawyer’s honesty, trustworthiness, or fitness as a lawyers in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.”

- ❑ 5. Courts should consider the merits of requiring a letter of representation be on file with the court in every case where the defendant is represented by counsel. Such letters become part of the court’s file. A letter of representation is important for the following reasons:
 - ❑ a. It tells the court the scope of representation;
 - ❑ b. It provides the court with the attorney’s contact information that will be used in all subsequent communications from the court;
 - ❑ c. Prosecutors are not allowed to directly communicate with defendants represented by counsel. Rather, the prosecutor must communicate with the defendant through counsel; and
 - ❑ d. It may become important documentary evidence in the event defendant counsel fails to appear in court or commits other violations of the Texas Disciplinary Rules of Professional Conduct.

- ❑ 6. The court may require the attorney to acknowledge the existence of any local rules (rules of decorum or guidelines for practicing before the court).

Canon 3(D)(2), *Code of Judicial Conduct*.

The act of an attorney standing for or acting on behalf of a client is called “representation.” It is customary for defense attorneys to file a *letter of representation* informing both the court and the prosecution that a particular lawyer or law firm is representing the defendant in a specified matter. *Black’s Law Dictionary*

Rule 4.02, Texas Disciplinary Rules of Professional Conduct.

See, “An Introduction to Model Rules of Court Decorum” *Municipal Court Recorder*, Vol. 11:9 (Summer 2002) at 12.