
Texas Municipal Courts Education Center
2020 BENCH BOOK



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Texas Court of Criminal Appeals

ABBREVIATIONS

A.B.C.	Alcoholic Beverage Code
A.G.	Attorney General
Art.	Article
C.C.P.	Code of Criminal Procedure
Ch.	Chapter of Act of Legislation
D.A.D.A.P.	Drug and Alcohol Driving Awareness Program
D.L.	Driver's License
E.C.	Education Code
et al	and elsewhere
et seq.	(et sequentes) and those that follow
F.C.	Family Code
F. Supp.	Federal Supplement
Fin. C.	Finance Code
G.C.	Government Code
H.B.	House Bill
H.S.C.	Health and Safety Code
Infra	(Below) Refers the reader to an ensuing part of the book.
L.N.	Legislative Note
Leg.	Legislature
O.C.	Occupations Code
P.C.	Penal Code
P.W.C.	Parks and Wildlife Code
S.B.	Senate Bill
Supra	(Above) Refers the reader to a previous part of the book.
S.W.2d	Southwestern Reporter, Second Series
Sec.	Section
T.A.C.	Texas Administrative Code
T.C.	Transportation Code
Tex. Crim. App.	Texas Court of Criminal Appeals
Tex. Ct. App.	Texas Court of Appeals
Tex. R. Civ. P.	Texas Rules of Civil Procedure
TMCEC	Texas Municipal Courts Education Center
TMCA	Texas Municipal Courts Association
T.R.A.P.	Texas Rules of Appellate Procedure
T.R.E.	Texas Rules of Evidence
V.A.C.S.	Vernon's Annotated Civil Statutes

PREFACE

The TMCEC Bench Book is a reference guide for Texas municipal judges serving both as trial court judges as well as magistrates. This 13th edition is titled TMCEC 2020 Bench Book as it incorporates important statutory changes from the 86th Regular Legislature. Some of these changes are effective January 1, 2020. Notably, the passage of S.B. 346 brought important changes relating to criminal court costs and procedures. Rather than try and provide information on dual sets of law—with one set becoming inapplicable in little more than a month, we made the decision to provide clear guidance for 2020 and beyond.

This book often references *The Recorder* and the *TMCEC Forms Book*. Both of these resources can be easily accessed at <http://www.tmcec.com/Resources>.

Our publications and educational offerings only happen as a result of the collaborative teamwork of the TMCEC staff: Ryan Kellus Turner, Robby Chapman, Elizabeth Rozacky, Ned Minevitz, Elizabeth De La Garza, Lily Pebworth, Patty Thamez, Deadra Stark, Matthew Kelling, Andrea Walker, Brandi Valentine, Crystal Ferguson, Avani Bhansali, Antaris Jackson, Katherine Walker, Molly Knowles (2019 Texas Municipal Court Fellow), and Michael Null (2019 Texas Municipal Court Fellow).

A special word of thanks is owed to the myriad calls TMCEC receives on the toll-free legal line. These inquiries often set off a chain reaction of discussions, debates, and revisions that ultimately lead to better publications. Likewise, we are indebted to the Texas Court of Criminal Appeals, the Texas Municipal Courts Association's Board of Directors, and our constituents for their support of TMCEC.

The TMCEC Bench Book has grown over the years, and many people have worked to make it a better publication. As it is a perpetual work-in-progress, we welcome your comments and suggestions. The original version was published in 1996. That version and all subsequent ones were made possible through helpful comments and suggestion of municipal judges and court support personnel throughout Texas.

Mark Goodner
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Texas Municipal Courts Education Center
November 2019

TABLE OF CONTENTS

Preface	i
Table of Contents.....	ii
Table of Cases.....	viii

Checklist #	Title of Checklist	Page
-------------	--------------------	------

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

1. Magistrate's Warning for Adult, Article 15.17, C.C.P.....	2
2. When Bail May Be Denied or Delayed	14
3a. Release Because a Magistrate Has Not Determined Whether Probable Cause Exists.....	17
3b. When the Defendant Must Be Released Because the State is Not Ready	19
4. Requisites and Filing of a Bail Bond.....	21
5. Requisites of a Personal Bond	23
6. Conditions of Bail	29
7. When Bail May Be Raised, Changed, or Forfeited.....	34
8. Magistrate's Order for Emergency Protection (MOEP), Article 17.292, C.C.P.	36
9. Appointment of Counsel – When the Right Attaches.....	43
10. Examining Trial.....	44
11. Examination of Defendant in Custody Suspected of Having Mental Illness or Intellectual Disability .	47

Property Hearings: Disposition of Stolen Property

12. Restoration when No Trial Pending.....	51
13. Restoration upon Trial or Trial Pending	55
14. Hearing.....	57

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

1. The Chapter 15 Arrest Warrant.....	59
2. The Capias	62
3. The Chapter 45 Arrest Warrant.....	64
4. Search Warrants for Persons and Property.....	67
5. The Affidavit Supporting the Arrest Warrant, Capias, or Search Warrant.....	70
6. Search Warrants for Mere Evidence	73
7. Blood Search Warrants	75
8. Search Warrants to Photograph a Child. Art. 18.021, C.C.P.	78
9. Administrative Search Warrants. Art. 18.05, C.C.P.	79
10. Search Warrants and Affidavits Submitted by Reliable Electronic Means	81
11. Search Warrant Return and the Immediate Disposition of Seized Property.....	84
12. Public Disclosure of Arrest Warrants and Affidavits.....	86
13. The Capias Pro Fine.....	88

CHAPTER 3 PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

1. Communicating with the Pro Se Defendant out of Court.....	93
2. Communicating with the Pro Se Defendant in Court Proceedings	94
3. Defendants Represented by Counsel	96

CHAPTER 4 APPEARANCE AND PLEAS

1. Appearance	99
2. Pleas Made by Mail	103
3. Pleas in Open Court.....	107

4. Pleas in Jail	110
------------------------	-----

CHAPTER 5 DRIVING SAFETY COURSES (DSC)

1. Eligibility for Mandatory DSC	113
2. Procedure for Granting DSC	118

CHAPTER 6 PRETRIAL PROCEEDINGS

1. Conducting a Hearing	123
2. Arraignment	126
3. Motions for Continuance	127
4. Motions to Dismiss the Case	130
5. Motions to Quash the Complaint	133
6. Recusal and Disqualification	136
7. Requests for Discovery	140

Motions About Evidence

8. Motions to Suppress	144
9. Motions in Limine	148

CHAPTER 7 TRIAL PROCEEDINGS

1. The Non-Jury Trial (Bench Trial)	149
2. The Jury Trial – Before Trial	155
3. The Jury Trial – Trial Day	158
4. The Jury Trial – Batson Challenges	178
5. The Jury Trial – Jury Charge	181
6. The Jury Trial – Jury Deliberation	189
7. The Jury Trial – Master Checklist	192

CHAPTER 8 SENTENCING, DEFERRED, AND INDIGENCE

1. Sentencing	197
2. Deferred Disposition, Art. 45.051, C.C.P.	201
3. Indigence	207

CHAPTER 9 BOND FORFEITURES

1. Cash Bond Forfeitures in Satisfaction of Fine Under Article 45.044, C.C.P.	215
2. Cash, Surety, or Personal Bond Forfeiture Procedures Under Chapter 22, C.C.P.	217

CHAPTER 10 NEW TRIALS AND APPEALS

1. Motion for New Trial and Appeal in Non-record Municipal Court	231
2. Motion for New Trial and Appeal in Municipal Court of Record	235
3. Transcript in a Municipal Court of Record	240

CHAPTER 11 CITY ORDINANCES — GENERAL RULES

1. General Rules	243
------------------------	-----

CHAPTER 12 OATHS AND CEREMONIES

Complaints (a/k/a the Charging Instrument)

1. Complaints Filed in Municipal Court	249
--	-----

Complaints (a/k/a the Probable Cause Affidavit)

2. Complaints Accepted by a Magistrate as Sworn Affidavit for Arrest Warrant	251
--	-----

3. Other Affidavits	253
4. Oaths Administered During Trial — Jurors and Witnesses	255
5. Interpreters	257
6. Court Reporter	259
7. Appointed and Elected Officials	260

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

1. General Procedures	263
2. Waiver of Municipal Court Jurisdiction and Transfer of Child to Juvenile Court	272
Traffic and Other Motor Vehicle Misdemeanors	
3 Offenses	274
Traffic and Other Motor Vehicle Misdemeanors	
4. Penalties	275
Alcoholic Beverage Code	
5. General Status Offenses	278
6. General Penalty Provision, Section 106.071, A.B.C.	283
7. Specific Penalty Provision, Section 106.041, A.B.C. – Minor D.U.I.	290
Health & Safety Code	
8. Tobacco Offenses Committed by Minors	294
9. Penalties for Tobacco Use by Minors. Section 161.253, H.S.C.	298
Penal Code Offenses and Other Fine-Only Misdemeanors	
10. Offenses	301
11. Penalties	302
Education Code Offenses	
12. Criminal Procedure for School Offenses	303
13. Offenses	307
14. Penalties and Orders	309
15. Additional Optional Orders	310
16. Difficulty or Default in Payment of Fine	313
17. Failure to Appear	315
18. Children Taken into Custody – General Procedures	317
19. Children Taken into Custody for Violation of Juvenile Curfew	319
20. Unadjudicated Children, Now Adults (No Appearance Made)	321
21. Children Now Adults Who Fail to Pay	323
Expunction	
22. Expunction Under Article 45.0216, C.C.P.	324
23. Expunction for State Offenses Under the Alcoholic Beverage Code	327
24. Expunction of Status Tobacco Offenses	329
25. Expunction Procedures for Truancy Offenses	331
26. Confidentiality	332
27. Juvenile Contempt	334
Magistrate’s Warning for a Written or Oral Juvenile Confession of a Child, Section 51.095, Family Code	
28. Written Confession	336
29. Oral Confession	338

CHAPTER 14 CONTEMPT OF COURT

1. General Contempt	339
---------------------------	-----

CHAPTER 15 CORPORATIONS AND ASSOCIATIONS

1. Corporations and Associations	349
--	-----

CHAPTER 16 EVIDENCE

1. When Do the Texas Rules of Evidence Apply?	355
2. Ways to Prove a Fact	358
3. How Objections are Made and Ruled on by the Court.....	359
4. Hearsay	361
5. Objections Concerning Nature of Questions, Answers, or Courtroom Behavior	364
6. Objections to the Introduction of Physical Evidence	366

CHAPTER 17 ANIMALS

1. Definitions.....	367
2. Dogs that Cause Death or Serious Bodily Injury to a Person.....	369
3. Dangerous Dogs.....	372
4. Disposition of Cruelly Treated Animals	380

CHAPTER 18 CHAPTER 55 EXPUNCTIONS

1. Chapter 55 Expunction in Municipal Courts of Record.....	385
---	-----

TABLE OF CASES

Adkins v. State, 717 S.W.2d 363 (Tex. Crim. App. 1986).....	70
Aguirre v. State, 22 S.W.3d 463 (Tex. Crim. App. 1999).....	246
Allen v. United States, 164 U.S. 492 (1896).....	190
Alvarez v. State, 861 S.W.2d 878 (Tex. Crim. App. 1992).....	223
Batson v. Kentucky, 106 S.Ct. 1712 (1986).....	178
Bills v. State, 796 S.W.2d 194 (Tex. Crim. App. 1990).....	14
Brady v. Maryland, 373 U.S. 83 (1963).....	142
Brendlin v. California, 551 U.S. 249 (2007).....	144
Browne v. State, 268 S.W.2d 131 (Tex. Crim. App. 1954).....	225
Brown v. State, 870 S.W.2d 53 (Tex. Crim. App. 1994).....	189
Burns v. State, 814 S.W.2d 768 (Tex. App.—Houston [14th Dist.] 1991, rev'd on other grounds).....	215, 218
Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967).....	79
County of Riverside v. McLaughlin, 500 U.S. 44 (1991).....	2
Dees v. State, 865 S.W.2d 461 (Tex. Crim. App. 1993).....	228
Dopico v. State, 752 S.W.2d 212 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).....	360
Drope v. Missouri, 420 U.S. 162, 171-72 (1975).....	131
Empy v. State, 571 S.W.2d 526, 529 (Tex. Crim. App. 1978).....	107
Ethington v. State, 819 S.W.2d 854 (Tex. Crim. App. 1991).....	359
Ex parte Aldridge, 334 S.W.2d 161 (Tex. Crim. App. 1959).....	339
Ex parte Anderer, 61 S.W.3d 398 (Tex. Crim. App. 2001).....	22
Ex parte Avila, 659 S.W.2d 443 (Tex. Crim. App. 1983).....	342
Ex parte Barnett, 600 S.W.2d 252 (Tex. 1980).....	347
Ex parte Canady, 140 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2004).....	349
Ex parte Chambers, 898 S.W.2d 257 (Tex. 1995).....	339
Ex parte Clear, 573 S.W.2d 224 (Tex. Crim. App. 1978).....	1, 59, 67
Ex parte Crenshaw, 259 S.W.587 (Tex. Crim. App. 1924).....	342
Ex parte Daniels, 722 S.W.2d 707 (Tex. Crim. App. 1987).....	339
Ex parte Deaton, 582 S.W.2d 151 (Tex. Crim. App. 1979).....	8
Ex parte Ellis, 275 S.W.3d 109 (Tex. App.—Austin 2008).....	136
Ex parte Flournoy, 312 S.W.2d 488 (Tex. 1958).....	340
Ex parte Goodman, 742 S.W.2d 536 (Tex. App.—Fort Worth 1987).....	344
Ex parte Gordon, 584 S.W.2d 686 (Tex. 1979).....	340
Ex Parte Hannington, 832 S.W.2d 355 (Tex. Crim App. 1992).....	91, 199
Ex parte Hill, 52 S.W.2d 367 (Tex. 1932).....	340
Ex parte King, 613 S.W.2d 503 (Tex. Crim. App. 1981).....	34
Ex parte Knable, 818 S.W.2d 811 (Tex. Crim. App. 1991).....	339, 340
Ex parte Krupps, 712 S.W.2d 144 (Tex. Crim. App. 1986).....	339, 345
Ex parte Lee, 704 S.W.2d 15 (Tex. 1986).....	348
Ex Parte Minjares, 582 S.W.2d 105 (Tex. Crim. App. 1978).....	91
Ex parte Norton, 191 S.W.2d 713 (Tex. 1946).....	339, 342
Ex parte O'Fiel, 246 S.W. 664 (Tex. Crim. App. 1923).....	340
Ex parte Powell, 883 S.W.2d 775 (Tex. App.—Beaumont 1994)	
Sec. 21.002(c), G.C.	285, 291
Ex parte Rodriguez, 583 S.W.2d 792 (Tex. Crim. App. 1979).....	8
Ex parte Smith, 467 S.W.2d 411 (Tex. Crim. App. 1971).....	345
Ex parte Super, 175 S.W. 697 (Tex. Crim. App. 1915).....	93
Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976).....	346, 347
Gaal v. State, 332 S.W.3d 448 (Tex. Crim. App. 2011).....	136
Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991).....	183
Gerstein v. Pugh, 420 U.S. 103 (1975).....	2
Gilbert v. State, 493 S.W.2d 783 (Tex. Crim. App. 1973).....	1, 59
Guerra v. Garza, 987 S.W.2d 593 (Tex. Crim. App. 1999).....	19, 34
Guzman v. State, 955 S.W. 2d 85 (Tex. Crim. App. 1997).....	2
Hill v. State, 827 S.W.2d 860 (Tex. Crim. App. 1992).....	178

Illinois v. Allen, 397 U.S. 337 (1970).....	95
Illinois v. Gates, 462 U.S. 213 (1983).....	70
In re Bell, 894 S.W.2d 119 (Tex. 1995).....	340
James v. State, 413 S.W.2d 111 (Tex. Crim. App. 1967).....	226
James v. State, 563 S.W.2d 599 (Tex. Crim. App. 1978); Art. 39.02, C.C.P.	140
J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994).....	178
Katz v. United States, 389 U.S. 347 (1967).....	144
Kindley v. State, 879 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1994)	133
Lagrone v. State, 742 S.W.2d 659 (Tex. Crim. App. 1987).....	70
Lewis v. State, 779 S.W.2d 449 (Tex. App.—Tyler 1989, pet. ref'd).....	180
Linscomb v. State, 829 S.W.2d 164 (Tex. Crim. App. 1992).....	178
McDaniel v. State, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003).....	131
Meador v. State, 780 S.W.2d 836 (Tex. App.—Houston [14th Dist.] 1989, no pet.)	34
Meshell v. State, 739 S.W.2d 246 (Tex. Crim. App. 1987).....	131
Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).....	145
Miranda v. Arizona, 384 U.S. 436 (1966).....	146
Montoya v. State, 810 S.W.2d 160 (Tex. Crim. App. 1989).....	127
Moore v. State, 874 S.W.2d 671 (Tex. Crim. App. 1994).....	189
Naff v. State, 946 S.W.2d 529 (Tex. App.—Fort Worth 1997).....	249
Paulson v. State, 28 S.W.3d 570 (Tex. Crim. App. 2000).....	183
Phillips v. State, 77 S.W.3d 465 (Tex. App.—Houston [1st Dist.] 2002).....	53
Prosper v. State, 788 S.W.2d 625 (Tex. App.—Houston [14th] 1990).....	179
Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980).....	142
Rakas v. Illinois, 439 U.S. 128 (1978).....	144
Rothgery v. Gillespie County, 554 U.S. 191.....	1, 43
Sabine Consol. Inc. v. State, 816 S.W.2d 784 (Tex. App.—Austin 1991).....	349
Salazar v. State, 795 S.W.2d 187 (Tex. Crim. App. 1990).....	178, 179
Sanchez v. State, 138 S.W.3d 324 (Tex. Crim. App. 2004).....	134
Schmidt v. State, 659 S.W.2d 420 (Tex. Crim. App. 1983).....	72
Sharp v. State, 677 S.W.2d 513 (Tex. Crim. App. 1984).....	63
State ex rel Curry v. Bowman, 885 S.W.2d. 421 (Tex. Crim. App. 1993).....	180
State, Gilbert v.	67
State v. Jiminez, 987 S.W.2d 886 (Tex. Crim. App. 1999).....	107
State v. Johnson, 821 S.W.2nd 609 (Tex. Crim. App. 1991).....	132
State v. Morales, 869 S.W.2d 941 (Tex. 1994).....	246
Tate v. Short, 401 U.S. 395 (1971).....	88, 207
Tatum v. State, 861 S.W.2d 27 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).....	107
Taylor v. State, 612 S.W.2d 566 (Tex. Crim. App. 1981).....	128
Terry v. Ohio, 392 U.S. 1 (1968).....	145
Tex. Atty. Gen. Op. GA-0161 (2004).....	156
Tex. Atty. Gen. Op. JC-0393 (2001).....	91
Tex. Atty. Gen. Op. JM-363 (1985).....	8
Tex. Atty. Gen. Opp. GA-0660 (2008).....	373
Timmons v. Pecorino, 977 S.W.2d 603, (Tex. Crim. App. 1998).....	370
Tompkins v. State, 774 S.W.2d 195 (Tex. Crim. App. 1987).....	179
Treadgill v. State, 275 S.W.2d 658 (Tex. Crim. App. 1955).....	243
U.S. v. Wilhelm, 570 F.2d 461 (3d Cir. 1978).....	94
Vaughan & Sons v. State, 737 S.W.2d 805 (Tex. Crim. App. 1987).....	349
Villarreal v. State, 826 S.W.2d 621 (Tex. App.— Houston [14th Dist.] 1992).....	223
Warr v. State, 591 S.W.2d 832 (Tex. Crim. App. 1979).....	94
Watson v. State, 762 S.W.2d 591 (Tex. Crim. App. 1988).....	1
Wetherby v. State, 482 S.W.2d 852 (Tex. Crim. App. 1972).....	71
White v. State, 930 S.W.2d 673 (Tex. App.—Waco 1996).....	53
Williams v. State, 549 S.W.2d 183 (Tex. Crim. App. 1977).....	94

Williams v. State, 719 S.W.2d 573 (Tex. Crim. App. 1986).....	164
Williams v. State, 767 S.W.2d 872 (Tex. App.—Dallas 1989).....	179
Williams v. State, 767 S.W.2d 872 (Tex. App.—Dallas 1989, pet. ref'd).....	179
Wong Sun v. U.S., 371 U.S. 471 (1963).....	145

MAGISTRATE DUTIES

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

There is no statutory definition of a “magistrate,” but Article 2.10, C.C.P., does tell us the duty of magistrates:

It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.

The duty, as defined above, is broadly worded, but this chapter as well as Chapter 2 will outline in further detail many of the duties that municipal judges have as magistrates. As magistrates, municipal judges serve an important gate-keeping function in the adjudication of all criminal matters, playing an active role in the beginning stages of the life of a criminal action.

While every member of the judiciary in Texas is a magistrate, municipal judges and justices of the peace perform more magistrate duties than all other members of the judiciary combined. Magistrates have co-equal jurisdiction with all other magistrates within the county, and their jurisdiction is coextensive with the limits of the county. *Gilbert v. State*, 493 S.W.2d 783 (Tex. Crim. App. 1973), and *Ex parte Clear*, 573 S.W.2d 224 (Tex. Crim. App. 1978).

As magistrates, municipal judges are authorized to inform adult offenders of their respective rights as required by law. This is one of the most common and important functions of a magistrate. The duties of arresting peace officers and of magistrates are detailed in Article 14.06, C.C.P., which provides that peace officers must take the accused before a magistrate when a warrantless arrest is made pursuant to one of the exceptions to the warrant requirement. Such exceptions are stated in Chapter 14, C.C.P. Similarly, Article 15.17, C.C.P., requires that individuals arrested pursuant to a warrant also be brought before a magistrate. Presentation before a magistrate must take place without unnecessary delay, but in no event more than 48 hours after the person is arrested. Article 15.17, C.C.P.

Texas law contains no specific term for the presentation of the accused before a magistrate. The lack of a statutory term has resulted in the use of various terms (e.g., “magistration,” “15.17 hearing”), which leads to potential confusion. In the past, the U.S. Supreme Court has referred to the accused’s presentation before the magistrate as an “initial appearance,” although the term “magistration” appears to be gaining popularity. In 2008, the U.S. Supreme Court in *Rothgery v. Gillespie County*, 554 U.S. 191, noted the lack of a formal term for what they acknowledged as “magistration.” While the Court of Criminal Appeals has shown no preference for any one term, it has taken issue with courts and attorneys erroneously referring to it as an “arraignment.” *Watson v. State*, 762 S.W.2d 591 (Tex. Crim. App. 1988). An arraignment involves fixing the identity of the offender and taking a plea. See Checklist 6-2.

Generally, a magistrate is involved in the preliminary stages of a criminal proceeding. Such proceedings involve adults accused of criminal offenses. Because juvenile justice laws in Texas are civil, the preliminary stages of a child being taken into custody are governed by Title 3, F.C., not Article 15.17, C.C.P. In this sense, children who are taken into custody are not “magistrated” in the same manner as adults. Magistrates are, however, frequently involved in the procedures governing the taking of a confession by a child. See Checklists 13-29 and 13-30.

For more information on the role of magistrates, see TMCEC *The Municipal Judges Book*, Chapter 1.

General Provisions Applicable to Adults

1. Magistrate’s Warning for Adult, Article 15.17, C.C.P.

Checklist 1-1	Script/Notes
<p><input type="checkbox"/> 1. Determine whether the person has been (1) subject to custodial arrest; or (2) arrested and released after being issued a citation for an enumerated Class A or B misdemeanor.</p> <p><input type="checkbox"/> a. Subject to custodial arrest:</p> <p><input type="checkbox"/> (1) Determine probable cause.</p> <p><input type="checkbox"/> (a) If arrest is by a warrant, no further inquiry as to probable cause is needed.</p> <p><input type="checkbox"/> (b) If arrest is without a warrant, conduct probable cause hearing either by sworn testimony or written affidavit to review the facts and circumstances of the arrest to determine if probable cause exists for continued detention of arrestee.</p> <p><input type="checkbox"/> (2) If there is no probable cause, release the arrestee.</p> <p><input type="checkbox"/> (3) If there is probable cause, proceed.</p>	<p><i>Gerstein v. Pugh</i>, 420 U.S. 103 (1975).</p> <p><i>County of Riverside v. McLaughlin</i>, 500 U.S. 44 (1991).</p> <p>Magistrate to use a practical common sense approach to determine probable cause by considering all facts presented under oath; the “totality of the circumstances” test to determine whether there is a fair probability that the arrestee committed the offense with which he or she is charged. <i>Guzman v. State</i>, 955 S.W. 2d 85 (Tex. Crim. App. 1997).</p> <p>See <i>TMCEC 2020 Forms Book</i>: Release: Magistrate’s Determination of No Probable Cause.</p>

-
- | | |
|---|--|
| <p><input type="checkbox"/> (4) Appearance before a magistrate may be in person or through a videoconference allowing two-way communication of image. A record of the communication between the arrested person and the magistrate shall be made.</p> | <p>Art 15.17, C.C.P.
A videoconference includes secure internet conferencing.</p> |
|
 | |
| <p><input type="checkbox"/> b. Citation for enumerated Class A or B misdemeanor:</p> | |
| <p><input type="checkbox"/> (1) If the person resides in the county where the offense occurred, a peace officer who is charging a person with committing an offense that is an enumerated Class A or B misdemeanor may, instead of taking the person before a magistrate pursuant to Article 14.06(a), C.C.P., issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, and the offense charged.</p> | <p>Art. 14.06(c), C.C.P.</p> |
| <p><input type="checkbox"/> (2) Citations may only be issued for the following enumerated Class A or B misdemeanors:</p> | <p>Art. 14.06(d), C.C.P.</p> |
| <p><input type="checkbox"/> (a) Possession of four ounces or less of marihuana;</p> | <p>Sec. 481.121(b)(1)-(2), H.S.C.</p> |
| <p><input type="checkbox"/> (b) Possession of four ounces or less of a substance in Penalty Group 2-A;</p> | <p>Sec. 481.1161(b)(1)-(2), H.S.C. Effective September 1, 2011, Penalty Group 2-A also includes K2 and other forms of synthetic marihuana.</p> |
| <p><input type="checkbox"/> (c) Criminal mischief, where the value of damage done was \$100 or more but less than \$750;</p> | <p>Sec. 28.03(b)(2), P.C.</p> |
| <p><input type="checkbox"/> (d) Graffiti, where the value of the damage done was \$100 or more but less than \$2,500;</p> | <p>Sec. 28.08(b)(2)-(3), P.C.</p> |

- | | |
|--|--|
| <ul style="list-style-type: none"> <input type="checkbox"/> (e) Theft, where the value of the property stolen was \$100 or more but less than \$750, or the value of property obtained by a hot check was \$20 or more but less than \$500; <input type="checkbox"/> (f) Theft of a service, where the value of the service stolen was \$100 or more but less than \$750; <input type="checkbox"/> (g) Possession of contraband in a correctional facility, if the offense was punishable as a Class B misdemeanor; and <input type="checkbox"/> (h) Driving with an invalid license. | <p>Sec. 31.03(e)(2)(A), P.C.</p> <p>Sec. 31.04(e)(2), P.C.</p> <p>Sec. 38.114, P.C.</p> <p>Sec. 521.457(f), T.C.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> (3) If a person issued a citation pursuant to Article 14.06, C.C.P., appears before a magistrate, the magistrate shall perform the duties imposed by Art. 15.17, C.C.P., as if the person had been arrested and brought before the magistrate by a peace officer. <input type="checkbox"/> (4) After the magistrate performs the duties imposed by this article, the magistrate, except for good cause shown, may release the person on personal bond. <input type="checkbox"/> (5) If a person issued a citation under Article 14.06(c) fails to appear as required by that citation, the magistrate before whom the person is required to appear shall issue a warrant for the arrest of the accused. | <p>Art. 15.17(g), C.C.P. This requirement applies to both those defendants issued a citation for an enumerated Class A or B misdemeanor and those issued a citation for a Class C misdemeanor.</p> <p>Art. 15.17(g), C.C.P.</p> <p>Art. 15.17(g), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 2. Identify yourself to the arrestee. <input type="checkbox"/> 3. Determine if the arrestee sufficiently understands the English language or possesses any impairments. <input type="checkbox"/> 4. If necessary, swear in a qualified interpreter. <input type="checkbox"/> 5. If the arrestee is hearing impaired, obtain the services of an interpreter as provided by Article 38.31, C.C.P., to interpret the warning. | <p>Art. 38.30, C.C.P. See Checklist 12-5.</p> <p>Art. 15.17(c), C.C.P.</p> |

- 6. Determine the arrestee's age at the time of the offense.
 - a. If the arrestee has not reached his or her 17th birthday, or was under 17 at the time of the offense but is now 17 or older, use the juvenile admonishment (warning).
 - b. If the arrestee is at least 17 or was 17 at the time of the offense, continue.
- 7. Determine whether arrestee is currently on bail for a separate offense.
- 8. Advise the arrestee in clear language of the offense with which he or she is charged.
 - a. Name the offense.
 - b. Inform arrestee of any affidavit filed in the case.
- 9. Warn the arrestee of the following rights:
 - a. The right to remain silent;
 - b. That the arrestee is not required to make a statement and that any statement made can and will be used against the arrestee;
 - c. The right to have an attorney present during any interview with peace officers or prosecutors;
 - d. The right to terminate the interview at any time; and
 - e. The right to an examining trial if the offense charged is a felony.

See Checklists 13-29 and 13-30.

Art. 15.17(a), C.C.P.

See *TMCEC 2020 Forms Book: Magistrate's Warning*.

“You are charged with the offense of _____. It is a _____ Degree/Class Misdemeanor/Felony.”

Although it is not constitutionally required for misdemeanors, it is a good practice to admonish all defendants of possible immigration consequences. *State v. Jimenez*, 987 S.W.2d 886 (Tex. Crim. App. 1999).

10. The Vienna Convention on Consular Notifications requires that a foreign national be offered the opportunity to have his or her country's consulate notified that he or she is facing criminal action. The magistrate should do the following:

a. Determine citizenship **on the record**;

b. If the foreign national is a citizen of a mandatory country:

(1) Notify the consular office "without delay" regardless of defendant's wishes; and

(2) Notify the defendant that you are making the notification.

c. If the foreign national is a citizen of a permissive country:

(1) Offer to notify the foreign national's consular office (in both English and the foreign national's language);

(2) Have the foreign national accept or decline the notification in writing; and

(3) If defendant accepted the offer, notify the consular office "without delay."

Download the U.S. Dept. of State's *Consular Notification and Access* at https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA%20Manual%205th%20Edition_September%202018.pdf

Mandatory notification requirements arise from bilateral agreements between the United States and 56 countries. A full list can be found in the U.S. Department of State's *Consular Notification and Access*.

All countries not listed as mandatory are considered permissive.

If foreign national requests consular notification, the magistrate should notify the consulate; it will not satisfy your duty to just let the defendant call the consulate.

- d. Document your notification, the detainee’s response, and any other relevant paperwork.
- 11. Warn arrestee of right to counsel and appointment of counsel.
 - a. Warn of the right to retain counsel.
 - b. Warn of the right to request appointment of counsel if the person cannot afford counsel.
 - c. Describe the local procedures, created by the district and county judges, for requesting appointment of counsel.
 - e. Ensure reasonable assistance in completing the necessary forms.
 - f. Appoint counsel, only if the magistrate is designated by the local district and county judges as the appropriate authority under Article 26.04, C.C.P., to appoint counsel.
 - g. Forward the completed paperwork to the appropriate designee if not designated by the local district and county judges to appoint counsel:
 - (1) Without unnecessary delay; and
 - (2) Not later than 24 hours after request for appointment.
- 12. A record must be made in each case in which a person is arrested and taken before a magistrate for an Article 15.17 hearing. It may be written, recorded, or in other form adopted by the county, and it should include:

See Checklist 1-9.

Only indigent defendants charged with a crime that may result in punishment by confinement are entitled to have an attorney appointed. However, if a court concludes that the interests of justice require representation by counsel, the court may appoint counsel. Art. 1.051, C.C.P. See Checklist 8-3 for indigence hearings.

Art. 15.17(e), C.C.P. See *TMCEC 2020 Forms Book: Magistrate Warning*.

- a. The magistrate informing the person of his or her right to request appointment of counsel;
 - b. The magistrate asking the person whether he or she wants to request appointment of counsel; and
 - c. Whether the person requested appointment of counsel.
13. Inquire if the arrestee understands his or her rights.
- a. A magistrate has a duty to clarify the rights if the arrestee indicates a lack of understanding.
 - b. A magistrate must ensure that reasonable assistance is given to the arrestee in completing the necessary forms for requesting appointment of counsel at the time of the Article 15.17 hearing.

14. Consider bail and pretrial release.

- a. Bail is the security given by the accused that he or she will appear and answer the accusation before the proper court.

See Checklist 1-9 and Article 26.04, C.C.P., if you are the designated authority to appoint counsel.

If a municipal judge appoints an attorney, the city may be responsible for paying the attorney, unless an interlocal agreement is entered to the contrary.

A magistrate cannot require a defendant to post bail in cash only. *Ex parte Deaton*, 582 S.W.2d 151 (Tex. Crim. App. 1979); *Ex parte Rodriguez*, 583 S.W.2d 792 (Tex. Crim. App. 1979); Tex. Atty. Gen. Op. JM-363 (1985). The exception to this rule is when a bond forfeiture has been declared and the defendant is arrested on a *capias*. The court may then require a cash bond. Art. 23.05, C.C.P. For more on bail bonds, see Article 17.02, C.C.P.

- b. A defendant may be released on bond by posting a cash deposit or surety bond, or by agreeing to a personal bond, if permitted by the magistrate.

15. Setting Bail

- a. Bail should be set at a reasonable amount. The court may consider any factor relevant to the fixing of bail.
- b. The court may consider any other issues deemed appropriate including any or all of the following:
 - (1) The amount must be high enough to ensure the presence of the arrestee when required, but not so high as to be oppressive;
 - (2) The nature and circumstances of the offense;
 - (3) The range of punishment for the offense charged;
 - (4) The arrestee’s ability to make bail in the amount under consideration;
 - (5) The income of a spouse;
 - (6) Do not consider the income of friends or other family members;
 - (7) The arrestee’s community ties;
 - (8) Work record;
 - (9) Family ties;

See *TMCEC 2020 Forms Book: Magistrate’s Determination of Bail and Commitment Form.*

Art. 17.15, C.C.P.

“Do you work? For whom?
How much do you earn?”

Are you married? How
much does your spouse
earn?

Do you live in _____
County? How will you
get to court if you are
released? Does anyone else
live with you?

- (10) Prior criminal record and appearances in other matters; and

- (11) Bail set in the defendant’s other cases, if any.

- c. If a pretrial services agency operates in the judicial district or county, order the arrestee to be interviewed and the information brought to you immediately.

- d. The court must also consider the safety of the victim, the victim’s family, and the community in fixing the amount of bail.

- e. The magistrate may impose any reasonable condition related to safety of the victim or safety of the community.

- f. Bail may only be denied or temporarily denied in certain instances.

- g. If bail is denied or temporarily denied, make a written finding explaining the legal basis.

- h. Set the amount of bail.

- i. Set conditions of bail.

- (1) Record each condition in writing; or

- (2) Recite each condition into the record; and

- (3) Require the arrestee to acknowledge that he or she understands each condition.

- 16. Consider the arrestee for release on personal bond.

“Have you ever been arrested before? When and for what? What was the outcome of the case?”

Arts. 17.15(5) and 56.02(a)(2), C.C.P.

Art. 17.40, C.C.P.

See Checklist 1-2.

“I now set bail at \$ ____.”

See Checklist 1-6. “Further, I am setting the following conditions and I order you to abide by each and every one of them.” Where the alleged victim is a child 12 years of age or younger, see Article 17.41, C.C.P. and *TMCEC 2020 Forms Book: Bail Condition Where Child is Alleged Victim*.

“Do you understand each of these conditions?”

See Checklist 1-5.

- 17. Set conditions of personal bond, if arrestee qualifies.
 - a. Ensure that the arrestee acknowledges and understands each condition.

- 18. Other restrictions:
 - a. Magistrate does not have discretion to restrict the type of bail, cash, or surety, to the exclusion of the other. A magistrate may require a cash bond only when a forfeiture of bail has been declared. A magistrate may designate that personal recognizance bond be denied by stating “cash or surety” on the bail setting.
 - b. A magistrate may not set differential bail based on the type of bond (e.g., \$200 cash or \$500 surety).
 - c. A magistrate cannot set bail that would be an instrument of oppression (i.e., too high in light of financial resources).

- 19. Other consideration:
 - a. Enter magistrate’s “Order for Emergency Protection.”

- 20. Special procedures for fine-only offenses:
 - a. Magistrate may set surety/cash appearance bond.
 - b. Magistrate may set personal bond.
 - c. Magistrate may release without setting bond:
 - (1) Only in fine-only misdemeanors;
 - (2) Magistrate must give defendant the time and place to appear to answer to the charges against him or her in writing;
 - (3) Release without bond is not available if defendant has a prior felony or Class A or B misdemeanor conviction.

See Checklist 1-6.

Ex parte Deaton, 582 S.W.2d 151 (Tex. Crim. App. 1979); *Ex parte Rodriguez*, 583 S.W.2d 792 (Tex. Crim. App. 1979); Art. 23.05, C.C.P.

Bail that is more than what the court would accept as a fine in a fine-only misdemeanor case is probably too high when there is no history of failing to appear.

See Checklist 1-8.

Art. 15.17(b), C.C.P.

Art. 15.17(b), C.C.P.

See *TMCEC 2020 Forms Book*: Release: With Order to Appear.

- 21. A magistrate may take a plea of guilty if person was arrested under warrant for a **fine-only offense** issued in a county other than the one in which the person is arrested.
 - a. Magistrate has discretion to take a plea in lieu of setting bail.
 - b. Defendant must make written plea of guilty or nolo contendere and waiver of jury trial.
 - c. Magistrate shall:
 - (1) Set fine;
 - (2) Determine costs;
 - (3) Accept payment;
 - (4) Give credit for time served:
 - (a) Determine a period of time between eight and 24 hours;
 - (b) Credit of at least \$100 for each period of time.
 - (5) Determine indigence;
 - (6) On satisfaction of judgment, discharge the defendant.
 - d. Magistrate must, before the 11th business day following the plea, transmit to the court with jurisdiction the following:
 - (1) Written plea;
 - (2) Any orders entered in the case; and
 - (3) Any fine or cost collected in the case.

Art. 15.18, C.C.P. See *TMCEC 2020 Forms Book: Out-of-County Magistrate's Bench Judgment.*

Art. 45.048, C.C.P.

See Checklist 8-3.

Art. 15.18(b), C.C.P.

☐ 22. If the arrested person fails or refuses to give bail as provided in Article 15.18, C.C.P., the magistrate shall commit the person to the jail of the county where the person was arrested. It is the magistrate's duty to immediately notify the sheriff of the county in which the offense was committed: (1) that the arrest and commitment occurred; and (2) whether the person was also arrested under a warrant issued under Section 508.251, G.C., in relation to the conditions of his or her parole or mandatory supervision.

Art. 15.19, C.C.P.

☐ a. The sheriff, upon receiving notice under Article 15.19, C.C.P., of a person's arrest pursuant to a warrant for violation of a condition of parole or mandatory supervision, should have the arrested person brought before the proper magistrate or court before the 11th day after the day the person was committed to jail.

Art. 15.20, C.C.P.

☐ b. The arrested person shall be released on personal bond without sureties or other security if the proper office of the county where the offense is alleged to have been committed does not demand an arrested person and take charge of the person before the 11th day after the date the person is committed to the jail of the county in which the person is arrested. The Magistrate shall forward the personal bond to the sheriff of the county where the offense is alleged to have been committed.

Art. 15.21, C.C.P.
See *TMCEC 2020 Forms Book*: Release: Personal Bond after No Timely Demand.

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

2. When Bail May Be Denied or Delayed

Checklist 1-2	Script/Notes
<p><input type="checkbox"/> 1. Bail may be denied in capital cases when the State presents proof evident that conviction and death sentence will result from trial.</p> <p><input type="checkbox"/> 2. A district judge may deny bail in non-capital cases when there is a substantial showing by the State within seven days of arrest that the defendant:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. Is guilty of the charged felony, with two prior convictions; the second being subsequent to the first:</p> <p style="padding-left: 80px;"><input type="checkbox"/> (1) Both in point of time of commission of the offense; and</p> <p style="padding-left: 80px;"><input type="checkbox"/> (2) Conviction;</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. Committed a felony while on bail for a prior felony for which he or she was indicted;</p> <p style="padding-left: 40px;"><input type="checkbox"/> c. Committed a felony involving the use of a deadly weapon after being convicted of a prior felony; or</p>	<p>Art. I, Sec. 11, Tex. Const.</p> <p>When a person accused of a felony is brought before a magistrate, the magistrate should contact the district court. Art. 17.21, C.C.P. If the court is not in session, then the magistrate may set the bail. Art. 17.22, C.C.P. Because Art. I, Sec. 11a, Tex. Const., provides that only a district judge may deny bail in non-capital cases and that the order denying the bail must be entered within seven calendar days of a defendant’s incarceration, a municipal judge exercising his or her authority as a magistrate should notify the district court immediately and send the warning sheet to the district court as soon as possible.</p> <p><i>Bills v. State</i>, 796 S.W.2d 194 (Tex. Crim. App. 1990).</p>

- d. Committed a violent or sexual offense while under the supervision of a criminal justice agency of the State or political subdivision of the State for a prior felony. Art. I, Sec. 11a, Texas Const.

- 3. The State’s burden is:
 - a. To prove guilt of the defendant in Steps 2(a) and 2(c) above; or
 - b. That the offense was committed while on bail in Steps 2(b) or 2(d) above.

- 4. A judge or magistrate may deny bail pending trial for a defendant: Art. 17.153, C.C.P.
 - a. Charged with a felony offense from the following provisions of the Penal Code, if committed against a child younger than 14 years of age:
 - (1) Chapter 21 (Sexual Offenses);
 - (2) Section 25.02 (Prohibited Sexual Conduct); or
 - (3) Section 43.25 (Sexual Performance by a Child);
 - (4) Section 20A.02 (Trafficking of Persons), if the defendant is alleged to have trafficked the child with the intent or knowledge that the child would engage in sexual conduct as defined under Section 43.25 or if the defendant benefited from participating in a venture that involved a trafficked child engaging in sexual conduct as defined under Section 43.25; or
 - (5) Section 43.05 (a)(2) (Compelling Prostitution); or

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

3a. Release Because a Magistrate Has Not Determined Whether Probable Cause Exists

Checklist 1-3(a)	Script/Notes
<p><input type="checkbox"/> 1. All persons arrested must be brought before a magistrate without unnecessary delay, never later than 48 hours after arrest.</p>	<p>Art. 15.17(a), C.C.P. See <i>TMCEC 2020 Forms Book</i>: Release: Magistrate’s Determination of No Probable Cause.</p>
<p><input type="checkbox"/> 2. A person arrested without a warrant must be released if a magistrate has not determined whether probable cause exists to believe that the person committed the offense within a certain time frame.</p>	<p>This law presumably is used in the absence of a magistrate, as the release is triggered not when a magistrate has determined there is no probable cause, but rather when a magistrate has not determined whether probable cause exists.</p>
<p><input type="checkbox"/> 3. In misdemeanor cases, if a magistrate has not determined whether probable cause exists:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. A defendant arrested without a warrant must be released on bond not to exceed \$5,000, not later than the 24th hour after the arrest; or</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. The arrestee must be released on a personal bond if arrestee is unable to make or secure surety/cash appearance bond.</p>	<p>Art. 17.033(a), C.C.P.</p>
<p><input type="checkbox"/> 4. In felony cases, if a magistrate has not determined whether probable cause exists:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. A defendant must be released on bond not to exceed \$10,000 not later than the 48th hour after the arrest; or</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. The arrestee must be released on a personal bond if arrestee is unable to make or secure surety/cash appearance bond.</p>	<p>Art. 17.033(b), C.C.P.</p>
<p><input type="checkbox"/> 5. On application by the prosecutor, the magistrate may postpone release for not more than 72 hours from arrest.</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Application must state the reason why a magistrate has not made a probable cause determination.</p>	<p>Art. 17.033(c), C.C.P.</p>

- ❑ 6. The time limits for release as outlined above do not apply to a person arrested without a warrant who is taken to a medical facility before being taken before a magistrate. Such an arrestee's time limit begins to run at the time of release from the facility rather than from the time of arrest.

Art. 17.033(d), C.C.P.

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

3b. When the Defendant Must Be Released Because the State is Not Ready

Checklist 1-3(b)	Script/Notes
<p>The magistrate that enters orders under Article 15.17, C.C.P., keeps jurisdiction of the defendant’s charge until a charging instrument (indictment, information, or complaint) is filed in a court with jurisdiction. Once the charging instrument has been filed in the cause, the magistrate has no further jurisdiction or responsibility.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 1. When the State is not ready and the defendant is unable to post the bail previously set, the defendant must be released on personal bond, or reasonable bail that the defendant can make must be set, if the defendant is charged with: <ul style="list-style-type: none"> <input type="checkbox"/> a. Any grade of felony and he or she has been incarcerated for 90 days; <input type="checkbox"/> b. A misdemeanor punishable by 180 days in jail or more and he or she has been incarcerated for 30 days; <input type="checkbox"/> c. A misdemeanor punishable by 180 days in jail or less and he or she has been incarcerated for 15 days; or <input type="checkbox"/> d. A misdemeanor punishable by fine-only and he or she has been incarcerated for five days; and <p>The defendant is not otherwise:</p> <ul style="list-style-type: none"> <input type="checkbox"/> e. Serving a sentence of confinement for another offense; <input type="checkbox"/> f. Being detained pending trial of another case and time has not yet lapsed on that case; <input type="checkbox"/> g. Incompetent to stand trial, during a period of incompetence; or 	<p><i>Guerra v. Garza</i>, 987 S.W.2d 593 (Tex. Crim. App. 1999).</p> <p>Art. 17.151, C.C.P.; <i>Jones v. State</i>, 803 S.W.2d 712 (Tex. Crim. App. 1991).</p>

- h. Being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community.

- 2. When defendant is indigent, either reduce bail to an amount the defendant can post or release the defendant on personal bond.

Absent a violation of bond condition, Art. 17.151, C.C.P., requires release on personal bond if the State is not ready to proceed to trial without consideration of the safety of either victims or the community. *Ex parte Gill*, 413 S.W.3d 425 (Tex. Crim App. 2013).

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

4. Requisites and Filing of a Bail Bond

Checklist 1-4	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Requisites of a bail bond: <ul style="list-style-type: none"> <input type="checkbox"/> a. Made payable to “The State of Texas;” <input type="checkbox"/> b. Defendant and surety, if any, bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him or her; <input type="checkbox"/> c. States whether the defendant is charged with a felony or misdemeanor; <input type="checkbox"/> d. Signed by name or mark of the defendant and surety, if any, with a mailing address for each; <input type="checkbox"/> e. States the time and place, when and where the defendant binds himself or herself to appear; <input type="checkbox"/> f. States the court or magistrate before whom to appear; <input type="checkbox"/> g. States that the defendant is bound to appear before any court or magistrate before whom the matter may be pending at any time and place required under law or by any court or magistrate; <input type="checkbox"/> h. Conditioned that the defendant and sureties, if any, will pay all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in re-arresting the defendant if failure to appear before the court or magistrate named in the bond at the time stated therein; and <input type="checkbox"/> i. Such expense shall be in addition to the principal amount of the bond. 	<p>Art. 17.08, C.C.P.</p>

2. Set any reasonable conditions that will assure the appearance of the defendant.

Ex parte Anderer, 61 S.W.3d 398 (Tex. Crim. App. 2001). See *TMCEC 2020 Forms Book: Magistrate’s Determination of Bail and Commitment Form*.

3. Sureties, generally:

a. If only one surety, must be worth at least double the amount of bail set less exempted, encumbered, or indebted property.

Art. 17.13, C.C.P.

b. Must be a resident of this state.

c. A corporate surety must have a power of attorney designating an authorized agent on file.

Art. 17.07, C.C.P.

d. A minor may not be a surety.

Art. 17.10, C.C.P.

e. A person who has signed as a surety on a bond and is in default is disqualified to sign as a surety as long as he or she is in default.

Art. 17.11, Sec. 2, C.C.P. A surety is in default from the time execution may be issued on the final judgment in a bond forfeiture proceeding unless the final judgment is superseded by the posting of a supersedeas bond (a bond required of someone who petitions to set aside a judgment or execution). If surety is a corporation, see Section 1704.212(c), O.C. A corporation may not act as a bail bond surety in a county in which the corporation is in default on five or more bonds.

f. A surety may file a motion for the purpose of discharging bail when no indictment or information has been timely presented against the defendant.

Art. 32.01, C.C.P.

4. In any manner permitted by the county in which it is written, a bail bond may be filed electronically with the court, judge, magistrate, or other officer taking the bond.

Art. 17.026, C.C.P.

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

5. Requisites of a Personal Bond

Other than in instances where probable cause is not determined in a timely manner (see Checklist 1-3(a)), the magistrate has discretion to grant personal bonds. As described in the following checklist, depending on the offense, Texas law either requires or allows the magistrate to impose other conditions.

Checklist 1-5	Script/Notes
<p><input type="checkbox"/> 1. A personal bond must contain the requisites of a bail bond and identification information, including the defendant's:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Name; <input type="checkbox"/> b. Address; <input type="checkbox"/> c. Place of employment; <input type="checkbox"/> d. Date and place of birth; <input type="checkbox"/> e. Height; <input type="checkbox"/> f. Weight; <input type="checkbox"/> g. Color of hair and eyes; <input type="checkbox"/> h. Driver's license number and state of issuance, if any; <input type="checkbox"/> i. Nearest relative's name and address, if any; and <input type="checkbox"/> j. Oath. <p><input type="checkbox"/> 2. Only the court before whom the case is pending may release on personal bond a defendant who is charged with:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Capital murder; 	<p>See Checklist 1-4.</p> <p>I swear that I will appear before (<i>the court or magistrate</i>) at (<i>address, city, county</i>), Texas, on the (<i>date</i>), at the hour of (<i>time, a.m. or p.m.</i>) or upon notice by the court, or pay to the court the principal sum of (<i>amount</i>) plus all necessary and reasonable expenses incurred in any arrest for failure to appear. Art. 17.04, C.C.P.</p> <p>Art. 17.03(b), C.C.P.</p>

- b. Aggravated kidnapping;
 - c. Aggravated sexual assault;
 - d. Deadly assault on law enforcement officer, corrections officer, parole board member or employee, or court participant;
 - e. Injury to a child, elderly individual, or disabled individual;
 - f. Aggravated robbery;
 - g. Burglary;
 - h. Organized criminal activity;
 - i. Continuous Sexual Abuse of Young Child or Children;
 - j. Continuous Trafficking of Persons;
 - k. Any aggravated felony under Chapter 481 or Section 485.033, H.S.C.; or
 - l. Failure to submit to testing as required by the court or a magistrate or whose test results for alcohol or drugs are positive.
3. Order drug or alcohol testing, education, and treatment if you, or the investigating or arresting law enforcement officer, reasonably believe:
- a. That drug or alcohol abuse was related to the offense; or
 - b. Drugs or alcohol are presently in the body of the defendant; and
 - c. The condition will serve to reasonably assure the appearance of the defendant in court.
4. Costs of testing may be assessed as a condition of bond or as court costs.

Art. 17.03(c), C.C.P.

Art. 17.03(e), C.C.P.

5. If a charge has been filed in your municipal court, you may not assess a personal bond reimbursement fee.

A municipal judge releasing a class C defendant under Article 45.016, C.C.P., may not assess a personal bond reimbursement fee. Art. 17.42(4)(a), C.C.P.

6. Order the personal bond fee:

Arts. 17.03(g), C.C.P. and 17.42, C.C.P. Bond fees can be assessed only if a court releases a defendant on a personal bond at the recommendation of a personal bond office before sentencing on a pending case.

a. Paid before the defendant is released;

b. Paid as a condition of bond;

c. Paid as court costs;

d. Reduced; or

e. Waived.

7. Release an offender with a mental illness or intellectual disability if:

Art. 17.032(b), C.C.P.
See *TMCEC 2020 Forms Book*:
Release: Personal Bond - Certain Mentally Ill Defendants.

a. The defendant is not charged with and has not previously received deferred adjudication, community supervision or probation, any deferred final disposition of a case, or a final conviction for:

(1) Murder;

(2) Capital murder;

(3) Kidnapping;

(4) Aggravated kidnapping;

(5) Indecency with a child;

(6) Assault (Class A);

(7) Sexual assault;

- (8) Aggravated assault;
 - (9) Aggravated sexual assault;
 - (10) Injury to a child, elderly person, or invalid;
 - (11) Aggravated robbery;
 - (12) Continuous sexual abuse of young child or children; or
 - (13) Continuous trafficking of persons; and
 - b. The defendant is examined for competency as provided in Article 16.22, C.C.P.;
 - c. The report submitted concludes the defendant is a person with mental illness and is nonetheless competent to stand trial;
 - d. The report recommends treatment or services;
 - e. Appropriate community based mental health or intellectual disability services are available for the defendant under Section 534.053 or 534.103, H.S.C., or through another mental health or intellectual and developmental disability services provider; and
 - f. The magistrate finds, after considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided by the attorney representing the state or the defendant, that release on personal bond would reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.
8. Consider ordering as a condition of bond that the defendant submit to outpatient or inpatient mental health treatment or intellectual and developmental disability services if the defendant's:

See Checklist 1-11.

Art. 17.032(c), C.C.P.

- a. Mental illness or intellectual disability is chronic in nature; or
 - b. Ability to function independently will continue to deteriorate if the defendant does not receive the recommended treatment or services.
- 9. Consider imposing any other conditions reasonably necessary to ensure the defendant's appearance in court to protect the community and the victim of the alleged offense.
- 10. If the county from which the warrant of arrest was issued has a personal bond office, a copy of the bond must be forwarded to the personal bond office in that county.
- 11. A municipal judge may require a personal bond to secure the defendant's appearance in accordance with this code, but may not, either instead of or in addition to the personal bond, require a defendant to give a bail bond unless:
 - a. The defendant fails to appear with respect to the applicable offense;
 - b. The judge determines that the defendant has sufficient resources or income to give a bail bond; and
 - c. The judge determines that a bail bond is necessary to secure the defendant's appearance in accordance with this code.
- 12. If a defendant required to give a bail bond by a municipal judge does not give a required bail bond within 48 hours of the bail bond being set, the justice or judge:
 - a. Shall reconsider the requirement for the defendant to give the bail bond and presume that the defendant does not have sufficient resources or income to give the bond; and

Arts. 17.032(d), 17.40, and 56.02(a)(2), C.C.P.

Art. 17.031(b), C.C.P.

The personal bond office shall create a record of persons released on personal bond, update it monthly, and file a copy of the record with the district or county clerk. Art. 17.42, Sec. 5, C.C.P.

Upon the filing of charges, a specific rule applies to bail set by municipal and justice courts. Art. 45.016(a-b), C.C.P.

Art. 45.016(c), C.C.P.

- b. May require the defendant to give a personal bond.

- 13. If the defendant refuses to give a personal bond or, except as provided by Art. 45.016(c), C.C.P., Subsection (c), refuses or otherwise fails to give a bail bond, the defendant may be held in custody.

Art. 45.016(d), C.C.P.

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

6. Conditions of Bail

Checklist 1-6	Script/Notes
<p><input type="checkbox"/> 1. Magistrates have the general discretion to impose any of the following as conditions of release for any offense:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Any reasonable condition related to the safety of the victim of the alleged offense or the safety of the community. <input type="checkbox"/> b. Home curfew and electronic monitoring. <input type="checkbox"/> c. Weekly drug testing for controlled substances. <input type="checkbox"/> d. Providing to a local law enforcement agency one or more specimens for the purpose of creating a DNA record under Subchapter G, Chapter 411, G.C. <p><input type="checkbox"/> 2. Magistrates have the discretion to impose any of the following as conditions of release for the following specific offenses:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. An offense involving family violence: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Refrain from going to or near a residence, school, place of employment, or other location as specifically described in the bond, frequented by an alleged victim of the offense; <input type="checkbox"/> (2) Carry or wear a global positioning system (GPS) device and pay the costs associated with the device; or 	<p>Art. 17.40, C.C.P.</p> <p>Arts. 17.43 and 17.44(a)(1), C.C.P.</p> <p>Art. 17.44(a)(2), C.C.P.</p> <p>Art. 17.47(a), C.C.P.</p> <p>Art. 17.49, C.C.P.</p> <p>Before imposing this condition, a magistrate must give the victim an opportunity to provide a list of areas from which the victim would like the defendant excluded. Art. 17.49(c), C.C.P.</p>

- (3) Pay the reimbursement fee associated with providing the victim a receptor that can receive information from the GPS device worn by the defendant and that notifies the victim if the defendant is at or near a prohibited location. Before imposing this condition, a magistrate must provide to an alleged victim information regarding:
 - (a) the victim’s right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the magistrate terminate the victim’s participation;
 - (b) the manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements;
 - (c) any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations;
 - (d) any sanctions that the court may impose on the defendant for violating a condition of bond imposed under this article;

If the magistrate determines that a defendant is indigent, the magistrate may require the defendant to pay reimbursement fee based on a sliding scale established by local rule in an amount less than the full amount associated with operating the GPS system. Art. 17.49(h) and (i), C.C.P.

Art. 17.49(d), C.C.P.

<ul style="list-style-type: none"> (e) the procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails; (f) community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of family violence; and (g) the fact that the victim’s communications with the court concerning the global positioning monitoring system and any restrictions to be imposed on the defendant’s movements are not confidential. 	
<ul style="list-style-type: none"> <input type="checkbox"/> b. Prostitution: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Attend AIDS/HIV education; and/or <input type="checkbox"/> (2) Attend AIDS/HIV counseling. 	<p>Art. 17.45, C.C.P.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> c. Stalking: <ul style="list-style-type: none"> <input type="checkbox"/> (1) No direct or indirect communication with the alleged victim; or <input type="checkbox"/> (2) Prohibited from going near a residence, place of employment, or business of the victim or to go near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance. 	<p>Art. 17.46, C.C.P.</p> <p>Note: The magistrate must specifically describe the prohibited locations and the minimum distances, if any, that the defendant must maintain from the locations.</p>

- ❑ 3. Magistrates are required to impose specific conditions of release for the following specific offenses:
 - ❑ a. If the charge is a subsequent “Driving, Flying or Boating While Intoxicated,” “Intoxication Assault” or “Intoxication Manslaughter,” the magistrate shall require on release that a defendant:
 - ❑ (1) Have installed on the motor vehicle owned or most regularly operated by the defendant a vehicle ignition interlock device;
 - ❑ (2) Not operate any motor vehicle unless the vehicle is equipped with that device;
 - ❑ (3) Have the device installed on appropriate motor vehicle within 30 days of release on bond; and
 - ❑ (4) Pay the expense of installation.
 - ❑ b. Sexual offenses, assaultive offenses, prohibited sexual conduct, or “Sexual Performance by a Child,” if committed against a child younger than 14:
 - ❑ (1) No direct communication with the alleged victim;
 - ❑ (2) Prohibited from going near a residence, school, or other location as specifically described in the bond, frequented by the alleged victim.

Art. 17.441, C.C.P. See *TMCEC 2020 Forms Book*: Bail with Ignition Interlock Condition. You may designate an appropriate agency to verify the installation of the device and to monitor the device. Magistrates may not require the installation of the device if to do so would not be in the best interest of justice.

Art. 17.41, C.C.P.

Note: To the extent that this condition conflicts with an existing court order granting possession or access to a child, this order prevails for a period specified by the magistrate, not to exceed 90 days.

- c. If the charge is “Aggravated Kidnapping with Intent to Inflict Injury or Sexual Abuse,” “Indecency with a Child,” “Sexual Assault,” “Aggravated Sexual Assault,” “Prohibited Sexual Conduct,” “Burglary of a Habitation with/or without Intent to Commit a Felony (excluding felony theft),” “Compelling Prostitution,” “Sexual Performance by a Child,” or “Possession or Promotion of Child Pornography,” the defendant shall provide to a local law enforcement agency one or more specimens for the purpose of creating a DNA record under Subchapter G, Chapter 411, G.C.

Art. 17.47(b), C.C.P.

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

7. When Bail May Be Raised, Changed, or Forfeited

Checklist 1-7	Script/Notes
<p><input type="checkbox"/> 1. Bail may be changed if:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. The initial bail bond is defective; <input type="checkbox"/> b. The initial bail bond is excessive; <input type="checkbox"/> c. The initial bail bond is insufficient; <input type="checkbox"/> d. The sureties, if any, are not acceptable; <input type="checkbox"/> e. The initial bail was set prior to indictment and indictment is returned; or <input type="checkbox"/> f. The initial bail bond was conditioned upon treatment under Article 17.40, C.C.P., and that condition is violated. 	<p>Art. 17.09, Sec. 3, C.C.P. In order to change bonds properly set by a magistrate, another judge must have jurisdiction of the case. Jurisdiction vests upon the filing of a charging instrument in the proper trial court. <i>Guerra v. Garza</i>, 987 S.W.2d 593 (Tex. Crim. App. 1999).</p> <p><i>Ex parte King</i>, 613 S.W.2d 503 (Tex. Crim. App. 1981).</p> <p>Art. 11.56, C.C.P.</p> <p>Art. 22.021, C.C.P.</p>
<p><input type="checkbox"/> 2. Bail may not be raised or forfeited:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Without cause; <input type="checkbox"/> b. If the defendant fails to hire counsel as ordered by the court; or <input type="checkbox"/> c. If defendant appears within a reasonable time. 	<p>Art. 17.09, Sec. 3, C.C.P.</p> <p>Art. 22.02, C.C.P.</p> <p>Three to five minutes late is not enough to raise or forfeit bail, with no prior forfeiture history. <i>Meador v. State</i>, 780 S.W.2d 836 (Tex. App.—Houston [14th Dist.] 1989, no pet.).</p>

- 3. In certain instances, magistrates are required to provide reasonable notice of a proposed bail reduction and an opportunity for a hearing to the attorney representing the state or the defendant’s counsel.

Art. 17.091, C.C.P. Note: This requirement only applies to offenses listed in Section 3g, Article 42A.054, C.C.P., or an offense described by Article 62.001(5), C.C.P., (defining “reportable conviction or adjudication.”) Offenses include: murder, capital murder, aggravated sexual assault, aggravated robbery, continuous sexual assault of a young child, and trafficking of persons.

- b. Abuse of a child of the family or household by a member of the family or household; or
- c. Dating violence, where victim and defendant have a dating relationship (more than a casual acquaintanceship or ordinary fraternization).
- 4. Based upon the information provided supporting the arrest of the defendant, consider whether a MOEP order is necessary.
 - a. At a defendant's appearance before a magistrate after an arrest for a family violence offense, a magistrate **shall** issue an order for emergency protection for offenses involving:
 - (1) Serious bodily injury to the victim; or
 - (2) The use or exhibition of a deadly weapon during the commission of an assault.
- 5. Identify the:
 - a. Victim;
 - b. Members of the victim's family or household; and
 - c. Children.
- 6. Identify the:
 - a. Residence;
 - b. Place of employment or business; and
 - c. School or child care facility where a child to be protected by the order is in attendance or is enrolled.

Sec. 71.0021, F.C.

Art. 17.292(b), C.C.P.

If an order for emergency protection prohibits a person from going to or near a child care facility or school, the magistrate shall send a copy of the order to the child care facility or school.
Art. 17.292(i), C.C.P.

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| <p><input type="checkbox"/> 7. Determine the minimum distances the defendant must maintain from each location.</p> | <p>Art. 17.292(e), C.C.P.</p> |
| <p><input type="checkbox"/> 8. Determine whether the children, if any, should be protected by the order.</p> | |
| <p><input type="checkbox"/> 9. Determine if the location is within:</p> <p style="margin-left: 20px;"><input type="checkbox"/> a. A municipality; or</p> <p style="margin-left: 20px;"><input type="checkbox"/> b. The unincorporated part of the county.</p> | |
| <p><input type="checkbox"/> 10. Determine whether a family lawsuit involving the parties is pending.</p> | <p>Art. 17.292(f), (f-1) and (f-2), C.C.P.</p> |
| <p><input type="checkbox"/> 11. The MOEP controls over other court orders with conflicting conditions, including child custody orders, while the MOEP is pending, unless:</p> <p style="margin-left: 20px;"><input type="checkbox"/> a. The order is a protective order issued by a family court after a hearing; or</p> <p style="margin-left: 20px;"><input type="checkbox"/> b. The order is an ex parte order of the family court that was aware of the MOEP and specifically dictates that the new order controls.</p> | <p>Art. 17.292(f), C.C.P.</p> <p>Art. 17.292(f-1), C.C.P.</p> <p>Art. 17.292(f-2), C.C.P.</p> |
| <p><input type="checkbox"/> 12. Determine if possession of firearms should be prohibited. Magistrates should note if the defendant is a peace officer.</p> | <p>Sec. 46.04, P.C.</p> |
| <p><input type="checkbox"/> 13. Determine if the defendant has a handgun license.</p> <p style="margin-left: 20px;"><input type="checkbox"/> a. You are required to suspend the handgun license.</p> <p style="margin-left: 20px;"><input type="checkbox"/> b. Upon suspension of the license, you or the clerk must immediately send a copy of the order to DPS.</p> | <p>Arts. 17.292(l) and 17.293, C.C.P.</p> <p>Attention: Suspension/ Revocation, Texas Department of Public Safety, Handgun Licensing, Section #0235, Austin, Texas 78765-4143 512.424.2000, ext. 3.</p> |
| <p><input type="checkbox"/> 14. Determine if a condition should be imposed as described by Article 17.49(b), C.C.P., including ordering a defendant’s participation in a GPS monitoring system or allowing participation in the system by an alleged victim or other person.</p> | <p>Art. 17.292, C.C.P.</p> |

- 15. Identify the defendant on the order by date of birth.
- 16. Enter these findings in the protection order.
- 17. Consider which prohibitions will be a part of the order. Magistrates may prohibit the arrested party from:
 - a. Committing family violence or an assault on the person protected under the order;
 - b. Committing an act in furtherance of a Trafficking of Persons or Stalking offense;
 - c. Communicating directly with the person protected or with a member of protected person's family or household in a threatening or harassing manner;
 - d. Communicating a threat through any person to a member of the protected person's family or household or to the person protected under the order;
 - e. Communicating, if the magistrate finds good cause, in any manner with a person protected under the order or a member of the family or household of a person protected under the order, except through the party's attorney or a person appointed by the court;
 - f. Going to or near the residence, place of employment, or business of a member of the family or household or of the person protected under the order;
 - g. Going to or near the residence, child care facility, or school where a child protected under the order resides or attends; and/or
 - h. Possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.

Art. 17.292, C.C.P.

- 18. Sign the order.
 - a. The order must contain the following statements printed in bold-faced type or in capital letters:

A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR OR BY BOTH. AN ACT THAT RESULTS IN OR A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE, AS APPLICABLE, IN ADDITION TO A VIOLATION OF THIS ORDER. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS. THE POSSESSION OF A FIREARM BY A PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO THIS ORDER MAY BE PROSECUTED AS A SEPARATE OFFENSE PUNISHABLE BY CONFINEMENT OR IMPRISONMENT.

NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER.

- 19. Ensure that a copy of the order is served on the defendant in person or electronically and that he or she signs the acknowledgment.
- 20. File the original order and acknowledgment with the court clerk.

Art. 17.292, C.C.P.
See Checklist 1-6.

- ❑ 21. As soon as possible but not later than the next business day, transmit copies of the order to the Chief of Police where the member of the family or household or individual protected by the order resides, as well as a copy to the victim.

- ❑ 22. If the victim is not present at the time the order is issued, order an appropriate peace officer to make a good faith effort to notify the victim within 24 hours by calling the victim's residence and place of employment.

- ❑ 23. The MOEP lasts no less than 31 days or more than 61 days unless the alleged offense involves the exhibition of a deadly weapon. Then the period shall last no less than 61 days or more than 91 days.

- ❑ 24. A MOEP may be transferred to the court with jurisdiction of the underlying criminal case:
 - ❑ a. On motion, notice, and hearing (serve all parties, including the State); or
 - ❑ b. On agreement of all parties.

- ❑ 25. The magistrate or the court to which a MOEP was transferred under Step 23 may modify all or part of the MOEP if:
 - ❑ a. Notice is made to each affected party of a hearing; and
 - ❑ b. The magistrate finds that:
 - ❑ (1) The order as originally issued is unworkable;
 - ❑ (2) The modification will not place the victim at greater risk than the original order; and
 - ❑ (3) The modification will not in any way endanger a person protected under the order.

The copies of the order and any other information may be sent electronically or in another manner accessible by the recipient.
Art. 17.292(h), C.C.P. See *TMCEC 2020 Forms Book*: Clerk's Letter: Copy of Magistrate's Order of Emergency Protection.

Art. 17.292(n), C.C.P.

Art. 17.292(j) and (n), C.C.P. See *TMCEC 2020 Forms Book*: Motion to Modify Magistrate's Order of Emergency Protection.

Art. 17.292(j), C.C.P.

See *TMCEC 2020 Forms Book*: Order Modifying Magistrate's Order of Emergency Protection.

- 26. On request by a person protected by an order for emergency protection issued under Article 17.292, or if determined necessary by the magistrate, the court issuing the order may protect the person's mailing address by rendering an order:
 - a. requiring the person protected under the order to:
 - (1) disclose the person's mailing address to the court;
 - (2) designate another person to receive on behalf of the person any notice or documents filed with the court related to the order; and
 - (3) disclose the designated person's mailing address to the court;
 - b. requiring the court clerk to:
 - (1) strike the mailing address of the person protected by the order from the public records of the court, if applicable; and
 - (2) maintain a confidential record of the mailing address for use only by the court or a law enforcement agency for purposes of entering the information required into the statewide law enforcement information system maintained by the Department of Public Safety; and
 - c. prohibiting the release of the information to the defendant.

Art. 17.294, C.C.P.
See *TMCEC 2020 Forms Book: Magistrate's Order of Confidentiality of Certain Information in Order for Emergency Protection.*

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

9. Appointment of Counsel – When the Right Attaches

Checklist 1-9	Script/Notes
<ul style="list-style-type: none"> <li data-bbox="212 449 862 485">❑ 1. The right to counsel “attaches” at magistration. <li data-bbox="212 554 889 758">❑ 2. Article 26.04, C.C.P., controls appointment of counsel and requires the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county to adopt and publish written countywide procedures for appointment of counsel. <li data-bbox="212 863 922 1003">❑ 3. Those judges acting as a body may designate someone to make the actual appointment under the guidelines and procedures they adopt. That could be a municipal judge. <li data-bbox="212 1041 922 1182">❑ 4. The procedures adopted by the body of judges must include procedures, financial standards, and forms to determine indigence and whether counsel should be appointed. <ul style="list-style-type: none"> <li data-bbox="310 1318 922 1417">❑ a. Standards can include all of the defendant’s financial information including spousal income available to the defendant. <li data-bbox="310 1461 922 1528">❑ b. The designee appointing counsel cannot consider whether the defendant posted bail. <li data-bbox="212 1566 889 1770">❑ 5. If a municipal judge is made the designee of the district or county judges to appoint counsel, the municipal judge should review the local plan concerning the responsibility to notify counsel of assignment and the information that is required to be provided to the accused. 	<p data-bbox="1000 449 1398 516"><i>Rothgery v. Gillespie County</i>, 554 U.S. 191 (2008).</p> <p data-bbox="1000 554 1369 831">See Checklist 1-1. It is rare that the municipal judge acting as a magistrate will be required to appoint counsel. This duty is normally the prerogative of the local administrative statutory county court judge and local administrative court judge.</p> <p data-bbox="1000 1041 1369 1283">Consult your county’s indigent defense plan. A copy of your jurisdiction’s local indigent defense plan and guidelines is available online at: http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx</p>

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

10. Examining Trial

Checklist 1-10	Script/Notes
<p><input type="checkbox"/> 1. The defendant in any felony case is entitled to an examining trial prior to indictment to determine the truth of the accusation against the defendant or to review bail.</p>	Art. 16.01, C.C.P.
<p><input type="checkbox"/> a. An examining trial may also be held upon the filing of an affidavit or sworn motion alleging that:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) The amount of bail is insufficient;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) The sureties are not worth twice the amount of the bail; or</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) The bail bond is defective.</p>	Art. 16.16, C.C.P.
<p><input type="checkbox"/> 2. The right to an examining trial in a felony terminates upon the return of an indictment.</p>	
<p><input type="checkbox"/> 3. There is no right to an examining trial in a misdemeanor.</p>	
<p><input type="checkbox"/> 4. The defendant may be either in custody or free on bail.</p>	
<p><input type="checkbox"/> 5. The defendant must be allowed sufficient time prior to any hearing to obtain counsel.</p>	Art. 16.01, C.C.P.
<p><input type="checkbox"/> 6. Appointment of counsel must be made pursuant to the procedures adopted by the local criminal courts. The magistrate should provide appropriate assistance to the defendant to obtain counsel through that system.</p>	Arts. 1.051 and 16.01, C.C.P. See Checklist 1-9.
<p><input type="checkbox"/> 7. The Texas Rules of Evidence apply to the examining trial.</p>	Art. 16.07, C.C.P.
<p><input type="checkbox"/> 8. The defendant must be present at the examining trial. The State must be represented by the district attorney.</p>	Art. 16.08, C.C.P.

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| <p><input type="checkbox"/> 9. The court may issue a subpoena, or an attachment without having first issued a subpoena, for any witness within the county.</p> | <p>Art. 16.10, C.C.P.</p> |
| <p><input type="checkbox"/> 10. An attachment for an out-of-county witness may be issued when:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. The party applying for the attachment swears in an affidavit that the testimony is material; and <input type="checkbox"/> b. The affidavit sets forth the facts expected to be proven by the witness; <input type="checkbox"/> c. The facts are admitted by the adverse party after a hearing before the court, unless the court finds the facts are not material. | <p>Art. 16.11, C.C.P.</p> |
| <p><input type="checkbox"/> 11. The proceeding must be transcribed by a court reporter. Alternatively a statement of facts, agreed to by the State and defense and approved by the presiding magistrate, may be used to preserve the testimony of the witnesses. The State or a defendant may preserve testimony for use in an examining trial by the taking of a deposition.</p> | <p>Art. 16.09, C.C.P. and Art. 39.01, C.C.P.</p> |
| <p><input type="checkbox"/> 12. Before beginning the hearing, inform the defendant:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Of the right to make a statement relative to the accusation in the complaint; <input type="checkbox"/> b. That he or she may not be compelled to make any statement; and <input type="checkbox"/> c. That if he or she does make a statement, it may be used in evidence against him or her. | <p>Art. 16.03, C.C.P.</p> |
| <p><input type="checkbox"/> 13. If the defendant desires to make a statement he or she may only do so prior to the examination of any witnesses.</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. The statement must be reduced to writing, and <input type="checkbox"/> b. Signed, but not sworn to, by the defendant. | |

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| <input type="checkbox"/> 14. The magistrate shall then attest by his or her own certificate and signature to the execution and signing of the statement. | Art. 16.04, C.C.P. |
| <input type="checkbox"/> 15. Allow the prosecutor to question the State's witnesses and the defense counsel to cross-examine them. | Art. 16.06, C.C.P. |
| <input type="checkbox"/> 16. The court may question the witnesses if no prosecutor appears. | Art. 16.06, C.C.P. |
| <input type="checkbox"/> 17. The proceeding may not be continued unless: | Art. 16.14, C.C.P. |
| <input type="checkbox"/> a. Either the defendant or the prosecutor signs a sworn statement setting forth the following: | |
| <input type="checkbox"/> (1) The name, address, and facts that either expect to prove with the testimony of the witness; or | |
| <input type="checkbox"/> (2) The nature of the evidence. | |
| <input type="checkbox"/> b. The court is satisfied that the testimony or evidence is material, and the adverse party denies the truth. | |
| <input type="checkbox"/> 18. At the conclusion of the proceeding, enter an order: | Art. 16.17, C.C.P. |
| <input type="checkbox"/> a. Committing the defendant to jail; | |
| <input type="checkbox"/> b. Discharging the defendant; or | |
| <input type="checkbox"/> c. Admitting the defendant to bail. | |
| <input type="checkbox"/> 19. Failure to enter an order within 48 hours after the proceeding has been completed operates as a finding of no probable cause and the defendant is discharged. | Art. 16.17, C.C.P. |

CHAPTER 1 MAGISTRATE DUTIES

General Provisions Applicable to Adults

11. Examination of Defendant in Custody Suspected of Having Mental Illness or Intellectual Disability

Checklist 1-11	Script/Notes
<p>Definitions:</p> <p>“Mental illness” means an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency that: (a) substantially impairs a person’s thoughts, perceptions of reality, emotional process, or judgment; or (b) grossly impairs behavior as demonstrated by recent disturbed behavior.</p> <p>“Intellectual disability” means significantly subaverage general intellectual functioning that is concurrent with deficit in adaptive behavior and originates during the developmental period.</p> <p>“Subaverage general intellectual functioning” refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used.</p> <p>“Department” means the Texas Department of Aging and Disability Services.</p> <p>“Person with intellectual disability” means a person determined by a physician or psychologist licensed in this state or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior.</p> <p>“Adaptive behavior” means how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.</p>	<p>Sec. 571.003(14), H.S.C.</p> <p>Sec. 591.003(7-a), H.S.C.</p> <p>Sec. 591.003(20), H.S.C.</p> <p>Sec. 591.003(7), H.S.C.</p> <p>Sec. 591.003(15-a), H.S.C.</p> <p>Sec. 591.003(1), H.S.C.</p>

- 1. The sheriff or municipal judge has a duty to notify the judge that there may be reasonable cause to believe that a defendant committed to the sheriff's custody has a mental illness or is a person with an intellectual disability.

See *TMCEC 2020 Forms Book: Sheriff's Notification – Sheriff's or Municipal Jailer's Notification – Person in Custody with Possible Mental Illness/Intellectual Disability*. Sheriff or municipal jailer shall notify a magistrate within 12 hours after receiving evidence or a statement that may establish reasonable cause. Art. 16.22(a), C.C.P.

The notice must include any information related to the sheriff's or municipal jailer's determination, such as information regarding the defendant's behavior immediately before, during, and after the defendant's arrest and, if applicable, the results of any previous assessment of the defendant. Sec. 16.22(a)(1), C.C.P.

- 2. Determine if there is reasonable cause to believe (1) defendant has a mental illness, or (2) is a person with an intellectual disability, by considering:
 - a. The defendant's behavior; and
 - b. The result of a prior evaluation indicating a need for referral for further mental health or intellectual disability assessment.
- 3. Is there reasonable cause?
 - a. If the judge determines that there is no reasonable cause, no further action is required.

See Checklist 1-11.

- b. If reasonable cause is determined, issue a written order that the defendant be interviewed.

See *TMCEC 2020 Forms Book: Magistrate’s Order for Mental Illness/Intellectual Disability Exam*. The interview must be conducted by the service provider that contracts with the jail to provide mental health or intellectual and disability services, local mental health authority, local intellectual and developmental disability authority, or another qualified mental health or intellectual disability expert. Art. 16.22(a), C.C.P.

- c. A magistrate is not required to order the collection of information if the defendant in the year preceding the defendant’s applicable date of arrest has been determined to have a mental illness or to be a person with an intellectual disability by the service provider that contracts with the jail to provide mental health or intellectual and disability services, local mental health authority, the local mental health authority, local intellectual and developmental disability authority, or another mental health or intellectual disability expert.

Sec. 16.22(a)(2), C.C.P.

- d. An interview may be conducted in person in the jail, by telephone, or through a telemedicine medical service or telehealth service.

Art. 16.22(a-4), C.C.P.

- 4. From the time of the order, the expert designated by the judge must return a written report within 96 hours for a defendant held in custody or 30 days for a defendant released from custody.

Art. 16.22(b), C.C.P.

- a. The judge is required to give copies of the report to the prosecutor, the defense attorney, and the trial court.

- 5. What if the defendant fails or refuses to submit to an examination?

- 3. Petition for Hearing Filed: If a criminal action involving the property in question is not pending, then any of the courts having jurisdiction may hold a hearing to determine the right to possession of the property, upon the petition of any interested party, including a county, a city, or the state.

Art. 47.01a(a), C.C.P. Note: A peace officer is an “interested party” since the evidence may establish that the State has a superior right to possession. A hearing may be held on the petition of a seizing officer. See *TMCEC 2020 Forms Book: Notice of Stolen Property Hearing*. The C.C.P. is silent as to the obligation of the Court to provide notice to interested parties. Nevertheless, due to the property interest at stake, due process interests, and a judge’s ethical adjudicative responsibilities (Canon 3B(8) *Code of Judicial Conduct*), interested parties should be given notice of the date and time of the hearing.

- 4. Notice Provided.

- 5. Conduct the Hearing.

See Checklist 1-14.

- 6. Post-Hearing Orders: After a hearing and appropriate findings, the court may enter the following orders:

- a. Order the property delivered to whoever has the superior right of possession:

Art. 47.01a(e). Note: The person with the superior right of possession is responsible for any transportation necessary for delivery.

- (1) Without conditions;

See *TMCEC 2020 Forms Book: Magistrate Duties: Order Restoring Stolen Property When No Trial is Pending*. Art. 47.01a(a)(1), C.C.P. Presumably, this is construed to mean that claimants are exempt from paying charges pursuant to Art. 47.07, C.C.P.

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| <ul style="list-style-type: none"> <input type="checkbox"/> (2) Subject to the condition that the property be made available to the State if needed in future prosecutions. | <p>Art. 47.01a(a)(2), C.C.P. This requires a written motion by an attorney representing the State. Furthermore, it contemplates that a trial is pending and that the motion is made before the trial is to begin.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> b. Order the property be awarded to the custody of a peace officer, pending resolution of the investigation involving the property. | <p>Art. 47.01a(a)(3), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> c. If it is shown in a hearing that probable cause exists to believe that the property was acquired by theft or by another manner that makes its acquisition an offense and that the identity of the actual owner of the property cannot be determined, the magistrate shall order the peace officer to: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Deliver the property to a government agency for official purposes; <input type="checkbox"/> (2) Deliver the property to a person authorized by Article 18.17, C.C.P., to receive and dispose of the property; or <input type="checkbox"/> (3) Destroy the property. | <p>Art. 47.01a(b), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> (1) Deliver the property to a government agency for official purposes; | <p>Art. 47.01a(b)(1), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> (2) Deliver the property to a person authorized by Article 18.17, C.C.P., to receive and dispose of the property; or | <p>Art. 47.01a(b)(2), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> (3) Destroy the property. | <p>Art. 47.01a(b)(3), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 7. Appeals: Appeal from a hearing held in a municipal court or justice court under Article 47.01(a), C.C.P., shall be heard by a county court or a statutory county court. Such appeals are governed by the rules of procedure for appeals for civil cases from justice court to county court. <ul style="list-style-type: none"> <input type="checkbox"/> a. The requirement that the notice of appeal be given at the conclusion of the hearing does not require that the notice be given in open court. The hearing does not conclude until the court’s ruling is both announced and received. <input type="checkbox"/> b. Only an “interested person” who appears at a hearing may appeal and must post an appeal bond by the end of the next business day. | <p>Art. 47.12(b), C.C.P.</p> <p><i>Phillips v. State</i>, 77 S.W.3d 465 (Tex. App.—Houston [1st Dist.] 2002); <i>White v. State</i>, 930 S.W.2d 673 (Tex. App.—Waco 1996).</p> <p>Art. 47.12(c), C.C.P.</p> |

- c. The court may require an appeal bond in the amount the court deems appropriate, but not more than twice the value of the property, made payable to the party awarded possession at the hearing, with sufficient sureties.

Art. 47.12(d), C.C.P.

CHAPTER 1 MAGISTRATE DUTIES

Property Hearings: Disposition of Stolen Property

13. Restoration upon Trial or Trial Pending

Checklist 1-13	Notes
<p><input type="checkbox"/> 1. Jurisdiction: Article 47.02, C.C.P., contemplates jurisdiction being:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. In a trial court, post-adjudication of a theft or illegal acquisition of property case;</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. In a trial court in which a theft or other illegal acquisition of property case is pending; or</p> <p style="padding-left: 40px;"><input type="checkbox"/> c. With any magistrate having jurisdiction in the county in which the property was alleged to have been stolen or, if the criminal action is pending in another county, the county in which the action is pending subject to Chapter 501, T.C. (The Texas Certificate of Title Act) and the consent of the prosecuting attorney.</p> <p><input type="checkbox"/> 2. Conduct the Hearing.</p> <p><input type="checkbox"/> 3. Post Hearing Orders.</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. Upon Trial: The court trying the case shall order the property to be restored to a person appearing on presentation of proof to be the owner. The owner of the property is responsible for any transportation necessary to restore the property to the owner.</p> <p style="padding-left: 80px;">If the property is not claimed within 30 days of conviction of the person who illegally acquired it, the property shall be disposed of pursuant to Article 18.17, C.C.P.</p> <p style="padding-left: 80px;">The real owner of the property sold pursuant to Article 47.06, C.C.P. may recover such property under the terms prescribed in Article 18.17(e), C.C.P.</p>	<p>See Checklist 1-14.</p> <p>See <i>TMCEC 2020 Forms Book: Order Restoring Stolen Property on Trial</i>.</p> <p>Art. 47.02, C.C.P.</p> <p>Art. 47.06, C.C.P.</p> <p>Art. 47.07, C.C.P.</p>

<p><input type="checkbox"/> b. Trial Pending: If it is proved to the satisfaction of the judge that the person is a true owner of the property alleged to be stolen and the property is in the possession of the peace officer, the peace officer by written order shall restore it to the owner.</p>	<p>Art. 47.02, C.C.P.</p>
<p><input type="checkbox"/> c. When Doubt Remains: If the court has doubt as to the ownership of the property, the court may require:</p> <p><input type="checkbox"/> (1) A bond of the claimant for redelivery of the property should it be thereafter shown not to belong to the claimant; or</p> <p><input type="checkbox"/> (2) That the sheriff retains the property until further orders are made regarding possession.</p>	<p>Art. 47.05, C.C.P.</p>
<p><input type="checkbox"/> d. Claimant to Pay Charges: The claimant of the property must pay all reasonable charges for safekeeping prior to delivery of the property. The officer claiming that such charges are owed must verify such charges. If the charges are not paid, the property shall be sold as under execution and the proceeds of the sale, less the charges and cost of the sale, paid to the owner of the property.</p>	<p>The owner is responsible for any transportation necessary to return the property to the owner. Art. 47.02 (c) C.C.P.</p>
<p><input type="checkbox"/> 4. Appeals: No appeals from hearings under Article 47.02 are authorized.</p>	<p>Presumably, efforts to appeal would be dependent on the outcome of the appeal of the theft or property acquisition matter.</p>

CHAPTER 1 MAGISTRATE DUTIES

Property Hearings: Disposition of Stolen Property

14. Hearing

Checklist 1-14	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. The court shall: <ul style="list-style-type: none"> <input type="checkbox"/> a. Order the property delivered to whomever has the superior right to possession; and <input type="checkbox"/> b. Make such orders as the facts require. <input type="checkbox"/> 2. If none of the interested parties appear at the hearing after having been properly notified, the court may presume that: <ul style="list-style-type: none"> <input type="checkbox"/> a. The parties do not have a valid claim to possession; <input type="checkbox"/> b. The parties have abandoned their claim to possession; or <input type="checkbox"/> c. They do not wish to assert a claim. <input type="checkbox"/> 3. The court may award possession of the property to the law enforcement agency if no interested party has proved a right to possess the property. <input type="checkbox"/> 4. If none of the interested parties appear at the hearing, except for the officer who has discovered another interested party since the scheduling of the hearing, the court should: <ul style="list-style-type: none"> <input type="checkbox"/> a. Instruct the officer to file an amended inventory of property seized, and to include the name and mailing address of the newly-discovered interested party on the amended form; <input type="checkbox"/> b. Reset the case; and <input type="checkbox"/> c. Notify the interested parties of the hearing. <input type="checkbox"/> 5. When the true owner of a stolen motor vehicle is unknown and there are no lien holders to be found: 	<p>Art 47.01a(a)(1), C.C.P.</p>

- ☐ a. The officer should proceed to file a seizure case; and
 - ☐ b. The court should notify the respondent (the person from whom the vehicle was seized, if any), of the right to appear at the hearing and assert a claim of possession.

- ☐ 6. Order of Proceedings: The hearing should be conducted in an orderly manner to ensure that parties are given an opportunity to be heard. This may be accomplished through a question and answer format facilitated by the judge.

- ☐ 7. Burden of Proof: In contrast to criminal cases in which the State’s case must be proven “beyond a reasonable doubt,” a respondent or petitioner must establish a claim to the property by a “preponderance of the evidence.”
 - ☐ a. If there are no other interested parties present who might rebut the respondent’s or petitioner’s evidence, the right to possession is established.

- ☐ 8. Rules of Evidence: In hearings conducted when no trial is pending, hearsay evidence is admissible.

- ☐ 9. Proceed to enter Post-Hearing Orders.

Though the C.C.P. is silent as to this issue, Canon 3B8, *Code of Judicial Conduct*, would nonetheless apply.

“Preponderance of the evidence” means the greater weight and degree of credible evidence. *Upjohn Co. v. Freeman*, 847 S.W.2d 589 (Tex. App.—Dallas 1992, no writ).

At the hearing, any interested person may present evidence that the property was not acquired by theft or another offense or that the person is entitled to possess the property.

Art. 47.01a(c), C.C.P. Article 47.02, C.C.P., does not address the admissibility of hearsay statements upon trial or when trial is pending.

See Checklists 1-12 and 1-13 for more information on Post-Hearing Orders.

SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

1. The Chapter 15 Arrest Warrant

Warrants, in contrast to other writs such as the *capias* and *capias pro fine*, are issued primarily by judges in their capacity as magistrates. There is one notable exception to this rule in Texas: municipal judges and justices of the peace have authority to issue warrants of arrest for fine-only misdemeanors filed in their court pursuant to Article 45.014, C.C.P. The 85th Regular Legislature made significant changes relating to Article 45.014 warrants. The issuance of an arrest warrant is prohibited for the defendant’s failure to appear at the initial court setting, including failure to appear as required by a citation issued under Article 14.06(b), unless certain additional notice is provided by telephone or regular mail. Furthermore, judges are required to recall an arrest warrant for the defendant’s failure to appear if, before the arrest warrant is executed, the defendant voluntarily appears to resolve the arrest warrant and the arrest warrant is resolved in any manner authorized by the Code of Criminal Procedure; this is commonly referred to as the “safe harbor” provision.

As a magistrate, a municipal judge has authority to issue warrants of arrest for offenses including those that are outside of the municipal court’s jurisdiction, such as Class A and B misdemeanors and felonies. For those offenses, a magistrate’s authority for issuing arrest warrants is found in Chapter 15, C.C.P. Article 2.09, C.C.P. lists those persons who are magistrates in Texas. Included in that list are municipal judges. A magistrate’s authority is countywide. *Gilbert v. State*, 493 S.W.2d 783 (Tex. Crim. App. 1973) and *Ex parte Clear*, 573 S.W.2d. 224 (Tex. Crim. App. 1978). A magistrate’s authority to issue warrants is discussed in Checklist 2-1.

Checklist 2-1	Script/Notes
<p>A “warrant of arrest” is a written order from a magistrate directed to a peace officer commanding the officer to take the body of the person accused of an offense to be dealt with according to law.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 1. No arrest warrant shall issue without probable cause supported by oath or affirmation. An arrest warrant may be issued: <ul style="list-style-type: none"> <input type="checkbox"/> a. When a verbal order of arrest is proper; <input type="checkbox"/> b. When a person swears under oath that another has committed an offense against the laws of the State; or 	<p>Art. 15.01, C.C.P. See TMCEC <i>The Municipal Judges Book</i>: Chapter 1.</p> <p>Art. 1.06, C.C.P.</p> <p>Art. 15.03(a)(1), C.C.P.</p> <p>Art. 15.03(a)(2), C.C.P. A person may appear before the magistrate in person or they may be presented to the magistrate through an electronic broadcast system. Art. 15.03(c), C.C.P. A recording of the communication must be made and preserved, if the defendant is charged with the offense, until the defendant is acquitted or all appeals have been exhausted. Art. 15.03(d), C.C.P.</p>

- c. In any case in which the C.C.P. permits the issuance of an arrest warrant.
- 2. The arrest warrant:
 - a. Issues in the name of “The State of Texas;”
 - b. Names the person to be arrested, if known, or reasonably describes the person to be arrested, including any or all of the following:
 - (1) Nickname or “street” name;
 - (2) Age;
 - (3) Gender;
 - (4) Height and weight;
 - (5) Identifying marks; and
 - (6) Ethnic origin.
 - c. Alleges the commission of some offense against the laws of the State; and
 - d. Is signed by a magistrate with his or her office named in the body of the warrant or in connection with the officer’s signature.
- 3. An arrest warrant must also be supported by an affidavit of probable cause stating:
 - a. The name of the accused, if known, and if not known, a reasonably definite description;
 - b. The time and place of the commission of the offense, as definitely as can be stated by the affiant; and
 - c. Sufficient facts to support a finding of probable cause that the person named therein:

Art. 15.03(a)(3), C.C.P.

See *TMCEC 2020 Forms Book*:
Warrant of Arrest: Magistrate.

Arts. 15.04 and 15.05, C.C.P., Art.
1.06, C.C.P.

- (1) Committed the offense charged;
and
- (2) Committed it within the period
covered by the statute of
limitations.

- 4. The specific requisites of the complaint or affidavit
are covered later in this chapter.

- 5. An arrest warrant is valid throughout Texas, unless
issued by a city mayor.

- 6. Make sure a copy of any warrant or affidavit
is provided to the clerk of the court for public
disclosure once executed.

See Checklist 2-4.

Art. 15.06, C.C.P. A warrant issued
by a mayor is generally only valid
in the county in which it is issued.
Art. 15.07, C.C.P.

Art. 15.26, C.C.P.
See Checklist 2-11.

<p><input type="checkbox"/> b. A <i>capias</i> may be issued by the court in misdemeanor cases upon the filing of an information or complaint.</p>	<p>A <i>capias</i> may issue only after a judge’s determination of probable cause. Art. 23.04, C.C.P.; <i>Sharp v. State</i>, 677 S.W.2d 513 (Tex. Crim. App. 1984).</p>
<p><input type="checkbox"/> c. A <i>capias</i> may be issued in electronic form for a person’s failure to appear before a court or to comply with a court order.</p>	<p>Art. 23.031, C.C.P.</p>
<p><input type="checkbox"/> d. A <i>capias</i> shall be issued when a bail forfeiture is declared.</p>	<p>Art. 23.05, C.C.P.</p>
<p><input type="checkbox"/> e. Make sure copies of all <i>capiases</i> and affidavits are provided to the clerk of the court for public disclosure once executed.</p>	<p>Art. 15.26, C.C.P. See Checklist 2-11.</p>
<p><input type="checkbox"/> 2. A “<i>capias</i>” as defined in Chapter 43 is a writ that is: (1) issued by a court having jurisdiction of a case after judgment and sentence; and (2) directed to any peace officer of the State of Texas commanding the officer to arrest a person convicted of an offense and bring the arrested person before that court immediately or on a day or at a term stated in the writ.</p>	<p>Art. 43.015(1), C.C.P.</p>
<p><input type="checkbox"/> a. The court may issue a <i>capias</i>, as defined in Chapter 43, when a judgment and sentence have been rendered against a defendant and the defendant is absent.</p>	<p>Art. 43.04, C.C.P</p>
<p><input type="checkbox"/> b. A <i>capias</i>, issued pursuant to Chapter 43, may be issued in electronic form.</p>	<p>Art. 43.021, C.C.P.</p>
<p><input type="checkbox"/> c. A <i>capias</i> may be issued to any county in the State and shall be executed as in other cases, but no bail shall be taken.</p>	<p>Art. 43.06, C.C.P.</p>

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

3. The Chapter 45 Arrest Warrant

Warrants, in contrast to other writs such as the *capias* and *capias pro fine*, are issued primarily by judges in their capacity as magistrates. There is one notable exception to this rule in Texas: municipal judges and justices of the peace have authority to issue arrest warrants for fine-only misdemeanors filed in their court pursuant to Art. 45.014, C.C.P. This Chapter 45 warrant is in many ways more similar to a *capias* than an arrest warrant, as it is issued by a judge as opposed to a magistrate and is often issued after the judge has jurisdiction over the offense due to the filing of the sworn complaint. It may also be issued by the judge after an affidavit establishing probable cause, but prior to formal charging, much like the Chapter 15 arrest warrant.

The 85th Regular Legislature made significant changes relating to the Article 45.014 warrant. The issuance of an arrest warrant is prohibited for the defendant’s failure to appear at the initial court setting, including failure to appear as required by a citation issued under Article 14.06(b) unless certain additional notice is provided by telephone or regular mail. Furthermore, judges are required to recall an arrest warrant for the defendant’s failure to appear if, before the arrest warrant is executed, the defendant voluntarily appears to resolve the arrest warrant and the arrest warrant is resolved in any manner authorized by the Code of Criminal Procedure; this is commonly referred to as the “safe harbor” provision.

Checklist 2-3	Script/Notes
<ul style="list-style-type: none"> <li data-bbox="212 989 915 1192"> <input type="checkbox"/> 1. Prior to issuing an arrest warrant for the defendant's failure to appear at the initial court setting, including failure to appear as required by a citation issued under Article 14.06(b), the judge must provide by telephone or regular mail to the defendant notice that includes: <ul style="list-style-type: none"> <li data-bbox="310 1304 915 1440"> <input type="checkbox"/> a. A date and time, occurring within the 30-day period following the date that notice is provided, when the defendant must appear before the justice or judge; <li data-bbox="310 1478 915 1545"> <input type="checkbox"/> b. The name and address of the court with jurisdiction in the case; <li data-bbox="310 1583 915 1719"> <input type="checkbox"/> c. Information regarding alternatives to the full payment of any fine or costs owed by the defendant, if the defendant is unable to pay that amount; and <li data-bbox="310 1757 915 1860"> <input type="checkbox"/> d. An explanation of the consequences if the defendant fails to appear before the justice or judge as required by this article; and 	<p data-bbox="1000 989 1256 1020">Art. 45.014(e), C.C.P.</p> <p data-bbox="1000 1058 1373 1125">See <i>TMCEC 2020 Forms Book</i>: Notice Initial Court Setting.</p> <p data-bbox="1000 1163 1409 1266">A court may send any notice using mail or electronic mail. Sec. 80.002, G.C.</p>

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| <p><input type="checkbox"/> 2. The defendant must fail to appear before the justice or judge as required by this article.</p> | |
| <p><input type="checkbox"/> 3. A defendant who receives notice may request an alternative date or time to appear before the judge if the defendant is unable to appear on the date and time included in the notice.</p> | <p>Art. 45.014(f), C.C.P.</p> |
| <p><input type="checkbox"/> 4. A judge may issue a warrant for the arrest of the accused and deliver the same to the proper officer to be executed when a sworn complaint or affidavit based on probable cause has been filed before the municipal court</p> | <p>Art. 45.014(a), C.C.P.</p> |
| <p><input type="checkbox"/> 5. The arrest warrant is sufficient if it:</p> | <p>See <i>TMCEC 2020 Forms Book: Warrant of Arrest: Judge</i></p> |
| <p><input type="checkbox"/> a. Issues in the name of “The State of Texas;”</p> | <p>Art. 45.014(b)(1), C.C.P.</p> |
| <p><input type="checkbox"/> b. Is directed to the proper peace officer or some other person specifically named in the warrant;</p> | <p>Art. 45.014(b)(2), C.C.P.</p> |
| <p><input type="checkbox"/> c. Includes a command that the body of the accused be taken, and brought before the authority issuing the warrant, at the time and place stated in the warrant;</p> | <p>Art. 45.014(b)(3), C.C.P.</p> |
| <p><input type="checkbox"/> d. States the name of the person whose arrest is ordered, if known, or if not known, it describes the person as in the complaint;</p> | <p>Art. 45.014(b)(4), C.C.P.</p> |
| <p><input type="checkbox"/> e. States that the person is accused of some offense against the laws of this state, naming the offense; and</p> | <p>Art. 45.014(b)(5), C.C.P.</p> |
| <p><input type="checkbox"/> f. Is signed by the judge, naming the office of the justice or judge in the body of the warrant or in connection with the signature of the justice or judge.</p> | <p>Art. 45.014(b)(6), C.C.P.</p> |
| <p><input type="checkbox"/> 6. Chapter 15 applies to a warrant of arrest issued under this article, except as inconsistent or in conflict with this chapter.</p> | <p>Art. 45.014(c), C.C.P.
See Checklist 2-1</p> |

☐ 7. In a county with a population of more than two million that does not have a county attorney, a judge may not issue a warrant under this section for the offense of Issuance of Bad Check under Section 32.41, P.C., unless the district attorney has approved the complaint or affidavit on which the warrant is based.

Art. 45.014(d), C.C.P.

☐ 8. A justice or judge shall recall an arrest warrant for the defendant's failure to appear if the defendant voluntarily appears and makes a good faith effort to resolve the arrest warrant before the warrant is executed.

Art. 45.014(g), C.C.P.

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

4. Search Warrants for Persons and Property

A municipal judge, signing a search warrant in his or her capacity as a magistrate, must have geographical authority over the area to be searched (i.e., the county or counties in which the city is located). For example, an Austin municipal judge lacks the authority to issue a search warrant for property located in the City of El Paso. All magistrates have co-equal jurisdiction with all other magistrates within the county or counties in which their city is situated and their jurisdiction is coextensive with the limits of the county or counties. *Gilbert v. State*, 493 S.W.2d. 783 (Tex. Crim. App. 1973) and *Ex parte Clear*, 573 S.W.2d. 224 (Tex.Crim. App. 1978).

Checklist 2-4	Script/Notes
<p>A “search warrant” is a written order from a magistrate to a peace officer commanding the officer to search for and to seize designated property or things and to return them to the magistrate.</p>	<p>Art. 18.01(a), C.C.P.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Review the search warrant, being certain it: <ul style="list-style-type: none"> <input type="checkbox"/> a. Issues in the name of “The State of Texas;” and <input type="checkbox"/> b. Directs any peace officer of the county to search the person, place, or thing named, and seize one or more of the following: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Property acquired by theft or by any manner that makes its acquisition a penal offense; <input type="checkbox"/> (2) Property specifically designed, made, or adapted for or commonly used in the commission of an offense; <input type="checkbox"/> (3) Arms or munitions kept or prepared for purposes of insurrection or riot; <input type="checkbox"/> (4) Weapons prohibited by the Penal Code; <input type="checkbox"/> (5) Gambling devices or equipment, altered gambling equipment, or gambling paraphernalia; 	<p>Art. 18.02, C.C.P.</p>

- (6) Obscene materials kept or prepared for commercial distribution or exhibition;
 - (7) A drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;
 - (8) Any property whose possession is prohibited by law;
 - (9) Implements or instruments used in commission of a crime;
 - (10) Property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person(s) committed an offense;
 - (11) Persons;
 - (12) Contraband subject to forfeiture under Chapter 59, C.C.P.; or
 - (13) Electronic customer data held in electronic storage.
- c. Identifies the property to be seized with particularity;
 - d. Identifies the location or property sought, including:
 - (1) A specific street address; and

See Checklist 2-6 for special rules concerning “evidentiary” warrants for mere evidence.

A warrant for electronic customer data can only be issued by a district judge. Art. 18B.353, C.C.P.

Art. 18.04(2), C.C.P.

Art. 18.04(2), C.C.P.

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| <ul style="list-style-type: none"> <input type="checkbox"/> (2) A full description of the building and surrounding areas. If no address is provided, this description should be detailed enough to distinguish the property to be searched. In cases of a multiple unit structure, such as apartment complexes, condominiums, and storage facilities, identify the specific unit to be searched. | |
| <ul style="list-style-type: none"> <input type="checkbox"/> e. Describes the person, place, or thing to be searched, including any or all of the following: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Proper name, nickname, or street name; <input type="checkbox"/> (2) Age; <input type="checkbox"/> (3) Gender; <input type="checkbox"/> (4) Height and weight; <input type="checkbox"/> (5) Identifying marks; or <input type="checkbox"/> (6) Ethnic origin. | <p>Art. 18.04(2), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 2. Date and sign the warrant. | <p>Art. 18.04(4), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 3. Ensure that your name is included in clearly legible handwriting or in typewritten form along with your signature. | <p>Art. 18.04(5), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 4. Record the date and hour the warrant is signed on the face of the warrant. | <p>Art. 18.07(b), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 5. If the facts presented for the issuance of a search warrant also establish probable cause that a person has committed an offense, the search warrant may also order the arrest of that person. | <p>This is a “combination” search and arrest warrant. Art. 18.03, C.C.P.; see <i>TMCEC 2020 Forms Book: Search and Arrest Warrant</i>.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 6. With the exception of affidavits for search warrants that have been temporarily sealed, make sure a copy of all warrants and affidavits are provided to the clerk of the court for public disclosure, when executed. | <p>Art. 15.26, C.C.P.
 Art. 18.01(b), C.C.P.
 Art. 18.011, C.C.P.
 See Checklist 2-11.</p> |

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

5. The Affidavit Supporting the Arrest Warrant, Capias, or Search Warrant

Checklist 2-5	Script/Notes
<p><input type="checkbox"/> 1. The affidavit must establish a substantial basis for concluding that there is a “fair probability” that a search will uncover evidence of wrongdoing or that a person has committed an offense.</p>	<p><i>Illinois v. Gates</i>, 462 U.S. 213 (1983).</p>
<p><input type="checkbox"/> 2. The affidavit must contain facts, not mere conclusions, from which the magistrate can make an independent determination of probable cause.</p> <p><input type="checkbox"/> a. The determination is based on the totality of the circumstances, practicality, and common sense.</p>	<p>See <i>TMCEC 2020 Forms Book: Affidavit for Probable Cause for Arrest Warrant</i> Art. 18.01(b), C.C.P.</p>
<p><input type="checkbox"/> b. Probable cause is a level of certainty more than mere suspicion but less than a preponderance; it is not a more-likely-than-not standard.</p>	<p>See <i>TMCEC The Municipal Judges Book: Chapter 1</i>.</p>
<p><input type="checkbox"/> 3. Any reliable evidence may be considered without regard to its admissibility at trial; hearsay and police records may be considered.</p>	
<p><input type="checkbox"/> 4. Do not consider any information not in the warrant affidavit.</p>	<p>The four-corners doctrine limits the determination of sufficient probable cause to the four corners of the affidavit. <i>Lagrone v. State</i>, 742 S.W.2d 659 (Tex. Crim. App. 1987); <i>Adkins v. State</i>, 717 S.W.2d 363 (Tex. Crim. App. 1986).</p>
<p><input type="checkbox"/> a. If the applicant for a warrant has additional information, have that information included in an affidavit that is attached to the warrant.</p>	<p>While the four-corners rule has been consistently applied to search warrants, its application to arrest warrants is less strict, especially with recent changes in the law allowing an oath to be made before a magistrate electronically. See “Rounding the Corners: Criminal Application of the Four-Corners Rule”, <i>The Recorder</i> (June 2012).</p>

- b. For search warrants submitted by electronic means, the magistrate may consider additional testimony or exhibits.

- 5. Determine whether the source of the information in the affidavit is reliable.
 - a. The affiant is presumed to be honest (because of the oath).
 - b. A named victim, eyewitness, or citizen informant who reports a crime is presumed reliable.
 - c. An unnamed informant’s reliability may be shown by:
 - (1) Recitation of lack of criminal record, good reputation in the community for general veracity, and gainful employment;
 - (2) Corroboration of details provided by the informant;
 - (3) Recitation that informant has provided true, correct, and reliable information in the past; or
 - (4) Declaration by informant against penal interest.

- 6. Determine the basis of the source’s knowledge and whether the information from the source is credible.
 - a. Is the information first-hand and the result of direct observation of the facts rather than an opinion or a conclusion?
 - b. Is the information hearsay and, if so, is there an indication of its reliability?
 - c. Is the information corroborated by other sources or independent investigation?

Magistrates who consider additional information will have additional responsibilities under the new Art. 18.01(b-1), C.C.P. See Checklist 2-10.

Wetherby v. State, 482 S.W.2d 852 (Tex. Crim. App. 1972).

- d. Are there details not commonly known that suggest inside information by the informant?
- e. In the case of a search warrant, does it state the time when the information was acquired?

- 7. The search warrant affidavit is generally public information after the warrant is executed and should be made available for public inspection.

- 8. Make sure a copy of all warrants and affidavits are provided to the clerk of the court for public disclosure.

Schmidt v. State, 659 S.W.2d 420 (Tex. Crim. App. 1983). Stale information will not support a conclusion that property is still on the premises to be searched.

Art. 18.01(b), C.C.P.
See Checklist 2-10.

Art. 15.26, C.C.P.
See Checklist 2-11.

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

6. Search Warrants for Mere Evidence

Checklist 2-6	Script/Notes
<p>A “mere evidence” or evidentiary search warrant is an order from the magistrate to a peace officer to search for and seize property or items, except the personal writings of an accused, that constitute evidence of an offense or tend to show a particular person committed an offense.</p>	<p>Art. 18.02(10), C.C.P. A blood warrant is an example of a “mere evidence” search warrant. See Checklist 2-7.</p>
<p><input type="checkbox"/> 1. An original mere evidence warrant may be issued by a judge of a municipal court of record or a county court judge who is a licensed attorney; a judge of a statutory county court, the Court of Criminal Appeals, or the Supreme Court.</p>	<p>Art. 18.01(h), C.C.P.</p>
<p><input type="checkbox"/> 2. Except under the limited circumstances noted below, neither a judge of a non-record municipal court nor a justice of the peace may issue a mere evidence warrant. The exception is for counties that do not have: (1) a judge of a municipal court of record who is a licensed attorney; (2) a county judge who is a licensed attorney; or (3) a statutory county court judge.</p>	<p>Art. 18.01(i), C.C.P.</p>
<p><input type="checkbox"/> 3. Any subsequent mere evidence warrant to search the same person, place, or thing subjected to a prior search under a mere evidence warrant may be issued only by a judge of a district court, a court of appeals, the Court of Criminal Appeals, or the Supreme Court.</p>	<p>Even municipal courts of record cannot issue a second mere evidence warrant. Art. 18.01(d), C.C.P.</p>
<p><input type="checkbox"/> 4. Greater specificity is required in the affidavit for an evidentiary warrant than for a regular search warrant.</p>	<p>Art. 18.01(c), C.C.P.</p>
<p><input type="checkbox"/> a. The affidavit must contain facts to establish probable cause that:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) A specific offense was committed;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) Specifically described property or items to be searched for and seized constitute evidence of the specific offense or that a particular person committed it; and</p>	<p>See Checklist 2-5 on probable cause.</p>

- (3) The property or items constituting evidence are located at or on the particular person, place, or thing to be searched.

- 5. A warrant to search for “mere evidence” — as opposed to items in Article 18.02(1-9) — may not be issued for the office of a:
 - a. Newspaper;
 - b. News magazine; or
 - c. Television or radio station.

Art. 18.01(e), C.C.P.

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

7. Blood Search Warrants

Checklist 2-7	Script/Notes
<p>A blood search warrant is an order from the magistrate to a peace officer some blood warrants may only have command to either seize or test blood. New case makes clear that warrants should have both specimen from a person who is arrested for an intoxication offense and refuses to submit to a breath or blood alcohol test.</p>	<p>Arts. 18.01(j) and 18.02(10), C.C.P.</p>
<p><input type="checkbox"/> 1. A blood search warrant may be issued by any magistrate who is a licensed attorney if:</p>	<p>Art. 18.01(j), C.C.P. See <i>TMCEC 2020 Forms Book: Blood Search Warrant.</i></p>
<p><input type="checkbox"/> a. The suspect refuses to submit to a breath or blood alcohol test; and</p>	
<p><input type="checkbox"/> b. Is charged with:</p>	
<p><input type="checkbox"/> (1) Driving While Intoxicated;</p>	<p>Sec. 49.04, P.C.</p>
<p><input type="checkbox"/> (2) Driving While Intoxicated with a Child Passenger;</p>	<p>Sec. 49.045, P.C.</p>
<p><input type="checkbox"/> (3) Flying While Intoxicated;</p>	<p>Sec. 49.05, P.C.</p>
<p><input type="checkbox"/> (4) Boating While Intoxicated;</p>	<p>Sec. 49.06, P.C.</p>
<p><input type="checkbox"/> (5) Assembling or Operating an Amusement Ride While Intoxicated;</p>	<p>Sec. 49.065, P.C.</p>
<p><input type="checkbox"/> (6) Intoxication Assault; or</p>	<p>Sec. 49.07, P.C.</p>
<p><input type="checkbox"/> (7) Intoxication Manslaughter.</p>	<p>Sec. 49.08, P.C.</p>
<p><input type="checkbox"/> 2. Greater specificity is required in the affidavit for an evidentiary warrant than for a regular search warrant.</p>	<p>Art. 18.01(c), C.C.P. See <i>TMCEC 2020 Forms Book: Affidavit for Blood Search Warrant.</i></p>
<p><input type="checkbox"/> a. The affidavit must contain facts to establish probable cause that:</p>	<p>See Checklist 2-5 on probable cause.</p>
<p><input type="checkbox"/> (1) A specific offense was committed;</p>	

- (2) Specifically described property or items to be searched for and seized constitute evidence of the specific offense or that a particular person committed it; and
 - (3) The property or items constituting evidence are located at or on the particular person, place, or thing to be searched.
3. In the following circumstances, a blood search warrant is not necessary for police to obtain a blood sample:
- a. A suspect voluntarily agrees to submit to the drawing of a blood sample;
 - b. A police officer is mandated to obtain a blood sample where a person has been arrested for a motor or watercraft intoxication offense, the person refuses the officer's request to submit to the taking of a specimen voluntarily, and:
 - (1) The person was the operator of a motor vehicle or a watercraft involved in a collision that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the collision:
 - (a) Any individual has died or will die;
 - (b) An individual other than the person has suffered serious bodily injury; or
 - (c) An individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for treatment;

Sec. 724.012, T.C.

- (2) The offense for which the person was arrested is Driving While Intoxicated with Child Passenger; or
- (3) At the time of the arrest, the officer possesses or receives reliable information from a credible source that the person:
 - (a) Has been previously convicted of or placed on community supervision for Driving While Intoxicated with Child Passenger, Intoxication Assault, or Intoxication Manslaughter; or
 - (b) On two or more occasions, has been previously convicted of or placed on community supervision for Driving While Intoxicated, Flying While Intoxicated, Boating While Intoxicated, or Assembling or Operating an Amusement Ride While Intoxicated.

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

8. Search Warrants to Photograph a Child. Art. 18.021, C.C.P.

Checklist 2-8	Script/Notes
<p><input type="checkbox"/> 1. The affidavit must contain the following information in addition to that normally required:</p> <p><input type="checkbox"/> a. The allegation of one of the following specific offenses:</p> <p><input type="checkbox"/> (1) Injury to a child;</p> <p><input type="checkbox"/> (2) Sexual assault of a child;</p> <p><input type="checkbox"/> (3) Aggravated sexual assault of a child; or</p> <p><input type="checkbox"/> (4) Continuous sexual abuse of young child or children.</p> <p><input type="checkbox"/> b. The name or a description of the victim;</p> <p><input type="checkbox"/> c. A statement that evidence of the offense or evidence that a particular person committed the offense can be detected by photographing the child; and</p> <p><input type="checkbox"/> d. A statement that the child to be located and photographed can be found at a particular place to be searched.</p> <p><input type="checkbox"/> 2. Special conditions for the execution of the warrant are also found in Article 18.021, C.C.P.</p> <p><input type="checkbox"/> 3. The return on the warrant shall include the exposed film.</p>	<p>Sec. 22.04, P.C.</p> <p>Sec. 22.011(a), P.C.</p> <p>Sec. 22.021, P.C.</p> <p>Sec. 21.02, P.C.</p> <p>Art. 18.01(f), C.C.P.</p> <p>Art. 18.021(c), C.C.P.</p> <p>Art. 18.021(d), C.C.P.</p>

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| <p><input type="checkbox"/> 3. If the officer is from a city or county, or political subdivision, verify that he or she is designated as a person authorized to be issued the warrant.</p> | <p>Art. 18.05(d), C.C.P.</p> |
| <p><input type="checkbox"/> 4. If the officer is from a political subdivision other than a city or county, verify that the political subdivision routinely inspects premises to determine whether there is a fire or health hazard, unsafe building condition, or a violation of fire, health or building regulations, statutes, or ordinances.</p> | <p>Art. 18.05(d), C.C.P.</p> |
| <p><input type="checkbox"/> 5. A warrant may not be issued under Article 18.05, C.C.P., to a code enforcement official of a county with a population of 3.3 million or more for the purpose of allowing the inspection of specified premises to determine the presence of an unsafe building condition or a violation of a building regulation, statute, or ordinance.</p> | <p>Art. 18.05(e), C.C.P.</p> |
| <p><input type="checkbox"/> 6. The affidavit must demonstrate probable cause to believe that the specific named violation or hazardous condition is present in the premises to be inspected.</p> | |
| <p><input type="checkbox"/> 7. The magistrate may consider the:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Specific knowledge of the affiant; <input type="checkbox"/> b. Age and general condition of the premises; <input type="checkbox"/> c. Previous violations or hazards found present in the premises; <input type="checkbox"/> d. Type of premises; <input type="checkbox"/> e. Purposes for which the premises are used; and <input type="checkbox"/> f. Presence of hazards or violations in, and the general condition of premises near, the premises sought to be inspected. | <p>Art. 18.05(c), C.C.P.</p> |

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

10. Search Warrants and Affidavits Submitted by Reliable Electronic Means

In *Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App 2013), the Court held, in light of the specific facts of the case, that the telephonic administration of an oath for a search warrant did not run afoul of Article 18.01. Judge Meyers, dissenting, stated that only the Legislature could expand the statute. See “Case Law and Attorney General Opinion Update” *The Recorder* (November 2013). It appears that the Legislature valued Judge Meyers’ dissent. During the 84th Legislature, Subsection (b-1) was added to Article 18.01 of the Code of Criminal Procedure authorizing communication of information supporting the issuance of a search warrant by telephone or any other reliable electronic means. Additionally, a magistrate may examine, under oath, an applicant or another person on whose testimony the application is based.

For traditionalists, subsection (b-1) marks a major departure from the “four-corners rule.” While the warrant that is ultimately issued may contain all of the required and relevant information to establish probable cause, the content within its four corners may look nothing like the initial proposed warrant. It may contain scribbled additions, subtractions, and edits written in by a magistrate after questioning an applicant or witness under oath over the phone. Many have seen this coming since the passage of H.B. 976 in the 82nd Legislature in 2011. See “Rounding the Corners: Criminal Application of the Four-Corners Rule” *The Recorder* (June 2012).

Checklist 2-10	Script/Notes
<p>If a search warrant as submitted fails to establish probable cause, information communicated by telephone or other reliable electronic means may be considered by the magistrate in determining whether to issue a search warrant.</p>	<p>Considering additional information using Art. 18.01(b-1), C.C.P., is not required under the law. Alternately, the magistrate may simply deny the issuance of the warrant.</p>
<p><input type="checkbox"/> 1. If the applicant, and any person on whose testimony the application is based, is available to testify regarding additional facts, the magistrate may examine the person(s). If the magistrate chooses to do so, the magistrate shall:</p>	<p>Art. 18.01(b-1)(1), C.C.P.</p>
<p><input type="checkbox"/> a. Place the applicant, or person on whose testimony the application is based, under oath;</p>	<p>Art. 18.01(b-1)(2), C.C.P.</p>
<p><input type="checkbox"/> b. Acknowledge any attestation in writing on the affidavit if the applicant, or person on whose testimony the application is based, attests to the contents of the affidavit;</p>	<p>Art. 18.01(b-1)(2)(A), C.C.P.</p>
<p><input type="checkbox"/> c. Ensure that any testimony is recorded verbatim by an electronic recording device, by a court reporter, or in writing;</p>	

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| <ul style="list-style-type: none"> <input type="checkbox"/> d. Ensure that any electronic recording, court reporter’s notes, exhibits and any other written record are transcribed, certified as accurate and properly preserved; and | <p>Art. 18.01(b-1)(2)(B), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> e. Sign, certify the accuracy of, and preserve any other record; and ensure that the exhibits are preserved. | <p>Art. 18.01 (b-1)(2)(D), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 2. The applicant for a search warrant for which additional information is being considered, shall: <ul style="list-style-type: none"> <input type="checkbox"/> a. Prepare a proposed duplicate original of the warrant; and <input type="checkbox"/> b. Read or transmit the contents of the duplicate original warrant verbatim to the magistrate. | <p>Art. 18.01 (b-1)(3), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 3. The magistrate must ensure that the contents of a proposed duplicate original warrant as read or otherwise transmitted verbatim to the magistrate are entered into an original warrant, which then may serve as the original search warrant. | <p>Art. 18.01 (b-1)(3), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 4. A magistrate that modifies a warrant for which information is provided under Art. 18.01(b-1) shall: <ul style="list-style-type: none"> <input type="checkbox"/> a. Transmit the modified version of the warrant to the applicant by reliable electronic means; or <input type="checkbox"/> b. File the modified original and direct the applicant to modify the proposed duplicate original accordingly. | <p>Art. 18.01 (b-1)(4), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 5. The magistrate who issues a warrant for which information is provided under Art. 18.01(b-1) shall: | <p>Art. 18.01 (b-1)(5), C.C.P.
 Evidence obtained pursuant to a search warrant for which information was provided in accordance Section 18.01(b-1) is not subject to suppression on the ground that issuing the warrant in compliance with this subsection was unreasonable under the circumstances, absent a finding of bad faith. Art. 18.01 (b-1)(6), C.C.P.</p> |

- a. Sign the original documents;
 - b. Enter the date and time of issuance on the warrant; and
 - c. Transmit the warrant by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original.
6. Evidence obtained pursuant to a search warrant for which information was provided in accordance Section 18.01(b-1) is not subject to suppression on the ground that issuing the warrant in compliance with this subsection was unreasonable under the circumstances, absent a finding of bad faith.

Art. 18.01 (b-1) (6), C.C.P.

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

11. Search Warrant Return and the Immediate Disposition of Seized Property

Checklist 2-11	Script/Notes
<p><input type="checkbox"/> 1. Review the search warrant returned and determine:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. If the warrant was executed;</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. The manner of execution; and</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. If any articles were seized.</p>	
<p><input type="checkbox"/> 2. Enter an order directing where and with whom the seized property will be kept for safekeeping.</p>	<p>See <i>TMCEC 2020 Forms Book: Order Directing Safe Keeping of Property Taken Under a Search Warrant</i>. Art 18.10, C.C.P.</p>
<p><input type="checkbox"/> 3. Hold a hearing on any questions arising from the execution of the search warrant.</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Discharge the defendant and release the property if good grounds for the issuance of the warrant are not shown.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Retain any criminal instruments seized and order them to be held by the sheriff subject to a subsequent order as provided by Articles 18.17, 18.18, and 18.19, C.C.P., or Chapter 59, C.C.P.</p>	<p>Art. 18.12, C.C.P.</p> <p>Art. 18.13, C.C.P. This provision presumably applies only if the defendant is also arrested, perhaps under a combination arrest/search warrant.</p>
<p><input type="checkbox"/> 4. The property seized may not be removed from the county without an order approving the removal signed by a magistrate in the county in which the warrant was issued.</p>	<p>Art. 18.10, C.C.P.</p>
<p><input type="checkbox"/> 5. File the search warrant with the clerk of the court having jurisdiction of the case.</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Send a record of any proceedings to the court of jurisdiction.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Retain a copy of all search warrants, affidavits, returns, and related documents.</p>	<p>Art. 18.15, C.C.P.</p>

- ❑ 6. Make sure a copy of all warrants and affidavits are provided to the clerk of the court for public disclosure.

Art. 15.26, C.C.P.
See Checklist 2-11.

- ❑ 6. An attorney representing the State in the prosecution of felonies may request a district judge or the judge of an appellate court to temporarily seal an affidavit presented under Article 18.01(b), C.C.P.
 - ❑ a. A district or appellate judge may seal the affidavit if the prosecuting attorney establishes a compelling state interest that either: (1) public disclosure of the affidavit would jeopardize the safety of a victim, witness, or confidential informant or cause the destruction of evidence; or (2) the affidavit contains information obtained from a court-ordered wiretap that has not expired at the time the attorney representing the State requests the sealing of the affidavit.
 - ❑ b. The order may not prohibit the disclosure of information relating to the contents of a search warrant, return of a search warrant, or inventory of the property taken pursuant to a search warrant, or affect the right of the defendant to discover the contents of an affidavit. When the order expires, the affidavit must be unsealed.

Art. 18.01(b), C.C.P.
Art. 18.011, C.C.P.

Art. 18.011(a), C.C.P.

Art. 18.011(d), C.C.P.

CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

13. The Capias Pro Fine

A capias pro fine is a post-judgment enforcement mechanism for unpaid fines and/or court costs. Article 45.045 of the Code of Criminal Procedure requires judges to hold a show cause hearing to determine whether the judgment imposes an undue hardship on the defendant prior to issuing a capias pro fine. A court has discretion when making a determination of undue hardship, but Article 45.0491 provides a list of criteria that courts are authorized to consider: Additionally, a court must recall a capias pro fine if, before the capias pro fine is executed, (1) the defendant provides notice to the justice or judge that they have difficulty paying in compliance with the judgment and a hearing is set, or (2) the defendant voluntarily appears and makes a good faith effort to resolve the capias pro fine.

The issuance of a capias pro fine authorizes an arrest, but it is neither an arrest warrant (see Checklist 2-1), nor is it a capias (see Checklist 2-2). Remember that converting a fine and/or court costs to a term of confinement when a defendant is unable to pay violates the defendant’s constitutional rights. The 14th Amendment requires that defendants accused of fine-only offenses be provided “alternative means” of discharging the judgment to avoid incarceration (via time-payment plans or discharge through community service.) *Tate v. Short*, 401 U.S. 395 (1971). See “Pay or Lay: *Tate v. Short* Revisited,” *The Recorder* (March 2003).

Checklist 2-13	Script/Notes
<p>A capias pro fine is a writ: (1) issued by a court having jurisdiction of a case after judgment and sentence for unpaid fines and costs; and (2) directed to any peace officer of the State of Texas commanding the officer to arrest a person convicted of an offense and bring the arrested person before that court immediately or on a day or at a term stated in the writ.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 1. Prior to issuing a capias pro fine for the defendant’s failure to satisfy the judgment according to its terms the court must hold a hearing to determine whether the judgment imposes an undue hardship on the defendant. <input type="checkbox"/> 2. A court has discretion when making a determination of undue hardship, but is authorized to consider: <ul style="list-style-type: none"> <input type="checkbox"/> a. Significant physical or mental impairment or disability; 	<p>Art. 43.015(2), C.C.P. Special rules apply to capias pro fines issued for offenses committed by those under age 17. See Checklist 13-22. See <i>TMCEC 2020 Forms Book: Capias Pro Fine</i>; <i>TMCEC The Municipal Judges Book: Chapter 5</i>.</p> <p>Art. 45.045(a-2), C.C.P. See <i>TMCEC 2020 Forms Book: Show Cause Prior to Issuing a Capias Pro Fine</i>.</p> <p>Judges may allow a defendant to appear by telephone or videoconference if a personal appearance would impose an undue hardship. Arts. 45.0201 and 45.0445, C.C.P.</p> <p>Art. 45.0491, C.C.P.</p>

- b. Pregnancy and childbirth;
 - c. Substantial family commitments or responsibilities, including child or dependent care;
 - d. Work responsibilities and hours;
 - e. Transportation limitations;
 - f. Homelessness or housing insecurity; and
 - g. Any other factor the court determines relevant.
3. At the hearing:
- a. If the judge finds the judgment to impose an undue hardship, the judge must determine how the fine and costs should be satisfied.
 - b. If a justice or judge determines that the judgment does not impose an undue hardship, the judge must order the defendant to comply with the judgment not later than the 30th day after the determination is made.
4. The court may issue a *capias pro fine* only if the defendant fails to:
- a. Appear at the show cause hearing; or
 - b. Comply with an order issued at a show cause hearing.
5. A *capias pro fine* may be issued in electronic form.
6. A *capias pro fine* shall recite the judgment and sentence and command the peace officer to immediately bring the arrested person to court.
7. A court must recall a *capias pro fine* if, before the *capias pro fine* is executed, the defendant:

Art. 45.045(a-3), C.C.P.

Art. 45.045(a-4), C.C.P.

Art. 45.045(a-2), C.C.P. See TMCEC 2020 Forms Book: Clerk’s Affidavit for *Capias Pro Fine*.

Art. 43.021, C.C.P.

Arts. 43.05(a), C.C.P. and 43.045(a), C.C.P.

Art. 45.045(a-5), C.C.P.

- | | |
|--|--|
| <ul style="list-style-type: none"> <input type="checkbox"/> a. Provides notice to the justice or judge that they have difficulty paying in compliance with the judgment and a reconsideration hearing is set, or
 <input type="checkbox"/> b. Voluntarily appears and makes a good faith effort to resolve the capias pro fine. | <p>This reconsideration hearing was created by the Legislature in 2019, and judges may allow a defendant to appear by telephone or videoconference if a personal appearance would impose an undue hardship. Arts. 45.0201 and 45.0445, C.C.P</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 8. A capias pro fine authorizes a peace officer to place the defendant in jail until the business day following the date of the defendant’s arrest if the defendant cannot be brought before the court immediately. | <p>Art. 43.045(a), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 9. If the court that issued the capias pro fine is unavailable, the arresting officer may take the defendant to one of the following locations in lieu of placing the defendant in jail: <ul style="list-style-type: none"> <input type="checkbox"/> a. if the court that issued the capias pro fine was a justice of the peace, to a justice of the peace or county criminal law magistrate court with jurisdiction over Class C misdemeanors that is located within the same county; or <input type="checkbox"/> b. if the court that issued the capias pro fine was a municipal court, to a municipal court judge that is located within the same city. | <p>Art. 45.045(a-1), C.C.P.</p> <p>Most municipal courts are unified, but state law does allow for the creation of multiple municipal courts. Capias pro fine commitment hearings may be heard at any court (or by any judge) in the city.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 10. A capias pro fine may be issued to any county in the State and shall be executed as in other cases, but no bail shall be taken. | <p>Art. 43.06, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 11. A capias pro fine may issue simultaneously with civil enforcement of the judgment (i.e., execution). | <p>Arts. 43.07, C.C.P. and 45.047, C.C.P.</p> |

- ❑ 12. When a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment, the judge may order the defendant confined in jail until discharged by law if the judge at a hearing makes a written determination that either:
 - ❑ a. The defendant is not indigent and has failed to make a good faith effort to discharge the fine or costs; or
 - ❑ b. The defendant is indigent and:
 - ❑ (1) has failed to make a good faith effort to discharge the fine or costs under Article 45.049, C.C.P. (community service); and
 - ❑ (2) could have discharged the fine or costs under Article 45.049, C.C.P., (community service) without experiencing any undue hardship.
- ❑ 13. A certified copy of the judgment, sentence, and order is sufficient to authorize confinement.
- ❑ 14. The court should set out a period of time between eight and 24 hours as the period the defendant must remain in jail to satisfy not less than \$100 of the fine and costs owed.

Art. 45.046(a), C.C.P. See *TMCEC 2020 Forms Book: Order of Commitment; Judgment/Jail Credit Addendum.*

Note: Article 45.0491, C.C.P., authorizes the waiver of fines and costs if the defendant defaults in payment and the court determines that (1) the defendant is indigent and (2) the performance of community service would constitute an undue hardship on the defendant.

Art. 45.046(b), C.C.P.

Art. 45.048, C.C.P.

Jail credit for time served before the judgment must be credited to each case concurrently. Post-judgment credit can be ordered to be served consecutively (or stacked) by the court if all cases with which the fine is to be treated consecutively are identified in the order. *Ex Parte Hannington*, 832 S.W.2d 355 (Tex. Crim App. 1992); Tex. Atty. Gen. Op. JC-0393 (2001); *Ex Parte Minjares*, 582 S.W.2d 105 (Tex. Crim. App. 1978).

**PRO SE DEFENDANTS AND DEFENDANTS
REPRESENTED BY COUNSEL**

Pro Se Defendants and Defen-
dants Represented by Counsel

CHAPTER 3 PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

Defendants in municipal court have constitutional and statutory rights to the assistance of counsel. However, in municipal court, even indigent defendants do not have the right to a court-appointed attorney, except where the “interests of justice” require, per Article 1.051(c), C.C.P. (For more information on “interests of justice” appointments, see, “The Oversimplification of the Assistance of Counsel in Class C Misdemeanors in Texas,” *The Recorder* (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 communicating with pro se defendants in two settings: (1) outside the courtroom; and (2) in the courtroom during hearings.

1. Communicating with Pro Se Defendants out of Court

Checklist 3-1	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Develop procedures and standing orders for the processing of walk-in defendants by support personnel. <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) Pay special attention 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 may not suggest or recommend a particular course of action. <input type="checkbox"/> 3. When a guilty plea is processed or a fine is paid, the clerk should verify that 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 TMCEC <i>The Municipal Judges Book</i>: Chapter 4.</p> <p>See Chapter 4.</p> <p>See Chapter 13.</p> <p>Court support personnel may not engage in the unauthorized practice of law. Sec. 81.101, G.C.</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

The majority of defendants in municipal courts do not retain counsel, and instead represent themselves in court proceedings. Though pro se defendants maintain the right to litigate their own cases, they often lack a proper understanding of court procedures and decorum. A defendant 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. *Williams v. State*, 549 S.W.2d 183 (Tex. Crim. App. 1977).

While no special treatment is required for pro se defendants, judges and court personnel can efficiently facilitate the court’s docket by informing pro se defendants of their rights in court and by clearly explaining the court’s expectations for maintaining order and decorum.

2. Communicating with Pro Se Defendants 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. The judge should be aware of the defendant’s ignorance of legal procedure and rules of evidence in maintaining order and decorum. <input type="checkbox"/> 5. In the interests of fairness and order, the court may inform the defendant of: <ul style="list-style-type: none"> <input type="checkbox"/> a. General procedures and steps in the trial; 	<p>See Chapter 4 in this book for procedures regarding 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>See TMCEC <i>The Municipal Judges Book</i>: Chapter 1.</p>

- b. Voir dire and jury selection;
 - c. Options concerning opening statements;
 - 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. Options concerning closing argument; and
 - i. Right to appeal.
6. If the defendant wishes to testify, inform him or her of the privilege against self-incrimination and obtain waiver.
7. The judge must maintain control of proceedings.
- a. If the defendant is unruly and disruptive, consider warning, restraint, or threat of contempt.

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.

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. Defendants Represented by Counsel

While most defendants appear pro se in municipal court, the number of defendants retaining counsel continues to increase. Judges should welcome representation by counsel and foster an environment for conducting the business of the court 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 communicating 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, pay fees, and file 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 court in which the application is filed—rather by the Board of Law Examiners. 	<p>Art. 45.020, C.C.P.</p> <p>Individuals who engage in the unauthorized practice of law may be sued civilly in an effort to prohibit future occurrences. 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>

- ❑ 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.

- ❑ 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 lawyer 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 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

For more information visit the Texas Center for Legal Ethics and Professionalism at www.legalethictexas.com.

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.

- 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).

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

APPEARANCE AND PLEAS

CHAPTER 4 APPEARANCE AND PLEAS

1. Appearance

This checklist is a model for the court to follow during the first appearance by a defendant before the court. This process is often—though not quite properly—referred to as an “arraignment.” The court must take a plea before conversation about the case or sentencing should take place. When the defendant pleads guilty or nolo contendere, this chapter must be read in connection with Chapter 5—Pleas and DSC. When the defendant pleads not guilty, the procedures in Chapters 6 and 7 follow. In either event, the procedures in Chapter 8 are necessary in entering a judgment of guilt or acquittal. Chapters 4 through 8 should be used together as a series of procedures used in resolving cases.

Checklist 4-1	Script/Notes
<p><input type="checkbox"/> 1. If the defendant is appearing before you after being issued a citation, you shall perform the magistrate duties imposed by Art. 15.17, C.C.P., in the same manner as if the person had been arrested and brought before you as a magistrate.</p>	<p>Art. 15.17(g), C.C.P. See Checklist 1-1.</p>
<p><input type="checkbox"/> 2. Ensure that the plea is made by the defendant or the defendant’s attorney.</p> <p><input type="checkbox"/> a. If the plea is made by any other person (parent, friend, spouse, etc.), do not accept the plea.</p> <p><input type="checkbox"/> b. Because this is a criminal case, inform the person that the law only allows the defendant or his or her attorney to enter a plea.</p> <p><input type="checkbox"/> c. If the correct person is not before you, reset the case for defendant to appear.</p>	<p>“Court Calls Case # _____, <i>State v. (Defendant).</i>”</p> <p>“Are you <i>(Defendant)</i>?”</p> <p>See <i>TMCEC 2020 Forms Book: Plea Form: In Person</i></p>
<p><input type="checkbox"/> 3. The defendant is entitled to a copy of the complaint at least one day before any criminal proceeding, unless the defendant waives that right.</p> <p><input type="checkbox"/> a. Ask the defendant if he or she understands the charge.</p> <p><input type="checkbox"/> b. Give the defendant a copy of the complaint at least one day before trial, unless the defendant waives that right.</p>	<p>Art. 1.05, C.C.P. See <i>TMCEC 2020 Forms Book: Waiver of Right to be Prosecuted by Complaint.</i></p> <p>“You are charged with _____, a misdemeanor punishable by a fine. Do you have a copy of the citation or complaint? Do you understand the nature of the charges against you?”</p> <p>Art. 45.018(b), C.C.P.</p>

4. Admonishments:

- a. Explain the range of punishment for the offenses before the court.

- b. Explain defendant’s right to jury trial.

- c. Explain defendant’s right to counsel.

For a greater discussion of an accused’s rights, see TMCEC *Municipal Judges Book*: Chapter 4.

“_____, is a misdemeanor punishable by a fine of not more than \$ _____ and not less than \$ _____ (if offense has a minimum fine) and by _____ (if offense bears sanctions in addition to a fine).”

“You have the right to have a jury determine your guilt or innocence on this charge. Do you wish to have a jury trial, or do you waive a jury and wish to proceed before the court without a jury?”

“You have a right to be represented by an attorney in this case. Since the maximum penalty in this case does not include time in jail, you do not have a right under the law—neither the Texas nor U.S. Constitutions—to have an attorney appointed. You have the right to hire legal counsel. An attorney could advise you and help you make important decisions concerning the consequences and alternatives in this case. An attorney would be familiar with trial procedures and rules of evidence. In this trial, you will be held to the same legal standards as if you were an attorney. Do you still wish to proceed representing yourself?”

- ❑ d. Despite the general rule that indigent defendants accused of fine-only offenses are not statutorily entitled to the appointment of counsel, the exception is if “the interests of justice require representation.” This is a discretionary determination made by the judge.

- ❑ e. If represented by counsel, make sure the attorney’s name, address, and telephone number are noted on the docket.

- ❑ f. If the defendant is not represented by counsel, the defendant must waive the right to retain counsel.

- ❑ g. If the defendant wishes to retain counsel, reset the case for the defendant to have time to do so. If not, proceed.

- ❑ h. Explain defendant’s privilege against self-incrimination.

Art. 1.051(c), C.C.P. Texas case law provides little guidance to such appointments. Criminal law scholars have opined, “Whether or not this is the case should be determined largely on the basis of whether the case presents defensive possibilities that are most likely to be adequately presented to the court only by an attorney. If this is the case, an attorney can and must be appointed regardless of the minor nature of the offense.” 42 Dix & Schmolesky, *Texas Practice: Criminal Practice & Procedure*, Sec. 29.32 (3d ed. 2011).

A warning and waiver of the constitutional right to retain counsel is required. See Chapter 3 concerning lay representation.

See *TMCEC 2020 Forms Book*: Non-Jury Trial Setting Form: Defendant Appears by Mail; and Non-Jury Trial Setting Form: Defendant Appears in Person.

“You are not required to testify and no one may make you testify. If you decide not to testify, I will not use the fact that you did not testify as evidence against you. Choosing to remain silent cannot be used against you.”

- i. Before accepting a plea of guilty or a plea of nolo contendere by a defendant charged with a misdemeanor involving family violence, the court shall admonish the defendant orally or in writing by using the statement to the right, verbatim.

- 5. If the defendant pleads not guilty:
 - a. Set the case for a pretrial hearing and/or trial; and
 - b. Provide the defendant with a copy of the setting order and docket the case.

“If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. Section 922(g)(9) or Section 46.04(b), Texas Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.”

While bail is not required, a specific rule applies to bail set by municipal and justice courts after charges have been filed. Under that rule, judges may only require a personal bond, unless certain determinations have been made. Art. 45.016, C.C.P. See Checklist 1-5 (steps 11-13).

CHAPTER 4 APPEARANCE AND PLEAS

2. Pleas Made by Mail

Under Art. 27.14(c), C.C.P., a payment received without a plea constitutes a finding of guilty in open court as though a plea of nolo contendere and a written waiver of jury trial had been received. Municipal court clerks usually collect and process these pleas and payments. If a plea and waiver of jury trial and a request for the amount of fine and/or appeal bond is received, the court must notify the defendant either in person or by regular mail of the amount of fine or costs; information regarding the alternatives to the full payment of any fine or costs assessed, if the defendant is unable to pay the full amount; and, if requested, the amount of an appeal bond that the court will accept. Defendants have up to 31 days from the date of receiving the notice to pay the fine and costs or file an appeal bond with the court. A defendant charged with a misdemeanor involving family violence may not mail or deliver in person a plea of guilty or nolo contendere; this plea must be made in open court. Art. 27.14(b), C.C.P.

Judges should instruct clerks to prepare judgments on all the pleas, waivers of jury trial, and payments offered to the courts. An offer to pay a fine and costs is not a conviction until the judge accepts the plea, waiver of jury trial, and/or payment of the fine, and enters judgment.

Checklist 4-2	Script/Notes
<p><input type="checkbox"/> 1. If the court receives payment by mail, without a plea:</p> <p><input type="checkbox"/> a. Determine that the defendant is at least 17 years of age or is not a minor defendant charged with an Alcoholic Beverage Code offense or a tobacco offense under the Health and Safety Code.</p> <p><input type="checkbox"/> b. Determine that the offense is punishable by fine-only and that no other sanction (such as counseling, community service, or DL suspension) is mandatory.</p> <p><input type="checkbox"/> c. Determine that the amount received is sufficient to cover the minimum lawful fine, court costs, and any other fees.</p> <p><input type="checkbox"/> d. Determine that the amount received is not more than the maximum lawful fine plus court costs and any other fees.</p> <p><input type="checkbox"/> e. Determine that the payment is in an amount acceptable to you.</p>	<p>Art. 27.14(b) and (c), C.C.P.</p> <p>Article 27.14, C.C.P., allows adult defendants charged in municipal and justice courts with fine-only offenses to mail or deliver in person to the court a plea of guilty or nolo contendere (no contest) and a written waiver of jury trial.</p> <p>Art. 27.14(c), C.C.P.</p> <p>Art. 27.14(c), C.C.P.</p>

- f. Determine that the payment is from the defendant, from defendant's attorney, or made with the defendant's agreement to be found guilty.
 - g. If the above requirements are met, accept the plea, waiver of jury trial, and/or payment and sign a judgment of guilty.

 - h. If the above requirements are not met, return the payment to the defendant or defense attorney, inform them of the acceptable fine amount and of any other applicable sanctions, and set the case for trial.
2. If the defendant does not deliver a fine, but delivers a plea or request for bond amount, determine if defendant has:
- a. Pled guilty or nolo contendere.
 - b. Requested in writing that the court notify defendant of the amount of an appeal bond the court will approve.
 - c. Waived a jury trial in writing.
 - d. Provided the court with defendant's or defense attorney's address.
 - e. Delivered the request, plea, jury waiver, and address by defendant's appearance date.

See *TMCEC 2020 Forms Book*:
Plea Form: By Mail or Delivery to
Court; and Judgment: Jury Waived
– Guilty.

Effective January 1, 2014, a
written acknowledgement of the
disclosure, receipt, and list of
any discovery provided to the
defendant must be signed by each
party before a plea of guilty or
nolo contendere is accepted. It is
unclear if an acknowledgment is
necessary when no discovery was
requested, ordered, or provided.
Art. 39.14(j), C.C.P.

Art. 27.14(b), C.C.P.

Art. 45.025, C.C.P.

- ❑ f. Extended his or her time by the “Mailbox Rule.” If the defendant mailed the plea and jury waiver on or before the due date of appearance, and these documents are received by the clerk not later than 10 days after the due date, the plea and waiver are properly filed. Make sure the clerk keeps the envelope with the postmark.
- ❑ g. Determine that the offense is punishable by fine-only and that no other sanctions (such as counseling, community service, or DL suspension) are mandatory and that defendant is at least 17 years of age.
- ❑ h. Determine that the defendant is not charged with a misdemeanor involving family violence, as defined by Sec. 71.004, F.C.

- ❑ i. If the above are done, notify defendant/defense attorney—either in person or by certified mail return receipt requested—of the amount of the fine assessed and the amount of the appeal bond.

Art. 45.013, C.C.P. “Day” does not include Saturday, Sunday, or legal holidays. This rule increases the amount of time allowed to file a document when the document is filed by mail.

A guilty or nolo contendere plea to a family violence case must be made in open court. Art. 27.14(b), C.C.P.

Art. 66.252, C.C.P., requires family violence defendants to be fingerprinted. This fingerprinting could occur in open court at the time of the plea. The court clerk, on disposition, must report the person’s citation or arrest and the disposition of the case to DPS using a uniform incident fingerprint card or an electronic methodology approved by DPS. The arresting law enforcement agency is charged with preparing the fingerprint card, but with Class C family violence cases, it is possible that a defendant was never arrested.

See *TMCEC 2020 Forms Book*: Notice to Defendant Following Plea by Mail. Defendant must pay fine or post the appeal bond by the 31st day after receiving the notice. Remember that the bond is timely filed if postmarked before the 31st day and received within 10 days. Art. 45.013, C.C.P.

- 3. If the defendant mails a plea of not guilty to the court, the plea should be processed in the same way as a plea of not guilty made in open court.

Article 27.16(b), C.C.P., allows a defendant charged with a misdemeanor for which the maximum possible punishment is by fine-only, in lieu of entering a plea in open court, to mail to the court a plea of not guilty.

CHAPTER 4 APPEARANCE AND PLEAS

3. Pleas in Open Court

Most of the requirements relating to acceptance of a plea are contained in Article 26.13, C.C.P. The Court of Criminal Appeals has held such statutory requirements inapplicable to misdemeanor cases. *Empy v. State*, 571 S.W.2d 526, 529 (Tex. Crim. App. 1978). Despite the increased number of direct and indirect consequences of being convicted of a Class C misdemeanor in Texas, federal due process only requires a plea of guilty in a misdemeanor be made knowingly and intelligently after being admonished as to the range of punishment. *Tatum v. State*, 861 S.W.2d 27 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). A guilty plea is not rendered involuntary by lack of knowledge of collateral consequence (e.g., deportation), and defendants have no constitutional right to be admonished of such consequences. *State v. Jimenez*, 987 S.W.2d 886 (Tex. Crim. App. 1999).

Checklist 4-3	Script/Notes
<p>If a defendant is charged with an offense involving family violence, the judge or justice must take the defendant’s plea in open court.</p> <p>“No contest” means that the defendant is neither admitting nor denying the charge but is choosing not to contest the charges in court. Within municipal court, a plea of no contest has the same legal effect as a plea of guilty.</p> <p>The defendant may waive a trial by jury in writing. Only when a written waiver is made can the court proceed. The decision to waive rests with the defendant. The manner, in writing, is controlled by statute.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 1. Give the admonishments as required in Checklist 4-1 and request a plea. <input type="checkbox"/> 2. If the defendant refuses to plead: 	<p>Art. 45.0211, C.C.P.</p> <p>Art. 66.252, C.C.P., requires family violence defendants to be fingerprinted. This fingerprinting could occur in open court at the time of the plea. The court clerk, on disposition, must report the person’s citation or arrest and the disposition of the case to DPS using a uniform incident fingerprint card or an electronic methodology approved by DPS. The arresting law enforcement agency is charged with preparing the fingerprint card, but with Class C family violence cases, it is possible that a defendant was never arrested.</p> <p>Art. 27.02, C.C.P.</p> <p>Art. 45.025, C.C.P.</p> <p>Arts. 27.16(a) and 45.024, C.C.P.</p>

- a. Enter a plea of not guilty;
 - b. Note on docket that defendant would not plea and that a plea of not guilty was entered by the court;
 - c. Note defendant’s election of jury trial or jury waiver on docket; set case for trial; and
 - d. Set a pretrial and trial date.
 - e. Provide defendant with Setting Notice for Pretrial or Trial. Go to Chapters 6 and 7.
3. If defendant pleads not guilty:
- a. Enter a plea of not guilty;
 - b. Note on docket;
 - c. Note defendant’s election of jury trial or jury waiver on docket; set a pretrial and trial date; and
 - d. Provide defendant with Setting Notice for Pretrial or Trial. Go to Chapters 6 and 7.
4. If the defendant will not elect jury or bench trial, set case for jury trial.

“If you will not plead, I am required by law to enter a plea of not guilty for you. I have done so. Do you want a jury trial? Or do you want to waive a jury trial and have a trial without a jury?”

“I accept a plea of not guilty. Do you wish to have a jury trial or to waive a jury trial and have a trial before the court?”

While bail is not required, a specific rule applies to bail set by municipal and justice courts after charges have been filed. Under that rule, judges may only require a personal bond, unless certain determinations have been made. Art. 45.016, C.C.P. See Checklist 1-5 (steps 11-13).

“Since you will not tell me whether you want a trial with or without a jury, I am setting your case for a jury trial.”

- ❑ 5. If the defendant is charged with an offense that is eligible for dismissal for a Driving Safety Course (DSC) pursuant to Article 45.0511, C.C.P., the court must inform the defendant that DSC may be an option.

- ❑ 6. If defendant pleads guilty or no contest without conditions, go to Step 9.
 - ❑ a. The most common conditional plea is a plea of guilty or no contest made with an election to take DSC. If the defendant elects DSC, go to Checklists 5-2 and 5-3.

 - ❑ b. Another conditional plea is a plea pursuant to a plea bargaining with the prosecutor.
 - ❑ (1) Advise the defendant that you, the judge, are not bound by the plea offer.

 - ❑ (2) Inform the defendant that if you reject the offer, the plea may be withdrawn.

 - ❑ (3) Accept or deny the offer.

 - ❑ (4) If rejected, permit the defendant to withdraw the plea of guilty or no contest.

 - ❑ c. If the conditions are denied, inform the defendant or his or her attorney that defense must enter an unconditional plea of not guilty, guilty, or no contest.

- ❑ 7. If the conditions are accepted, determine if other procedures are necessary.

See Checklist 5-1 for DSC eligibility. Art. 45.0511(p), C.C.P.
 “You may have the right to elect to have your case dismissed for taking a Driving Safety Course or Motorcycle Operator Training Course under Article 45.0511, C.C.P. Do you wish me to further explain that option, or do you wish to elect to take a Driving Safety Course?”

“I am not bound by the plea agreement you made with the State.”

“If I reject the agreement, I will permit you to withdraw your plea of guilty or no contest.”

“I accept the plea agreement.”

“I reject the plea agreement. Do you wish to withdraw the plea of guilty or no contest and enter a plea of not guilty?”

See Checklist 5-1 for DSC; Checklist 8-2 for deferred disposition; and Checklist 8-3 for community service and indigence.

- ❑ 8. Determine whether it is a plea of guilty or a plea of no contest and enter it on the court’s docket.

“Do you understand that by your plea of guilty or no contest, you give up the right to contest these charges and that your plea is all of the evidence I will need to find you guilty?”

“Are you pleading guilty or no contest of your own free will? No one has threatened you or promised you anything we have not already discussed?”

Effective January 1, 2014, a written acknowledgement of the disclosure, receipt, and list of any discovery provided to the defendant must be signed by each party before a plea of guilty or nolo contendere is accepted. It is unclear if an acknowledgment is necessary when no discovery was requested, ordered, or provided. Art. 39.14(j), C.C.P.

- ❑ 9. Go to Checklist 8-1 for sentencing.

e. Discharge the defendant.

3. Following a plea of guilty or nolo contendere entered while detained in jail, the judge shall grant a motion for new trial made not later than 10 days after the rendition of judgment and sentence, and not afterward.

Effective January 1, 2014, a written acknowledgement of the disclosure, receipt, and list of any discovery provided to the defendant must be signed by each party before a plea of guilty or nolo contendere is accepted. It is unclear if an acknowledgment is necessary when no discovery was requested, ordered, or provided. Art. 39.14(j), C.C.P.

Remember that the motion is timely filed if postmarked on or before the 10th day and received within 10 days. Art. 45.013, C.C.P.

DRIVING SAFETY COURSES (DSC)

CHAPTER 5 DRIVING SAFETY COURSES (DSC)

1. Eligibility for Mandatory DSC

Checklist 5-1	Script/Notes
<p><input type="checkbox"/> 1. To be entitled to mandatory DSC (where the court must grant DSC according to limited terms), the defendant must meet a four-point test. The elements of that test are:</p> <p><input type="checkbox"/> a. The defendant must elect DSC;</p> <p><input type="checkbox"/> b. The election must be timely;</p> <p><input type="checkbox"/> c. The defendant must be charged with a qualified offense; and</p> <p><input type="checkbox"/> d. The defendant must be qualified.</p> <p><input type="checkbox"/> 2. The defendant must elect to take DSC. No special form or language appears to be necessary. That election should be coupled with a plea of guilty or nolo contendere. The defendant may make that election:</p> <p><input type="checkbox"/> a. In person;</p> <p><input type="checkbox"/> b. By attorney; or</p> <p><input type="checkbox"/> c. By certified mail.</p> <p><input type="checkbox"/> 3. Determine whether defendant has made the election and plea in Step 2 by the answer date on the citation.</p> <p><input type="checkbox"/> a. Amount of time increased by the “Mailbox Rule.”</p>	<p>The defendant must plead guilty or nolo contendere before the court orders the defendant to take DSC under Article 45.0511, C.C.P.</p> <p>See Step 2 below.</p> <p>See Step 3 below.</p> <p>See Steps 4 and 5 below.</p> <p>See Step 6 below.</p> <p>Art. 45.0511(b)(1) and (3), C.C.P. A defendant under the age of 17 must appear and enter a plea in open court. Art. 45.0215, C.C.P.</p> <p>Art. 45.0511(b)(3), C.C.P.</p> <p>Art. 45.013, C.C.P. If the request for a DSC is mailed first class on or before the appearance date on the citation and received by the clerk not later than 10 business days after the due date for appearance, the request is timely filed. Make sure the clerk keeps the envelope with the postmark. “Day” does not include Saturday, Sunday, or legal holidays.</p>

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| <ul style="list-style-type: none"> <input type="checkbox"/> b. If the defendant has not pled and elected to take a DSC by the answer date on citation, determine that the defendant was advised of his or her right to take a driving safety course. <input type="checkbox"/> c. If the defendant was not advised of his or her right to a DSC, advise the defendant now and allow the defendant to enter plea of guilty or no contest and request a DSC as if it had been timely made. | <p>Art. 45.0511(r), C.C.P. Printing notice of DSC eligibility on defendant’s copy of citation should satisfy this requirement. Arts. 45.0511(p) and (q), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 4. The defendant may elect DSC for offenses: <ul style="list-style-type: none"> <input type="checkbox"/> a. Under the jurisdiction of the municipal or justice court; and <input type="checkbox"/> b. Involving the operation of a motor vehicle; and <input type="checkbox"/> c. Defined by: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Section 472.022, T.C. (Obeying Warning Signs); <input type="checkbox"/> (2) Subtitle C, Title 7, T.C. (Rules of the Road); or <input type="checkbox"/> (3) Section 729.001(a)(3), T.C. (Operation of Motor Vehicle by Minor). | <p>Art. 45.0511(a)(1), C.C.P.</p> <p>Art. 45.0511(a)(2) and (3), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 5. A defendant under the age of 25 may elect DSC for offenses: <ul style="list-style-type: none"> <input type="checkbox"/> a. Under the jurisdiction of the municipal or justice court; and <input type="checkbox"/> b. Involving the operation of a motor vehicle; and <input type="checkbox"/> c. Classified as moving violations. | <p>Art. 45.0511(a-1), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 6. Article 45.0511 does not apply to a person who holds a commercial driver’s license or held a commercial driver’s license when the offense was committed. | <p>Art. 45.0511(s), C.C.P.</p> |

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| <ul style="list-style-type: none"> ☐ 8. DSC is available for safety belt violations. <ul style="list-style-type: none"> ☐ a. If the violation involved a child passenger safety seat system or failing to secure a child younger than age 17 in a safety belt, the defendant must complete a special driving safety class with instructions on child restraint. ☐ b. Defendants charged with an offense under Section 545.412, T.C., have a right to take a specialized driving safety course on child restraints, even if they have had a regular DSC course in the preceding 12 months from a current offense. Defendant does not have this right if the course included specialized instruction on child restraint. ☐ 9. The court may dismiss only one charge for each course. ☐ 10. The defendant must be qualified for DSC. <ul style="list-style-type: none"> ☐ a. The defendant must not have completed DSC under Article 45.0511, C.C.P., in the 12 months preceding the offense. [See exception 8(b) above.] <ul style="list-style-type: none"> ☐ (1) The 12 month period begins with completion of the course. ☐ (2) The 12 month period ends on the date of the current citation. ☐ b. The defendant must produce evidence of financial responsibility under the Texas Motor Vehicle Responsibility Act. This is most commonly done by presenting a motor vehicle insurance card. ☐ c. The defendant must produce a valid Texas driver's license or permit or be a member, spouse, or dependent child of a member of the U.S. military forces serving on active duty: | <p>.</p> <p>Secs. 545.412(g) and 545.413(i), T.C.</p> <p>Art. 45.0511(u), C.C.P.</p> <p>Art. 45.0511(m), C.C.P.</p> <p>Art. 45.0511(b)(2), C.C.P.</p> <p>Art. 45.0511(b)(6), C.C.P., Ch. 601, T.C.</p> <p>Art. 45.0511(b)(4), C.C.P.</p> |
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<ul style="list-style-type: none"> ❑ (1) Requiring a Texas driver’s license or permit is likely to violate the “Full Faith and Credit” provision of the U.S. Constitution. This may be remedied by the court providing a similar relief to out-of-state drivers under Article 45.051, C.C.P. (deferred disposition). 	<p>Art. IV, U.S. Constitution. See Checklist 8-2.</p>
<ul style="list-style-type: none"> ❑ (2) The holder of a commercial driver’s license may not be granted DSC. Neither may an individual who held a commercial driver’s license when the offense was committed. 	<p>Art. 45.0511(s), C.C.P.</p>
<p>❑ 11. Other alternatives:</p>	
<ul style="list-style-type: none"> ❑ a. Discretionary DSC 	<p>Art. 45.0511(d), C.C.P.</p>
<ul style="list-style-type: none"> ❑ (1) The court may grant DSC if the defendant has taken a course in the 12 months preceding the citation, or if the defendant failed to make a timely election. 	
<ul style="list-style-type: none"> ❑ (2) If the court grants discretionary DSC, the procedures in Checklist 5-2 are followed, except: 	
<ul style="list-style-type: none"> ❑ (3) The court may assess a fine not to exceed the maximum possible fine for the offense. 	<p>Although the passage of S.B. 346 (2019) changed the term “special expense fee” to “fine,” the administrative DSC fine in this article is separate from the punitive fine that could be assessed on conviction.</p>
<ul style="list-style-type: none"> ❑ b, The court may consider deferred disposition under Article 45.051, C.C.P., even if a defendant is not qualified for DSC under Article 45.0511, C.C.P. 	<p>See Checklist 8-2. The defendant may not be granted deferred disposition for a traffic offense committed in a work zone while workers are present (Sec. 472.022, T.C.) or a moving violation committed by the holder of a commercial driver’s license.</p>

CHAPTER 5 DRIVING SAFETY COURSE (DSC)

2. Procedure for Granting DSC

Checklist 5-2	Script/Notes
<p><input type="checkbox"/> 1. When the court accepts the conditional plea of guilty and determines that the defendant is eligible, the court should enter judgment on the plea and defer imposition of judgment.</p>	<p>See <i>TMCEC 2020 Forms Book</i>: Judgment: Driving Safety Course Granted; and Request for a Driving Safety Course. Art. 45.0511(c), C.C.P.</p>
<p><input type="checkbox"/> 2. Court must assess and collect all state and local court costs.</p>	<p>Art. 45.0511(f), C.C.P.; Sec. 133.101, L.G.C.</p>
<p><input type="checkbox"/> 3. The court must impose the following conditions:</p>	
<p><input type="checkbox"/> a. Defer imposition of sentence for 90 days;</p>	<p>Art. 45.0511(c), C.C.P. Note: An order of deferral terminates any liability under a bond given for the charge. Art. 45.0511 (1), C.C.P.</p>
<p><input type="checkbox"/> b. During the deferral period, require the defendant to successfully complete a driving safety course approved by the Texas Education Agency or a course under the motorcycle operator training and safety program approved by the designated state agency under Chapter 662, T.C.</p>	<p>Art. 45.0511(b), C.C.P.</p>
<p><input type="checkbox"/> c. During the deferral period, present the court with a uniform certificate of completion of the driving safety course or verification of completion of the motorcycle operator training course.</p>	<p>Art. 45.0511(c)(1), C.C.P.</p>
<p><input type="checkbox"/> d. During the deferral period, present to the court the defendant’s DPS driving record showing that the defendant had not completed an approved driving safety course or motorcycle operator training course in the 12 months preceding the date of the citation.</p>	<p>Art. 45.0511(c)(2), C.C.P.</p>

A judge, at the time the defendant requests a driving safety course or motorcycle operator training course, is authorized to require the defendant to pay a reimbursement fee equal to the sum of the fee as established by Sec. 521.048, T.C., and the state electronic Internet portal fee for obtaining the defendant's driving record by using the state electronic Internet portal, and require DPS to provide by means of the state electronic Internet portal a copy of the defendant's driving record on request to the court "as soon as practicable." The custodian of a municipal or county treasury who receives reimbursement fees collected under this subsection is required to keep a record of the fees and, without deduction or prorating, forward the fees to the Comptroller of Public Accounts.

Art. 45.0511(c-1), C.C.P.

e. During the deferral period, present to the court an affidavit stating the defendant is not taking a course and did not take a course not reflected on the driving record.

See *TMCEC 2020 Forms Book: Affidavit for a Driving Safety Course*.

f. If the defendant did not have a valid Texas driver's license or permit and is a member, spouse, or dependent child of a member, of the U.S. military serving in active duty, the affidavit must state that the defendant was not taking a driving safety course or motorcycle operator course in another state on the date of request and had not completed one in the preceding 12 months from the current offense.

Art. 45.0511(c)(4), C.C.P.

g. A special driving safety course including instruction of child restraints is required if the offense was a child restraint violation.

Sec. 545.413(i), T.C.

4. The court may require the payment of a reimbursement fee in a amount of not more than \$10.

Art. 45.0511(f)(1), C.C.P.

a. See Step 10 of Checklist 5-1 for special instructions on discretionary DSC.

Art. 45.0511(f)(2), C.C.P.

b. This fee is not refundable.

Art. 45.0511(g), C.C.P.

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| <p><input type="checkbox"/> 5. If the defendant completes all of these terms during the 90 day deferral period and presents the court the required evidence, the court shall:</p> <p><input type="checkbox"/> a. Remove the judgment;</p> <p><input type="checkbox"/> b. Dismiss the charge; and</p> <p><input type="checkbox"/> c. Report the date the DSC was completed to DPS.</p> <p><input type="checkbox"/> d. That report cannot be used for any purpose including increasing insurance rates.</p> <p><input type="checkbox"/> 6. If the defendant fails to complete the terms during the 90 day deferral period, the court shall:</p> <p><input type="checkbox"/> a. Notify the defendant in writing:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Mailed to the address on file with the court;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) That the defendant failed to fulfill the orders of the court; and</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) That the defendant is required to appear at a particular place and time to show good cause why the defendant did not timely comply.</p> <p><input type="checkbox"/> b. If the defendant does not appear, enter an adjudication of guilt and impose a fine.</p> <p><input type="checkbox"/> c. If the defendant appears and does not show good cause for non-compliance, enter an adjudication of guilt and impose a fine.</p> <p><input type="checkbox"/> d. If the defendant appears and shows good cause for non-compliance, the court may allow an extension to allow the defendant to present proof of compliance.</p> | <p>Art. 45.0511(<i>l</i>), C.C.P. See <i>TMCEC 2020 Forms Book: Judgment: Driving Safety Course Program Granted.</i></p> <p>Art. 45.0511(<i>l</i>)(2), C.C.P.</p> <p>Art. 45.0511(<i>n</i>)-(o), C.C.P.</p> <p>Art. 45.0511(<i>i</i>)-(k), C.C.P.</p> <p>Art. 45.0411(<i>i</i>), C.C.P. See <i>TMCEC 2020 Forms Book: Driving Safety Course: Notice to Defendant to Show Cause.</i></p> <p>Art. 45.0511(<i>j</i>), C.C.P. See Checklist 8-1.</p> <p>See Checklist 8-1.</p> <p>Art. 45.0511(<i>k</i>), C.C.P.</p> |
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- e. After entry of judgment and if there is no appeal, the court may proceed to use available collection tools.

See Chapter 10 in this book for appeals. See Checklist 8-3.

PRETRIAL PROCEEDINGS

CHAPTER 6 PRETRIAL PROCEEDINGS

Chapter 45, C.C.P., is silent on pretrial matters; accordingly, Article 28.01, C.C.P., governs pretrial matters in municipal court. Article 28.01 provides that the court may set the case for a pretrial hearing before the case is set for a trial on the merits. The court may direct the prosecutor and the defendant (and his or her attorney of record) to appear. The defendant must be present at a pretrial proceeding. In municipal courts, pretrial hearings may be held on matters regarding any pleadings of the defendant, special pleas, motions to quash, motions for continuance, motions to suppress, motions for change of venue, discovery, entrapment, and motions for the appointment of an interpreter. See Article 28.01, Sec. 1, C.C.P.

Although Article 45.031, C.C.P., requires a prosecutor to be present to represent the State at trial, a prosecutor is not always required at pretrial proceedings. If a pretrial proceeding is held to inform the defendant about procedures, such as his or her right to have an attorney (not appointed by the court), then the prosecutor need not appear. If, however, the pretrial proceeding is held to resolve a contested issue, or when the judge will be required to hear evidence the prosecutor should be present to represent the State. The judge cannot serve as the State's attorney.

Although the court is not required to set a matter for a pretrial hearing, it is the local rule in many courts to require that the parties attend a pretrial hearing when the case has been set for a jury trial. It is also a common local rule to set cases for pretrial to allow the parties to reach a plea bargain agreement.

1. Conducting a Hearing

Checklist 6-1	Script/Notes
<input type="checkbox"/> 1. If a pretrial hearing has been requested by the State or the defendant or local rules require that pretrial hearing be set, the Court will set the matter for pretrial hearing.	Art. 28.01, C.C.P.
<input type="checkbox"/> 2. If a hearing is set, notice must be given to both the municipal prosecutor and the defendant. The following matters should be heard:	Art. 28.01, Sec. 2, C.C.P.
<input type="checkbox"/> a. Arraignment, if necessary;	See Checklist 6-2.
<input type="checkbox"/> b. Appointment of counsel, if necessary;	See TMCEC <i>The Municipal Judges Book</i> : Chapter 4 and Art. 1.051(c), C.C.P.
<input type="checkbox"/> c. Pleadings of the defendant;	
<input type="checkbox"/> d. Special pleas, if any (such as double jeopardy);	
<input type="checkbox"/> e. Exceptions to form or substance of the complaint (Motions to Quash);	

- f. Motions for continuance;
- g. Motions to suppress evidence;
- h. Motions for change of venue do not apply to municipal court, unless teen court has been granted;
- i. Discovery;
- j. Entrapment; and
- k. Motions for appointment of interpreter.
- 3. Other motions (including but not limited to the election of jury punishment).
- 4. Notice can be made in open court if the defendant or attorney of record is present, by personal service, or in writing depending on the order of the court.
- 5. The defense must have 10 days notice of trials or pretrials in which to file motions.
- 6. Matters not raised within seven days of the pretrial hearing are waived, except by permission of the court for good cause shown.
- 7. The defendant has the right to open and close the argument on all defense pleadings presented to the court.
- 8. Testimony should be limited to the issue contained in the motion.
- 9. The Rules of Evidence may not apply in all pretrial proceedings.
 - a. The parties should be provided the opportunity to cross-examine, rebut, or argue if the other side is permitted to present evidence or argue.

For a detailed discussion of election and jury punishment, see *The Recorder* (August 2000).

Art. 28.01, Sec. 3, C.C.P.

Art. 28.01, Sec. 2, C.C.P.

Art. 28.01, Sec. 2, C.C.P.

Art. 28.02, C.C.P.

Arraignments are not required in misdemeanor cases punishable by fine only. See Checklist 16-2.

- 10. After the judge makes a decision on the motions presented, the judge announces:
 - a. Granted; or
 - b. Denied.

Rulings are discussed in TMCEC
The Municipal Judges Book:
Chapter 2, Section I, Part C.

CHAPTER 6 PRETRIAL PROCEEDINGS

2. Arraignment

Arraignments are not required in misdemeanor cases punishable by fine only. This has historically caused confusion in municipal and justice courts because the Code of Criminal Procedure provides no proper name for a defendant’s initial appearance to enter a plea in municipal or justice court. While in the most general sense of the word, the defendant’s first appearance in municipal court is an arraignment, the lack of a proper name has resulted in cities using various descriptive labels (i.e., “initial appearance” and “appearance docket”). Presumably, Texas law does not classify what occurs in municipal court as an arraignment because most defendants accused of fine-only offenses have the option of entering a plea without making a physical appearance in court (i.e., entering a plea by mail pursuant to Article 27.14 or 27.16, C.C.P.) and because municipal courts are not required to comply with all of the other provisions in Chapter 26, C.C.P.

Checklist 6-2	Script/Notes
<p><input type="checkbox"/> 1. If the court has followed the procedures in Checklist 4-1 concerning appearance, a formal arraignment is not necessary.</p>	<p>Arraignments in municipal courts are not specifically required or prohibited.</p>
<p><input type="checkbox"/> 2. The purpose of an arraignment is twofold:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Fix identity of the accused; and</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Take the plea of the accused.</p>	<p>Arts. 26.01-26.03, C.C.P.</p>
<p><input type="checkbox"/> 3. Arraignments are required in all felonies and misdemeanors punishable by confinement.</p>	
<p><input type="checkbox"/> 4. Only a court having jurisdiction over a particular offense may arraign the defendant. For instance, a municipal judge is permitted only to arraign defendants charged with fine-only misdemeanors filed in the court where the judge presides.</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. When a magistrate administers the warnings required by Article 15.17, C.C.P., it is not an arraignment although it is sometimes improperly referred to as such.</p>	<p>If the court orders an arraignment, the court cannot refuse to accept a waiver of arraignment from an attorney representing the defendant in order to require the defendant to appear. Art. 26.011, C.C.P.</p> <p>See Checklist 1-1.</p>

CHAPTER 6 PRETRIAL PROCEEDINGS

3. Motions for Continuance

Checklist 6-3	Script/Notes
<p><input type="checkbox"/> 1. The court must keep a docket in each case showing whether the trial was by bench or jury. The exact method of maintaining and storing the docket is left to the discretion of the court.</p>	<p>Art. 45.017, C.C.P.</p>
<p><input type="checkbox"/> 2. Motions for continuance are used by the prosecutor or defendant to postpone or continue the trial at a later setting.</p>	<p>Chapter 29, C.C.P., governs continuances.</p>
<p><input type="checkbox"/> 3. The court may continue the case upon the written motion of either party, upon “sufficient cause shown,” but only for as long as is necessary.</p>	<p>Art. 29.02, C.C.P.</p>
<p><input type="checkbox"/> 4. The court may continue the trial on its own motion; however,</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. The court must continue the trial as a matter of law where the defendant has neither been arrested nor served with summons, or when insufficient time for trial exists in the term of court (an unlikely event); or</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. If a jury panel is not available, the whole docket may be continued or reset.</p>	<p>Art. 29.01, C.C.P.</p>
<p><input type="checkbox"/> 5. In municipal courts of record, all motions for continuance must be in writing to be appealed.</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Motions must be sworn to by the moving party and affidavits should be attached showing sufficient facts to justify the continuance.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. All motions for continuance must be “for sufficient cause.” The motion must be in writing and state cause for continuance.</p>	<p>Arts. 29.01 and 29.02, C.C.P.; see Art. 29.011, C.C.P., for religious continuance.</p> <p>Arts. 29.02 and 29.08, C.C.P., and <i>Montoya v. State</i>, 810 S.W.2d 160 (Tex. Crim. App. 1989).</p> <p>Art. 29.03, C.C.P.</p>

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| <ul style="list-style-type: none"> <input type="checkbox"/> c. The State’s first motion for continuance based on a missing witness must contain the witness’s name and address, allegations of the efforts made to obtain the witness, and an assertion that the testimony is material. | <p>Art. 29.04, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> d. Subsequent motions by the State, in addition to requirements above, must also show the facts to be established by the missing witness, that those facts are material, that the witness will be available at the next term of court, and that no other witness can testify to the same matter. | <p>Art. 29.05, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> e. The defendant has similar requirements for both first and subsequent motions. The defendant must also show that the defendant did not cause the witness’s absence and that the motion is not made for the sole purpose of a delay of trial. | <p>Art. 29.06, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 6. Motions may be by agreement or unopposed, subject to the court’s approval. Agreed motions do not need to be argued, unless the court believes it is necessary. | <p>Art. 29.02, C.C.P. These motions are presented in open court.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> a. When a hearing is conducted: <ul style="list-style-type: none"> <input type="checkbox"/> (1) The court is granted broad discretion in determining “sufficient cause.” <input type="checkbox"/> (2) Opposing affidavits can be filed. <input type="checkbox"/> (3) The court may rule on affidavits or hear evidence or argument within its discretion. | <p>Art. 29.02, C.C.P., and <i>Taylor v. State</i>, 612 S.W.2d 566 (Tex. Crim. App. 1981).</p> <p>Art. 29.09, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 7. The court has broad discretion in granting or denying motions for continuance and in resetting the case once a motion is granted. | <p>A continuance may be only for as long as is necessary. Arts. 29.02 and 29.03, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 8. Motions for continuance during trial can only be granted if: <ul style="list-style-type: none"> <input type="checkbox"/> a. A surprise occurs; | <p>Art. 29.13, C.C.P.</p> |

- b. Due diligence would not have prevented the surprise; and
- c. The surprise prevents a fair trial.

- b. Statute or ordinance in the instant case denies the defendant equal protection in violation of the Constitution.
- c. Prosecutorial misconduct.

State v. Johnson, 821 S.W.2d 609
(Tex. Crim. App. 1991).

CHAPTER 6 PRETRIAL PROCEEDINGS

5. Motions to Quash the Complaint

Checklist 6-5	Script/Notes
<p><input type="checkbox"/> 1. A complaint vests the municipal court with jurisdiction to try a case. Motions objecting to the complaint are called motions to quash the complaint. These motions are properly made to the allegations of the complaint on its face; they are not properly related to the evidence that would prove the allegations, or the sufficiency of that evidence.</p>	<p>Arts. 45.018 and 45.019, C.C.P.</p>
<p><input type="checkbox"/> 2. The complaint shall commence:</p> <p><input type="checkbox"/> a. “In the name and by the authority of the State of Texas.”</p>	<p>Art. 45.019, C.C.P.</p>
<p><input type="checkbox"/> 3. The complaint must state:</p> <p><input type="checkbox"/> a. The name or description of the defendant;</p> <p><input type="checkbox"/> b. That the accused committed an offense;</p> <p><input type="checkbox"/> c. A venue allegation that the offense was committed in the territorial limits of the municipality; and</p> <p><input type="checkbox"/> d. The date on which the offense was committed and the date the complaint is signed (these dates must be within two years of each other).</p>	<p>Art. 45.019, C.C.P. See TMCEC <i>The Judges Book</i>: Chapter 4 for a discussion on complaints.</p> <p>Art. 12.02, C.C.P.</p>
<p><input type="checkbox"/> 4. The complaint shall conclude:</p> <p><input type="checkbox"/> a. “Against the peace and dignity of the State” (penal statutes) and it must, when appropriate, also conclude “Contrary to said ordinance” (municipal ordinances).</p>	
<p><input type="checkbox"/> 5. Complaints must be sworn.</p>	<p>Art. 45.018, C.C.P.</p>
<p><input type="checkbox"/> 6. The offense alleged in “plain and intelligible words” should include:</p>	<p><i>Kindley v. State</i>, 879 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1994).</p>

- a. Every element of the offense;
 - b. The facts sufficient to identify a particular offense to be defended against and sufficient facts to enable the defendant to plead the judgment in bar of further prosecution;
 - c. The intent required under the statute or ordinance, if any;
 - d. The name of the owner of property if that is an element of the offense;
 - e. A specific description of property if that is an element of the offense;
 - f. Language used in the allegation should be clear and concise; and
 - g. The exact language of the statute or ordinance is usually most appropriate, but not required.
7. If the defendant does not object to a defect, error, or irregularity of form or substance in a complaint before the day trial commences, the defendant waives the right to object to the complaint.
- Article 45.019(f), C.C.P., does not mean that a defendant must make a motion to quash before the date on which the case is set for trial.
- The trial court is not prohibited from requiring that each objection to a complaint be made at an earlier time (e.g., pretrial hearing).
8. Granting the motion to quash does not bar re-prosecution with a proper complaint if the new complaint is filed within the statute of limitations.
9. The error can be cured if the complaint is dismissed and refiled with appropriate corrections. This must be done:
- a. In writing;
 - b. Before the date of trial; or

Art. 45.019(f), C.C.P.

Sanchez v. State, 138 S.W.3d 324 (Tex. Crim. App. 2004).

See Checklist 6-1.

Art. 28.04, C.C.P.

This method of dismissal and refile is recommended over the process of amendment. It is not clear if a complaint can be amended, nor in what manner it can be done.

- c. On the date of trial or during trial if the defense does not object.

CHAPTER 6 PRETRIAL PROCEEDINGS

One of the guiding principles of the American legal system is the idea of an independent and neutral judiciary. In order to ensure the aims of justice and to protect the integrity of the judicial system, all judges must understand the law governing (1) disqualification and (2) recusal. While the terms disqualification and recusal are used interchangeably, such use is a grievous error. If a judge is disqualified under the constitution, he or she is absolutely without jurisdiction in the case, and any judgment rendered by him or her is void, without effect, and subject to collateral attack. The failure of a judge to recuse when recusal is appropriate can constitute a violation of the Code of Judicial Conduct. Failure to recuse may rise to the level of disqualification when it impacts a litigant’s right to due process.

Article V, Section 11 of the Texas Constitution provides grounds for disqualifying a judge from sitting in any case. Similarly, Article 30.01, C.C.P., provides instances in which the judge is disqualified regardless of the judge’s application of discretion. The defendant cannot waive the judge’s disqualification.

While disqualification is mandatory, recusal lies in a judge’s appraisal of the individual situation. While this determination can only be made in light of the specifics of a situation, the Texas Rule of Civil Procedure 18b provide grounds for when a judge shall recuse. Remember, however that judges are obligated to decide issues presented in cases and must not unnecessarily recuse themselves even when the judges might prefer not to decide the issues. *Ex parte Ellis*, 275 S.W.3d 109 (Tex. App.—Austin 2008).

While disqualification and recusal are very different, the procedures following a judge’s disqualification or recusal are the same. In the 82nd Legislative Session (2011), a comprehensive series of procedures was created in Subchapter A-1 of Chapter 29, G.C. These rules, derived from Texas Rule of Civil Procedure 18A, are designed to accommodate all sizes of municipal courts, and strike a balance between uniformity in application of the law and judicial efficiency. They can be used in any kind of criminal or civil case in which a municipal court has jurisdiction.

6. Recusal and Disqualification

Checklist 6-6	Script/Notes
<p>Recusal</p> <p><input type="checkbox"/> 1. A judge must recuse in any proceeding in which:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. The judge’s impartiality might reasonably be questioned;</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. The judge has a personal bias or prejudice concerning the subject matter or a party;</p>	<p>T.R.C.P. 18b sets out the law concerning recusal and includes instances in which a judge must step down from hearing a case for reasons other than the disqualifying grounds listed in the constitution. <i>Gaal v. State</i>, 332 S.W.3d 448 (Tex. Crim. App. 2011).</p>

- c. The judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
- d. The judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;
- e. 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;
- f. The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- g. The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (1) Is a party to the proceeding or an officer, director, or trustee of a party;
 - (2) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (3) Is to the judge's knowledge likely to be a material witness in the proceeding; or
- h. The judge or the judge's spouse, or a person within the first degree of relationship to either of them, is acting as a lawyer in the proceeding.

Disqualification:

- 2. No justice or judge shall sit in any case where:
 - a. The judge may be the party injured;
 - b. The judge has been of counsel for the State or the accused; or
 - c. The accused may be connected with the judge by consanguinity or affinity within the third degree.

Art. 30.01, C.C.P.

An individual's relatives within the third degree by consanguinity are the individual's parent, child, brother, sister, grandparent, grandchild, great-grandparent, great-grandchild, aunt, uncle, nephew, or niece. Sec. 573.023, G.C. Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual. Sec. 573.024, G.C.

Recusal or Disqualification Without a Motion:

- 3. If you choose to recuse or disqualify yourself, you are recused or disqualified. Go to step 5.

Sec. 29.055, G.C.

See *TMCEC 2020 Forms Book: Order of Recusal or Disqualification*.

Recusal or Disqualification Upon Party Motion:

- 4. If a motion has been filed to recuse or disqualify you from presiding over the case, you may do one of the following:
 - a. Recuse or disqualify yourself (go to step 3); or
 - b. Decline to recuse or disqualify yourself and request the Regional Presiding Judge of the Administrative Judicial Region to assign a judge hear the motion; and
 - (1) Forward a referral order, the motion, and statements to the Regional Presiding Judge.

Sec. 29.052, G.C.

Sec. 29.055, G.C.
See *TMCEC 2020 Forms Book: Order of Recusal or Disqualification*.

See *TMCEC 2020 Forms Book: Order of Referral upon Motion for Recusal or Disqualification*.

- ❑ 5. If you are recused or disqualified, a determination must be made as to who will sit for you in the case.
 - ❑ a. If you are the only municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.
 - ❑ b. If you are the presiding municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.
 - ❑ c. If you are not the presiding municipal judge in the municipality, you must request the presiding municipal judge of the municipality to assign another judge of the city to hear the case.

Sec. 29.057, G.C.

CHAPTER 6 PRETRIAL PROCEEDINGS

7. Requests for Discovery

Michael Morton was wrongfully convicted in 1987 for the murder of his wife, Christine. In 2011, after serving nearly 25 years in prison, he was exonerated. His case brought needed attention to the issues of discovery in criminal cases and prosecutorial misconduct. The Michael Morton Act, passed by the 83rd Legislature 2013, amended the Code of Criminal Procedure to revise provisions relating to discovery in a criminal case. The changes were made in an effort to uphold a defendant’s constitutional right to a defense, minimize the likelihood of wrongful convictions, save thousands in taxpayer dollars, promote an efficient justice system, and improve public safety, all while increasing the public’s confidence in the criminal justice system.

Checklist 6-7	Script/Notes
<p><input type="checkbox"/> 1. Requests for discovery are governed by Article 39.14, C.C.P.</p> <p><input type="checkbox"/> 2. Depositions are generally not allowed in criminal proceedings. Depositions for the defendant may be ordered on application and the filing of affidavits “stating facts necessary to constitute a good reason for taking same.” Merely wishing to discover adverse testimony has been held not to constitute “good reason” for deposition of a witness.</p> <p><input type="checkbox"/> 3. For defendants represented by counsel, discovery of papers and physical items should:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Be produced by the state on timely request by the defendant;</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Be limited to production for examination, electronic duplication, copying, and photographing;</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. Not be removed from the possession of the State or inspected outside the presence of the State; and</p> <p style="padding-left: 20px;"><input type="checkbox"/> d. Not include work products of the State.</p> <p><input type="checkbox"/> 4. For pro se defendants, discovery of papers and physical items should:</p>	<p><i>James v. State</i>, 563 S.W.2d 599 (Tex. Crim. App. 1978); Art. 39.02, C.C.P.</p> <p>Art. 39.14, C.C.P. As amended by the Michael Morton Act, Article 39.14, C.C.P. distinguishes defendants from pro se defendants with regard to discovery.</p> <p>No order from the court is needed. The State must produce discovery upon a timely request from the defendant. Art. 39.14(a), C.C.P.</p> <p>Art. 39.14(d), C.C.P.</p>

<p><input type="checkbox"/> a. Be produced by the State upon an order from the court;</p>	<p>The State is not required to produce discovery without an order from the court as is the case for defendants represented by counsel. Art. 39.14(d), C.C.P.</p>
<p><input type="checkbox"/> b. Be limited to production for inspection and review;</p>	<p>The State is not required to allow electronic duplication as is the case for defendants represented by counsel. Art. 39.14(d), C.C.P.</p>
<p><input type="checkbox"/> c. Not be removed from the possession of the State or inspected outside the presence of the State; and</p>	<p>Art. 39.14(a), C.C.P.</p>
<p><input type="checkbox"/> 5. If only a portion of a document, item, or information is subject to discovery, the State is not required to produce or permit the inspection of the portion that is not subject to discovery may withhold or redact that portion. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law.</p>	<p>Art. 39.14(c), C.C.P.</p>
<p><input type="checkbox"/> a. The State shall inform the defendant that a portion of the document, item, or information has been withheld or redacted;</p>	<p>Art. 39.14(c), C.C.P.</p>
<p><input type="checkbox"/> b. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law.</p>	<p>Art. 39.14(c), C.C.P.</p>
<p><input type="checkbox"/> 6. The defendant, the defense attorney, or any agent of the defense attorney may not disclose to a third party any documents, evidence, materials, or witness statements received from the State unless:</p>	<p>Art. 39.14(e), C.C.P.</p>
<p><input type="checkbox"/> a. The court orders disclosure upon a showing of good cause after notice and hearing after considering the security and privacy interests of any victim or witness; or</p>	<p>Art. 39.14(e), C.C.P.</p>
<p><input type="checkbox"/> b. The documents, evidence, materials, or witness statements have already been disclosed.</p>	<p>Art. 39.14(e), C.C.P.</p>

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| <p>☐ 7. The defense attorney or any agent of the defense attorney may allow a defendant, witness, or prospective witness to view information acquired through discovery, but may not allow that person to have copies of the information, other than a copy of the witness’s own statement.</p> | <p>Art. 39.14(f), C.C.P.</p> |
| <p>☐ a. Before allowing a person to view a document or witness statement of another, the person possessing the information shall redact the address, telephone number, driver’s license number, social security number, date of birth, and any bank account or other identifying information in the document or statement.</p> | <p>Art. 39.14(f), C.C.P.</p> |
| <p>☐ 8. No general right to discovery of inculpatory evidence exists. However, the defendant has the constitutional right to discover “Brady” evidence, or exculpatory evidence, that shows the defendant may not be guilty.</p> | <p><i>Quinones v. State</i>, 592 S.W.2d 933 (Tex. Crim. App. 1980); <i>Brady v. Maryland</i>, 373 U.S. 83 (1963).</p> |
| <p>☐ a. Prosecutors are statutorily required to promptly provide the defense with any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. This requirement applies upon discovery of such evidence at any time before, during, or after trial. A defendant need not request this information.</p> | <p>Art. 39.14(h) and (k), C.C.P.</p> |
| <p>☐ b. Prosecutors also have an ethical duty to provide the defense with both exculpatory and mitigating evidence. A defendant need not request this information.</p> | <p>Rule 3.09, Texas Disciplinary Rules of Professional Conduct.</p> |
| <p>☐ 9. If either party so requests, the court may order the parties to disclose the name and address of each person the party may call as a witness at trial. This is generally referred to as a “witness list.” The judge shall specify when witness lists must be disclosed, no later than 20 days before trial.</p> | <p>Art. 39.14(b), C.C.P.</p> |

- ❑ 10. A court may order the defendant to pay costs related to discovery, but the costs may not exceed the charges prescribed by Subchapter F, Chapter 552, G.C.
- ❑ 11. If a conflict exists between the rules of discovery in criminal cases under Art. 39.14, C.C.P., and the rules pertaining to public information under Chapter 552, G.C., the rules of discovery prevail.
- ❑ 12. Parties may agree to discovery and documentation requirements equal to or greater than those required under Art. 39.14, C.C.P.

Subchapter F, Chapter 552, G.C., deals with charges for providing copies of public information.

Art. 39.14(m), C.C.P.

Art. 39.14(n), C.C.P.

CHAPTER 6 PRETRIAL PROCEEDINGS

Two motions specifically affect the admission of evidence at trial. The motion to suppress evidence is generally based on constitutional or statutory grounds. On the other hand, the motion in limine is advisory in nature only. This motion provides a way to pre-judge the admissibility of evidence at trial.

Motions About Evidence

8. Motions to Suppress

Checklist 6-8	Script/Notes
<p><input type="checkbox"/> 1. The motion to suppress can be used to exclude:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. Physical evidence based on police violation of the 4th Amendment of the U.S. Constitution, Art. 38.23, C.C.P., and Art. I, Sec. 10 of the Texas Constitution prohibiting “unreasonable searches or seizures.”</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. The court must determine:</p> <p style="padding-left: 80px;"><input type="checkbox"/> (1) Did a search or seizure occur? To be a search, police conduct must intrude upon the defendant’s “reasonable expectation of privacy.” A seizure occurs if a reasonable person would have believed that he was not free to leave;</p> <p style="padding-left: 80px;"><input type="checkbox"/> (2) Did the defendant have an interest in the items or area searched? If not, then the defendant does not have “standing” to complain of the search or seizure; and</p> <p style="padding-left: 80px;"><input type="checkbox"/> (3) Is the area private as opposed to open to the public or exposed to the public by the defendant? Open fields, overheard conversations, and items abandoned or relinquished to others may not be protected by the 4th Amendment.</p> <p><input type="checkbox"/> 2. Was seizure pursuant to a warrant?</p>	<p>See TMCEC <i>The Municipal Judges Book</i>: Chapter 4 for a discussion on the 4th Amendment.</p> <p><i>Katz v. United States</i>, 389 U.S. 347 (1967); <i>Brendlin v. California</i>, 551 U.S. 249 (2007).</p> <p><i>Rakas v. Illinois</i>, 439 U.S. 128 (1978).</p> <p>See Checklist 2-4</p>

- a. Was the warrant valid?
- b. Was the item seized within the scope of the warrant?
- 3. Was there an exception to the requirement of a warrant?
 - a. Was the seizure in “plain view?”
 - (1) The court must find that the officer was properly in the place where the discovery was made and it was immediately apparent the item was, in fact, evidence.
 - b. Was the search made with consent of the defendant or another person with the right to consent to the search?
 - c. Was the search or seizure only a temporary detention or “frisk” based on reasonable suspicion?
 - d. Was the search of the person or the area within his or her reach incident to a proper arrest?
 - e. Was the search based on an inventory policy of searching a properly seized vehicle?
 - f. Was the seizure or stop based on a valid roadblock or traffic stop?
 - g. Was the search based on emergency or exigent circumstances?
- 4. Has the defendant properly supported the motion to suppress with law and evidence? If so, the court grants the motion to suppress illegally obtained evidence.
- 5. If an illegal search or arrest leads to other evidence it too must be suppressed as “fruit of the poisonous tree.”

Terry v. Ohio, 392 U.S. 1 (1968).

Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

Wong Sun v. U.S., 371 U.S. 471 (1963).

- 6. Statements of the accused must be suppressed as violating the defendant’s 5th Amendment right against self-incrimination if:
 - a. The statements were involuntarily made;
 - b. The statements were involuntary due to promises or threats made by the police;
 - c. The statements were made subject to “custodial interrogation” (the defendant must be in legal custody and the statements must be the result of questioning) and the police failed to “Mirandize” the defendant; or
 - d. The statements were made subject to “custodial interrogation” that does not comply with the requirement in Article 38.22, C.C.P., that the entire statement be recorded or in writing with the statutory warnings of that section included in the recording or writing.
 - e. Exceptions to this section include:
 - (1) Any statements that contain any assertions of fact or circumstances which are later found to be true;
 - (2) Prior testimony of the defendant;
 - (3) Statements introduced for the purposes of impeaching the defendant’s testimony at trial; or
 - (4) Statements obtained by federal law enforcement in compliance with federal law or obtained in another state and in compliance with the laws of that state.
 - f. If the defendant raises the issue of voluntariness as stated above, the court must hold a hearing outside the presence of the jury and make findings concerning the voluntariness of the statement.

See TMCEC *The Municipal Judges Book*: Chapter 4.

Miranda v. Arizona, 384 U.S. 436 (1966).

Art. 38.22, C.C.P.

Art. 38.22, Sec. 8, C.C.P.

- ❑ 7. An in-court identification of a defendant by a witness must be suppressed if the court finds that the identification was based on an improperly suggestive police identification procedure.
 - ❑ a. Police misconduct in this situation must be of such an improper nature that it causes the court to believe that there is a substantial likelihood of irreparable misidentification by the witness.
 - ❑ b. Factors to consider include:
 - ❑ (1) The witness's opportunity to observe the defendant;
 - ❑ (2) Nature of the suggestion;
 - ❑ (3) Whether the in-court identification is based in any way on the improper procedure;
 - ❑ (4) Accuracy of prior description;
 - ❑ (5) Time between the offense and the identification; and
 - ❑ (6) Totality of the circumstances.
- ❑ 8. In the hearing on a motion to suppress, the initial burden of establishing standing (or the right to complain) is upon the defendant. Once standing is established, the burden to show evidence was properly obtained shifts to the State.
- ❑ 9. Hearings on motions to suppress can often turn into a trial of the entire case. The court can and should limit pretrial testimony to only those legal and factual matters that must be developed for a proper ruling on the motion.

CHAPTER 6 PRETRIAL PROCEEDINGS

The motion in limine is a mechanism by which either the prosecutor or defendant may raise issues of the admissibility of evidence prior to trial.

Motions About Evidence

9. Motions in Limine

Checklist 6-9	Script/Notes
<p><input type="checkbox"/> 1. The motion in limine is simply a judicial order that certain evidence be brought before the court outside of the jury’s presence so that it can be ruled on at the proper point in trial.</p>	<p>A judge can reconsider a ruling on a motion in limine if facts change and evidence becomes admissible.</p>
<p><input type="checkbox"/> 2. This motion is used by counsel and the court to avoid mistrials and trial by ambush.</p>	
<p><input type="checkbox"/> 3. The court as a practical matter should not make final rulings on matters of evidence until those matters are brought before the court in trial.</p>	
<p><input type="checkbox"/> 4. The court should, in appropriate circumstances, order that the attorneys not go into certain areas of evidence in front of the jury until opposing counsel has had an opportunity to make objections and the court has had the opportunity to hear arguments and make a proper ruling.</p>	
<p><input type="checkbox"/> 5. Granting or denying a motion in limine is not a final ruling by the court.</p>	
<p><input type="checkbox"/> 6. Regardless of the ruling on the motion in limine, counsel must still tender or object to the evidence at trial to preserve an issue for appeal in a court of record.</p>	

TRIAL PROCEEDINGS

CHAPTER 7 TRIAL PROCEEDINGS

Defendants in municipal courts have a right to appear by counsel as in other cases. Art. 45.020, C.C.P. When the defendant appears, the court can require the defendant to enter a plea in writing. Art. 45.021, C.C.P. A defendant who wants the judge to hear the evidence and decide his or her case must waive the right to a jury trial in writing. Art. 45.025, C.C.P. Unless good cause is shown by the defendant, a municipal court may order a defendant who does not waive a jury trial and who fails to appear for the trial to pay the costs incurred for impaneling the jury. This order is enforced by contempt as prescribed by Section 21.002(c), G.C. See Article 45.026, C.C.P.

If the prosecutor is not present at trial—both bench and jury—the court may: (1) postpone the trial to another date; (2) appoint an attorney *pro tem* (see Article 2.07, C.C.P.); or (3) proceed to trial. Art. 45.031, C.C.P. If the judge opts to proceed to trial, the State’s failure to present a prima facie case of the offense alleged in the complaint entitles the defendant to a directed verdict of “not guilty.” Art. 45.032, C.C.P. In this instance, State’s witnesses, such as the peace officer, may be present at the trial but unable to testify for the State unless called by the prosecutor.

Because procedures for conducting a bench trial differ from a jury trial, there are separate checklists for these procedures.

1. The Non-Jury Trial (Bench Trial)

Checklist 7-1	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Opening Ceremony and Remarks: <ul style="list-style-type: none"> <input type="checkbox"/> a. Opening announcement given by bailiff or court clerk. <input type="checkbox"/> b. Judge’s opening statements: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Explain court procedures. <input type="checkbox"/> (2) The court may want to repeat the admonishments made on first appearance. <input type="checkbox"/> c. Call case for trial: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Prosecution and defense announce ready for trial, make motions for continuance, or present pretrial motions (e.g., motion to suppress). <input type="checkbox"/> 2. The prosecutor reads the complaint: 	<p>“All rise! The Municipal Court of the City of _____ is now in session. The Honorable _____, judge presiding.”</p> <p>See Checklist 4-1.</p> <p>“I call the case of the State of Texas vs. (<i>Defendant’s name</i>).”</p>

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| <p><input type="checkbox"/> a. The defendant is entitled to a copy of the complaint at least one day before trial, but the defendant can waive that right.</p> | <p>Art. 45.018(b), C.C.P.</p> |
| <p><input type="checkbox"/> b. Ask the defendant if he or she understands the charge and the rights explained earlier. The defendant must be provided a reasonable amount of time to secure counsel. If the defendant does not waive a jury trial in writing, the case must be docketed as a jury trial.</p> | <p>Art. 45.025, C.C.P.</p> |
| <p><input type="checkbox"/> 3. Defendant enters a plea:</p> | |
| <p><input type="checkbox"/> a. Ask the defendant if he or she waives his or her right to a jury trial, and have the defendant sign a written waiver.</p> | <p>See <i>TMCEC 2020 Forms Book</i>: Plea Form: In Person.</p> |
| <p><input type="checkbox"/> b. The defendant then enters a plea of:</p> | |
| <p><input type="checkbox"/> (1) Guilty;</p> | |
| <p><input type="checkbox"/> (2) Nolo contendere (no contest);</p> | |
| <p><input type="checkbox"/> (3) Not guilty; or</p> | |
| <p><input type="checkbox"/> (4) Special plea (double jeopardy).</p> | |
| <p><input type="checkbox"/> c. If the defendant refuses to enter a plea, the court must enter a plea of not guilty for the defendant.</p> | <p>Art. 45.024, C.C.P.</p> |
| <p><input type="checkbox"/> d. If the defendant pleads guilty or nolo contendere, then the only remaining issue is the amount of fine, and the court determines the punishment.</p> | <p>Art. 45.022, C.C.P.
See Checklist 8-1.</p> |

- ❑ 4. Place witnesses under “The Rule.”
 - ❑ a. At the request of either the defense or prosecution, or on your own motion, the court may prevent witnesses from hearing the testimony of other witnesses.
 - ❑ (1) Determine all possible witnesses.
 - ❑ (2) Give oath to witnesses.
 - ❑ (3) Admonish witnesses as to “The Rule.”
 - ❑ b. Before a victim, close relative of a victim, or a guardian of a victim can be excluded under “The Rule,” the moving party must show, and the court must determine that:
 - ❑ (1) The victim (or relative or guardian) will testify; and
 - ❑ (2) The testimony of the witness/victim would be materially affected if the witness/victim is not excluded under The Rule.
 - ❑ c. If either side asks the judge to make an exception for a particular witness (for example, the crime victim or an expert witness), the judge may grant the exception if it is determined that the testimony of the witness will not be tainted or influenced if that person is allowed to remain in the courtroom during the trial and to hear the testimony of the other witnesses in the case.

- ❑ 5. Opening Statements:
 - ❑ a. Prosecution first.

Rule 614, T.R.E.

“All those of you who may be witnesses in this case who are now in the courtroom, please stand and raise your right hand.”

“Do you solemnly swear or affirm that the testimony that you are about to give in the case now on trial is the truth, the whole truth, and nothing but the truth (so help you God)?”

“Ladies and gentlemen, ‘The Rule’ has been invoked. ‘The Rule’ means that the witnesses, except the defendant, must remain outside the hearing of the courtroom at all times while testimony is being heard, except when testifying or until discharged. If you are a witness, you must stay close enough so that you may be reached when needed.”

“You must not converse with each other or with any other person about the case, and you are not to read any report of or comment upon the testimony in the case while under ‘The Rule.’ You may, however, discuss the case with attorneys in the case outside the presence of other witnesses. Please remain outside until called.”
 For a violation of “The Rule,” contempt may be an option.
 See TMCEC *The Municipal Judges Book*: Chapter 6.

Art. 36.01(b), C.C.P.

- b. Defense second. (Defense may reserve opening statement until after the State rests its case-in-chief, as long as the defense presents a case.)
- c. Should the prosecution waive its opening statement, the defense may not make an opening statement until the defense presents its case-in-chief.
- 6. Presentation of Evidence:
 - a. All testimony must be presented under oath.
 - b. Prosecution's Case
 - (1) State's direct evidence.
 - (2) Defendant's cross-examination.
 - (3) State's redirect examination.
 - (4) Defendant's recross-examination.
- 7. Prosecution rests.
- 8. Motion for directed verdict:
 - a. At this point, the defense is permitted to request a motion for directed verdict of acquittal. The motion is based upon the belief of the defense that the State has failed to present evidence proving each and every element of the offense.
 - b. If the judge believes that the defense is correct, then the judge should return a verdict of not guilty.

“Do you solemnly swear or affirm that the testimony that you are about to give in the case now on trial is the truth, the whole truth, and nothing but the truth (so help you God)?”

Art. 45.032, C.C.P.

- c. Granting the motion has the same practical effect of ending the trial in an acquittal. Overruling the motion results in a continuation of the trial, and the defense would then be allowed to present its case.
- 9. Defendant's case:
 - a. Defendant's direct examination.
 - b. State's cross-examination.
 - c. Defendant's redirect examination.
 - d. State's recross-examination.
- 10. Rebuttal evidence, if any. The prosecution may present rebuttal evidence in the same manner as the prosecution's case-in-chief.
- 11. Prosecution closes. If the prosecution presents more evidence, the defense may present more evidence if it chooses.
- 12. Defense closes.
- 13. Closing arguments:
 - a. Prosecution argues first (may waive).
 - b. Defense makes its arguments.
 - c. Prosecution has right to argue last.
 - d. Equal time should be given to each side.
- 14. Decide whether the State proved its case, render judgment orally in open court, and enter the judgment in the docket.
 - a. All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt.

Art. 45.041(d), C.C.P.
See the *TMCEC 2020 Forms Book* for a variety of judgment forms.

- ❑ b. If you return a finding of guilty, render judgment by assessing a specific fine amount within the range permitted under the statute or ordinance under which the defendant was prosecuted.

- ❑ c. If the defendant is found guilty, inform the defendant of the right to appeal.

See Chapter 8 in this book for more information on sentencing.

“You have the right to appeal my decision. Appeal is to the county court. In order to appeal this case, you must give notice of appeal and file a bond with this court in the amount of *(calculate and state the amount of twice the fine and costs)* within 10 days of tomorrow’s date.”

The procedure may vary for courts of record.

See Art. 45.013, C.C.P., for enlargement of time period if bond filed by mail.

See Chapter 10 in this book.

CHAPTER 7 TRIAL PROCEEDINGS

2. The Jury Trial – Before Trial

For courts that conduct jury trials infrequently, it is recommended that a pretrial hearing be conducted to ensure that the parties are in agreement on all possible issues and to minimize the risk for procedural surprises during the trial. This is especially important for jury trials involving pro se defendants that may not understand trial processes.

Although courts can carry out many of the following procedures on the day of trial, handling them in advance will achieve a smoother and more efficient trial experience. Under no circumstances should the pretrial process be used as a tool to thwart or discourage a person from exercising his or her constitutional right to a trial.

Coordination and agreement (or the court’s ruling) before the day of trial on trial-related issues may assist in eliminating unnecessarily long delays for the jury panel.

Some judges prefer to prepare the jury charge in advance and allow both sides to comment and recommend revisions. The judge, however, has the final decision on the wording. Both sides have a final opportunity to make recommendations or state objections to the charge on the day of trial, but are less likely to do so if given a previous opportunity to respond. The court may not flatly prohibit motions made on the day of trial and after the deadline date, but the court may require the movant to show good cause for not complying with the deadline. Some motions must be ruled upon on the trial day, but some can be decided in advance.

Checklist 7-2	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. If a pretrial hearing was not held, the court may send a “trial packet” to the prosecution and defense containing: <ul style="list-style-type: none"> <input type="checkbox"/> a. Copy of complaint; <input type="checkbox"/> b. Copy of draft jury charge; <input type="checkbox"/> c. Date and time of trial; and <input type="checkbox"/> d. Notice setting the deadline for: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Filing motions; <input type="checkbox"/> (2) Filing subpoena lists; 	<p>Both sides shall be notified if a witness on the subpoena list cannot be located or if documents are not available.</p>

- (3) Filing objections to the complaint;
 - (4) Filing recommendations, or exceptions to the jury charge;
 - (5) Requests for interpreter; or
 - (6) Other motions (including but not limited to election of jury punishment.)
2. Sign an order for the clerk to summon a sufficient number of jurors for the type of case.
- a. Consider summoning 30 to 40 persons for a misdemeanor trial.
 - b. Prospective jurors may be randomly selected from:
 - (1) Driver’s license records, if available;
 - (2) Utility records;
 - (3) Tax rolls; and
 - (4) Voter registration rolls.
 - c. Prospective jurors must live within the city
3. Court may reschedule prospective jurors to a later date. Clerk may postpone juror’s service if:

Challenges to the complaint need not be considered unless good cause is shown for violating the court’s order to file them timely.

For a detailed discussion of election and jury punishment, see *The Recorder* (August 2000).

See *TMCEC 2020 Forms Book: Order to Summon Venire*.

Practice Tip: For consistency and transparency, a written policy can be developed and adopted by the court that details the procedure for jury selection (preparing the jury candidate list, summoning the prospective jurors, etc.).

Sec. 62.501, G.C.

Tex. Atty. Gen. Op. GA-0161 (2004).
See *TMCEC 2020 Forms Book: Official Model Jury Summons and Questionnaire; Jury Service Cover Letter*.

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| <p><input type="checkbox"/> a. The person summoned has not been granted a postponement in the county for one year prior to the date on which the juror is summoned to appear; and</p> <p><input type="checkbox"/> b. The person and the clerk determine a substitute date on which the person will appear for jury service that is not later than six months after the date on which the person was originally summoned to appear.</p> | <p>Sec. 62.0143, G.C.</p> |
| <p><input type="checkbox"/> 4. Unless the court's criminal case records are accessible on the internet, the clerk of the court must post in a designated public place in the courthouse notice of a criminal docket setting as soon as the court notifies the clerk of the setting.</p> | <p>Art. 17.085, C.C.P.</p> |

CHAPTER 7 TRIAL PROCEEDINGS

3. The Jury Trial –Trial Day

Checklist 7-3 begins with calling the jury. Please remember that the court must receive announcements and explain procedures to the pro se defendant, even in a jury trial. Please review Chapters 3 and 4. These actions should not take place in front of the jury. If the defendant waives a jury in writing or pleads guilty and waives a jury in writing, the jury is not necessary.

Checklist 7-3	Script/Notes
<input type="checkbox"/> 1. Instruct the clerk of the court to prepare a jury list containing the name of each juror in the order in which he or she was chosen.	See <i>TMCEC 2020 Forms Book</i> : Jury Panel List (Venire Panel).
<input type="checkbox"/> 2. Seat jurors in the order in which they were selected.	
<input type="checkbox"/> 3. Distribute a copy of the numbered list of jurors to the prosecutor and the defendant or defense counsel.	Art. 35.11, C.C.P.
<input type="checkbox"/> a. The judge may, at his or her discretion, ask each attorney to read and sign an admonishment against distributing juror information contained on the juror information cards to the media.	Generally, juror information may not be disclosed unless permitted by the court after a showing of good cause on application by a party in the trial or a bona fide member of the news media. Art. 35.29, C.C.P.
<input type="checkbox"/> 4. Verify that an absent juror has not established his or her exemption by filing a signed statement with the clerk of the court prior to the appearance date or been given a postponement by the clerk.	Art. 35.04, C.C.P.; Secs. 62.0142 and 62.0143, G.C.
<input type="checkbox"/> a. If desired, set contempt hearings and issue attachments for missing jurors not exempt.	Art. 45.027, C.C.P. See Chapter 14 in this book, concerning Contempt. See <i>TMCEC 2020 Forms Book</i> : Show Cause Notice: Juror Contempt. See <i>TMCEC The Municipal Judges Book</i> : Chapter 6.
<input type="checkbox"/> 5. Opening Ceremony and Remarks	
<input type="checkbox"/> a. Opening announcements may be given by the bailiff or court clerk.	“All rise! The Municipal Court of the City of _____ is now in session. The Honorable _____, judge presiding.”

□ 6. Judge's opening remarks.

“Ladies and gentlemen, I want to welcome you to the _____ Municipal Court. You have been called for jury duty for this (*day/week*). You will be examined for inclusion on a jury hearing a criminal case. Courtroom hours vary, but are normally from 9:00 a.m. until 5:00 p.m.”

“Whether you are selected as a juror today or not, you are performing a significant service that only free people can perform. If you are selected, the case will be tried as expediently as possible consistent with justice that requires a careful and correct trial.”

“If selected on the jury, unless instructed otherwise, you will be permitted to separate at recess, for meals, and at night.”

□ 7. The judge should administer the first jury oath to the array.

Art. 35.02, C.C.P.

“Do each of you solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its directions, touching your service and qualifications as a juror (so help you God).”

“The law requires that each of you must possess certain qualifications before you may be considered for service as a juror.”

“There are also certain excuses and exemptions that some of you may wish to claim.”

8. Ask the array the questions shown to the right.

“Except for a failure to register, are you a qualified voter in this city, county, and state under the Constitution and laws of the state?”

“Have you ever been convicted of theft or any felony?”

“Are you under indictment or legal accusation, or on deferred adjudication for theft or any felony?”

“Are you presently insane?” Arts. 35.19 and 35.16(a)(4), C.C.P.

“Are you 18 years of age or older?”

“Are you a resident of the city where this court is located?”

“Are you of sound mind and good moral character?”

“Are you able to read and write the English language?”

“Have you served as a petit juror for six days in the preceding three months in a county court, or six days in the preceding six months in a district court?” Sec. 62.102(6), G.C.

Arts. 35.12, 35.16, and 35.19, C.C.P.

9. Immediately excuse any person whose answer to any one of the above questions is inconsistent with the statutory requirements.

Sec. 62.106, G.C.

10. Determine if anyone who is otherwise qualified to be a juror wishes to claim one of the following legal exemptions:

“You may claim any of the following exemptions if you choose to, but you are not required to claim them.”

“If one of these applies to you, but you still desire to be considered as a juror, please continue to remain seated.”

a. The person is over 70 years of age;

“Are you over 70 years of age?”

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| <p><input type="checkbox"/> b. The person has legal custody of a child under the age of 12 years, and jury service would leave the child or children without adequate supervision;</p> | <p>“Do you have legal custody of a child under the age of 12 years and service on a jury at this time would result in the child not receiving adequate supervision?”</p> |
| <p><input type="checkbox"/> c. The person is a student in a public or private secondary school;</p> | <p>“Are you a student in a public or private high school or secondary school?”</p> |
| <p><input type="checkbox"/> d. The person is enrolled and in actual attendance at an institution of higher education;</p> | <p>“Are you enrolled and in actual attendance at a college or community college?”</p> |
| <p><input type="checkbox"/> e. The person is an officer or employee of the Senate, the House of Representatives, or any department, commission, board, office, or other agency in the legislative branch of State government;</p> | <p>“Are you an officer or employee of the Senate, the House of Representatives, or any department, commission, board, office, or other agency in the legislative branch of State government?”</p> |
| <p><input type="checkbox"/> f. The person is the primary caretaker of a person who is unable to care for himself or herself;</p> | <p>“Are any of you a primary caretaker for a person who is unable to care for himself or herself?”</p> |
| <p><input type="checkbox"/> g. In counties with populations over 200,000, the person has served on a petit jury in the county in the last 24 month period preceding the currently scheduled date for service, unless the county uses a jury plan under Section 62.011, G.C., and the period authorized under Section 62.011(b)(6), G.C., exceeds two years;</p> | <p>Sec. 62.106(a)(6), G.C.</p> <p>“Have you served on a petit jury in this county in the last 24 to 36 months immediately preceding today?”</p> |
| <p><input type="checkbox"/> h. Unless the jury wheel in the county has been reconstituted after the date the person served as a petit juror, people in counties with a population of at least 250,000 who have served as a petit juror in the county during the 36 month period preceding the date the person is to appear for jury service may claim an exemption; or</p> | <p>Secs. 62.106(a)(8) and 62.106(b), G.C.</p> |

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| <p><input type="checkbox"/> i. The person is a member of the U.S. military on active duty deployed away from his or her home station and county of residence.</p> | <p>Sec. 62.106(a)(9), G.C.</p> <p>“If any of these apply to you and you do not desire to serve as a juror, please come up to the bench at this time.”</p> |
| <p><input type="checkbox"/> 11. Hear the exemption and rule accordingly.</p> | |
| <p><input type="checkbox"/> 12. An exemption must be claimed in person on the date of service, or before the date of service by filing a signed statement of the ground for exemption with the clerk of the court.</p> | <p>Art. 35.04, C.C.P.</p> |
| <p><input type="checkbox"/> 13. Call forward any juror who wishes to be excused.</p> | <p>Art. 35.03, Sec. 1, C.C.P.</p> <p>“If any of you feel there is a reason why you cannot sit as a juror today, please come up to the bench now and I will hear your excuse.”</p> |
| <p><input type="checkbox"/> 14. The judge may accept or reject any “reasonable” or “sufficient” excuse.</p> | <p>Art. 35.03, Sec. 1, C.C.P.
Sec. 62.110(a), G.C.</p> |
| <p><input type="checkbox"/> a. If an excuse is deemed sufficient, the juror may be released, or his or her service may be postponed to another date.</p> | <p>Art. 35.03, Sec. 1, C.C.P.</p> |
| <p><input type="checkbox"/> b. A juror may be excused for observance of a religious holiday upon completing an affidavit as required by Article 29.012(c), C.C.P.</p> | <p>Art. 35.03, Sec. 3, C.C.P.</p> |
| <p><input type="checkbox"/> 15. A juror may not be excused for economic reasons without the consent of the parties.</p> | <p>Sec. 62.110(c), G.C.</p> |
| <p><input type="checkbox"/> a. A juror who, without prompting, articulates an inability to listen to testimony and be fair and impartial may be excused.</p> | <p><i>Butler v. State</i>, 830 S.W.2d 125 (Tex. Crim. App. 1992).</p> |
| <p><input type="checkbox"/> 16. Hear without delay any challenges to the array from either party.</p> | <p>Art. 35.07, C.C.P.</p> <p>“Array” is a term meaning the jury panel as a whole.</p> |
| <p><input type="checkbox"/> a. The only ground for challenge is that the summoning officer has willfully summoned jurors with a view to securing a conviction or an acquittal.</p> | |

- b. The challenge must be in writing and must set forth the grounds for challenging.
- c. When made by the defendant, it must be supported by his or her affidavit or the affidavit of any credible person.
- 17. If the challenge is sustained:
 - a. Discharge the array;
 - b. Order a new array summoned;
 - c. Prohibit the person who summoned or composed the array to bring another array in the case; and
 - d. Have another array brought to the courtroom.
- 18. After the array is qualified, the prosecutor and defendant or defendant's attorney should be permitted to view them for purposes of requesting a jury shuffle.

Art. 35.08, C.C.P.

It may be prudent to reschedule the trial to allow sufficient time to summon another array in an orderly manner. Discuss the new trial date with both parties and seek consensus for the new date.

Put simply, a "jury shuffle" occurs when one of the parties does not like the order in which the jury is seated and wants the panel reseated in a new order.

A simple way to do this is to write each juror's name on a card, place the cards in a container and mix them up (shuffle) and randomly draw out each card in sequence. The first name drawn is now juror number one; the second name is juror number two, etc., until all names are drawn. The clerk will prepare the new juror list and they will be re-seated in the order drawn.

- 19. The trial judge, on motion of the defendant or his or her attorney, or of the State’s attorney shall cause the names of the jurors to be randomly shuffled. The clerk shall deliver a copy of the new juror list to the State’s attorney and to the defendant or his or her attorney.

Only one shuffle is permissible by law.

- 20. The motion must be made before the State’s voir dire begins.
- 21. After a jury shuffle, seat the panel in the order their names were drawn.
- 22. Seating the Panel:
 - a. After considering and determining qualifications, exemptions, and excuses, the remaining jurors should be seated. The panel at this stage should consist of no fewer than 12 persons. This will allow the prosecution and the defense to exercise three strikes each and still have at least six persons available to serve on the jury.
 - b. There is no authority for the selection of alternate jurors in municipal court cases.

- 23. Announcement of the Case and Introductions.

- a. Introduce yourself.
- b. Call the case.
- c. Introduce lawyers.

Williams v. State, 719 S.W.2d 573 (Tex. Crim. App. 1986).

Arts 33.01, C.C.P. and 45.029, C.C.P.

Art. 33.011, C.C.P.

“Good morning. My name is _____, and I am the Judge of the _____ Municipal Court. I will be presiding over this trial.”

“At this time, I call the *State of Texas* vs. _____. What says the State? And the Defense? Ladies and gentlemen, allow me to introduce the lawyers in this case.”

“Representing the State in this matter is (*title of state’s attorney*), Mr(s). _____; representing the defendant is Mr(s). _____.” If the defendant is representing himself or herself, see Chapter 3 in this book.

d. Introduce defendant.

“This is a criminal case. It will be tried before six of you selected as the jury. As jurors, it is your exclusive duty to decide all questions of fact in this case, and, for that purpose, to determine the effect, the value, and the weight of the evidence. The evidence in this case will be the testimony you receive and hear from the witness stand and from that place only.”

“You will not be called upon to decide questions of law. It is my duty as judge to rule upon legal matters and to see that this case is tried in accordance with the rules of law.”

“Both the defendant and the people of this state have a right to expect that you will conscientiously consider and weigh the evidence, apply the law given you to that evidence, and that you will reach a just verdict.”

“In this case, as in all cases, the actions of us all—the judge, the attorneys, the witnesses, parties, and jurors—must be according to law: You must therefore follow all instructions given you, as well as others received as the case progresses.”

24. Preliminary instructions:

“Do not mingle with, nor talk to, the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except of course, for casual greetings. They must follow these same instructions, and you will understand it when they do.”

a. These are the court’s instructions to each juror to follow throughout the trial.

“Do not accept from, nor give to, any of those persons any favors, however slight, such as food, refreshments, or cigarettes.”

- ❑ 25. The judge directs the prosecutor and the defense to voir dire. The prosecutor has the right to conduct voir dire first, the defense second.
- ❑ 26. Opening voir dire remarks.

“Do not discuss anything about this case, nor mention it to anyone, nor permit anyone to mention it in your presence, until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case with you, report it to me immediately.”

“The parties, through their attorneys, have the right to direct questions to each of you concerning your qualifications, background, attitudes, and experiences.”

“In so questioning, they are not prying into your personal affairs, but are trying to select fair and impartial jurors who will be free from bias or prejudice in this case. If you are selected to serve as a juror, you will be permitted to separate at recesses, unless otherwise instructed by me. Consistent with justice, we will try this case as expediently as possible, but justice requires a careful and correct trial.”

The court will proceed into what is called voir dire (questioning under oath). Art. 35.17, C.C.P.

“Ladies and gentlemen of the jury panel: The case about to be tried is Cause Number _____, styled *The State of Texas vs. (Defendant)*, who is charged by complaint with the offense of *(name of offense)*. The range of punishment provided for by law for this offense is a fine between \$____ and \$____.” [In addition, identify other sanctions, if any, that apply upon conviction, such as: community service hours, attendance at an education course, etc.]

- 27. Explain the jury's function and the role of the judge.

“As the jury panel, you have been seated in the order in which your names were selected using a purely random process. This is done purposely so that no one can “stack” or in any way manipulate who may sit as a juror on any particular case.”

“Some of you may be eliminated because of disqualification.”

“For those that remain, each side will have three peremptory challenges. Peremptory strikes may be exercised for any lawful reason. A peremptory strike removes a name from the list of potential jurors. Each side also has an unlimited number of strikes based upon a variety of legal reasons. The first six names remaining after all the strikes have been made will form the jury for this case.”

“It is the function of the jury to determine the facts. In doing so, you are the sole and exclusive judge of the credibility of the witnesses and the weight to be given their testimony. Even I, as the judge, am not permitted to influence your evaluation through words or actions during the trial. My job is to decide the law and to be certain that both sides receive a fair trial. When I rule on the admissibility of evidence, or hear other objections, I am not indicating my personal feelings for one side or the other, but simply applying rules of law established by the legislature that govern this trial.”

“There are a few general principles of law that I would like to review with you at this time.”

28. Explain who has the burden of proof in a criminal trial.

“The burden of proof in this case rests solely upon the State. The prosecutor must prove each and every element of the offense beyond a reasonable doubt.”

29. Explain the presumption of innocence and touch upon the concept of beyond a reasonable doubt.

“The defendant is presumed to be innocent until guilt is established by legal evidence, received before you in the trial of this case, beyond a reasonable doubt. If, after you retire to deliberate, each of you believes beyond a reasonable doubt that the defendant is guilty of the offense charged, it will be your duty to return a verdict of ‘Guilty.’ If you have a reasonable doubt as to the guilt of the defendant, it will be your duty to return a verdict of ‘Not Guilty.’”

30. Explain that the defendant is not required to testify in a criminal trial.

“The defendant in any criminal case is not required to prove himself or herself innocent. If the defendant does not choose to testify, you may not consider that fact as evidence of guilt, nor may you, in your deliberations, comment or in any way allude to that fact.”

31. Explain the purpose of a complaint in a criminal trial.

“The complaint in this case is not an indication of the guilt of the defendant. It is simply the legal means by which a person in Texas is brought to trial in municipal court.”

32. Emphasize the importance of a fair trial.

“The defendant, the prosecutor, the public, and our system of justice, all require that a fair jury, one without bias or prejudice, and free of opinion as to the guilt or innocence of the defendant, be chosen here today. A fair jury is one that, not having heard any of the evidence, is not committed to either side. A fair jury is one that is impartial to both sides and that can and will follow the law as given to it by this court.”

- ❑ 33. Explain why the attorneys for each side, or the defendant, if pro se, will question them.

- ❑ 34. Allow prosecutor to proceed with his or her voir dire. After prosecutor has finished with voir dire, allow defense to proceed with voir dire.

- ❑ 35. After voir dire is completed, allow prosecutor and defense to exercise their peremptory challenges.
 - ❑ a. The prosecutor and the defense may each exercise as many as three strikes (that is, ask that a potential juror be excused) without having to explain why the strikes were made unless a *Batson* challenge is raised.

 - ❑ b. Each side takes its jury list supplied by the court and marks through as many as three names.

 - ❑ c. The two lists are returned to the clerk, who makes a list of the first six names that have not been marked through. Those six persons then take their position in the jury box. The clerk delivers the original list to the judge and gives a copy of the list of six jurors to both the prosecutor and the defendant or the defendant’s attorney.

- ❑ 36. Seat and administer oath to jury at the conclusion of the voir dire proceedings.

“In a moment, the attorneys for each side are going to ask each of you some questions. These questions are not meant to pry into your personal affairs, or those of your family. The questions are designed to determine if you can be a fair juror, or whether any bias or prejudice you may have about the law in this case or the facts as they may be presented to you, will prevent you from following your oath as a juror.”

Art. 35.25, C.C.P.

Art. 45.029, C.C.P. See Checklist 7-4.

Art. 33.01, C.C.P.

It is good practice for the judge to compare the attorney’s strikes with the juror list prepared by the clerk to assure accuracy. The judge will then direct the clerk to prepare the juror list and make a copy for each side.

For instructions for a “pickup jury,” see Art. 45.028, C.C.P., and *TMCEC 2020 Forms Book: Other Jurors Summoned (“Pickup Jury”)*.

If there is a *Batson* challenge, see Checklist 7-4.

37. Give oath and preliminary instructions to jury at conclusion of voir dire.

a. Oath.

b. Preliminary instructions.

38. Explain how the trial will proceed.

“Members of the jury, will you please stand, raise your right hand, and be sworn.”

Art. 35.22, C.C.P.

“Each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence (so help you God).”

“You may be seated. Ladies and gentlemen of the jury, by that oath which you took as jurors, you have become officials of this court and active participants in the public administration of justice. It is your duty to listen to and consider the evidence and law in this case and to obey all instructions given you.”

“As an additional instruction, I now instruct you not to discuss this case among yourselves until after you have heard all the evidence and the attorney’s arguments, and until I have sent you to the jury room to deliberate and consider your verdict.”

“Ladies and gentlemen, we are now ready to proceed.”

“The trial will proceed as follows:”

“The prosecutor may make an opening statement;”

“The defense attorney/ defendant may do so as well, or at a later time;”

“The prosecutor will then offer evidence through witnesses;” and

- 39. Have prosecutor read complaint; take defendant's plea.
 - a. Prosecutor reads complaint, unless defendant waives the right to have the complaint read aloud.
 - b. The defendant then enters a plea of:
 - (1) Guilty;
 - (2) Nolo contendere (no contest); or
 - (3) Not guilty.
 - c. If the defendant refuses to enter a plea, the court must enter a plea of not guilty for the defendant.
 - (1) If the defendant pleads guilty or nolo contendere, then the court determines the punishment.

“The defense attorney/ defendant may cross-examine each witness.”

“When the prosecutor has finished presenting the State’s case, the defense attorney/defendant may or may not present his or her evidence.”

“The defendant is never required to prove his or her innocence.”

“The prosecutor may cross-examine each defense witness, if any.”

“When the defense is finished presenting its witnesses, the prosecutor may put on rebuttal witnesses, and the defense may then do the same.”

“After the prosecution and the defense have presented their cases, we will hear closing arguments.”

Art. 36.01, C.C.P.

Art. 45.023, C.C.P.

Art. 45.024, C.C.P.

Art. 45.022, C.C.P.

- b. If the court believes that the defense is correct, the judge should instruct the jury to return a verdict of not guilty.
 - (1) Granting the motion has the same practical effect of ending the trial in an acquittal. Overruling the motion results in a continuation of the trial, and the defense would then be allowed to present its case.

- 44. Defendant's case:
 - a. Defendant's direct examination.
 - b. State's cross-examination.
 - c. Defendant's redirect examination, if any.
 - d. State's recross-examination, if any.

- 45. Rebuttal evidence.
 - a. The prosecution may present rebuttal evidence in the same manner as the prosecution's case-in-chief.

- 46. Prosecution closes.
 - a. If the State presents more evidence, the defense may present more evidence if it chooses.

- 47. Defense closes.

Art. 36.01, C.C.P.

❑ 48. You must give the jury a charge on the law that applies to the case. The charges may be made orally or in writing, except that the charge must be in writing if required by law. Municipal courts of record are required to have a written jury charge. The jury charge must be given before closing arguments.

❑ 49. Read the charge to the jury. Do not comment or communicate your views regarding the instructions given by changes in your voice or facial expressions.

Art. 45.033, C.C.P.

A written charge is preferred by most judges to avoid objections to the oral charge being made in front of the jury. Some judges prepare the charge in advance and provide a copy to the defense and the prosecution for review and objection prior to the trial. This avoids having to review and possibly revise the charge at trial while the jury and others wait. The final version is provided to the prosecution and defense at the trial. See Checklist 7-5.

Art. 36.14, C.C.P.

“At this time, ladies and gentlemen, I will read to you the charge of the court containing the law applicable to this case. In continuing to discharge your responsibilities as jurors, you will continue to observe all the instructions that have previously been given to you. These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and myself. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury.”

“If any of you observe one or more of your group violating any of my instructions, you shall immediately warn the violator and caution him or her not to do so again.”

- 50. Closing arguments:
 - a. Prosecution argues first (may waive).

 - b. Defense makes its argument.
 - c. Prosecution has the right to argue last.

- 51. Submit case to the jury for deliberations:
 - a. Instruct the jury.
 - (1) Provide the jury with:
 - (a) Jury charge;
 - (b) Jury instructions; and
 - (c) Verdict forms.

 - b. Instruct the jury to assess a fine if they find the defendant guilty of the offense. (This instruction is given only if the defendant elected to have the jury assess punishment.)

“Please listen carefully as I read the charge to you. The original will be placed on the table in the jury room when you retire to begin your deliberations.”

See Checklist 7-5 on preparing a jury charge.

Arts. 36.07 and 36.08, C.C.P.

Both sides are allotted equal time for closing arguments. If the prosecution chooses to divide their argument, they do not receive additional time.

Art. 36.16, C.C.P.

“You must appoint a presiding juror.”

“The verdict must be unanimous.”

“If you find the defendant guilty, you must assess a fine. In setting a fine, you must not compromise or set the fine by chance. It must be an amount set by the free opinion of each individual juror within the range allowed by law.”

- c. If the defendant did not elect the jury to determine punishment, instruct the jury to only render a verdict of “Not Guilty” or “Guilty.”
 - (1) If verdict is “Guilty,” you will assess a fine.

- 52. The verdict.
 - a. The judge should see that the verdict is in the proper form (if guilty, the verdict should include assessment of punishment).
 - b. Read the verdict in open court.
 - c. Enter the verdict on your docket.
 - (1) If the jury is deadlocked, give an *Allen Charge*.
 - (2) If a verdict cannot be reached and it is improbable that an agreement can be reached, the jury should be discharged and the case tried again.

- 53. Poll jury on request of prosecution or defense.

- 54. Discharge jury.

“If you find the State did not prove each element of its case and the guilt of the defendant beyond a reasonable doubt, you must return a verdict of ‘Not Guilty’.”

“You will be provided forms to reflect a verdict of either not guilty or guilty. After you have reached your verdict, the presiding juror will complete the appropriate form, sign the form, and notify the bailiff a verdict has been reached.”

“Any communication between the jury and court must be in writing and transmitted by the bailiff.”

“If you cannot reach a verdict within a reasonable time, notify the bailiff of your difficulty or problem.”

See *TMCEC 2020 Forms Book: After Jury Verdict and After Jury Verdict (Juvenile)*.

Art. 45.036, C.C.P.

Art. 45.017, C.C.P.

See Checklist 7-6(5).

Art. 37.05, C.C.P.

See Chapter 8 in this book.

CHAPTER 7 TRIAL PROCEEDINGS

Parties use peremptory challenges to remove from the jury panel jurors they believe will have an unfavorable bias as a factfinder. Though a party need not state a reason for rejecting jurors when using peremptory challenges, the U.S. Supreme Court held in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), that these challenges cannot be used to strike a juror in a criminal case based solely on his or her race or gender, respectively.

4. The Jury Trial – *Batson* Challenges

Checklist 7-4	Notes
<p><input type="checkbox"/> 1. Hold a hearing upon a timely, specific objection or motion, written or oral, by either the State or the defendant, that the opposing party made a peremptory strike based upon:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Race; or</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Gender.</p> <p><input type="checkbox"/> 2. The motion is timely so long as it is made before the jury is impaneled and sworn.</p> <p><input type="checkbox"/> 3. Subsequent proceedings are public and should be held in the courtroom.</p> <p><input type="checkbox"/> 4. Administer the witness oath to both the prosecutor and defense attorney.</p> <p><input type="checkbox"/> 5. A <i>prima facie</i> case of racial or gender-based discrimination consists of a showing that the opposing party:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Struck all venire members of the same race or gender; or</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Struck a disproportionate number of venire members of one race or gender.</p> <p><input type="checkbox"/> 6. The party against whom the objection or motion is made is then permitted to offer a reasonable race or gender-neutral explanation for the strike(s).</p>	<p>The C.C.P. provides relief only to the defendant, but federal courts have expanded the right to challenge to the State.</p> <p>Art. 35.261(a), C.C.P.; <i>Batson v. Kentucky</i>, 476 U.S. 79 (1986); <i>Georgia v. McCollum</i>, 505 U.S. 42 (1993).</p> <p><i>J.E.B. v. Alabama ex rel T.B.</i>, 511 U.S. 127 (1994).</p> <p><i>Hill v. State</i>, 827 S.W.2d 860 (Tex. Crim. App. 1992).</p> <p><i>Salazar v. State</i>, 795 S.W.2d 187 (Tex. Crim. App. 1990).</p> <p><i>Salazar v. State</i>, 795 S.W.2d 187 (Tex. Crim. App. 1990).</p> <p><i>Linscomb v. State</i>, 829 S.W.2d 164 (Tex. Crim. App. 1992).</p>

- ❑ 7. If the party against whom the objection or motion is made fails to offer a reasonable race or gender-neutral reason, the objecting party’s burden is met.
- ❑ 8. If the party against whom the objection or motion is made offers a reasonable race or gender-neutral explanation, the objecting party has the burden of persuading the judge by a preponderance of the evidence that the allegations of purposeful discrimination are true.
 - ❑ a. The objecting party may call witnesses, including opposing counsel.
 - ❑ b. The objecting party’s counsel is entitled to examine opposing counsel’s notes for purposes of cross-examination.
 - ❑ c. Objecting counsel may also testify as to what occurred during voir dire.
- ❑ 9. The trial judge must evaluate the reasons given in light of the circumstances of the trial and decide whether the explanations are valid or a pretext.
 - ❑ a. In reviewing the rationale for strikes, the judge should look at:
 - ❑ (1) Reasons given not related to facts given;
 - ❑ (2) Lack of questions or meaningful questions;
 - ❑ (3) Disparate treatment of prospective jurors;
 - ❑ (4) Disparate questioning to exclude jurors; and
 - ❑ (5) Bias toward a group or profession where the trait is not shown to apply.
 - ❑ b. Reasons held to be racially neutral include but are not limited to:

Williams v. State, 767 S.W.2d 872 (Tex. App.—Dallas 1989, pet. ref’d).

Tompkins v. State, 774 S.W.2d 195 (Tex. Crim. App. 1987).

Williams v. State, 767 S.W.2d 872 (Tex. App.—Dallas 1989).

Salazar v. State, 795 S.W.2d 187 (Tex. Crim. App. 1990).

Prosper v. State, 788 S.W.2d 625 (Tex. App.—Houston [14th] 1990).

- (1) Juror has family members with criminal problems;
 - (2) Juror has family member in the penitentiary;
 - (3) Juror has a criminal history;
 - (4) Juror previously served on a hung jury; and
 - (5) Juror previously served on a jury that acquitted.
10. The judge should, but is not required to, make findings of fact and conclusions of law.
11. If purposeful discrimination is found, the judge is not required to dismiss the venire, call another, and begin jury selection again. The judge may fashion any remedy he or she deems appropriate consistent with *Batson*, and its progeny.
- a. Consider, for example:
 - (1) Calling a new jury array under Art. 35.261, C.C.P.; or
 - (2) Seating the struck venire person.

Lewis v. State, 779 S.W.2d 449 (Tex. App.—Tyler 1989, pet. ref'd).

State ex rel Curry v. Bowman, 885 S.W.2d. 421 (Tex. Crim. App. 1993).

CHAPTER 7 TRIAL PROCEEDINGS

In a jury trial, the jury determines questions of fact while the judge determines questions of law. Despite having such an important role in deciding a defendant’s criminal liability, jurors often do not fully understand what they are to properly consider in determining fact questions. Jury charges narrow the scope of considerations to be made by the jury to relevant and nonprejudicial matters.

5. The Jury Trial – Jury Charge

Checklist 7-5	Script/Notes
<p><input type="checkbox"/> 1. The judge must charge the jury before either the defense or prosecution presents closing arguments. The charge may be made orally or in writing. However, the charge must be in writing if required by law.</p> <p><input type="checkbox"/> a. Delete any allegations of alternative means of committing the offense for which no evidence was presented.</p> <p><input type="checkbox"/> b. Obtain a copy of the complaint and statute or ordinance alleged to be violated.</p> <p><input type="checkbox"/> c. Request submission of any specially requested charges by the parties and make a ruling on each.</p> <p><input type="checkbox"/> d. Give each party a reasonable time to inspect and object to the charge intended to be given.</p>	<p>Art. 45.033, C.C.P.</p> <p>A written jury charge is specifically required in municipal courts of record. Art. 36.14, C.C.P.</p> <p>Art. 36.14, C.C.P.</p> <p>Art. 36.14, C.C.P.</p>
<p><input type="checkbox"/> 2. Caption:</p> <p><input type="checkbox"/> a. Insert the:</p> <p><input type="checkbox"/> (1) Cause number;</p> <p><input type="checkbox"/> (2) Court; and</p>	<p>CAUSE NUMBER _____</p> <p>THE STATE OF TEXAS</p> <p>§ IN THE MUNICIPAL § COURT OF § (City) § (County), TEXAS</p> <p>CHARGE TO THE JURY</p>

(3) Defendant's name.

3. Commencement:

a. Insert the:

(1) Name of the offense;

(2) Name of the city;

(3) Date of the offense; and

(4) Defendant's plea.

4. Abstract Charge:

a. Describe the offense as specifically as possible from the statute and complaint.

b. Consider quoting verbatim actual statutory language applicable.

5. Definitions:

MEMBERS OF THE JURY:

The defendant, (*name as appearing on the complaint*), is charged with the offense of _____ alleged to have been committed in the City of (*municipality*), (*county*), Texas, on or about the _____ day of _____, 20___. To this charge the defendant has pled not guilty. You are instructed that the law applicable to this case is as follows:

E.g., A person commits the offense of assault if the person intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

a. Define the culpable mental state, if any.

E.g., A person acts intentionally or with intent, with respect to the nature of his or her conduct or to a result of his or her conduct, when it is his or her conscious objective or desire to engage in the conduct or cause the result.

b. Define any terms which are defined in the code or statute.

c. Reasonable Doubt.

The six paragraphs previously required by *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) are no longer required under the holding of *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000).

6. Application Paragraph:

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, (name of defendant), on or about (date alleged in the complaint), in the City of _____, Texas, did then and there intentionally or knowingly cause physical contact with (name of victim/complainant), by (set out facts alleged in complaint), when the defendant knew or should have reasonably believed that the said (name of victim/ complainant) would regard the contact as offensive or provocative, you will find the defendant guilty of the offense of assault by contact.

a. Incorporate complaint or statutory language to include all elements of offense.

b. Delete any manner or means of committing the offense not supported by evidence.

c. Change conjunctive pleadings (“and”) to disjunctive (“or”) where applicable.

d. Apply law without commenting on weight of evidence.

7. Converse charge:

- a. Insert the converse charge.

8. Evidentiary instructions:

- a. If evidence has been admitted for a limited purpose such as to impeach a witness, add an instruction to limit the jury's consideration to the purpose for which it was offered.
- b. If there is a fact issue as to admissibility of evidence or a confession because of illegality in the way it was obtained, submit it to the jury if requested by the defendant.

9. Defenses:

- a. If evidence from any source establishes a defense, instruct the jury on the law and the requirement to acquit if the State fails to disprove the defense evidence beyond a reasonable doubt.

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

E.g., You are instructed that certain evidence was admitted before you in regard to the defendant having been charged and convicted of an offense or offenses, other than the one for which the defendant is now on trial. Such evidence cannot be considered by you against the defendant as any evidence of guilt in this case. The evidence was admitted for the purpose of aiding you, if it does, in passing upon the credibility of the defendant as a witness in this case, and to aid you, if it does, in deciding on the weight you will give to the defendant's testimony, and you will not consider it for any other purpose. Arts. 38.22 and 38.23, C.C.P.

- b. If evidence from any source establishes an affirmative defense, instruct the jury on the law and the requirement to acquit if defendant proves the defense by a preponderance of the evidence.

- 10. Presumptions:
 - a. Add any evidentiary presumption authorized by law.

 - b. Include the general instructions relating to presumptions found in Section 2.05, P.C.

The jury is instructed relative to this presumption:

(1) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

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

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

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

11. Range of punishment:

- a. Instruct on the range of punishment for every offense if defendant elected jury to assess punishment.

12. General instructions:

- a. Add general instructions.

An individual adjudged guilty of _____ shall be punished by a fine not to exceed _____ dollars [or] by a fine of not less than \$ _____ nor more than \$ _____. Therefore, if you find the defendant guilty you shall assess punishment by a fine not to exceed _____ dollars [and not less than \$ _____].

“You are instructed that the criminal complaint is not evidence of guilt. It is the means whereby a defendant is brought to trial in a misdemeanor prosecution. It is not evidence, nor can it be considered by you in passing upon the innocence or guilt of this defendant.”

“During your deliberations in this case, you must not consider, discuss or relate any matters not in evidence before you. You should not consider or mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.”

- b. If the defendant elected that the jury assess punishment, explain how to arrive at punishment.

“After you have retired to your jury room, you should select one of your members as your presiding juror. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by signing the same as presiding juror.”

“You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the evidence, but you are bound to receive the law from the court, which is herein given to you, and be governed thereby.”

“A form for your verdict is attached; your verdict must be in writing and signed by your presiding juror. In deliberating on the punishment in this case, you must not refer to or discuss any matter not in evidence before you. You must not arrive at the punishment to be assessed by any lot or chance, or by putting down any figures or doing any dividing.”

“Your verdict must be unanimous.”

“You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the court which is herein given you, and be governed thereby.”

13. Verdict Form:

a. Prepare the verdict form on a separate page and include it with the charge.

b. If defendant elected to have the jury assess punishment, include a punishment section on verdict form.

14. Objections to the main charge:

a. Allow each party to make objections to the charge.

15. Make any needed changes to the charge.

a. Do not indicate in the charge which party requested the instruction.

16. Read the charge to the jury.

CAUSE NUMBER _____

THE STATE OF TEXAS

§ IN THE MUNICIPAL
COURT OF

§ (City)

§ (County), TEXAS

VERDICT

(Choose one of the following)

We, the Jury, find the defendant not guilty.

Presiding Juror

We, the Jury, find the defendant guilty, and assess a fine of \$ _____.

Presiding Juror

- ❑ 5. If the jury is deadlocked and cannot reach a verdict, the court may give an “*Allen Charge*” or “*Dynamite Charge*.”
 - ❑ a. Read the charge to the jury and give the charge to them in writing to take to the jury room along with the original instructions.

An “Allen” charge is one given to a deadlocked jury which indicates to a juror that some deference is owed to the opinion of the majority of the other jurors. *Allen v. United States*, 164 U.S. 492 (1896).

“While undoubtedly, members of the jury, the verdict of a jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves. Every juror should listen with deference to the arguments of the other jurors, and with a distrust of his or her own judgment if he or she finds the larger majority of the jury takes a different view of the case than that which he or she takes. No juror should go to the jury room with a blind determination that the verdict should represent his or her opinion of the case at that moment or that he or she should close his or her eyes to the arguments of the other jurors, who are equally honest and intelligent.”

“So I charge that although the law requires the considered verdict of each individual juror and not a mere acquiescence in the conclusion of his or her fellows, you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.”

- 6. If a verdict is returned, read it in open court.
- 7. Poll the jury on request of the prosecution or defense.
- 8. If jury cannot agree, it may be discharged:
 - a. When both parties consent to its discharge; or
 - b. When the court believes that the jury has been kept together for such time as to render it altogether improbable that it can agree.

“Now, it is your duty to decide this case, if you can conscientiously do so. No juror is expected to do violence to his or her own conscience. You should listen with a disposition to be convinced of each other’s arguments. If a much larger number are for conviction, a dissenting juror should consider whether his or her doubt is a reasonable doubt, which made no impression upon the minds of so many men or women equally honest and intelligent as himself or herself.”

“If, on the other hand, a majority of you are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.”

“Having given you these additional instructions, it is my hope that you will return to the jury room and endeavor to reach a verdict. And with these instructions in mind, I am now going to ask you to return to the jury room and consider further your verdict.”

Art. 37.05, C.C.P.

Art. 36.31, C.C.P.

CHAPTER 7 TRIAL PROCEEDINGS

7. The Jury Trial - Master Checklist

Checklist 7-7	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Defendant requests trial by jury (or refuses to waive right to trial by jury in writing). <input type="checkbox"/> 2. Set pretrial hearing date or trial date if no pretrial hearing. <input type="checkbox"/> 3. Issue orders to summon jury panel. <input type="checkbox"/> 4. Call case for announcements and admonishments to defendant. <input type="checkbox"/> 5. Qualify and swear the central jury panel, if a central jury panel system is used. <input type="checkbox"/> 6. Swear the jury panel. <input type="checkbox"/> 7. Qualify the jury panel. <input type="checkbox"/> 8. Seat the panel in the courtroom. <ul style="list-style-type: none"> <input type="checkbox"/> a. Shuffle the panel if either side requests it. Only one shuffle is permitted. <input type="checkbox"/> 9. If requested by either party, order the official court reporter to transcribe the voir dire. (Only applicable for courts of record.) <input type="checkbox"/> 10. Introductions and administration of the juror oath. <input type="checkbox"/> 11. Opening remarks by the court. <input type="checkbox"/> 12. Permit the prosecutor to voir dire the panel. <input type="checkbox"/> 13. Permit the defendant or, if represented by counsel, the defendant’s attorney to voir dire the panel. <input type="checkbox"/> 14. Direct the parties to make their peremptory strikes (rule on challenges for cause, if any). <input type="checkbox"/> 15. The jury is the first six of those left. 	<p>See Chapter 6 in this book.</p>

- 16. If requested, hold a hearing on the discriminatory use of peremptory challenges.
- 17. Seat the jury and administer the oath.
- 18. Take defendant’s plea.
- 19. At the request of either the defense or prosecution, or on your own motion, you should determine all possible witnesses.
 - a. Invoke “The Rule” if requested.
- 20. Opening statements:
 - a. Prosecution first.
 - b. Defense second, but may reserve opening statement until after the State rests its case-in-chief.
 - c. Should the prosecution waive its opening statement, the defense may not make an opening statement until the prosecution concludes its case-in-chief.
- 21. Prosecution’s case-in-chief:
 - a. State’s direct evidence.
 - b. Defendant’s cross-examination.
 - c. State’s redirect examination, if any.
 - d. Defendant’s recross-examination, if any.
 - e. State rests.
- 22. Motion for directed verdict.
 - a. If the state fails to prove a prima facie case of the offense alleged in the complaint, the defendant is entitled to a directed verdict of “not guilty.”
- 23. Defendant’s case:

Art. 45.032, C.C.P.

- a. Defendant's direct examination.
 - b. State's cross-examination.
 - c. Defendant's redirect examination, if any.
 - d. State's recross-examination, if any.
 - e. Defendant rests.
24. Rebuttal evidence: The prosecution may present rebuttal evidence in the same manner as the prosecution's case-in-chief.
25. Prosecution closes. The defense may present rebuttal evidence if the prosecution did so.
26. Defense closes.
27. Provide a charge to the jury and a copy to prosecution and defense.
28. Read the charge to the jury.
29. Closing arguments:
- a. Prosecution argues first (may waive).
 - b. Defense makes its argument.
 - c. Prosecution has the right to argue last.
 - d. Both sides are given equal time.
30. Submit case to the jury for deliberations.
31. Verdict:
- a. You should see that the verdict is in the proper form (if guilty, the verdict should include assessment of punishment) and read it in open court.
 - b. Enter the verdict on your docket.

c. If a verdict cannot be reached and it is improbable that an agreement can be reached, the jury should be discharged and the case tried again.

32. Motion for new trial.

33. Appeal

If the defendant is found guilty, the judge should inform the defendant of the right to appeal. The defendant is not required to give notice in open court. However, the notice of appeal and appeal bond must be filed within 10 days of rendition of judgment.

See Chapter 10 in this book.

Procedures for appeal differ for municipal courts of record and non-record municipal courts.

See Chapter 10 in this book.

SENTENCING, DEFERRED, AND INDIGENCE

Sentencing, Deferred, and
Indigence

6. If the court believes deferred disposition is appropriate, go to Checklist 8-2 and skip the rest of this list.

Art. 45.051, C.C.P.

7. If the judge determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, determine whether the fine and costs should be:

Art. 45.041(a-1), C.C.P.
See Checklist 8-3 for determining sufficient resources or income to pay.

a. Paid at some later date or in a specified portion at designated intervals;

b. Discharged by performing community service;

c. Waived in full or in part; or

d. Satisfied through any combination of a-d above.

8. The court may order the fine and costs paid in the following manners:

Art. 45.041(b), C.C.P.

a. The entire fine and costs when sentence is pronounced;

If you determine that the defendant is unable to immediately pay the fine and costs, you must allow the defendant to pay in specified portions at designated intervals.
Art. 45.041(b-2), C.C.P.

This does not preclude community service per Article 45.049, C.C.P., or waiver of fines and costs per Article 45.0491, C.C.P.

See *TMCEC 2020 Forms Book*: Installment Agreement; and Schedule of Payments for Installment Agreement.

b. The entire fine and costs at some later date; or

“You will pay the total amount of \$(*fine and costs*) immediately.”
“You will pay the total amount of \$(*fine and costs*) on or before (*date*).”

- c. A specified portion of the fine and costs at designated intervals.

“You will pay the amount of \$(*payment*) on or before (*date*) and payments of \$(*installment*) each (*installment period*) until the total amount of \$(*fine and costs*) is paid.”

A time payment fee of \$25 must be paid if the total fine and costs are not paid before the 31st day after judgment. Sec. 133.103, L.G.C.

For more information on payment plans, see Checklist 8-3.

- 9. The court should impose orders authorized or required by law.

Art. 45.041(b)(3). For special sanctions allowed and required in juvenile cases, see Checklist 13-6 (alcohol), 13-7 (DUI), 13-14 (school education code offenses), 13-15 (all other juvenile cases).

- 10. The court, if applicable, may direct the defendant to pay restitution to any **victim** of the offense. In instances involving passing a bad check, restitution is limited to \$5,000.

Art. 45.041(b)(2) and (b-1), C.C.P. A victim is any person who suffers loss as a direct result of the criminal offense. *Hanna v. State*, 426 S.W.3d 87 (Tex. Crim. App. 2014).

- 11. If the defendant has been placed in jail on the charge, the court must calculate jail credit.

Arts. 42.03, Sec. 2; 45.041(c), and 45.048 C.C.P.

- a. Court must determine the period of time that must be served to get credit. The period can be no less than eight hours nor more than 24 hours.

Art. 45.048(b), C.C.P.

- b. Each period earns not less than \$100 in credit against the fine and costs for each period served.

Art. 45.048(a)(2), C.C.P. The credit amount is \$100 per period served if the offense was committed before Jan. 1, 2004.

- c. Credit must be given for all time in jail in said cause prior to sentence in each cause even when the effect is the defendant receives multiple jail credits.

Ex Parte Hannington, 832 S.W.2d 355 (Tex. Crim. App. 1992).

- 12. The court must enter a written judgment signed by the trial judge reflecting the sentence and terms rendered above.
- 13. A copy of the judgment should be provided to the defendant.
- 14. Advise of right to appeal.

Art. 42.01, Sec. 1, C.C.P.

CHAPTER 8 SENTENCING, DEFERRED, AND INDIGENCE

2. Deferred Disposition, Art. 45.051, C.C.P.

Deferred disposition is a form of probation used by municipal and justice courts that can last up to 180 days. Granting deferred disposition is within the court’s discretion. It is not mandatory. For more information about deferred disposition, see “Deferred Disposition is Not Deferred Adjudication,” *The Recorder*, (August 2002).

Checklist 8-2	Script/Notes
<input type="checkbox"/> 1. Determine that deferred disposition is available for the alleged offense. It is not available for:	
<input type="checkbox"/> a. Traffic offenses committed in a work-construction zone while workers are present;	Art. 45.051(f)(1), C.C.P.
<input type="checkbox"/> b. Violation of a state law or local ordinance relating to “motor vehicle control,” other than a parking violation committed by a person who holds a commercial driver’s license or held a commercial driver’s license at the time of the offense; or	Art. 45.051(f)(2), C.C.P.
<input type="checkbox"/> c. A minor with two prior convictions for either Consumption of Alcohol by a Minor (Sec. 106.04, A.B.C.) or Driving or Operating Watercraft Under the Influence of Alcohol by a Minor (Sec. 106.041, A.B.C.).	If there are two prior convictions, the municipal court must waive jurisdiction of the third or subsequent offenses unless the court has a juvenile case manager. Sec. 51.08, F.C.
<input type="checkbox"/> 2. Deferred disposition may be granted:	See <i>TMCEC 2020 Forms Book: Deferred Disposition Order</i> .
<input type="checkbox"/> a. After defendant pleads guilty or no contest; or	The plea may be oral or written.
<input type="checkbox"/> b. After a finding of guilt by judge or jury.	Deferred may be granted at the defendant’s request, the prosecutor’s suggestion, or the court’s own motion.
<input type="checkbox"/> 3. Set a fine.	The court must set a fine when granting deferred disposition, even though the case may be dismissed later.

- 4. Defendant must pay court costs:
 - a. At the time the deferred disposition is granted or ordered; or,
 - b. Alternatively, notwithstanding any other provision of law;
 - (1) in installments during the probation period;
 - (2) by performing community service, if eligible, under Article 45.049, C.C.P., if:
 - (a) Defendant failed to pay previously assessed fine or cost; or
 - (b) Defendant is determined by the court to have insufficient resources or income to pay fine or costs;
 - (i) by performing community service, if defendant is younger than 17 years, under Article 45.0492, C.C.P.;
 - (ii) by performing tutoring, if defendant is younger than 17 years of age and the offense occurred in a building or on the grounds of the primary or secondary school at which the defendant was enrolled at the time of the offense, under Article 45.0492, C.C.P.; or
 - (iii) through a combination of the alternatives described above.
- 5. Defer the proceedings for a period of time not to exceed 180 days.
- 6. Set any or all of the following conditions to be performed by the defendant during the deferral period, which may include:

Art. 45.051(a), C.C.P.; Sec. 133.101, G.C.

Art. 45.051(a-1), C.C.P.

Alternatives should be incorporated as conditions of the deferred disposition order. See Checkbox 6 below.

- a. Post bond in amount of the fine to secure payment of the fine;
- b. Require payment of restitution to victim;
- c. Go to professional counseling;
- d. Submit to alcohol or drug testing;
- e. Submit to psychosocial assessment;
- f. Participate in an alcohol or drug abuse treatment or education program such as:
 - (1) A drug education program approved by the Department of State Health Services in accordance with Sec. 521.734, T.C.; or
 - (2) An alcohol awareness program described by Sec. 106.115, A.B.C.
- g. Pay for testing, treatment, or education;
- h. Complete a driving safety course or other course;
- i. Present the court with proof of compliance with any required conditions;
- j. Comply with any other reasonable requirements;
- k. If the offense is Purchase, Attempt to Purchase, Consumption, or Possession of Alcohol by a Minor; Misrepresentation of Age by a Minor; or Driving or Operating Watercraft Under the Influence of Alcohol by a Minor, the court must require as a condition of deferred disposition that the minor attend an alcohol awareness course, a DADAP, or a drug awareness program.

Restitution under the deferred statute may not be more than the fine assessed.

If the offense is a “traffic offense classified as a moving violation” and the defendant is younger than age 25, the judge shall require as a condition of deferred disposition that the defendant complete a driving safety course. See Checkbox “m” below.

Community service and committing no further offenses are examples of “other reasonable requirements.”

Sec. 106.115(a), A.B.C.

- | | |
|---|--|
| <ul style="list-style-type: none"> ☐ l. If the offense is Purchase, Attempt to Purchase, Consumption, or Possession of Alcohol by a Minor; Misrepresentation of Age by a Minor; or Public Intoxication the court must require as a condition of deferred disposition that the minor performs eight to 12 hours of community service for a first offense and 20 to 40 hours of community service for a subsequent offense; and/or
 ☐ m. If the offense is a “traffic offense classified as a moving violation” and the defendant is younger than age 25: <ul style="list-style-type: none"> ☐ (1) The judge shall require as a condition of deferred disposition that the defendant complete a driving safety course;
 ☐ (2) The judge may require as a condition of deferred disposition that the defendant complete an additional driving safety course designed for drivers younger than 25 years of age; and
 ☐ (3) If the defendant holds a provisional license, during the deferral period, the judge shall require that the defendant be examined by the DPS.
 ☐ 7. Inform the defendant: <ul style="list-style-type: none"> ☐ a. When all the conditions are met, the case will be dismissed at the end of the deferral period. Otherwise the court will enter a judgment, and the fine will be due; and | <p>Mandatory community service must be related to education about or prevention of misuse of alcohol or drugs, as applicable.
Sec. 106.071(d), A.B.C.</p>
<p>Art. 45.051(b-1) through (b-3), C.C.P.</p>
<p>Sec. 521.161(b)(2), T.C.
Persons under age 18 hold provisional licenses under Sec. 521.123, T.C.</p>
<p>Give the defendant a written copy of the order deferring disposition, listing all the conditions, and the consequences of both successful and unsuccessful compliance.</p> |
|---|--|

b. Whether a fine is imposed.

Art. 45.051(a), C.C.P.

This is the fine formerly called a “special expense fee.” Although the passage of S.B. 346 (2019) changed the term “special expense fee” to “fine,” this administrative deferred disposition fine is separate from the punitive fine.

(1) The judge may impose a fine on the defendant not to exceed the amount of the fine that could be imposed as punishment for the offense.

(2) The fine may be collected at any time before the end of the probation period.

(3) The judge may elect not to impose the fine for good cause shown.

(4) If the judge orders collection of a fine, it must be credited in the event of default by the defendant toward the payment of the amount of the fine imposed by the judge as punishment for offense on conviction.

8. At the end of the deferral period:

a. If the defendant presents satisfactory evidence of compliance with the requirements, then dismiss the case.

b. If the defendant fails to provide proof of compliance within the deferred period:

(1) The court must set the matter for a show cause hearing.

Art. 45.051(c-1), C.C.P.

(2) The court must provide notice in writing of the defendant’s opportunity to show cause. The notice shall be mailed to either the address on file with the court or the address that appeared on the citation.

- (3) The court shall require the defendant to appear at the time and place stated in the notice and show cause why the deferral should not be revoked.

- (4) At the show cause hearing on the defendant's showing of good cause for failure to present satisfactory evidence of compliance with the requirements of the deferred order, the court may allow an additional period during which the defendant may present evidence of the defendant's compliance with the order's requirements. Art. 45.051(c-2), C.C.P.

- (5) After a show cause hearing the judge may either: Art. 45.051(d)-(d-1), C.C.P.
 - (a) impose the fine originally suspended pending the deferral period; or

 - (b) impose a lesser fine (except in instances involving defendants younger than 25 years of age involving traffic offenses classified as moving violations; court shall impose the original fine assessed.).

CHAPTER 8 SENTENCING, DEFERRED, AND INDIGENCE

3. Indigence

In certain instances, judges are required to determine whether a defendant is able to pay the fine and costs assessed in a case. In Class C misdemeanor cases, this determination is required (1) at the time of judgment, (2) upon a default in the discharge of the judgment, and (3) before commitment to jail. The 85th Legislature made significant changes requiring judges to make an inquiry regarding the ability to pay fine and court costs for defendants who enter a plea in open court during or immediately after sentencing. This new inquiry is outlined in Checklist 8-1.

Whether or not a particular defendant is able to pay the fine and costs is a complex determination involving numerous factors that widely vary depending on where a defendant lives, especially in a state as large and diverse as Texas. The U.S. Supreme Court has made no attempt to define indigence, leaving that duty to state legislatures. Texas statutes like Articles 45.041, 45.046, and 45.049 of the Code of Criminal Procedure provide judicial discretion in determining whether a defendant is indigent without defining indigence.

The 78th Legislature defined “indigent” to mean “an individual who earns not more than 125 percent of the income standard established by applicable federal poverty guidelines” under Sec. 133.002, L.G.C. The TMCEC application form for time payment, extensions, or community service asks that the defendant note any federal programs that he or she is eligible for and is receiving assistance from. The court should consider this information in combination with all relevant facts regarding the defendant’s ability to pay a fine and costs.

Checklist 8-3

Script/Notes

- | Checklist 8-3 | Script/Notes |
|---|---|
| <p><input type="checkbox"/> 1. Defendant enters plea in open court or raises indigence or inability to pay.</p> | <p>A person who is unable to pay a fine must be provided an alternative means of discharging the fine other than incarceration under the equal protection clause. The policy of “pay or lay” was found to violate the 14th Amendment of the U.S. Constitution. <i>Tate v. Short</i>, 401 U.S. 395 (1971).</p> <p>See Chapter 5, TMCEC <i>The Municipal Judges Book</i> for more information on Judgments, Indigence, and Enforcement.</p> |

2. Give the defendant a financial information sheet.

See *TMCEC 2020 Forms Book: Application for Time Payment, Extension, Community Service, or Waiver*.

“Please complete a financial information form.”

3. Have the defendant swear to or affirm information on the sheet.

After defendant completes form, have defendant sign under oath.

“Do you swear (affirm) that the information that you have provided in this document is true and correct?”

a. Place the defendant under oath to present testimony about financial condition.

“I’m going to place you under oath before conducting this indigence hearing and reviewing your financial information sheet. Please raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth in this matter pending before the court?”

4. Consider the defendant’s income and resources:

Except as otherwise specifically provided, in determining a defendant’s ability to pay for any purpose, the court shall consider only the defendant’s present ability to pay. Art. 1.053, C.C.P.

a. Amount of income;

b. Source of income:

(1) Wages, investment income, checking/savings, child support, social security/disability/welfare income, selling assets/non-exempt property, etc.

(2) Loans and ability to borrow money.

- 5. Consider the defendant's expenses:
 - a. Number and ages of dependents;
 - b. Rent/mortgage payment;
 - c. Debts and obligations (car notes, credit cards, etc.);
 - d. Personal expenses; and
 - e. Illness/incapacity of defendant or spouse.
- 6. Consider other evidence:
 - a. Ability to work; and
 - b. Spouse's financial condition.
- 7. Factors not to be considered:
 - a. Future ability to pay;
 - b. Financial resources of parents and other relatives;
 - c. Exempt property including homestead and vehicles (see Chapters 41 and 42, Texas Property Code); and
 - d. Attitude.
- 8. Review financial information sheet with the defendant, if necessary.
- 9. Review any federal assistance program(s) that the defendant is participating in.
- 10. Procedural issues:
 - a. Consider the truthfulness of indigent affidavit and defendant's testimony;
 - b. Examine court records — payment history and/or prior indigence hearing;
 - c. Documentation:

Art. 1.053, C.C.P.

- (1) Note date and time of hearing or ruling; and
 - (2) Attach or secure all documentation with ruling and place in file.
11. Upon determination that defendant is unable to immediately pay the fine and costs.
- a. Consider ordering payment:
 - (1) All at a later date;
 - (2) In periodic installments;
 - b. Consider ordering community service:
 - (1) Each eight hours of service discharges not less than \$100 of the fine and costs.
 - (2) No more than 16 hours per week, unless the court finds that a greater period would not work a hardship.
 - (3) Court must specify the number of hours to be performed and the day by which the defendant must submit documentation to the court verifying completion.
 - (4) Can be used in conjunction with partial payment.

Art. 45.041(b), C.C.P.

Explain that upon conviction, the defendant must pay a \$15 time payment reimbursement fee if any part of the fine or court costs is paid on or after the 31st day after judgment is entered. Art. 102.030, C.C.P.

Art. 45.049, C.C.P.

See *TMCEC 2020 Forms Book*: Community Service Order; and Community Service Time Sheet.

- (1) Is in the conservatorship of the Department of Family and Protective Services (or was at the time of the offense); or
 - (2) Is designated as a homeless child or youth, as defined by 42 U.S.C. 11434a (or was at the time of the offense).
13. A determination of undue hardship is in the court's discretion. In making that determination, the court may consider, as applicable, the defendant's:
- (1) significant physical or mental impairment or disability;
 - (2) pregnancy and childbirth;
 - (3) substantial family commitments or responsibilities, including child or dependent care;
 - (4) work responsibilities and hours;
 - (5) transportation limitations;
 - (6) homelessness or housing insecurity; and
 - (7) any other factors the court determines relevant.
14. If the defendant notifies the judge that the defendant has difficulty paying the fine and costs in compliance with judgment, the judge shall hold a reconsideration hearing to determine whether the judgment imposes an undue hardship on the defendant.
- a. A defendant may notify the judge by:

Art. 45.0491(c), C.C.P.

Art. 45.445, C.C.P.

This reconsideration hearing was created by the Legislature in 2019, and judges may allow a defendant to appear by telephone or videoconference if a personal appearance would impose an undue hardship. Art. 45.0201, C.C.P.

- (1) voluntarily appearing and informing the judge or the clerk of the court in the manner established by the justice or judge for the purpose;
 - (2) filling a motion with the judge;
 - (3) mailing a letter to the judge; or
 - (4) any other method established by the judge for that purpose.
- b. If the judge determines at the hearing that the judgment imposes an undue hardship on the defendant, the judge shall consider whether to allow time payment, community service, full or partial waiver, or some combination of those methods.
- c. The judge may decline to hold a reconsideration hearing if the judge:
- (1) previously held a reconsideration hearing with respect to the case and is able to determine without holding a hearing that the judgment does not impose an undue hardship on the defendant; or
 - (2) is able to determine without holding a hearing that the judgment imposes an undue hardship on the defendant; and the fine and costs should be satisfied through time payment, community service, full or partial waiver, or some combination of those methods.
- d. The judge retains jurisdiction of the case for the purpose of making a determination at a reconsideration hearing.

BOND FORFEITURES

CHAPTER 9 BOND FORFEITURES

Municipal judges are empowered to admit persons to bail and to forfeit bail in the same manner as provided for county courts. The failure to perform the condition on the bond causes the court to declare forfeiture of the bail. Therefore, a defendant’s failure to appear in court after posting bail and the judicial declaration of the forfeiture initiates bond forfeiture procedures.

Generally, Chapter 22, C.C.P., governs bond forfeiture proceedings. The exception to using the bond forfeiture procedures in Chapter 22 is found in Article 45.044, C.C.P. This statute provides an additional method of forfeiting a cash bond in certain instances.

1. Cash Bond Forfeitures in Satisfaction of Fine Under Article 45.044, C.C.P.

Checklist 9-1	Script/Notes
<input type="checkbox"/> 1. Ask the defendant to acknowledge his or her presence when the defendant’s name is called.	Art. 22.02, C.C.P. Calling name in hallway on sixth floor is sufficient. <i>Burns v. State</i> , 814 S.W.2d 768 (Tex. App.—Houston [14th Dist.] 1991, rev’d on other grounds). See <i>TMCEC 2020 Forms Book: Bailiff’s/Clerk’s Affidavit of Defendant’s Failure to Appear</i> .
<input type="checkbox"/> 2. When the defendant fails to answer, order the bailiff or another to call the defendant’s name distinctly at the courthouse door.	Art. 45.044, C.C.P.
<input type="checkbox"/> 3. If the defendant has posted a cash bond and has signed a conditional plea of nolo contendere and waiver of jury trial, the judge may forfeit the bond for fine and court costs when the defendant fails to appear. Otherwise, skip remaining steps and proceed to judgment.	<input type="checkbox"/> 4. Notify the defendant immediately by regular mail of the court action and the right to request a new trial.

- ❑ 5. If the defendant makes a request for a new trial within 10 days after the forfeiture, the court shall grant the motion and allow the defendant to withdraw his or her conditional plea of nolo contendere and waiver of jury trial. The bond is reinstated and the case is set for trial.

To count, start the day after the forfeiture and count 10 calendar days. If the 10th day falls on a weekend or holiday, go to the next working day of the court for the 10th day.

- ❑ a. Amount of time increased by the “Mailbox Rule.”

If the request for new trial is mailed first class mail on or before the due date of filing of the request for new trial and received by the clerk not later than 10 days after the due date, the motion is properly filed. (“Day” does not include Saturday, Sunday, or legal holiday.) Make sure the clerk keeps the envelope showing the postmark.

- ❑ 6. If the defendant does not make a timely motion for a new trial, the judgment and forfeiture become final. Court costs are paid to the State and the fine is deposited in the general revenue fund. If the offense is a traffic offense, the court reports the conviction to the Department of Public Safety:

- ❑ a. If the defendant has been in jail, jail time credit is required to be given at a rate of not less than \$100 for a period of time specified in the judgment. The court should determine the period of time between eight and 24 hours.
- ❑ b. Depending on the credit and amount of fine imposed, the court may have to refund all or part of the bond.

Sec. 311.014, G.C.

Art. 45.013, C.C.P.
Defendants filing documents by mail have additional time (10 days) in which to present the document to the court. This rule, commonly called the “Mail Box Rule,” increases the time for filing documents.

If a defendant initially entered a plea in open court, the judge must inquire into the defendant’s ability to pay. Art. 45.041, C.C.P. See Checklist 8-1.

Arts. 42.03 Sec. 2, 45.041, and 45.048, C.C.P.

CHAPTER 9 BOND FORFEITURES

2. Cash, Surety, or Personal Bond Forfeiture Procedures Under Chapter 22, C.C.P.

Before a judgment nisi is issued initiating a bond forfeiture, a surety can be released from the responsibility on the bond by filing an affidavit of intention to surrender the defendant. A surety may not be released from responsibility if the accused is in federal custody to determine whether the accused is lawfully present in the United States under Article 17.16, C.C.P. The affidavit must include a statement that notice to the principal’s attorney has been given as required by Article. 17.19, C.C.P. See Arts. 17.16 and 17.19, C.C.P., for rules regarding discharge of liability on bond.

An action by the State to forfeit a bail bond must be brought not later than the fourth anniversary of the date the principal fails to appear in court. Art. 22.18, C.C.P.

Checklist 9-2

Script/Notes

<p>Definitions:</p> <p>“Agreed judgment” is a judgment entered on agreement of the parties, which receives the sanction of the court. When the court gives the agreement its sanction, it becomes the judgment of the court.</p> <p>An “answer” is the formal written statement made by a defendant setting forth grounds for his or her defense. In some instances the answer may need to be verified (sworn to).</p> <p>A “citation” is a writ (written order) issued by the clerk of the court. The citation notifies a person of a lawsuit filed against him or her and directs the person to file an answer to the suit within a certain number of days.</p> <p>“Defendant” is a term used to describe the surety.</p> <p>“Forfeiture” means the signing of the judgment nisi.</p> <p>“Judgment nisi” is a temporary order which will become final unless the defendant in the criminal case and/or the surety show good cause why the judgment should be set aside.</p> <p>“Judicial notice” is an act by which a court, in conducting a trial, will, without the production of evidence, recognize the existence and truth of certain facts or documents because the court already is aware of the facts or documents.</p> <p>A “movant” is one who makes a motion before a court.</p>	

“Pleadings” are formal documents filed by parties, stating their respective claims and defenses.

A “principal” is the defendant in the criminal case.

“*Scire Facias*” is a special docket required by law to handle all cases and proceedings involved in the forfeiture of bail bonds. This docket may also be called the civil docket.

“Summary proceeding” is any proceeding by which a controversy (lawsuit) is settled, case disposed of, or trial conducted in a prompt and simple manner, without a jury. The court may grant a summary judgment when it believes that there is no genuine issue of material fact and that the party is entitled to prevail as a matter of law. Any party to a civil action may move for a summary judgment.

“Surrender” means that a surety may relieve himself or herself of liability before forfeiture by surrendering the accused into custody or by filing an affidavit stating that the accused is in federal, state, or county custody. A surety may not be released from responsibility if the accused is in federal custody to determine whether the accused is lawfully present in the United States.

A “waiver” is a sworn statement that intentionally and voluntarily relinquishes the right of being served by citation.

- 1. Ask the defendant to acknowledge his or her presence when the defendant’s name is called.
- 2. When the defendant fails to answer, order the bailiff or another to call the name distinctly at the courthouse door.
- 3. Note the time the call was made and who made the call.

Art. 22.10, C.C.P.

Art. 17.16 *et. seq.*, C.C.P.

Art. 22.02, C.C.P.
Burns v. State, 814 S.W.2d 768 (Tex. App.—Houston [14th Dist.] 1991, rev’d in part on other grounds). Court held that calling name in hallway on sixth floor is sufficient.
 See *TMCEC 2020 Forms Book: Bailiff’s/Clerk’s Affidavit of Defendant’s Failure to Appear*.

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|---|---|
| <p><input type="checkbox"/> 4. If the defendant does not appear within a reasonable time after the call, enter judgment nisi against the defendant and his or her sureties. (The judgment nisi is usually prepared by the clerk for the judge’s signature.)</p> | <p>Arts. 22.02 and 23.05, C.C.P.
 State’s Motion for Bond Forfeiture of (<i>Defendant’s name</i>)’s bond is granted. A capias for the defendant’s arrest is hereby issued with a new bond set at \$ _____.
 See <i>TMCEC 2020 Forms Book: Judgment Nisi Declaring Forfeiture: Cash or Personal Recognizance Bond and Judgment Nisi Declaring Forfeiture: Surety Bond.</i></p> |
| <p><input type="checkbox"/> 5. Issue a capias for the defendant’s arrest.</p> | <p>Art. 23.05, C.C.P.
 See <i>TMCEC 2020 Forms Book: Capias: After Forfeiture or Upon Surrender of Principal.</i></p> |
| <p><input type="checkbox"/> 6. Set the new bond. (May require a cash bond.)</p> | <p>Art. 23.05, C.C.P.</p> |
| <p><input type="checkbox"/> 7. Set the forfeiture case on the <i>scire facias</i> or civil docket.</p> | <p>Art. 22.10, C.C.P.
 See <i>TMCEC 2020 Forms Book: Scire Facias Docket.</i></p> |
| <p><input type="checkbox"/> a. List “The State of Texas” as plaintiff.</p> | |
| <p><input type="checkbox"/> b. List the principal and any sureties as defendants.</p> | |
| <p><input type="checkbox"/> 8. On request of the prosecutor, order clerk to issue citation(s) to surety, if any, and principal.</p> | <p>Art. 22.03, C.C.P.
 See <i>TMCEC 2020 Forms Book: Citation.</i></p> |
| <p><input type="checkbox"/> a. Citation shall be in the form provided for citations in civil cases. Prosecutor may request multiple citations be issued.</p> | <p>Art. 22.04, C.C.P.; Tex. R. Civ. P. 99.</p> |
| <p><input type="checkbox"/> b. If prosecutor presents a motion supported by an affidavit showing specific facts why personal service or service by mail has not been successful, grant substitute service (someone over 16 years of age at location specified in affidavit may accept service).</p> | <p>Tex. R. Civ. P. 106(b).</p> |

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| <ul style="list-style-type: none"> <input type="checkbox"/> c. If substitute service is unsuccessful and prosecutor under oath states the residence of surety is unknown and, though diligence has been used to serve the citation, the defendant surety cannot be located, grant publication. | <p>Tex. R. Civ. P. 109.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 9. The defendant/principal’s citation is served by regular mail if the address appears on the bond. If no address, court is not required to notify principal of bond forfeiture. | <p>Art. 22.05, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 10. Answers are due as in civil cases. | <p>Art 22.11, C.C.P.
Tex. R. Civ. P. 92.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> a. Maximum of 27 days after proper service of citation to answer. | |
| <ul style="list-style-type: none"> <input type="checkbox"/> b. Amount of time increased—10 additional days are allowed if the answer is mailed by first class mail, properly addressed and mailed on or before the last day for filing an answer. (Make sure the court clerk keeps the envelope in which answer is received.) | <p>Tex. R. Civ. P. 5.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 11. If the surety and principal fail to answer within the time limit, the court shall enter a judgment by default. | <p>Art. 22.15, C.C.P.
Tex. R. Civ. P. 239.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> a. Before entering default judgment, determine if service was proper; court should have evidence of properly signed return of service or verified waiver. Proof of service includes: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Verified waiver; <input type="checkbox"/> (2) Certified mail; green card signed by: <ul style="list-style-type: none"> <input type="checkbox"/> (a) Defendant/surety; <input type="checkbox"/> (b) State Board of Insurance (surety is corporation); <input type="checkbox"/> (c) Registered agent (surety is a corporation); or | <p>Tex. R. Civ. P. 107.</p> <p>Tex. R. Civ. P. 107.
Clerk is required to complete return on citation after receiving properly signed green card.</p> |

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| <ul style="list-style-type: none"> <input type="checkbox"/> (d) Executor, administrator, or heirs (surety is deceased). | <ul style="list-style-type: none"> <input type="checkbox"/> (3) If the prosecutor files a motion supported by an affidavit showing specific facts why personal service or service by mail has not been successful, grant an order of substitute service (someone over 16 years of age at location specified in affidavit) and officer's return on citation completed; <input type="checkbox"/> (4) Personal service—officer's return on citation is completed; or <input type="checkbox"/> (5) If substitute service is unsuccessful, prosecutor's affidavit states the residence of surety was unknown and, though diligence has been used to serve the citation, the defendant surety could not be located, order granting publication and copy of publication attached to return. | <p>Tex. R. Civ. P. 106(b).</p> <p>Tex. R. Civ. P. 107.</p> <p>Tex. R. Civ. P. 109.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> b. Court must inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant before granting default judgment on service. | | <p>Tex. R. Civ. P. 239.
Art. 22.15, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> c. Proof of service on file at least 10 days, exclusive of the date of filing and the date of judgment, for every defendant. | | <p>Tex. R. Civ. P. 107.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> d. Time expired for answers. | | <p>Defendant(s) may have been served on different days and therefore may have different deadlines to answer.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> e. Approximately 40 days have elapsed. | | |

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| <ul style="list-style-type: none"> <input type="checkbox"/> f. The State moves for default judgment.
 <input type="checkbox"/> (1) The State prepares default judgment for judge’s signature; and <input type="checkbox"/> (2) The State certifies the address of the parties against whom the default is taken.
 <input type="checkbox"/> g. The clerk sends notice of default judgment to surety and defendant.
 <input type="checkbox"/> 12. Summary judgment in a bond forfeiture case is usually filed by the State.
 <input type="checkbox"/> a. Party requesting must file and serve the motion and supporting affidavit at least 21 days before the time specified for hearing. <input type="checkbox"/> b. Filed when: <ul style="list-style-type: none"> <input type="checkbox"/> (1) No valid defense is raised; and <input type="checkbox"/> (2) No genuine issue as to material fact exists and moving party is entitled to judgment as matter of law. <input type="checkbox"/> c. Defenses raised must be verified and the answer not verified. Defenses required to be verified include: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Defendant did not execute bond; <input type="checkbox"/> (2) Defendant is not liable in the capacity sued; | <p>Tex. R. Civ. P. 239.
See <i>TMCEC 2020 Forms Book: Final Judgment: Cash or Personal Recognizance Bond – Finding for State and Final Judgment: Surety Bond – Finding for State.</i></p> <p>Tex. R. Civ. P. 305.</p> <p>Tex. R. Civ. P. 239a.</p> <p>If an answer has been filed and the case is set on the <i>scire facias</i> docket but no one appears, the State can move for default judgment.</p> <p>Tex. R. Civ. P. 166a.
See <i>TMCEC 2020 Forms Book: Final Judgment: Cash or Personal Recognizance Bond – Finding for State; Final Judgment: Surety Bond – Finding for State; and Agreed Final Judgment.</i></p> <p>Tex. R. Civ. P. 166a(c).</p>
<p>Tex. R. Civ. P. 93.</p> |
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- (3) There is a defect of parties; or
- (4) Defendant alleged to be a corporation and is not incorporated as alleged.
- d. Adverse party has no later than seven days prior to hearing to file and serve opposing affidavits.
- e. Fact issues include:
 - (1) Whether surety executed bond;
 - (2) Whether principal's name was called at courthouse door;
 - (3) Whether principal failed to appear; or
 - (4) Whether principal had a valid reason for not appearing.
- f. Summary judgment hearing:
 - (1) No oral testimony;
 - (2) Judge reviews pleadings; and,
 - (3) State asks judge to take judicial notice of bond and judgment nisi, then rests.
- g. Defense must set forth affidavits. Affidavit must include:
 - (1) Information based on personal knowledge; and
 - (2) How affiant became personally familiar with facts.
- h. If no genuine issue exists, grant movant's (usually State's) motion for summary judgment.

Alvarez v. State, 861 S.W.2d 878 (Tex. Crim. App. 1992).

Villarreal v. State, 826 S.W.2d 621 (Tex. App.—Houston [14th Dist.] 1992).

- i. If there is a genuine issue, deny and set for bond forfeiture trial.
- 13. Procedure at bond forfeiture trial:
 - a. At least 45 days notice of the first trial setting required.
 - b. If service of citation is by publication and there was no answer, appoint an attorney to represent the surety.
 - c. Defendant may request a jury trial.
 - d. Written request for a jury trial is required.
 - e. Must be received not less than 30 days in advance of the first trial setting for trial before the judge.
 - f. Defendant must pay jury trial fee of \$5. (Fee might be \$5, which is paid to county court, or \$10, which is paid to district court. Court will have to determine which fee is applicable.)
 - g. If fee is not paid, deny jury trial and proceed with bench trial.
- 14. Call case.
- 15. State presents case.
 - a. Bond.
 - b. Docket entry and indication of forfeiture.

Tex. R. Civ. P. 245.

In the case of continuance, the court may reset to a later date on any reasonable notice to the parties or by agreement of the parties.

Tex. R. Civ. P. 244.

Tex. R. Civ. P. 216.

Tex. R. Civ. P. 216.

“What says the State in cause number ____?”

State answers. If defense does not appear, State can move for default judgment.

“What says Defendant?”

Defense answers.

- c. Certificate, affidavit, or testimony of bailiff or person who called name.
- d. Judgment nisi.
- 16. State may ask court to take judicial notice of bond and judgment nisi.
- 17. Judge may take judicial notice of bond and judgment nisi unless defendant and/or surety have filed a sworn answer challenging bond's validity. If sworn answer, State must establish required predicate (present the court facts that the bond is valid) to introduce the bond.
- 18. When validity of the bond is challenged, the judge cannot take judicial notice of bond. State presents evidence that bond is:
 - a. Submitted by the defendant;
 - b. Received by the court;
 - c. Court has taken proper care of bond; and
 - d. Not more burdensome than required by law.
- 19. State rests.
- 20. Defendant, principal, or surety presents evidence on one of the following defenses:
 - a. Bond is not valid because:
 - (1) Not valid as to principal or surety; Art. 22.13, C.C.P.
 - (2) Defendant did not execute bond (must be verified by affidavit); or Art. 22.13, C.C.P.
 - (3) Bond is more burdensome than statute requirement. *Browne v. State*, 268 S.W.2d 131 (Tex. Crim. App. 1954).
 - b. Defendant or principal died before forfeiture taken. Art. 22.13, C.C.P.

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| <ul style="list-style-type: none"> <input type="checkbox"/> c Defendant or principal was sick or some uncontrollable circumstance prevented the defendant's appearance. Defendant shows that the principal's failure to appear arose from no fault on the principal's part. | <p>Art. 22.13, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> d Incarceration of the principal in any jurisdiction in the United States at the time of or not later than the 180th day after the date of the principal's failure to appear in court. | <p>Art. 22.13, C.C.P.
<i>James v. State</i>, 413 S.W.2d 111 (Tex. Crim. App. 1967).</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> e Defendant's name was not called at courthouse door. | |
| <ul style="list-style-type: none"> <input type="checkbox"/> f Surety had requested to be relieved from the bond and the court had: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Refused to issue a warrant of arrest for principal after the affidavit for surrender of the principal was filed with the court; and <input type="checkbox"/> (2) After refusal to issue warrant, principal failed to appear. | <p>Arts. 17.16 and 17.19, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> g The following defenses must be verified by affidavit: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Defendant did not execute bond; <input type="checkbox"/> (2) Defendant is not liable in the capacity sued; <input type="checkbox"/> (3) Defendant does not have legal capacity to be sued; <input type="checkbox"/> (4) There is a defect of parties; or <input type="checkbox"/> (5) Defendant alleged to be a corporation is not incorporated as alleged. | <p>Tex. R. Civ. P. 93.</p> <p>Tex. R. Civ. P. 93(7).</p> <p>Tex. R. Civ. P. 93(2).</p> <p>Tex. R. Civ. P. 93(1).</p> <p>Tex. R. Civ. P. 93(4).</p> <p>Tex. R. Civ. P. 93(6).</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 21. After a judicial declaration of forfeiture is entered the court has the power to do any of the following: | <p>Art. 22.125, C.C.P.</p> |

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| <p><input type="checkbox"/> a. Exonerate the defendant and any sureties for cause;</p> | <p>Art. 22.13, C.C.P. If the principal is not liable, everyone is exonerated. If the principal is liable and one or more sureties, if any, is liable on bond, then only non-liable sureties are exonerated.</p> |
| <p><input type="checkbox"/> b. Remit forfeiture;</p> | <p>Art. 22.125, C.C.P.</p> |
| <p><input type="checkbox"/> c. Set aside forfeiture only as expressly provided for in Chapter 22, C.C.P.; or</p> | <p>See <i>TMCEC 2020 Forms Book: Dismissal and Reinstatement of Bond; Motion and Order of Dismissal with Costs; Motion and Order of Dismissal without Costs; and Agreed Final Judgment.</i></p> |
| <p><input type="checkbox"/> d. The court may approve any proposed settlement of the liability on the forfeiture that is agreed to by the State and by the defendant or the defendant’s sureties, if any.</p> | <p>Art. 22.14, C.C.P.</p> |
| <p><input type="checkbox"/> 22. If no exoneration, enter judgment against each for the amount in which sureties, if any, are respectively bound.</p> | <p>“The court finds that the principal and/or surety has/have shown grounds for exoneration and the court enters an order of dismissal in this matter.”</p> |
| <p><input type="checkbox"/> 23. Enter dismissal of forfeiture if exoneration is found.</p> | <p>Art. 22.16, C.C.P.</p> |
| <p><input type="checkbox"/> 24. Remittitur.</p> | <p>Sec. 302.002, Fin. C.</p> |
| <p><input type="checkbox"/> a. If the defendant or surety is entitled to remittitur, before entry of final judgment and written motion submitted, deduct from the amount of the bond, court costs, interest, and any reasonable costs to the city for the return of the defendant.</p> | <p></p> |
| <p><input type="checkbox"/> b. Interest accrues on the bond amount from the date of forfeiture in the same manner and at the same rate as provided for in the accrual of prejudgment interest in civil cases.</p> | <p></p> |

- c. Interest on the bond amount after forfeiture begins to accrue on the face amount of the bond if no specified rate of interest is agreed upon by the defendant (surety) or State (prosecutor). Interest on the bond forfeiture begins to accrue from the date of the judgment nisi.
- d. Remittitur is required if the defendant or sureties show:
 - (1) Defendant (principal) is released on new bail; or
 - (2) The case for which the bond was given is dismissed.
- e. The court may remit the bond or any part of the bond for any other good cause shown the court.
- 25. Agreed Judgment. If the county population is more than 110,000 or a bail bond board created within the county:
 - a. State and defense may agree to an amount less than bond and recommendation is submitted to court.
 - b. Court accepts the recommendation and enters a final judgment.

Arts. 22.16(c) and 22.17(a), C.C.P.
Dees v. State, 865 S.W.2d 461
 (Tex. Crim. App. 1993).

Art. 22.125, C.C.P.; Sec. 1704.205,
 O.C.

The court accepts the State’s recommendation of the agreed judgment and finds that the judgment nisi is now final. The defendant and sureties are jointly and severally bound in the amount of \$ _____ and costs of court to (*City*), Texas and order judgment be entered and execution issued. (Note: If sureties are a corporation, they are not in default until the 11th day after judgment. Sec. 1704.212, O.C.)
 See *TMCEC 2020 Forms Book: Agreed Final Judgment*.

26. Motion for new trial:

- a. Defendant and/or surety requests within 30 days after final judgment has been signed.
- b. Request (motion) is made in writing.

Tex. R. Civ. P. 329(b).

Motion extends time for issuance of execution up to 105 days. If the judge never signs the motion for new trial, it will be deemed overruled 75 days after the original judgment was signed. The same rule applies whenever a final judgment is signed.

27. Non-contested cases:

- a. Proper answer is filed; and
- b. Defendant is not contesting forfeiture.

Tex. R. Civ. P. 245.

The case may be tried or disposed of at any time, whether set or not, and may be set at any time for any other time.

28. Appeal:

- a. Defendant(s) have the right to appeal a final forfeiture.

Art. 45.042, C.C.P.

29. Bill of review:

- a. Defense presents not later than two years after the date of final judgment.
- b. Includes request, on equitable grounds, that the final judgment be reformed and that all or part of the bond be remitted to the surety.
- c. The court grants a bill in part or in whole. For bill of review, interest accrues on the bond amount from the date of:
 - (1) The date of forfeiture to the date of final judgment in the same manner and at the same rate as provided for the accrual of prejudgment interest in civil cases; and

Art. 22.17, C.C.P.

The court grants the bill of review (*in part / in whole*) and orders that judgment be reformed and the amount of \$ ____ be returned to the defendant.

- (2) The date of final judgment to the date of the order for remittitur at the same rate as provided for the accrual of post-judgment interest in civil cases.

- d. The court denies the bill.

The State should review and respond to the bill. If granting the bill, costs of court, any reasonable expenses in re-arresting the defendant, and interest accrued on the bond from the date of the forfeiture should be deducted.

NEW TRIALS AND APPEALS

CHAPTER 10 NEW TRIALS AND APPEALS

1. Motion for New Trial and Appeal in Non-record Municipal Court

Checklist 10-1	Script/Notes
<p><input type="checkbox"/> 1. All defendants have a right to appeal their convictions.</p> <p><input type="checkbox"/> 2. Defendants are not required to go to trial; the defendant can plead guilty or nolo contendere and have judgment entered.</p> <p><input type="checkbox"/> 3. Motions for new trial:</p>	<p>Art. 44.02, C.C.P. See TMCEC <i>The Municipal Judges Book</i>: Chapters 1 and 4.</p>
<p><input type="checkbox"/> a. A defendant has five days after the rendition of judgment and sentence to file a motion for new trial.</p>	<p>Art. 45.037, C.C.P. See Article 45.013, C.C.P., for an increase in the amount of time to file the motion for new trial. If the defendant mails the motion for new trial on or before the due date and the clerk receives the motion not later than 10 days after the due date, the motion is timely filed. Do not count Saturday, Sunday, or legal holidays.</p>
<p><input type="checkbox"/> b. A motion for new trial may be granted not later than 10 days after the date of judgment when the judge, for good cause shown, believes that justice has not been served.</p>	<p>Art. 45.038, C.C.P. Since the judge must rule on the motion by the 10th calendar day after judgment, the motion, if filed by mail, may be overruled by operation of law.</p>
<p><input type="checkbox"/> c. A defendant may only receive one new trial.</p>	<p>Art. 45.039, C.C.P.</p>
<p><input type="checkbox"/> d. The court must hold a second trial as soon as practicable.</p>	<p>Art. 45.039, C.C.P.</p>
<p><input type="checkbox"/> e. In no case is the State entitled to a new trial.</p>	<p>Art. 45.040, C.C.P.</p>
<p><input type="checkbox"/> 4. Defendant may give notice of appeal (but is not required to do so).</p>	<p>Art. 45.0426(c), C.C.P.</p>

- 5. An appeal bond must be filed with the judge who tried the case not later than the 10th day after the date the judgment was entered.

 - a. Mailbox Rule – If defendant mails the bond on or before the due date and the court receives it within 10 working days from the due date, the bond is properly filed.
 - b. If appeal bond is not timely, the municipal court should still send it to the appellate court.

- 6. Appearance by mail or delivery in person to the court: Court shall notify the defendant either in person or by regular mail of the amount of any fine or costs assessed in the case, information regarding the alternatives to the full payment of any fine or costs assessed against the defendant, if the defendant is unable to pay that amount, and, if requested by the defendant, the amount of an appeal bond the court will approve.

 - a. Mailbox Rule – If defendant mails the bond on or before the due date and the court receives it within 10 working days from the due date, the bond is properly filed.
 - b. If appeal bond is not timely, the municipal court should still send it to the appellate court.

- 7. Appeal bond must be at least two times the amount of the fine and court costs, but in no case less than \$50.

- 8. Bond may be cash or surety (court cannot require cash); judge may grant a personal appeal bond.

Art. 45.0426(a), C.C.P.

Courts should keep the defendant’s postmarked envelope. Art. 45.013, C.C.P.

The appellate court does not have jurisdiction if the bond is not timely, and the appellate court shall remand the case back to the municipal court for execution of the sentence. Art. 45.0426(b), C.C.P.

Art. 27.14(b), C.C.P.

A court may send any notice or document using mail or electronic mail. Sec. 80.002, G.C.

Courts should keep the defendant’s postmarked envelope. Art. 45.013, C.C.P.

The appellate court does not have jurisdiction if the bond is not timely, and the appellate court shall remand the case back to the municipal court for execution of the sentence. Art. 45.0426(b), C.C.P.

Art. 45.0425(a), C.C.P.

Arts. 17.38 and 44.20, C.C.P.

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| <ul style="list-style-type: none"> <input type="checkbox"/> a. Conditions of the appeal bond – Must recite that the defendant has been convicted and has appealed and that the defendant will make a personal appearance before the court to which the appeal is taken instanter, if the court is in session, or, if the court is not in session, at its next regular term, stating the time and place of that session, and there remain from day to day and term to term, and answer in the appealed case before the appellate court. | <p>Art. 45.0425(b), C.C.P.
See <i>TMCEC 2020 Forms Book</i>:
Cash Appeal Bond; Surety Appeal Bond; and Personal Appeal Bond.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 9. If bond is filed after time deadline, the appellate court shall remand (send back) the case to the municipal court to collect the judgment. | <p>Art. 45.0426(b), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 10. If bond is defective in form or substance, the appellate court may allow the defendant to file a new bond. | <p>Art. 44.15, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 11. When court receives bond, clerk should date stamp day received. <ul style="list-style-type: none"> <input type="checkbox"/> a. Posting of bond perfects (completes) appeal. | <p>Art. 45.0426(a), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 12. Clerk should give bond to judge to make a determination if the surety is sufficient. | <p>Arts. 17.10 and 17.13-141, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 13. Clerk makes copies of all original papers in case file. | <p>Art. 44.18, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 14. Clerk sends all the original papers and attaches the bond with a certified record to the appellate court (usually county court). The certified record could include: <ul style="list-style-type: none"> <input type="checkbox"/> a. Citation; <input type="checkbox"/> b. Complaint; <input type="checkbox"/> c. Magistrate’s warning; <input type="checkbox"/> d. Appearance bond; <input type="checkbox"/> e. Plea form; <input type="checkbox"/> f. Copy of setting notice to defendant; | <p>See <i>TMCEC 2020 Forms Book</i>:
Certified Transcript of Proceedings
(Court of Non-Record).</p> |

- g. Applications for subpoenas;
 - h. Writ summoning venire;
 - i. Jury waiver;
 - j. Venire;
 - k. Jury;
 - l. Verdict;
 - m. Certified copy of judgment of conviction;
 - n. Motion for new trial;
 - o. Notice of appeal; and
 - p. Appeal bond.
15. Case is tried de novo in county court.
16. If defendant is convicted in appellate court, appellate court collects fine and deposits it in the county treasury.
17. Defendant may not withdraw appeal.

Trial de novo means a whole new trial as if no earlier trial had occurred.
Arts. 44.17 and 45.042(b), C.C.P.

CHAPTER 10 NEW TRIALS AND APPEALS

2. Motion for New Trial and Appeal in Municipal Court of Record

Checklist 10-2	Script/Notes
<p><input type="checkbox"/> 1. All defendants have a right to appeal their convictions.</p>	<p>Art. 44.02, C.C.P. Sec. 30.00014(a), G.C.</p>
<p><input type="checkbox"/> 2. Defendant must go to trial in order to seek appeal in a municipal court of record.</p>	<p>Sec. 30.00014(b), G.C.</p>
<p><input type="checkbox"/> 3. Judgment is entered (conviction).</p>	<p>Art. 45.041, C.C.P.</p>
<p><input type="checkbox"/> 4. Defendant makes a written motion for a new trial not later than the 10th day after date on which judgment is rendered.</p> <p><input type="checkbox"/> a. The motion may be amended with permission of the court not later than the 20th day after the date on which the original motion is filed.</p> <p><input type="checkbox"/> b. The court may extend the time for filing or amending not to exceed 90 days from the original filing deadline.</p> <p><input type="checkbox"/> c. If the court does not act on the motion before the expiration of the 30 days allowed for determination of the motion, the original or amended motion is overruled by operation of law.</p>	<p>Sec. 30.00014(c), G.C.</p>
<p><input type="checkbox"/> 5. If the motion for new trial is denied, and if the defendant wants to appeal, the defendant must give notice of the appeal not later than the 10th day after the date on which the motion for new trial was overruled.</p> <p><input type="checkbox"/> a. The notice of appeal may be given orally in open court, if the defendant requested a hearing on the motion for new trial.</p>	<p>Sec. 30.00014(d), G.C.</p>

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| <ul style="list-style-type: none"> ❑ b. If there is no hearing on the motion for new trial, the notice of appeal must be in writing and must be filed with the court not later than the 10th day after the motion for new trial is overruled. The court may extend for good cause the time period not to exceed 90 days from the original filing deadline. ❑ c. The trial court or the clerk must note on the copies of the notice of appeal and the trial court’s certification of the defendant’s right to appeal, the case number and the date when each is filed. The clerk must then immediately send one copy of each to the clerk of the appropriate appellate court and, if the defendant is the appellant, one copy of each to the State’s attorney. | <p>Rule 25.2(e), Rules of Appellate Procedure</p> |
| <ul style="list-style-type: none"> ❑ 6. The appeal bond must be approved by the court and must be filed not later than the 10th day after the date on which the motion for new trial is overruled. | <p>Sec. 30.00015(a), G.C.</p> |
| <ul style="list-style-type: none"> ❑ 7. The appeal bond must be for \$100 or double the amount of the fines and costs adjudged against the defendant, whichever is greater. | <p>Sec. 30.00015(b), G.C.</p> |
| <ul style="list-style-type: none"> ❑ a. Appeal bond must state that the defendant was convicted in the case and has appealed and be conditioned on the defendant’s immediate and daily personal appearance in the court to which the appeal is taken. | <p>Sec. 30.00015(c), G.C.
See <i>TMCEC 2020 Forms Book</i>:
Cash Appeal Bond; Surety Appeal Bond; and Personal Appeal Bond.</p> |
| <ul style="list-style-type: none"> ❑ b. Judge determines whether the surety is sufficient. | <p>Sec. 30.00015(a), G.C.</p> |
| <ul style="list-style-type: none"> ❑ 8. If bond is defective in form or substance, the appellate court may allow the defendant to file a new bond. | <p></p> |
| <ul style="list-style-type: none"> ❑ 9. Defendant must pay a \$25 clerk’s record preparation fee required to be established by ordinance. This fee will be refunded to the defendant if the case is reversed and dismissed on appeal. | <p>Sec. 30.00014(f), G.C.</p> |
| <ul style="list-style-type: none"> ❑ 10. Defendant must pay the cost for an actual transcript of the proceedings. | <p>Sec. 30.00014(g), G.C.</p> |
| <ul style="list-style-type: none"> ❑ 11. Defendant must pay for a reporter’s record. | <p>Sec. 30.00019(b), G.C.</p> |

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| <p><input type="checkbox"/> 12. Record on appeal: Must conform to the Texas Rules of Appellate Procedure and the C.C.P.</p> | <p>Sec. 30.00016, G.C.
Art. 44.33, C.C.P.
Rule 534.1-35.3, Rules of Appellate Procedure</p> |
| <p><input type="checkbox"/> a. The clerk’s record must conform to provisions in the Texas Rules of Appellate Procedure and the C.C.P.</p> | <p>Sec. 30.00017, G.C.
See <i>TMCEC 2020 Forms Book: Checklist for Record on Appeal (Court of Record)</i>.
See Checklist 10-3.</p> <p>Rules 33.1 and 33.2, Rules of Appellate Procedure</p> |
| <p><input type="checkbox"/> b. The bills of exception must conform to the Texas Rules of Appellate Procedure and the C.C.P.</p> | <p>Sec. 30.00018, G.C.
A bill of exception is a formal statement in writing of the objections or exceptions taken by a party during trial to the decisions, rulings, or instructions of the trial judge, stating the objection, with the facts and circumstances on which it is founded, and signed by the judge.</p> |
| <p><input type="checkbox"/> c. The reporter’s record must conform to the Texas Rules of Appellate Procedure and the C.C.P.</p> | <p>Sec. 30.00019, G.C.
Art. 44.33, C.C.P.
Rules 34.6, 35.2, and 35.3, Rules of Appellate Procedure</p> |
| <p><input type="checkbox"/> d. Transfer of the record – Not later than the 60th day after the date on which the notice of appeal is given or filed, the parties must file the reporter’s record, a written description of material to be included in the clerk’s record, and any material to be included in the clerk’s record that is not in the custody of the clerk.</p> | <p>Sec. 30.00020(a), G.C.</p> |
| <p><input type="checkbox"/> (1) On completion of the record, the municipal judge shall approve the record in the manner provided for record completion, approval, and notification in the appellate court.</p> | <p>Sec. 30.00020(b), G.C.</p> |
| <p><input type="checkbox"/> (2) After the judge approves the record, the clerk shall promptly send the record to the appellate court clerk for filing.</p> | <p>Sec. 30.00020(c), G.C.</p> |

<p><input type="checkbox"/> (3) The appellate court determines appeal from the municipal court of record conviction on the basis of the errors that are set forth in the appellant’s motion for new trial and that are presented in the transcript and statement of facts.</p>	<p>Sec. 30.00014(b), G.C.</p>
<p><input type="checkbox"/> 13. Brief on Appeal:</p>	<p>Sec. 30.00021, G.C.</p>
<p><input type="checkbox"/> a. An appellant’s brief on appeal must be filed with the appellate court clerk not later than the 15th day after the date on which the clerk’s record and reporter’s record are filed with that clerk.</p>	<p>Sec. 30.00021(a)-(b), G.C.</p>
<p><input type="checkbox"/> b. An appellee’s brief on appeal must be filed with the appellate court clerk not later than the 15th day after the date on which the appellant’s brief is filed.</p>	<p>Sec. 30.00021(c), G.C.</p>
<p><input type="checkbox"/> c. Each party shall deliver a copy of the brief to the opposing party and to the municipal judge.</p>	<p>Sec. 30.00021(d), G.C.</p>
<p><input type="checkbox"/> 14. Withdrawal of appeal and new trial:</p>	<p>Sec. 30.00022, G.C.</p>
<p><input type="checkbox"/> a. The trial court shall decide from the briefs of the parties whether the appellant should be permitted to withdraw the notice of appeal and be granted a new trial by the court. The court may grant a new trial at any time before the record is filed with the appellate court.</p>	<p>Unless the briefs are filed well in advance of the deadline, the municipal court will not have the ability to grant the new trial.</p>
<p><input type="checkbox"/> 15. Disposition on appeal – Appellate court may:</p>	<p>Sec. 30.00024(a)(1), G.C.</p>
<p><input type="checkbox"/> a. Affirm the judgment of the municipal court of record;</p> <p><input type="checkbox"/> (1) If the judgment is affirmed, the fine imposed on appeal and the costs imposed on appeal shall be collected from the defendant by the municipal court, and the fine of the municipal court when collected shall be paid into the municipal treasury.</p>	<p>Art. 44.281, C.C.P.</p>

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| <ul style="list-style-type: none"> <input type="checkbox"/> (2) The municipal court may enforce the judgment by: <ul style="list-style-type: none"> <input type="checkbox"/> (a) Forfeiting the defendant’s bond; <input type="checkbox"/> (b) Issuing a writ of <i>capias</i> for the defendant; <input type="checkbox"/> (c) Abstracting the judgment; <input type="checkbox"/> (d) The municipal court may order a refund of the defendant’s costs; or <input type="checkbox"/> (e) The municipal court may conduct an indigency hearing. <input type="checkbox"/> b. Reverse and remand for a new trial; <ul style="list-style-type: none"> <input type="checkbox"/> (1) If appellate court grants a new trial, it is as if the municipal court of record granted the new trial. The new trial is conducted by the municipal court of record. <input type="checkbox"/> c. Reverse and dismiss the case; or <ul style="list-style-type: none"> <input type="checkbox"/> (1) If appellate court reverses and dismisses the case, the court must refund the \$25 transcription preparation fee to the defendant. <input type="checkbox"/> d. Reform and correct the judgment. | <p>Sec. 30.00025(b)(1)-(5), G.C.</p> <p>See Checklist 2-2.
See <i>TMCEC 2020 Forms Book: Capias</i> (Chapter 43).</p> <p>See <i>TMCEC 2020 Forms Book: Abstract of Judgment</i>.</p> <p>See Checklist 8-3.</p> <p>Sec. 30.00024(a)(2), G.C.</p> <p>Sec. 30.00026, G.C.</p> <p>Sec. 30.00024(a)(3), G.C.</p> <p>Sec. 30.00024(a)(4), G.C.</p> |
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- ❑ (3) A transcript of all or part of the proceedings shown by the notes to have occurred before, during, or after the trial, if requested by the defendant.

CITY ORDINANCES

CHAPTER 11 CITY ORDINANCES — General Rules

1. General Rules

Checklist 11-1	Script/Notes
<p><input type="checkbox"/> 1. Jurisdiction:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. A home-rule city can enact and enforce laws to abate and remove nuisances in the city or within 5,000 feet of the city limits. General law cities can enact and enforce laws to abate and remove nuisances within the city limits.</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. A municipal court has jurisdiction over any individual or business entity acting within its limits.</p> <p style="padding-left: 40px;"><input type="checkbox"/> c. A municipal court has jurisdiction over city ordinance violations that occur on city-owned property in the city’s extraterritorial jurisdiction.</p> <p style="padding-left: 40px;"><input type="checkbox"/> d. A municipality may enter into an agreement with a contiguous municipality or a municipality with boundaries that are within one-half mile to establish concurrent jurisdiction in the municipalities provide original jurisdiction to the municipal court in which a case is brought as if the municipal court were located in the municipality in which the case arose. This concurrent jurisdiction is limited to the following types of cases:</p> <p style="padding-left: 80px;"><input type="checkbox"/> (1) All criminal cases arising under a municipal ordinance or resolution, rule, or order of a joint board operating an airport that either municipality would have jurisdiction over;</p> <p style="padding-left: 80px;"><input type="checkbox"/> (2) Seizure of cruelly treated animal cases; and</p> <p style="padding-left: 80px;"><input type="checkbox"/> (3) Truant conduct cases.</p>	<p>See TMCEC <i>The Municipal Judges Book</i>: Chapter 1.</p> <p>Chapter 54, Secs. 217.042 and 217.022, L.G.C.; <i>Treadgill v. State</i>, 275 S.W.2d 658 (Tex. Crim. App. 1955).</p> <p>Art. 4.14(a), C.C.P.; Sec. 29.003(a), G.C.</p> <p>Sec. 29.003, G.C.</p> <p>Sec. 29.003(i), G.C.</p> <p>Sec. 29.003(a), G.C.</p> <p>Sec. 821.022, H.S.C.</p> <p>Sec. 65.003, F.C.</p>

- c. It is preempted by state or federal law;

- d. It is inconsistent with the U.S. Constitution or federal law; or

- e. It is enacted in violation of the Texas Open Meetings law and not subsequently validated by the Legislature.

- 3. Culpable mental states:
 - a. If the ordinance does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition of the offense plainly dispenses with any mental element.

 - b. An offense defined by municipal ordinance may not dispense with the requirement of a culpable mental state if the offense is punishable by a fine exceeding \$500.

- 4. Notice

A determination of invalidity in municipal court results in an individual being found not guilty. Barring an injunction from a court of equity, a municipality may continue to enforce its ordinances. *State v. Morales*, 869 S.W.2d 941 (Tex. 1994).

Sec. 6.02(b), P.C. A city ordinance on adult businesses was held to require a culpable mental state even though the ordinance was silent as to the issue. *Aguirre v. State*, 22 S.W.3d 463 (Tex. Crim. App. 1999). NOTE: To the degree that *Aguirre* contradicts Section 6.02, P.C., its holding is modified by legislative enactment.

Sec. 6.02(f), P.C.

- a. There is no notice requirement in most ordinances.
- b. If there is a notice requirement, whether it has been complied with is a matter to be decided after hearing the testimony.
- c. Notice need not be pled in the complaint.
- 5. Judicial Notice:
 - a. Judge **may** take judicial notice of all municipal ordinances.
 - b. Some court of record statutes state that the judge **shall** take judicial notice of the ordinances.
 - c. A printed ordinance is self-authenticating and a judge **shall** admit it without further proof.
- 6. Warrants:
 - a. A magistrate may issue search warrants for code inspections based on probable cause.

A city may adopt an ordinance which incorporates some other document, such as the International Building Code. Unless a notice provision is specifically eliminated or altered, the city is bound to follow the language of the incorporated document. *State v. Cooper*, 420 S. W. 3d 829 (Tex. Crim. App. 2013).

Check procedure in Chapter 30, G.C., if a court of record.

Requirements for these warrants are found in Section 18.05, C.C.P.

OATHS AND CEREMONIES

CHAPTER 12 OATHS AND CEREMONIES

Complaints (a/k/a the Charging Instrument)

1. Complaints Filed in Municipal Court

Caution: The term “complaint” has historically been a source of confusion in Texas criminal law (especially in the context of criminal procedure). The term describes the formal charging instrument to try Class C misdemeanors. Unfortunately, it is also the term used to describe what is commonly known as the sworn affidavit for a warrant under Chapter 15, C.C.P. Do not confuse the two different applications of the term. For a detailed discussion of the different meanings of the term “complaint,” see “Complaints, Complaints, Complaints: Don’t Let the Language of the Law Confuse You,” *The Recorder* (July 2004). Checklist 12-1 relates to the term as used to refer to the charging instrument under Chapter 45, C.C.P. Checklist 12-2 relates to the term as it refers to the affidavit for the issuance of a warrant.

In *Naff v. State*, 946 S.W.2d 529 (Tex. App.–Fort Worth 1997), the court held that a person swearing to a complaint in municipal court may do so based on information contained in the citation. In this case, the defendant argued that the complaint filed against him in municipal court was invalid because it was sworn to by the municipal prosecutor’s secretary. The secretary did not have firsthand knowledge of the events in question. She swore to the complaint based upon the information contained in the citation written by the police officer. The court stated that there is no requirement that the person swearing to the complaint do so based on firsthand knowledge.

Checklist 12-1	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Affiant reviews complaint. <input type="checkbox"/> 2. Affiant and person administering oath both raise their right hands. <input type="checkbox"/> 3. Oath is administered. <input type="checkbox"/> a. The following persons have authority to administer this oath: 	<p>The requisites of the complaint are found in Article 45.019, C.C.P.</p> <p>“Affiant” - a person who signs an affidavit and swears to its truth.</p> <p>“Do you solemnly swear (or affirm) that the information contained in this complaint is true and correct (so help you God)?”</p>

- (1) Any officer authorized to administer oaths;
 - (2) Municipal judge or retired municipal judge;
 - (3) Municipal court clerk or deputy court clerk;
 - (4) City secretary; and
 - (5) City attorney or deputy city attorney.
-
- 4. Affiant signs complaint.
 - 5. Person administering oath signs jurat.
 - 6. Judge or clerk places municipal court seal on complaint. The impression of the seal can either be attached manually or it may be created electronically.
 - 7. If a notary public administered the oath, notary seal is also required to be placed on the complaint.

Art. 45.019(d), C.C.P. ,
Sec.602.002, G.C.

Art. 45.019(e), C.C.P.

“Jurat”- the certificate of an officer that a written instrument was sworn to by the individual who signed it.

All municipal courts must have a court seal, which must be included on all papers issued out of the court except subpoenas. Art. 45.012(g), C.C.P.

For municipal courts of record, the seal must include the phrase: “Municipal Court of/in _____, Texas.” Sec. 30.000125, G.C.

CHAPTER 12 OATHS AND CEREMONIES

Complaints (a/k/a the Probable Cause Affidavit)

2. Complaints Accepted by a Magistrate as Sworn Affidavit for Arrest Warrant

The affidavit made before the magistrate is called a “complaint” if it charges the commission of an offense. Art. 15.04, C.C.P. The complaint must contain the name or a reasonable description of the accused, a statement that the accused has committed or that the affiant has good reason to believe and does believe that the accused has committed some offense, and the time and place the offense was committed. Art. 15.05, C.C.P. It must also be signed by the affiant.

Checklist 12-2	Script/Notes
<p><input type="checkbox"/> 1. Affiant reviews complaint.</p>	<p>The requisites of the complaint are found in Article 15.05, C.C.P.</p>
<p><input type="checkbox"/> 2. Affiant and person administering oath both raise their right hands.</p>	<p>“Affiant” - a person who signs an affidavit and swears to its truth.</p> <p>An affiant may appear before a magistrate, for the purposes of making oath, either in person or through an electronic broadcast system. Art. 15.03(c), C.C.P. See Checklist 2-1 on arrest warrants.</p>
<p><input type="checkbox"/> 3. Oath is administered.</p>	<p>“Do you solemnly swear (or affirm) that the information contained in this complaint is true and correct (so help you God)?”</p>
<p><input type="checkbox"/> a. The following persons have authority to administer this oath:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Magistrate;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) District Attorney; and</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) County Attorney.</p>	<p>Art. 15.04, C.C.P.</p>
<p><input type="checkbox"/> 4. Affiant signs complaint.</p>	<p>Art. 15.05, C.C.P.</p>

- ❑ 5. Person administering oath signs jurat.

“Jurat”- the certificate of an officer that a written instrument was sworn to by the individual who signed it.

CHAPTER 12 OATHS AND CEREMONIES

3. Other Affidavits

One frequently administered oath involves the defendant being placed on DSC. (See Checklist 5-2.) This procedure should be followed for that affidavit or any other oath or affidavit requested or required by the court.

Checklist 12-3	Script/ Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Affiant reviews affidavit. <input type="checkbox"/> 2. Defendant and person administering the oath both raise their right hands. <input type="checkbox"/> 3. Oath is administered. <ul style="list-style-type: none"> <input type="checkbox"/> a. This oath may be administered by any person authorized to administer oaths in Texas. Persons with the authority to administer an oath most commonly seen in municipal court include the following: <ul style="list-style-type: none"> (1) Municipal judge, retired municipal judge, or clerk; (2) Municipal judge or retired judge of a court of record; (3) Municipal court clerk of a court of record; (4) Notary public; and (5) Peace officer may administer an oath when engaged in performance of duties and oath pertains to duties. <input type="checkbox"/> 4. Defendant signs affidavit. <input type="checkbox"/> 5. Person administering oath signs jurat. 	<p>“Affiant” - a person who signs an affidavit and swears to its truth.</p> <p>“Do you solemnly swear (or affirm) that the information contained in this affidavit is true and correct (so help you God)?”</p> <p>Sec. 602.002, G.C., contains a full list of all persons who may administer an oath in Texas. Note: The ability of municipal judges and clerks to administer oaths to appointed and elected officials is detailed in Checklist 12-7.</p> <p>“Jurat”- the certificate of an officer that a written instrument was sworn to by the individual who signed it.</p>

- 6. Court seal is impressed, stamped, or electronically imprinted on document.
- 7. If a notary public administers oath, notary public seal required to be placed on affidavit.

Art. 45.012(g), C.C.P.

CHAPTER 12 OATHS AND CEREMONIES

4. Oaths Administered During Trial — Jurors and Witnesses

Checklist 12-4	Script/Notes
<p><input type="checkbox"/> 1. Jury:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Summon jurors. (Jurors are required to answer questions about their qualifications; this is called voir dire.) <input type="checkbox"/> b. Ask prospective jurors to raise their right hands. <input type="checkbox"/> c. Person administering the oath raises right hand. <input type="checkbox"/> d. Oath is administered by the court or under its direction. <input type="checkbox"/> e. Voir dire is completed and six persons are selected to hear the case. <input type="checkbox"/> f. Ask jurors to raise their right hands. <input type="checkbox"/> g. Judge (or other person administering oath) raises right hand. <input type="checkbox"/> h. Oath is administered by the court or under its direction. <p><input type="checkbox"/> 2. Witnesses:</p>	<p>Art. 35.02, C.C.P.</p> <p>For further procedures in jury trials, see Chapter 7 in this book.</p> <p>“Do you and each of you solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its directions, touching your service and qualifications as a juror (so help you God)?”</p> <p>Arts. 35.22 and 45.030, C.C.P.</p> <p>“Do you and each of you solemnly swear that, in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence (so help you God)?”</p>

- a. Before testifying, each witness shall be required to declare that he or she will testify truthfully by oath or affirmation in a form calculated to awaken the witness's conscience and impress on the witness the duty to do so.
- b. Both the judge (or other person administering oath) and witness should raise their right hands.
- c. Oath is administered.

- d. Invoke "The Rule."

Rule 603, T.R.E.

"Do you solemnly swear or affirm that the testimony that you are about to give in the case now on trial is the truth, the whole truth, and nothing but the truth (so help you God)?"

At the request of either party, or the court, witnesses may be excluded from the courtroom so that they cannot hear the testimony of other witnesses. This is commonly called "The Rule." If "The Rule" is invoked, all witnesses should be sworn before being directed to wait outside the courtroom. Rule 614, T.R.E.

- ❑ c. Oath is administered by the court or under its direction.

“Do you solemnly swear or affirm that you will make a true interpretation to the person being examined (or the person accused, or the juror), who is deaf, of all the proceedings in the case in a language that he/she understands, and that you will repeat said deaf person’s statements, questions, and answers to questions to counsel, the court, or the jury, in the English language, to the best of your skill and judgment (so help you God)?”

See *TMCEC 2020 Forms Book*: Oath for Interpreter for Deaf or Hard of Hearing Juror, Defendant, or Witness.

CHAPTER 12 OATHS AND CEREMONIES

6. Court Reporter

An official court reporter must take the oath of office required of other officers of this state. In addition to the official oath, each official court reporter must sign an oath administered by the district clerk.

Checklist 12-6	Script/Notes
<input type="checkbox"/> 1. Court reporter raises right hand.	Sec. 52.045, G.C.
<input type="checkbox"/> 2. Person administering the oath raises right hand.	
<input type="checkbox"/> 3. Oath administered by the clerk.	
<input type="checkbox"/> 4. The court reporter files these oaths with the papers of the court.	“I, _____, do solemnly swear (or affirm) that I will well and truly keep a correct and impartial record of the evidence offered in the case, the objections and the exceptions made by the parties to the case, and the rulings and remarks made by the court in determining the admissibility of testimony presented in the case (so help me God).”
<input type="checkbox"/> 5. Court reporter signs the oath.	
<input type="checkbox"/> 6. Person administering the oath signs jurat.	
<input type="checkbox"/> 7. If notary public administered the oath, notary seal is also required to be placed on the oath.	“Jurat”- the certificate of an officer that a written instrument was sworn to by the individual who signed it.

CHAPTER 12 OATHS AND CEREMONIES

7. Appointed and Elected Officials

All appointed or elected officials are required to subscribe to an anti-bribery statement before taking an oath of office. Municipal judges should take and file an oath before each term of office, even if they continue to serve another term as an operation of Section 29.005 of the Government Code. See “When the Acts of a Judge May Be Void: A Look at the Constitutional Oath Requirement in Light of Section 29.005 of the Texas Government Code,” *The Recorder* (May 2013)

Checklist 12-7	Notes
<p><input type="checkbox"/> 1. All elected and appointed officials, including judges, court clerks, and court reporters, must:</p> <p style="margin-left: 40px;"><input type="checkbox"/> a. Swear to an anti-bribery statement; and</p> <p style="margin-left: 40px;"><input type="checkbox"/> b. File it with the city secretary or clerk of the court.</p> <p><input type="checkbox"/> 2. Both the official and person administering oath raise their right hands.</p> <p><input type="checkbox"/> 3. Oath is administered.</p> <p style="margin-left: 40px;"><input type="checkbox"/> a. The following municipal court personnel have authority to administer this oath:</p> <p style="margin-left: 80px;">(1) Municipal judge or retired municipal judge;</p>	<p>Art. XVI, Sec. 1, Tex. Const. See <i>TMCEC 2020 Forms Book: Anti-Bribery Oath of Appointed/Elected Officer</i>.</p> <p>An amendment to the Texas Constitution effective January 1, 2002 altered the previous requirement of this section that the oath be sent to the Texas Secretary of State.</p> <p>“I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be (so help me God).”</p> <p>See Section 602.002, G.C., for a complete list of authorized persons.</p>

- (2) Municipal court clerk; and
 - (3) Notary public.
4. Appointed official signs statement.
- a. Person administering oath signs jurat.
 - b. If notary public administers oath, notary’s seal is placed on oath.
5. Oath of office
- a. Both the appointed official and the person administering the oath raise their right hands.
 - b. Oath is administered.
 - c. The following municipal court personnel have authority to administer an oath to an appointed or elected official:
 - (1) Municipal judge or retired municipal judge;
 - (2) Municipal court clerk; and
 - (3) Notary public.

“Jurat”- the certificate of an officer that a written instrument was sworn to by the individual who signed it.

Art. XVI, Sec. 1, Tex. Const.
See *TMCEC 2020 Forms Book*:
Oath of Office.

“I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State (so help me God).”

The oath of office should be administered at the beginning of each new term of office for a clerk or judge.

See Section 602.002, G.C., for a complete list of authorized persons.

- d. Appointed official signs oath.
 - (1) Person administering oath signs jurat.
 - (2) If notary public administers oath, notary's seal is placed on oath.

- 6. File the oath of office with the city secretary or the person responsible for maintaining the official records of the office.

The city secretary must notify the Texas Judicial Council of the name of each person who is elected or appointed as, or who vacates the office of mayor, municipal judge, or clerk of a municipal court within 30 days after the election, appointment, or vacancy. Sec. 29.013(a), G.C.

See *TMCEC 2020 Forms Book: Report of Change or Vacancy in Judge/Clerk/Mayor Position*.

A copy of the reporting form can also be found here: <http://www.courts.state.tx.us/oca/pdf/MunicipalCourtPersonnelForm.pdf>.

JUVENILE AND MINOR PROCEEDINGS

Juvenile and
Minor Proceedings

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

1. General Procedures

Checklist 13-1	Script/Notes
<p><input type="checkbox"/> 1. If juvenile offender does not appear as required, see Checklist 13-18.</p>	
<p><input type="checkbox"/> 2. If juvenile offender appears, determine age of offender at the time of the offense.</p>	<p>A student required to make a court appearance, including days absent from school due to traveling, receives an excused absence from school. Sec. 25.087, E.C.</p>
<p><input type="checkbox"/> a. Generally, a municipal court has jurisdiction over a person between 10 years of age and under 17 years of age for the following offenses:</p>	<p>Secs. 51.02(2)(A) and 51.03(f), F.C., and Sec. 8.07, P.C.</p>
<p>(1) Certain traffic offenses;</p>	
<p>(2) Status Alcoholic Beverage Code offenses;</p>	<p>A “status” offender is a child who is accused, adjudicated, or convicted of conduct that would not, under state law, be a crime if committed by an adult. Sec. 51.02(15), F.C.</p>
<p>(3) Certain Education Code offenses;</p>	<p>H.B. 2398 (84th Legislature) repealed Failure to Attend School and designated justice, municipal, and certain county courts as truancy courts, having original, exclusive jurisdiction over allegations of truant conduct, handled as civil cases under Title 3A of the Family Code.</p>

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| <p>(4) Class C misdemeanors in the Penal Code;</p> | <p>Effective September 1, 2011, juveniles younger than 12 may not be charged criminally for most types of Disorderly Conduct offenses occurring at a public school campus (involving language, gestures, odors, noise, and fights). Sec. 42.01., P.C.</p> |
| <p>(5) Status tobacco offenses in the Health and Safety Code; and</p> | |
| <p>(6) Other fine-only offenses.</p> | |
| <p><input type="checkbox"/> b. A person who is at least 10 years of age but younger than 15 years of age is presumed incapable of committing a fine-only offense under state law or local ordinance, other than a juvenile curfew or traffic offense.</p> | <p>Sec. 8.07(d), P.C.</p> |
| <p><input type="checkbox"/> (1) The presumption may be refuted if the prosecution proves to the court by a preponderance of the evidence that the child had sufficient capacity to understand that the conduct was wrong at the time.</p> | |
| <p><input type="checkbox"/> (2) The prosecution is not required to prove that the child knew that the act was a crime or knew the legal consequences of the offense.</p> | |
| <p><input type="checkbox"/> c. Under the Transportation Code, a “minor” is a person who is younger than 17 years of age.</p> | <p>Sec. 729.001, T.C.
See Checklists 13-3 and 13-4 for a listing of traffic offenses and penalties.</p> |
| <p><input type="checkbox"/> d. Under the Alcoholic Beverage Code, a “minor” is a person under 21 years of age.</p> | <p>Sec. 106.01, A.B.C.
See Checklists 13-6, 13-7, and 13-16 for a listing of Alcoholic Beverage Code offenses and penalties.</p> |

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| <p><input type="checkbox"/> e. Municipal courts do have jurisdiction of public intoxication of children.</p> <p style="padding-left: 40px;">If the offender is younger than age 21, the offender is subject to the penalties in Section 106.071, A.B.C.</p> | <p>Sec. 49.02(e), P.C.
See Checklist 13-6.</p> |
| <p><input type="checkbox"/> f. For purposes of status tobacco offenses, a “minor” is an individual under 21 years of age.</p> | <p>Sec. 161.252(a), H.S.C.
See Checklists 13-8 and 13-9 for a listing of status tobacco offenses and penalties.</p> |
| <p><input type="checkbox"/> g. For purposes of all other offenses, a child is a person who is at least age 10 and under the age of 17.</p> | <p>Sec. 51.02(2), F.C.
Municipal court has jurisdiction only if the child is at least 10 years of age.</p> |
| <p><input type="checkbox"/> 3. Court determines if there is probable cause to believe that a child, including a child with mental illness or developmental disability:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. Lacks the capacity to understand the proceedings or to assist in their own defense and is unfit to proceed; or</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. Lacks substantial capacity either to appreciate the wrongfulness of the child’s own conduct or to conform their conduct to the requirements of the law.</p> | <p>Sec. 8.08, P.C.</p> |
| <p><input type="checkbox"/> 4. If court determines that probable cause exists under step 3 above, the court may dismiss the complaint after giving notice to the prosecution.</p> | <p>The prosecution has the right to appeal such determinations. Art. 44.01, C.C.P.</p> |
| <p><input type="checkbox"/> 5. Court determines whether to retain jurisdiction or to transfer a case involving a child under the age of 17 to the juvenile court.</p> | <p>See Checklist 13-2.
The court may not transfer a traffic offense or a tobacco offense involving persons under the age of 17.</p> |
| <p><input type="checkbox"/> 6. If the court does not waive jurisdiction, the court proceeds.</p> | |

- ☐ 7. Determine if parent(s) is present. (Parent’s presence required for all proceedings if the child or minor is under the age of 17 and for a 17-year-old defendant charged with a sexting offense under Section 43.261, P.C.)

Art. 45.0215, C.C.P.

“Parent” includes a person standing in parental relation, a managing conservator, or a custodian. Art. 45.057(a)(3), C.C.P.

Marriage removes the disability of minority. Thus, the parents of defendants who are younger than 17 years of age and who are married need not be summoned. Sec. 1.104, F.C.

- ☐ 8. If the parent does not appear, determine if the parent(s) has been served with a summons. If not, reset the case.

- ☐ a. The court must summon the parent(s) to appear in open court with his or her child (a person under the age of 17 or a 17-year-old charged with a sexting offense under Section 43.261, P.C.).

Art. 45.0215, C.C.P.

- ☐ b. If the parent(s) has been served with a summons but failed to appear, the court may waive the requirement of the presence of the parents, guardian, or managing conservator if, after diligent effort, the court cannot locate them or compel their presence.

If the court waives this requirement, it is advisable to document what action the court employed to compel the parent’s presence in the offender’s file. If the parent, guardian, or managing conservator fails to respond to the summons, it is punishable as a Class C misdemeanor. Art. 45.057(g), C.C.P.

- 9. Notify parent and child in writing of their continuing obligation to give written notice of current address. The court should provide a copy of Article 45.057(h) and (i), C.C.P., to child and parent.

Art. 45.057, C.C.P.

“Here is a copy of the law requiring you and your parent to give notice of your current address. If you fail to give this court written notice of your current address or if you move and fail to give written notice of your current address within seven days after moving, you and your parent(s) could be charged with a Class C misdemeanor that has a maximum penalty of \$500.”

Art. 45.057(h), C.C.P. A child and parent required to appear before the court have an obligation to provide the court in writing with the current address and residence of the child. The obligation does not end when the child reaches age 17. On or before the seventh day after the date the child or parent changes residence, the child or parent shall notify the court of the current address in the manner directed by the court. A violation of this subsection may result in arrest and is a Class C misdemeanor. The obligation to provide notice terminates on discharge and satisfaction of the judgment or final disposition not requiring a finding of guilt.

Art. 45.057(i), C.C.P. If an appellate court accepts an appeal for a trial de novo, the child and parent shall provide the notice under Subsection (h) to the appellate court.

10. Make notes on child’s sophistication and maturity and file notes with case.

Article 45.045, C.C.P., requires the court to consider the defendant’s sophistication and maturity before issuing a *capias pro fine* for the defendant when the defendant reaches age 17. This might be the only time that the court has to determine that information. See Checklist 13-21 Children Now Adults Who Fail to Pay.

11. If an attorney appears without the child or the child’s parent(s), reset the case.

Art. 45.0215, C.C.P.
 “The law requires that a child and his or her parents must personally be present in open court before the court can proceed with the child’s case. Therefore, I am resetting this case.”

12. If the child does not appear with an attorney, determine whether the juvenile offender is intending to hire an attorney.

See Checklist 3-2 for explaining the defendant’s right to counsel.

a. If an attorney is going to be hired, reset the case and inform the juvenile offender and parent or guardian to have the attorney present for the date and time in which the case is rescheduled.

“At your next court date and at any subsequent court appearances, you and your parent(s) must still appear even though you will be represented by an attorney.” Art. 45.0215, C.C.P.

b. Provide the specific:

- (1) Date;
- (2) Place; and
- (3) Time of the resetting.

c. If an attorney is not going to be hired, proceed.

13. Explain the child’s rights, charge(s), pleas, and penalties. Make sure that child understands consequences of each plea.

See Checklists 3-2 and 4-1 for rights and pleas; see Checklists 13-3, 13-5, 13-6, 13-8, and 13-13 for information on charges and penalties for each code.

- 14. In addition to the rights in Checklists 3-2 and 4-1, if the offense is a fine-only misdemeanor penal offense (includes Penal Code offenses, penal ordinance offenses, and Education Code offenses the court must:
 - a. Notify the parent and child of the child’s right to an expunction at the commencement of the proceedings; and
 - b. Give both the parent and child a copy of the expunction statute, Article 45.0216, C.C.P.

- 15. Request a plea.

- 16. On a plea of not guilty, determine whether the juvenile offender wants to:
 - a. Waive a jury trial and proceed with a non-jury trial; or
 - b. Exercise his or her right to a trial by jury.
 - c. Set the case according to the juvenile offender’s request.
 - d. Set bail, if applicable.
 - e. Inform both the juvenile offender and his or her parent or guardian of the date, time, and place of the trial.

- 17. On a plea of “guilty” or “no contest,” inform the juvenile offender and his or her parent or guardian of the possible options to dispose of the case:
 - a. Driving safety course, if applicable.
 - b. Teen court, if applicable.

See Checklist 13-22.

“You have the right to have the offense of _____ expunged.

Here is a copy of the law regarding your right to expunction. Please take time to read this information.”

See Chapter 5 on taking pleas.

“How do you plead to the charge of _____ brought against you? ‘Guilty,’ ‘No Contest,’ or ‘Not Guilty’?”

All trials are to be open to the public. Art. 1.24, C.C.P.

See Chapters 6 and 7 for pretrial and trial procedures.

If the trial date is not known at the time of plea, tell the juvenile offender and parent or guardian that notice is coming. Verify the juvenile’s address at this time.

See Checklist 5-1.

Art. 45.052, C.C.P.

- c. Deferred disposition, if applicable.

- 18. Set the fine and impose any required sanctions. The court may require rehabilitative sanctions under Article 45.057, C.C.P. See Checklist 13-16 for imposing those sanctions.

- 19. You may allow a defendant who is a child to elect at the time of conviction to discharge the fine and costs by:
 - a. Performing community service or receiving tutoring under Article 45.0492, as added by Chapter 227 (H.B. 350), Acts of the 82nd Legislature, Regular Session, 2011; or
 - b. Paying the fine and costs.

- 20. If you do not allow election by the child, determine how you would like the fine to be discharged. It can be discharged by:
 - a. Payment;
 - b. By performing community service, if eligible, under Article 45.049, C.C.P., if:
 - (1) Defendant failed to pay previously assessed fine or cost; or

See Checklist 8-2.
See Checklist 8-1 for sentencing.

“The fine is set in the amount of \$_____. In addition to the fine, you must pay court costs.”

For Alcoholic Beverage Code offenses, see Checklist 13-7 for information on required sanctions.

For tobacco offenses, see Checklist 13-9 for information on required sanctions.

For additional sanctions that the court might also impose upon conviction for any offense, see Checklist 13-16.

Art. 45.041(b-3), C.C.P.

See Checklist 8-3 for indigent hearings.

Art. 45.049, C.C.P.
“If you do not have the resources to pay the fine and costs, you may perform community service for a governmental entity or a non-profit organization to discharge payment of your fine and costs.”

- (2) Defendant is determined by the court to have insufficient resources or income to pay fine or costs.
- c. By performing community service, if defendant is younger than 17 years, under Article 45.0492, C.C.P.;
- d. By performing tutoring, if defendant is younger than 17 years of age and the criminal offense occurred in a building or on the grounds of the primary or secondary school at which the defendant was enrolled at the time of the offense, under Article 45.0492, C.C.P.; or
- e. Through a combination of the alternatives described above.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

2. Waiver of Municipal Court Jurisdiction and Transfer of Child to Juvenile Court

It would be prudent for the municipal judge and other interested officials to meet with the juvenile court judge in their respective jurisdiction to devise a system of transfer that is acceptable to both courts.

Checklist 13-2	Script/Notes
<p><input type="checkbox"/> 1. If the court decides to waive jurisdiction, see the following information:</p> <p><input type="checkbox"/> a. A municipal court may enter an “order of waiver of jurisdiction” and transfer the juvenile defendant to juvenile court whenever a complaint is pending against a juvenile for any fine-only offense other than a traffic offense, or a tobacco offense under Section 161.252, H.S.C. This is called discretionary transfer.</p> <p><input type="checkbox"/> b. A municipal court shall enter an “order of waiver of jurisdiction” and transfer the juvenile defendant to juvenile court if the complaint pending alleges a violation of Section 43.261, P.C., that is punishable by fine-only (e.g., “sexting”).</p> <p><input type="checkbox"/> c. A municipal court shall enter an “order of waiver of jurisdiction” and transfer the juvenile defendant to juvenile court if the municipal court or another court has previously dismissed a complaint against the child under Section 8.08, P.C.</p> <p><input type="checkbox"/> d. A municipal court shall enter an “order of waiver of jurisdiction” and transfer the juvenile defendant to juvenile court when the juvenile has previously been convicted of:</p> <p><input type="checkbox"/> (1) Two or more misdemeanors punishable by fine-only other than traffic or tobacco;</p>	<p>Sec. 51.08(b)(2), F.C. Sec. 161.257, H.S.C.</p> <p>Sexting offenses alleged against a child must be transferred to juvenile court. Municipal courts may only see a defendant age 17 for a sexting offense.</p> <p>Sec. 51.08(f), F.C. Section 8.08, P.C., allows a court to dismiss a complaint if probable cause exists to believe that the child lacked sufficient capacity to proceed in the trial or to appreciate the wrongfulness of the child’s action.</p> <p>If court is waiving because of two prior convictions, include information on prior convictions in waiver notice.</p> <p>Sec. 161.257, H.S.C. Sec. 51.08(b)(1), F.C.</p>

(2) Two or more violations of a penal ordinance of a political subdivision other than a traffic; or

(3) One or more of each of the types of misdemeanors described above.

This is called mandatory transfer.

2. A municipal court may elect not to enter an “order of waiver of jurisdiction” for a third or other subsequent violation if the court employs a juvenile case manager under Article 45.056, C.C.P.

Sec. 51.08(d), F.C.

3. Notice to Juvenile Court

Sec. 51.08(c), F.C.

a. A municipal court is required to notify the juvenile court of any pending complaint against a juvenile in which jurisdiction is not waived except for:

A letter addressed to the juvenile court judge or the appropriate designee of the juvenile court should contain the following information:

- 1) Name of the court;
- 2) Name of the defendant;
- 3) Name of the judge;
- 4) Offense charged; and
- 5) Cause number assigned to the case.

See *TMCEC 2020 Forms Book*:
Report to Juvenile Court of
Complaint Filed.

(1) A traffic offense; or

(2) A tobacco offense committed by a person under the age of 17.

b. In addition, the municipal court must furnish the juvenile court with notice of the final disposition of the cases in which the municipal court retained jurisdiction.

Sec. 51.08(c), F.C.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Traffic and Other Motor Vehicle Misdemeanors

4. Penalties

Checklist 13-4	Script/Notes
<p><input type="checkbox"/> 1. General and specific penalties for traffic offenses:</p> <p><input type="checkbox"/> a. Registration of Vehicles – Chapter 502, T.C.:</p> <p>Sec. 502.401, T.C. (General Penalty) – A fine not to exceed \$200.</p> <p><input type="checkbox"/> b. Driver’s License Offenses – Chapter 521, T.C.</p> <p>Sec. 521.461, T.C. (General Penalty) – A fine not to exceed \$200.</p> <p><input type="checkbox"/> c. Rules of the Road Offenses – Title 7, Subtitle C, T.C. (Chapters 541-600)</p> <p>Sec. 542.401, T.C. (General Penalty) – A fine of not less than \$1 or more than \$200.</p>	<p>Sec. 729.001(c), T.C., provides that the fine range provided in Transportation Code violations applies to violators under age 17.</p> <p>Sec. 521.025, T.C., provides that if a person fails to display a driver’s license but actually had a valid driver’s license on the day of the offense, it is a defense to the prosecution. The prosecutor must make a motion to dismiss the charge. An optional \$10 fee may be assessed.</p> <p>The court may double the minimum and maximum fines for offenses committed in a construction or maintenance work zone when workers are present. Sec. 542.404, T.C.</p>

- d. Motor Vehicle Safety Responsibility Act – Chapter 601, T.C.

Sec. 601.191, T.C. (Specific Penalty) – A minimum fine of \$175 and a maximum fine of \$350.

If the offense involves failure to yield right-of-way that causes a crash and bodily injury to a person other than defendant, the fine is a minimum of \$500 and a maximum of \$2,000. The fine increases to a minimum of \$1,000 and a maximum of \$4,000 if the offense results in serious bodily injury or death. Sec. 542.4045, T.C.

Fines for no safety belt are a minimum of \$25 and a maximum of \$50. Fines for allowing a child younger than 17 to ride in a vehicle without requiring a safety belt are a minimum of \$100 and a maximum of \$200. Sec. 545.413, T.C.

If the driver is charged with not having a child secured, the fines are a maximum of \$25 for the first offense and a maximum of \$250 for a second or subsequent offense. Sec. 545.412(b), T.C.

The fine for passing a school bus is a minimum of \$200 and a maximum of \$1000. Sec. 545.066(c), T.C.

If the court determines that a person has not been previously convicted of Failure to Maintain Financial Responsibility and that the person is economically unable to pay the fine, the court may reduce the fine to not less than \$175. Sec. 601.191(d), T.C.

Sec. 601.191(c), T.C. (Specific Penalty) – If a person has been previously convicted of an offense of failure to maintain financial responsibility, the fine is not less than \$350 or more than \$1000. (The complaint must be enhanced alleging a prior judgment and the prosecution must prove the prior judgment before the court may assess this fine.)

- e. General Provisions Relating to Vehicle Size and Weight – Chapter 621, T.C.

Sec. 621.507, T.C. (General Penalty) – A fine not to exceed \$200. (Subsequent offenses include jail time. Hence, municipal court does not have jurisdiction.)

- f. Protective Headgear for Motorcycle Operators and Passengers – Chapter 661, T.C.

Sec. 661.003(h), T.C. (Specific Penalty) – A minimum fine of \$10 and a maximum fine of \$50.

- 2. In addition to the fine, upon conviction, the court may also require optional sanctions under Article 45.057, C.C.P.
- 3. There is no right to expunge traffic convictions.

On a second or subsequent conviction for Failure to Maintain Financial Responsibility, the court shall order the sheriff to impound the vehicle if the defendant was an owner at the time of the offense and at the time of conviction. Sec. 601.261, T.C. See *TMCEC 2020 Forms Book: Order for Impoundment of In-State Motor Vehicle*.

If a person is covered with valid insurance or other form of financial responsibility at the time of offense, presents it to the court, and the court (clerk) verifies that it is valid at the time of the offense, the court shall dismiss the charge. No fee may be charged.

All persons under the age of 21 must wear protective headgear. Exceptions to this rule are contained in Section 661.003(c), T.C.

See Checklist 13-16.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Alcoholic Beverage Code

5. General Status Offenses

Checklist 13-5	Script/Notes
<p><input type="checkbox"/> 1. Before proceeding with this Checklist, see Checklists 3-2, 4-1, and 13-1 for general procedures, rights, and pleas.</p> <p><input type="checkbox"/> 2. Identify the code provision that is alleged to have been violated.</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Purchase of Alcohol by a Minor – Elements of this offense are:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) A minor;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) Purchases;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) An alcoholic beverage.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Attempt to Purchase Alcohol by a Minor – Elements of this offense are:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) A minor;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) With specific intent to purchase alcohol;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) Does an act amounting to more than mere preparation;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (4) That intends but fails to commit the offense.</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. Consumption of Alcohol by a Minor – Elements of this offense are:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) A minor;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) Consumes;</p>	<p>Sec. 106.02, A.B.C.</p> <p>It is not an offense if the minor purchases an alcoholic beverage under the immediate supervision of a commissioned peace officer engaged in enforcing the provisions of this code.</p> <p>Sec. 106.025, A.B.C.</p> <p>Sec. 106.04, A.B.C.</p>

- (3) An alcoholic beverage.
- (4) It is an affirmative defense if the minor consumed an alcoholic beverage in the visible presence of the minor’s adult parent, guardian, or spouse.
- (5) This offense does not apply to a minor who:
 - (a) Requested emergency medical assistance in response to the possible alcohol overdose of the minor or another person;
 - (b) Was the first person to make a request for medical assistance;
 - (c) Remained on the scene until medical assistance arrived; and
 - (d) Cooperated with medical assistance and law enforcement personnel.
- (6) This offense does not apply to a minor who reports the sexual assault of the minor or another person, or is the victim of a sexual assault reported by another person, to:
 - (a) a health care provider treating the victim of the sexual assault;
 - (b) an employee of a law enforcement agency, including an employee of a campus police department of an institution of higher education; or

Sec. 106.04(b), A.B.C.

Sec. 106.04(e), A.B.C.

A minor is entitled to raise this defense only if the minor is in violation of this section at the time of the commission of the reported sexual assault. A minor who commits a sexual assault that is reported is not entitled to raise the defense. Secs. 106.04(e)-(g), A.B.C.

- | | |
|--|--|
| <ul style="list-style-type: none"> <input type="checkbox"/> (c) the Title IX coordinator of an institution of higher education or another employee of the institution responsible for responding to reports of sexual assault. | |
| <ul style="list-style-type: none"> <input type="checkbox"/> d. Driving or Operating Watercraft Under the Influence of Alcohol by a Minor – Elements of this offense are: <ul style="list-style-type: none"> <input type="checkbox"/> (1) A minor; <input type="checkbox"/> (2) Operates a motor vehicle or a watercraft; <input type="checkbox"/> (3) In a public place; <input type="checkbox"/> (4) With any detectable amount of alcohol in his or her system. | <p>Sec. 106.041, A.B.C.</p> <p>Sec. 106.041, A.B.C.
 Juvenile DUI is not a lesser included offense under Section 49.04, P.C., which is the offense of Driving While Intoxicated.
 Sec. 106.041(g),
 A.B.C.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> e. Possession of Alcohol by a Minor – Elements of this offense are: <ul style="list-style-type: none"> <input type="checkbox"/> (1) A minor; <input type="checkbox"/> (2) Possesses; <input type="checkbox"/> (3) An alcoholic beverage. <input type="checkbox"/> (4) It is an exception to an offense under this section if the minor possesses an alcoholic beverage: <ul style="list-style-type: none"> <input type="checkbox"/> (a) In the course and scope of his or her employment provided that such employment is not prohibited by this code; <input type="checkbox"/> (b) In the presence of an adult parent, guardian, or spouse; or | <p>Sec. 106.05, A.B.C.</p> |

(c) In the immediate supervision of a commissioned peace officer engaged in enforcing the provisions of this code.

(5) This offense does not apply to a minor who:

(a) Requested emergency medical assistance in response to the possible alcohol overdose of the minor or another person;

(b) Was the first person to make a request for medical assistance;

(c) Remained on the scene until medical assistance arrived; and

(d) Cooperated with medical assistance and law enforcement personnel.

(6) This offense does not apply to a minor who reports the sexual assault of the minor or another person, or is the victim of a sexual assault reported by another person, to:

(a) a health care provider treating the victim of the sexual assault;

(b) an employee of a law enforcement agency, including an employee of a campus police department of an institution of higher education; or

Sec. 106.05(d), A.B.C.

A minor is entitled to raise this defense only if the minor is in violation of this section at the time of the commission of the reported sexual assault. A minor who commits a sexual assault that is reported is not entitled to raise the defense. Sec. 106.05(e)-(g), A.B.C.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Alcoholic Beverage Code

6. General Penalty Provision, Section 106.071, A.B.C.

Checklist 13-6	Script/Notes
<input type="checkbox"/> 1. Section 106.071, A.B.C., provides the punishment scheme for the following violations: <ul style="list-style-type: none"> <input type="checkbox"/> a. Purchase of Alcohol by a Minor. <input type="checkbox"/> b. Attempt to Purchase Alcohol by a Minor. <input type="checkbox"/> c. Consumption of Alcohol by a Minor. <input type="checkbox"/> d. Possession of Alcohol by a Minor. <input type="checkbox"/> e. Misrepresentation of Age by a Minor. <input type="checkbox"/> f. Public Intoxication Under the Age of 21. 	Sec. 106.115, A.B.C. Sec. 106.02, A.B.C. Sec. 106.025, A.B.C. Sec. 106.04, A.B.C. Sec. 106.05, A.B.C. Sec. 106.07, A.B.C. Sec. 49.02(e), P.C.
<input type="checkbox"/> 2. A first conviction is punishable as a Class C misdemeanor—maximum fine of \$500.	“You have been found guilty of the offense of _____ and the fine is assessed at \$_____. In addition, you must pay court costs. Moreover, the court must require other sanctions.” See items below.
<input type="checkbox"/> 3. In addition to the fine, the court is required to order: <ul style="list-style-type: none"> <input type="checkbox"/> a. Attendance at an alcohol awareness or Drug Education program approved under the Department of State Health Services under this section or a drug and alcohol driving awareness program (DADAP) approved by the Texas Education Agency; 	Sec. 106.115, A.B.C.

- (1) If the defendant resides in a county with a population of 75,000 or less and access to an alcohol awareness program is not readily available in the county:
 - (a) The court may allow the defendant to take an online alcohol awareness program if the Department of State Health Services approves online courses; or
 - (b) The court may require the defendant to perform not less than eight hours of community service related to alcohol abuse prevention or treatment and approved by the Department of State Health Services instead of attending the alcohol awareness program.
- (2) The minor has 90 days from the date of final conviction to submit to the court evidence of satisfactory completion of the alcohol awareness program or DADAP.
- (3) For good cause, the court may extend this period by not more than 90 days.

Sec. 106.115(b-1) A.B.C.

A defendant's residence is the one listed on the defendant's driver's license. If no driver's license or state ID, residence is that of defendant's voter registration certificate. If not registered to vote, the residence is that which is on file with the public school district. If not enrolled in public school, residence is determined by commission rule. The court may consider a defendant who is a college student to be a resident of the county where the college is, if the county offers readily available alcohol awareness classes.

If a court wishes to allow and online program, the cumbersome residency and county population requirements can be avoided by ordering DADAP instead, as it has approved online courses.

Community service ordered under this subsection is in addition to community service ordered under Section 106.071(d).

Sec. 106.115(c), A.B.C.

"You are required to attend an alcohol awareness program or DADAP. You have 90 days from today to submit to this court evidence of completion of the program."

"If you fail to submit the proper evidence within 90 days, this court will schedule a show cause hearing."

- ❑ (4) Failure by the defendant to present evidence of completion of the alcohol awareness program or DADAP within the prescribed time period obligates the court to order the Department of Public Safety to suspend the defendant’s driver’s license or permit, or, if the defendant does not have a driver’s license or permit, to deny the issuance of a license or permit for a period not to exceed six months in either event.

- ❑ (5) If a defendant previously convicted of a Chapter 106, A.B.C., offense fails to provide proof of attending an alcohol awareness program or DADAP within the period proscribed by the court, the court may either order the suspension of the defendant’s driver’s license or permit for a period not to exceed one year or, if the defendant does not have a license or a permit, may deny the issuance of a license or a permit for a period not to exceed one year.

- ❑ (6) If the minor fails to present evidence of completion of the alcohol awareness program or DADAP, the court may order the parent or guardian of the minor to do any act or refrain from doing any act if the court determines that the doing or refraining from doing the act will increase the likelihood that the minor will complete the alcohol awareness course.

- ❑ (7) Court order on parents may be enforced by contempt.
 - ❑ (a) Punishment for the parents: up to three days in jail and a fine up to \$100.

“If the court determines that you did not have a good reason for not completing the alcohol awareness program and submitting evidence of completion within 90 days, I will order the Texas Department of Public Safety to suspend or deny issuance of your driver’s license for up to 180 days.” Sec. 106.115(d)(1)(A), A.B.C.

Sec. 106.115(d)(1)(B), A.B.C.

Sec. 106.115(d)(2), A.B.C.

Ex parte Powell, 883 S.W.2d 775 (Tex. App.—Beaumont 1994), Sec. 21.002(c), G.C.

(1) 20-40 hours of alcohol-related community service; and

(2) DPS to suspend or deny issuance of the minor's DL or permit for 60 days.

b. The alcohol awareness, Drug Education program, or DADAP is optional.

However, if the court opts to order the defendant to attend a subsequent alcohol awareness program or DADAP and the defendant fails to provide proof of attending with the proscribed period, the court may either order the suspension of the defendant's driver's license or permit for a period not to exceed one year or, if the defendant does not have a license or permit, may deny the issuance of a license or a permit for a period not to exceed one year.

5. If it is shown at trial that a minor (17 to 20 years of age) has two prior convictions under this section, the offense is punishable by a fine of not less than \$250 or more than \$2,000; confinement in jail of not more than 180 days; or both fine and confinement; plus 180 days suspension or denial of DL or permit.

Community service ordered must be related to education about or prevention of misuse of alcohol if programs and services are available in the community. If educational programs and services are not available, the court may order community service that it considers appropriate for rehabilitative purposes.

The driver's license suspension takes effect on the 11th day after the date the minor is convicted. Sec. 106.071(h), A.B.C. The judge should order the clerk to immediately send notice of the order to DPS.

If the court requires the minor to attend an alcohol awareness program or DADAP, the court may require that the parent or guardian of the minor attend the alcohol awareness program when the minor is younger than 18 years of age. Sec. 106.115(a), A.B.C.

Sec. 106.115(d)(1)(B), A.B.C.

For procedures on alcohol awareness program and DADAP, see the previous discussion on first conviction.

If the prosecutor wants to seek the more serious penalty provided by this section, the municipal court does not have jurisdiction because the penalty includes the possibility of jail-time.

- ❑ 6. If a person is under 17 years of age and has two prior convictions under this section, then the court must transfer the case to juvenile court.

- ❑ 7. For purposes of determining whether a minor has been previously convicted:
 - ❑ a. An adjudication under Title 3, F.C., that the minor engaged in DUI is considered a conviction; and

 - ❑ b. An order of deferred disposition for an offense alleging DUI is considered a conviction.

- ❑ 8. If a court grants deferred disposition, the court, in addition to any other term ordered under Article 45.0511, C.C.P., must require the minor to:
 - ❑ a. Attend an alcohol awareness program, Drug Education program, or DADAP; and

 - ❑ b. Perform eight to 40 hours of community service.

- ❑ 9. The court may also enter additional orders under Section 45.057, C.C.P.

Sec. 51.08, F.C.

An exception is made in Section 51.08(d), F.C., for courts that have created juvenile case managers under Article 45.056, C.C.P.

Sec. 106.071(f), A.B.C.

Note: When a defendant receives deferred disposition for an alcohol offense (excluding DUI), the defendant's driver's license is not suspended. The court does, however, report the deferred disposition to DPS using Form DIC-15. If the defendant is subsequently convicted of an alcohol offense, prior deferred disposition orders are treated as convictions for the purpose of determining the duration of the driver's license suspension (e.g., a defendant convicted of an alcohol offense with two prior deferred dispositions would face a 180 day suspension). Furthermore, prosecutors may use prior deferred dispositions to allege enhanced charges.

Sec. 106.115, A.B.C.

Sec. 106.071, A.B.C.

See Checklist 13-16.

- 10. Minors convicted of or arrested for an Alcoholic Beverage Code status offense may request an expunction.

- 11. If person is under 17 years of age and has two prior convictions under this section, see Step 6 above.

Sec. 106.12, A.B.C.
See Checklist 13-24.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Alcoholic Beverage Code

7. Specific Penalty Provision, Section 106.041, A.B.C. – Minor D.U.I.

Checklist 13-7	Script/Notes
<p><input type="checkbox"/> 1. Section 106.041, A.B.C., provides the punishment for Driving or Operating Watercraft Under the Influence of Alcohol by a Minor.</p> <p><input type="checkbox"/> 2. A first conviction is punishable as a Class C misdemeanor—maximum fine of \$500.</p> <p><input type="checkbox"/> a. The court is required to order:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) 20 to 40 hours of alcohol-related community service; and</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) An alcohol awareness program.</p> <p style="padding-left: 80px;"><input type="checkbox"/> (a) The minor has 90 days from the date of final conviction to submit to the court evidence of satisfactory completion of the alcohol awareness program.</p> <p style="padding-left: 80px;"><input type="checkbox"/> (b) For good cause, the court may extend this period by not more than 90 days.</p>	<p>Sec. 106.041, A.B.C.</p> <p>“You have been found guilty of the offense of driving under the influence and the fine is assessed at \$_____. In addition, you must pay court costs. Moreover, the court must require other sanctions.” See items below.</p> <p>“In addition to the fine and alcohol awareness program, you must perform 20 to 40 hours community service (judge selects amount of hours). You must complete the community service by _____.”</p> <p>Community service ordered must be related to education about or prevention of misuse of alcohol.</p> <p>Sec. 106.115, A.B.C.</p> <p>Sec. 106.115(c), A.B.C. “You are required to attend an alcohol awareness program. You have 90 days from today to submit to this court evidence of completion of the program.”</p> <p>“If you fail to submit the proper evidence within 90 days, this court will schedule a show cause hearing.”</p>

- (c) Failure by the defendant to present evidence of completion within the prescribed time period obligates the court to order the Department of Public Safety to suspend the defendant’s driver’s license or permit, or, if the defendant does not have a driver’s license or permit, to deny the issuance of a license or permit for a period not to exceed six months in either event.

“If the court determines that you did not have a good reason for not completing the alcohol awareness program and submitting evidence of completion within 90 days, I will order the Texas Department of Public Safety to suspend or deny issuance of your driving record for up to 180 days.” Sec. 106.115(d), A.B.C.
- (d) If the defendant presents evidence of successful completion of the course in a timely manner, the court may reduce the assessed fine to an amount equal to no less than one-half of the amount of the initial fine.

Sec. 106.115(c), A.B.C.
- (e) If the minor fails to present evidence of completion of the alcohol awareness program, the court may order the parent or guardian of the minor to do any act or refrain from doing any act if court determines that the doing or refraining from doing the act will increase the likelihood that the minor will complete the alcohol awareness course.

Sec. 106.115(d)(2), A.B.C.
- (f) Court order on parents may be enforced by contempt. Punishment for the parents is up to three days in jail and a fine up to \$100.

Ex parte Powell, 883 S.W.2d 775 (Tex. App. – Beaumont 1994)
Sec. 21.002(c), G.C.
- (g) The court has no authority to order DPS to suspend or deny issuance of the DL.

An administrative DL suspension is conducted in the same manner as DWI offenders.

See Chapters 524 and 724, T.C.

3. A second conviction (charge is enhanced alleging a prior conviction) is punishable as a Class C misdemeanor—maximum fine of \$500.

a. The court is required to order:

(1) 40-60 hours of alcohol-related community service.

(2) The alcohol awareness program is optional.

However, if the court opts to order the defendant to attend a subsequent alcohol awareness program and the defendant fails to provide proof of attending within the proscribed period, the court may either order the suspension of the defendant’s driver’s license or permit for a period not to exceed one year or, if the defendant does not have a license or permit, may deny the issuance of a license or a permit for a period not to exceed one year.

4. If it is shown at trial that a minor (17 to 20 years of age) has two prior convictions under this section, the offense is punishable by:

a. A fine of not less than \$500 or more than \$2,000;

b. Confinement in jail of not more than 180 days; or

Community service ordered must be related to education about or prevention of misuse of alcohol.

If the court requires the minor to attend an alcohol awareness program, the court may require that the parent or guardian of the minor attend the alcohol awareness program when the minor is younger than 18 years of age. Sec. 106.115(a), A.B.C.

Sec. 106.115(d)(1)(B), A.B.C.

For procedures on alcohol awareness programs, see items above under first conviction.

If the prosecutor wants to seek the penalty provided by this section, the offense is a Class B misdemeanor within the jurisdiction of the county court.

- c. Both fine and confinement.
- d. In addition, the court shall order DL suspension for 180 days.
- 5. For purposes of determining whether a minor has been previously convicted of DUI:
 - a. An adjudication under Title 3, F.C., that the minor engaged in DUI is considered a conviction.
 - b. An order of deferred disposition for an offense alleging DUI is considered a conviction.
- 6. If a court grants deferred disposition, the court, in addition to any other term ordered under Article 45.0511, C.C.P., must require the minor to attend an alcohol awareness program.
- 7. Upon conviction for DUI, the court may impose additional orders under Section 45.057, C.C.P.
- 8. Minors convicted of or arrested for an Alcoholic Beverage Code status offense may request an expunction upon reaching age 21 if they have only one alcohol conviction or arrest.
- 9. If person is under 17 years of age and has two prior convictions under this section, then the court must transfer the case to juvenile court.

Sec. 106.041(h), A.B.C.

Note: This section allows prosecutors to enhance charges against minors who have either previously been adjudicated in juvenile court for DUI or placed on deferred disposition for DUI in either municipal or justice court.

Courts are required to report convictions, deferred dispositions, and acquittals of DUI to DPS. Sec. 106.117, A.B.C. (Use Form DIC-15.)

Sec. 106.115, A.B.C.

See Checklist 13-16.

Sec. 106.12, A.B.C.
See Checklist 13-24.

An exception is made in Sec. 51.08(d), F.C., for courts that have created juvenile case managers under Article 45.056, C.C.P.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Health & Safety Code

Section 161.257, H.S.C., provides that Title 3, F.C., does not apply to a proceeding under Chapter 161, Subchapter N (Tobacco Use by Minors), H.S.C. This means that minors charged with tobacco offenses may not be transferred to juvenile court.

8. Tobacco Offenses Committed by Minors

Checklist 13-8	Script/Notes
<p>Definitions:</p> <p>Section 161.251, H.S.C., incorporates the definitions of “cigarette,” “e-cigarette,” and “tobacco product” found in the Tax Code and elsewhere in the Health and Safety Code.</p> <p>“Cigarette” is defined in Section 154.001, Tax Code, as a roll for smoking:</p> <ul style="list-style-type: none"> <input type="checkbox"/> (1) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco; and <input type="checkbox"/> (2) that is not a cigar. <p>“E-cigarette” is defined in Section 161.081, H.S.C., as an electronic cigarette or any other device that simulates smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device. The term does not include a prescription medical device unrelated to the cessation of smoking. The term includes:</p> <ul style="list-style-type: none"> <input type="checkbox"/> (1) a device described by this subdivision regardless of whether the device is manufactured, distributed, or sold as an e-cigarette, e-cigar, or e-pipe or under another product name or description; and <input type="checkbox"/> (2) 2. a component, part, or accessory for the device, regardless of whether the component, part, or accessory is sold separately from the device. <p>“Tobacco product” is defined in Section 155.001, Tax Code, as:</p>	

<ul style="list-style-type: none"> <input type="checkbox"/> (1) a cigar; <input type="checkbox"/> (2) smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette; <input type="checkbox"/> (3) chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco suitable for chewing; <input type="checkbox"/> (4) snuff or other preparations of pulverized tobacco; or <input type="checkbox"/> (5) an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette. 	
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Before proceeding with this Checklist, see Chapter 4 and Checklist 13-1 for general procedures, rights, and pleas. 	
<ul style="list-style-type: none"> <input type="checkbox"/> 2. A person must be younger than 21 years of age to commit the offenses described in Section 161.252, H.S.C. 	<p>Sec. 161.252(a), H.S.C.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> 3. Identify the code provision that is alleged to have been violated. 	
<ul style="list-style-type: none"> <input type="checkbox"/> a. Possession, Purchase, Consumption, or Acceptance of Cigarettes, E-cigarettes, or Tobacco Products by a Minor – Elements of this offense are: 	<p>Sec. 161.252(a)(1), H.S.C.</p>
<ul style="list-style-type: none"> (1) an individual younger than 21 	<p>To give defendant adequate notice of the offense charged, complaint must allege only one specific violation (e.g., “possessed a cigarette” or “purchased a cigar”). A complaint alleging defendant “possessed, purchased, or received” or alleging “a tobacco product” is subject to being quashed.</p>

(select one):

- (2) possesses;
- (3) purchases;
- (4) consumes; or
- (5) accepts

(select one):

- (a) a cigarette; or
- (b) an e-cigarette; or
- (c) a tobacco product (specify the product).

- b. False Proof of Age by a Minor to Obtain Cigarette, E-cigarette, or Tobacco Product – Elements of this offense are:

- (1) an individual younger than 21;
- (2) falsely represents himself or herself to be 21 or older;
- (3) by displaying a proof of age that is false;
- (4) in order to *(select one)*:
 - (a) obtain possession of;
 - (b) purchase; or
 - (c) receive

Sec. 161.252(a)(2), H.S.C.

To give defendant adequate notice of the offense charged, complaint must allege only one specific violation (e.g., “to obtain possession of a cigarette” or “to purchase chewing tobacco”). A complaint alleging “to obtain possession of, purchase, or receive” or alleging “a tobacco product” is subject to being quashed.

(select one):

- (i) a cigarette; or
- (ii) an e-cigarette; or
- (iii) a tobacco product
(specify the product).

c. Exceptions:

- (1) It is an exception if the defendant is in the presence of an employer, if possession or receipt is required as part of defendant's duties as an employee.
- (2) It is an exception if the defendant is participating in an inspection or test of compliance in accordance with Section 161.088, H.S.C.
- (3) It is an exception if the defendant is at least 18 years of age and presents at the time of purchase a valid military identification card of the United States military forces or the state military forces.

The employee exception applies only to possession or receipt by a minor. Sec. 161.252(b)(2), H.S.C.

This is sometimes known as "the minor sting operation" exception and applies to all Section 161.252 offenses. Sec. 161.252(c), H.S.C.

Sec, 161.252(c-1), H.S.C.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Health & Safety Code

9. Penalties for Tobacco Use by Minors. Section 161.253, H.S.C.

Checklist 13-9	Script/Notes
<p><input type="checkbox"/> 1. Section 161.253, H.S.C., provides the punishments for tobacco offenses committed by persons under the age of 21.</p>	
<p><input type="checkbox"/> 2. A conviction is punishable by a fine not to exceed \$100.</p>	<p>Sec. 161.252(d), H.S.C. “You have been found guilty of the offense of _____. I am assessing a fine in the amount of \$_____.”</p>
<p><input type="checkbox"/> 3. The court is required to:</p>	<p>Sec. 161.253, H.S.C.</p>
<p><input type="checkbox"/> a. Suspend execution of sentence; and</p>	<p>“I am going to suspend execution of the sentence, which means that I am not going to require you to pay the fine. However, you must pay court costs.”</p>
<p><input type="checkbox"/> b. Order attendance at an e-cigarette and tobacco awareness program.</p>	<p>Sec. 161.253(b), H.S.C. “I am going to require you to attend an e-cigarette and tobacco awareness program (or perform eight to 12 hours of tobacco related community service). You have 90 days to attend the program (or perform the community service) and submit evidence to me that you completed the program.”</p>
	<p>Defendant may request an e-cigarette and tobacco awareness program be taught in a language other than English.</p>
<p><input type="checkbox"/> c. Determine if an e-cigarette and tobacco awareness program approved by the Texas Department of State Health Services is readily available where defendant resides.</p>	

<p><input type="checkbox"/> d. If approved e-cigarette and tobacco awareness program is available, order defendant to complete program by the 90th day after conviction.</p>	<p>Call the Office of Tobacco Prevention and Control, Texas Department of State Health Services, at 800.345.8647 for a list of approved providers.</p> <p>Sec. 161.253(a) and (e), H.S.C.</p>
<p><input type="checkbox"/> e. If e-cigarette and tobacco awareness program is not readily available, order defendant to complete eight to 12 hours of e-cigarette and tobacco-related community service by the 90th day after conviction.</p>	<p>Sec. 161.253(c) and (e), H.S.C.</p>
<p><input type="checkbox"/> f. Court may order parent or guardian to attend e-cigarette and tobacco awareness program with the defendant.</p>	<p>Sec. 161.253(a), H.S.C.</p>
<p><input type="checkbox"/> g. Defendant to present to court, in the manner required by the court, evidence of completion of the awareness course or of the community service.</p>	<p>Sec. 161.253(e), H.S.C.</p>
<p><input type="checkbox"/> h. If defendant presents evidence on time:</p> <p>(1) On first conviction: Judge shall dismiss the case.</p> <p>(2) On subsequent conviction: Case not dismissed, but judge has discretion to reduce fine to not less than half the fine imposed.</p>	<p>Sec. 161.253(f)(2), H.S.C. “If you complete the e-cigarette and tobacco awareness program and present evidence of completion within 90 days from today, I will dismiss your case.”</p> <p>“If you do not present this court with evidence of completion of the program, I will enter a final judgment and assess a fine of \$_____.”</p> <p>Sec. 161.253(f)(1), H.S.C.</p>
<p><input type="checkbox"/> 4. The court may also order a sanction under Section 45.057, C.C.P.</p>	<p>See Checklist 13-15.</p>

- ❑ 5. Minors convicted of a status tobacco offense may apply to the court to have the conviction expunged on or after their 21st birthday.

Sec. 161.255, H.S.C.
See Checklist 13-25.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Penal Code Offenses and Other Fine-Only Misdemeanors

10. Offenses

Checklist 13-10	Script/Notes
<ul style="list-style-type: none"><li data-bbox="212 457 911 558"><input type="checkbox"/> 1. Before proceeding with this Checklist, see Chapter 4 and Checklist 13-1 for general procedures, rights, and pleas.<li data-bbox="212 596 911 659"><input type="checkbox"/> 2. Identify the Penal Code offense alleged to have been violated.<li data-bbox="212 697 911 800"><input type="checkbox"/> 3. Municipal court has jurisdiction over all fine-only offenses (Class C misdemeanors) in the Penal Code, other state codes, and local ordinances.	

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Penal Code Offenses and Other Fine-Only Misdemeanors

11. Penalties

Checklist 13-11	Script/Notes
<p><input type="checkbox"/> 1. Fine-only offenses in the Penal Code are called Class C misdemeanors and have a maximum fine of \$500.</p>	<p>Sec. 12.23, P.C.</p>
<p><input type="checkbox"/> 2. Outside the Penal Code, offenses are classified as Class C misdemeanors if the offense is punishable by fine only.</p>	<p>Sec. 12.41, P.C.</p>
<p><input type="checkbox"/> 3. In addition to the fine, upon conviction, the court may order a sanction under Section 45.057, C.C.P.</p>	<p>See Checklist 13-15.</p>
<p><input type="checkbox"/> 4. A child charged with a Class C misdemeanor Penal Code offense has a right to expunction.</p>	<p>Art. 45.0216, C.C.P. See Checklist 13-22.</p>

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Education Code Offenses

12. Criminal Procedure for School Offenses

Chapter 37, E.C., contains subchapters governing “Law and Order,” “Protection of Buildings and School Grounds,” and “Penal Provisions,” but until the passage of S.B. 393 in 2013, no subchapter in the Education Code governed criminal procedure. This omission contributed to existing disparities in the legal system and has resulted in greater consumption of limited local judicial resources.

The creation of a new subchapter in the E.C. (Subchapter E-1, Criminal Procedure) balances the interest of the other subchapters with due process and procedural protections for children accused of criminal violations. Under Section 37.141, E.C., Subchapter E-1 only governs criminal procedures to be utilized when a child is alleged to have committed an offense on property under the control and jurisdiction of a school district which is a Class C misdemeanor, excluding traffic offenses. It aims to preserve judicial resources for students who are most in need of formal adjudication.

Checklist 13-12	Script/Notes
<p>Definitions:</p> <p>“Child” is a person who is at least 10 years of age and younger than 18 years of age, who is charged with or convicted of an offense that a justice or municipal court has jurisdiction of, and who is a student.</p> <p>“School offense” is an offense committed by a child enrolled in a public school that is a Class C misdemeanor other than a traffic offense and that is committed on property under the control and jurisdiction of a school district.</p> <p><input type="checkbox"/> 1. To the extent of any conflict, this subchapter controls over any other law applied to a school offense alleged to have been committed by a child.</p> <p><input type="checkbox"/> 2. A peace officer may not issue a citation to a child who is alleged to have committed a school offense.</p> <p><input type="checkbox"/> 3. Subchapter E-1 does not prohibit a child from being taken into custody under Section 52.01, Family Code.</p>	<p>Sec. 37.141(1), E.C.</p> <p>Sec. 37.141(1), E.C</p> <p>Sec. 37.142, E.C.</p> <p>Sec. 37.143(a), E.C.</p> <p>Sec. 37.143(b), E.C.</p>

- 4. Graduated Sanctions: A school district that commissions peace officers under Section 37.081 may develop a system of graduated sanctions that the school district may require to be imposed on a child before a complaint is filed under Section 37.145 against the child for a school offense that is an offense under Section 37.124 or 37.126, E.C., or under Section 42.01(a)(1), (2), (3), (4), or (5), P.C. A system adopted under this section must include multiple graduated sanctions. The system may require:

 - a. A warning letter to be issued to the child and the child’s parent or guardian that specifically states the child’s alleged school offense and explains the consequences if the child engages in additional misconduct;
 - b. A behavior contract with the child that must be signed by the child, the child’s parent or guardian, and an employee of the school and that includes a specific description of the behavior that is required or prohibited for the child and the penalties for additional alleged school offenses, including additional disciplinary action or the filing of a complaint in a criminal court;
 - c. The performance of school-based community service by the child; and
 - d. The referral of the child to counseling, community-based services, or other in-school or out-of-school services aimed at addressing the child’s behavioral problems.
- 5. If a child fails to comply with or complete graduated sanctions, or if the school district has not adopted a system of graduated sanctions, the school may file a complaint against the child with a criminal court in accordance with the subchapter.
- 6. In addition to the requirements imposed by Article 45.019, C.C.P, a complaint alleging the commission of a school offense must:

Sec. 37.144, E.C.

A referral to counseling may include participation by the child’s parent or guardian if necessary.
Sec. 37.144(b), E.C.

Sec. 37.145, E.C.

Sec. 37.146(a), E.C.

- ❑ (2) Report a crime witnessed at the school only to certain persons or peace officers.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Education Code Offenses

13. Offenses

Checklist 13-13	Script/Notes
<p><input type="checkbox"/> 1. Before proceeding with this Checklist, see Chapter 4 and Checklist 13-1 for general procedures, rights, and pleas.</p> <p><input type="checkbox"/> 2. Identify the Education Code offense alleged to have been violated.</p> <p><input type="checkbox"/> 3. The following offenses may be violated under the Education Code:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. Rules Enacted by School Board (related to the operation of vehicles and parking on school property);</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. Trespass on School Grounds;</p> <p style="padding-left: 40px;"><input type="checkbox"/> c. Possession of Intoxicants on School Grounds;</p> <p style="padding-left: 40px;"><input type="checkbox"/> d. Disruption of Classes;</p>	<p>H.B. 2398 (84th Legislature) repealed Failure to Attend School and designated justice, municipal, and certain county courts as truancy courts, having original, exclusive jurisdiction over allegations of truant conduct, handled as civil cases under Title 3A of the Family Code.</p> <p>Sec. 37.102, E.C.</p> <p>Sec. 37.107, E.C.</p> <p>Sec. 37.122, E.C. It is a defense to prosecution under this section that the person possessed the intoxicating beverage at a performing arts facility during an event held outside of regular school hours and not sponsored or sanctioned by a school district. Sec. 37.122(a-1), E.C.</p> <p>This offense cannot be committed by a primary or secondary grade student enrolled at the school. Sec. 37.124, E.C.</p>

- e. Disruption of Transportation; and

- f. Pledging or soliciting another to pledge to a public school fraternity, sorority, secret society, or gang that is not sanctioned by the statute or state or national authorities.

This offense cannot be committed by a primary or secondary grade student. Sec. 37.126, E.C.

Sec. 37.121, E.C.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Education Code Offenses

14. Penalties and Orders

Checklist 13-14	Script/Notes
<p><input type="checkbox"/> 1. The following offenses are Class C misdemeanors with a maximum fine of \$500:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Rules enacted by School Board Relating to Traffic; <input type="checkbox"/> b. Trespass on School Grounds; <input type="checkbox"/> c. Possession of Intoxicants on School Grounds; <input type="checkbox"/> d. Disruption of Classes; <input type="checkbox"/> e. Disruption of Transportation; <input type="checkbox"/> f. Pledging or soliciting another to pledge to a public school fraternity, sorority, secret society, or gang that is not sanctioned by the statute or state or national authorities; and <p><input type="checkbox"/> 2. A child charged with an Education Code offense has a right to an expunction under Article 45.0216, C.C.P.</p>	<p>Sec. 37.102, E.C.</p> <p>Sec. 37.107, E.C.</p> <p>Sec. 37.122(c), E.C</p> <p>Sec. 37.124(b), E.C.</p> <p>Sec. 37.126(b), E.C.</p> <p>Sec. 37.121(2)(c), E.C.</p> <p>See Checklist 13-22.</p>

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

15. Additional Optional Orders

While deferred disposition allows courts to impose conditions as terms of probation, Article 45.057, C.C.P., provides a “laundry list” of orders that can be imposed on any child upon conviction.

Checklist 13-15	Script/Notes
<p><input type="checkbox"/> 1. In addition to any fine and upon finding that the child committed a fine-only misdemeanor, the municipal or justice court may:</p> <p><input type="checkbox"/> a. Refer the child or the child’s parents, managing conservators, or guardians for services under Section 264.302, F.C.; or</p> <p><input type="checkbox"/> b. Order parent to refrain from conduct that may encourage the child to violate court order.</p> <p><input type="checkbox"/> c. Parent may be ordered to attend a parenting class or a parental responsibility program.</p> <p><input type="checkbox"/> d. Require that the child attend a special program that the court determines to be in the best interest of the child. Programs include:</p> <p><input type="checkbox"/> (1) Rehabilitation;</p> <p><input type="checkbox"/> (2) Counseling;</p> <p><input type="checkbox"/> (3) Self-esteem and leadership;</p> <p><input type="checkbox"/> (4) Work and job skills training;</p>	<p>Art. 45.057, C.C.P. “In addition to the fine that I have already assessed, I am going to require you (or you and your parents) to _____. This must be completed by _____.”</p> <p>Art. 45.057(b)(3), C.C.P. Any order for a parent should be included in the child’s judgment. The court should inform the parent of the consequences of not complying — contempt with a maximum fine of \$100 and/or up to three days in jail. See Chapter 14 of this book concerning contempt.</p>

- | | |
|--|----------------------------------|
| <ul style="list-style-type: none"> <input type="checkbox"/> (5) Job interviewing and work preparation; <input type="checkbox"/> (6) Self-improvement; <input type="checkbox"/> (7) Parenting; <input type="checkbox"/> (8) Manners; <input type="checkbox"/> (9) Violence avoidance; <input type="checkbox"/> (10) Tutoring; <input type="checkbox"/> (11) Sensitivity training; <input type="checkbox"/> (12) Parental responsibility; <input type="checkbox"/> (13) Community service; <input type="checkbox"/> (14) Restitution; <input type="checkbox"/> (15) Advocacy; and <input type="checkbox"/> (16) A mentoring program. | |
| <ul style="list-style-type: none"> <input type="checkbox"/> e. If the program involves the expenditure of municipal or county funds, it must be approved by the governing body of the municipality or county commissioners court. | <p>Art. 45.057(b)(2), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> f. The court may not order a parent, managing conservator, or guardian of a child to pay an amount greater than \$100 for the costs of the program. | <p>Art. 45.057(c), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> g. The court may require that a person required to attend this program submit proof of attendance to the court. | <p>Art. 45.057(d), C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> h. A municipal or justice court shall endorse on the summons issued to a parent, managing conservator, or a guardian an order to personally appear at the hearing with the child. | <p>Art. 45.057(e), C.C.P.</p> |

- i. An order under this section involving a child is enforceable as contempt under Article 45.050, C.C.P.

Art. 45.057(f), C.C.P.
See Checklist 13-28.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

16. Difficulty or Default in Payment of Fine

Checklist 13-16	Script/Notes
<p><input type="checkbox"/> 1. If the defendant notifies the judge that the defendant has difficulty paying the fine and costs in compliance with the judgment, the judge shall hold a reconsideration hearing to determine whether the judgment imposes an undue hardship on the defendant. The defendant may notify the judge by voluntarily appearing in court, filing a motion, mailing a letter, or any other method established by the judge.</p> <p><input type="checkbox"/> a. If the judge determines at the reconsideration hearing that the judgment imposes an undue hardship on the defendant, the justice or judge shall consider whether to allow the defendant to satisfy the fine and costs through one or more methods listed under Article 45.041(a-1).</p> <p><input type="checkbox"/> b. The judge may decline to hold a reconsideration hearing if the judge:</p> <p><input type="checkbox"/> (1) previously held a hearing under that subsection with respect to the case and is able to determine without holding a hearing that the judgment does not impose an undue hardship on the defendant; or</p> <p><input type="checkbox"/> (2) is able to determine without holding a hearing that the judgment imposes an undue hardship on the defendant and the fine and costs should be satisfied through one or more methods listed under Article 45.041(a-1).</p> <p><input type="checkbox"/> c. The justice or judge retains jurisdiction for the purpose of making a determination under this article.</p>	<p>Art. 45.0445, C.C.P.</p> <p>This reconsideration hearing was created by the Legislature in 2019, and judges may allow a defendant to appear by telephone or videoconference if a personal appearance would impose an undue hardship. Arts. 45.0201 and 45.0445, C.C.P.</p>

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| <p><input type="checkbox"/> 2. Default in payment of fines</p> <p><input type="checkbox"/> a. In no event, after conviction or plea of guilty and imposition of fine, may a juvenile offender be committed to any jail in default of payment of any fine or costs.</p> <p><input type="checkbox"/> b. The court may consider contempt when a child fails to pay a fine or violates a court order. (These rules apply even if the child has turned age 17 before the contempt hearing is conducted, or if the child turned age 17 and then failed to pay.)</p> <p><input type="checkbox"/> c. Court must schedule a contempt hearing and give the child an opportunity to be heard.</p> <p><input type="checkbox"/> d. Court may waive payment of all or part of a fine imposed on a defendant who defaults in payment if the court determines that:</p> <p style="padding-left: 20px;"><input type="checkbox"/> (1) Defendant is indigent or was, at the time the offense was committed, a child; and</p> <p style="padding-left: 20px;"><input type="checkbox"/> (2) Discharging the fine through community service or tutoring would impose an undue hardship on the defendant.</p> <p><input type="checkbox"/> e. Court may waive of all or part of the costs imposed if the court determines that:</p> <p style="padding-left: 20px;"><input type="checkbox"/> (1) Defendant is indigent or does not have sufficient income to pay all or part of the costs; or</p> <p style="padding-left: 20px;"><input type="checkbox"/> (2) Defendant was a child (under 17) at the time the offense was committed.</p> | <p>Art. 45.050, C.C.P.</p> <p>Art. 45.050, C.C.P.</p> <p>Article 45.045(b)(3), C.C.P., requires courts to proceed under Article 45.050, C.C.P., to compel the person to discharge the judgment before issuing a <i>capias pro fine</i>. See Checklist 13-22.</p> <p>Art. 45.050(c), C.C.P.
See Checklist 13-28 for contempt procedures.</p> <p>Art. 45.0491(a), C.C.P.</p> <p>Art. 45.0491(d), C.C.P.</p> |
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CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

17. Failure to Appear

Checklist 13-17	Script/Notes
<p><input type="checkbox"/> 1. A justice or municipal court may not order the confinement of a child for the failure to appear for an offense committed by the child.</p>	<p>Art. 45.050, C.C.P.</p>
<p><input type="checkbox"/> 2. If the parent(s) does not appear:</p> <p><input type="checkbox"/> a. Determine if the parent(s) has been served with a summons. If not, reset the case.</p> <p><input type="checkbox"/> b. If the parent(s) has been served with a summons but failed to appear, the court may waive the requirement of the presence of the parents, guardian, or managing conservator if, after diligent effort, the court cannot locate them or compel their presence.</p> <p><input type="checkbox"/> c. If the parent(s) was served with a summons, the prosecutor may charge the parent(s) with a Class C misdemeanor for failure to appear in court with child. (Maximum fine \$500).</p>	<p>If the court waives this requirement, the court should document the actions taken in an effort to compel the parent's presence in the defendant's file.</p> <p>Arts 45.0215(d), C.C.P. and 45.057(g), C.C.P.</p>
<p><input type="checkbox"/> 3. If child does not appear for a traffic offense, the court shall:</p>	
<p><input type="checkbox"/> a. Report to the Department of Public Safety any minor charged with a traffic offense who does not appear.</p>	<p>Sec. 521.3452, T.C.</p>
<p><input type="checkbox"/> b. A court that has filed a report under this section shall report to the Department of Public Safety on final disposition of the case.</p>	<p>Sec. 521.3452, T.C.</p>
<p><input type="checkbox"/> 4. If a child fails to appear for any offense other than traffic, the court may:</p>	
<p><input type="checkbox"/> a. Report to the Department of Public Safety any minor charged with an offense other than traffic who does not appear.</p>	<p>Secs. 521.201 and 521.294, T.C.</p>

- b. A court that has filed a report under this section shall report to the Department of Public Safety on final disposition of the case.
- 5. General procedure when a child fails to appear:
 - a. A court should issue an order for nonsecure custody for the child.

Secs. 521.201 and 521.294, T.C

Arts. 45.058 and 45.059, C.C.P.

Article 45.060, C.C.P., requires the court to have used all available procedures in Chapter 45 to secure the appearance of the child before issuing a warrant of arrest when the child turns age 17.

See Checklist 13-19 for nonsecure custody.

See Checklist 13-21 for information regarding a juvenile who has failed to appear and then turns age 17.

- b. The child may be held in the nonsecure facility only long enough to accomplish the purpose of:
 - (1) Identification;
 - (2) Investigation;
 - (3) Processing;
 - (4) Release to parents; or
 - (5) The arranging of transportation to the appropriate juvenile court, juvenile detention facility, municipal court, or justice court.
- c. Residential use of the area is prohibited.
- d. The child shall be under continuous visual supervision by a law enforcement officer or facility staff person during the time the child is in nonsecure custody.
- e. The child may not be detained in a place of nonsecure custody for more than six hours.
- 4. A child taken into custody for an offense that a municipal court has jurisdiction of may be released to the child's parent, guardian, custodian, or other responsible adult as provided in Section 52.02(a) (1), F.C.
- 5. A child cannot be incarcerated for contempt. For details about contempt for juveniles see Checklists 13-17, 13-22, and 13-28.
- 6. If the judge sees the child, the judge may handle all charges against the child.

Art. 45.058, C.C.P.

- d. A juvenile curfew processing office may not be designated or intended for residential purposes.
 - e. The person must be under continuous visual supervision by a peace officer or other person during the time the person is in the juvenile curfew processing office.
 - f. A person may not be held in a juvenile curfew processing office for more than six hours.
3. A juvenile curfew office, if so designated, may also be used as a place of nonsecure custody for children taken into custody for:
- a. Traffic offenses;
 - b. Other fine-only misdemeanor offenses; or
 - c. A status offense.

Beware that Section 370.002, L.G.C., requires review, public hearings, and reenactment of curfew ordinances no less than every three years.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

20. Unadjudicated Children, Now Adults (No Appearance Made)

Checklist 13-20	Script/Notes
<p><input type="checkbox"/> 1. Procedures when child turns age 17:</p> <p><input type="checkbox"/> a. Court issues a notice of continuing obligation to appear by personal service or by mail to the last known address and residence of the individual. Notice contains an order to appear.</p> <p><input type="checkbox"/> b. Court gives notice to a peace officer to serve either in person or by mail at the last known address on file with the court.</p> <p><input type="checkbox"/> c. If child now an adult appears:</p> <p><input type="checkbox"/> (1) Court proceeds to handle all cases filed against the 17 year old.</p> <p><input type="checkbox"/> (2) Court should explain charges, pleas, and rights.</p> <p><input type="checkbox"/> d. The child now an adult fails to appear in response to the notice and order to appear.</p> <p><input type="checkbox"/> (1) Prosecutor files a sworn complaint charging the offense of Violation of Continuing Obligation to Appear (VCOA) as ordered by the notice. (Not to be confused with Section 38.10, P.C., offense of Failure to Appear.)</p>	<p>An individual may not be taken into secured custody for offenses alleged to have occurred before the individual's 17th birthday except an individual under the age of 17 may be taken into nonsecure custody as allowed by Articles 45.058 and 45.059, C.C.P.</p> <p>Art. 45.060, C.C.P.</p> <p>Art. 45.202, C.C.P. If defendant is convicted and peace officer served notice, court must assess \$35 reimbursement fee under Art. 102.011, C.C.P.</p> <p>See Checklist 13-1. See Chapter 4 in this book.</p> <p>Sec. 45.060(c), C.C.P.</p>

- (2) Court orders a warrant prepared for issuance only for the VCOA as ordered by the notice. (Court must also have a probable cause affidavit before issuing the warrant.)

- 2. Procedures when child now an adult is arrested:
 - a. Court should explain charges, pleas, and rights.

 - b. Court proceeds to handle all cases filed against the 17 year old, including all the cases that were filed while the individual was under the age of 17.

 - c. For the penalties, see the applicable Checklist for that offense in this chapter.

Court may not issue warrants on the charges filed while the individual was under the age of 17. Art. 45.060, C.C.P.

When a warrant is processed or served by a peace officer, the court must assess a \$50 warrant reimbursement fee. Art. 102.011, C.C.P.

See Checklist 13-1.
See Chapter 4 in this book.

It is an affirmative defense to prosecution for the charge of violation of continuing obligation to appear as ordered by the notice if the individual was not informed of the individual's obligation to notify the court of a current address within seven days of moving. Art. 45.060(d), C.C.P.

If the individual fails to pay, see Checklist 13-22.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

21. Children Now Adults Who Fail to Pay

Checklist 13-21	Script/Notes
<p><input type="checkbox"/> 1. When a child now an adult (at least age 17) fails to pay:</p> <p><input type="checkbox"/> a. A capias pro fine may not be issued for an individual convicted for an offense committed before the individual’s 17th birthday unless:</p> <p><input type="checkbox"/> (1) The individual is 17 years of age or older;</p> <p><input type="checkbox"/> (2) The court finds that the issuance of the capias pro fine is justified after considering:</p> <p><input type="checkbox"/> (a) The sophistication and maturity of the individual;</p> <p><input type="checkbox"/> (b) The criminal record and history of the individual; and</p> <p><input type="checkbox"/> (c) The reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court; and</p> <p><input type="checkbox"/> (3) The court has proceeded under Article 45.050, C.C.P., to compel the individual to discharge the judgment.</p> <p><input type="checkbox"/> 2. If the court finds that the issuance of a capias pro fine is not justified, the court may still issue an order for nonsecure custody for the child who is now an adult.</p>	<p>Art.45.045(b), C.C.P.</p> <p>Art 45.045(b)(1), C.C.P.</p> <p>Art. 45.045(b)(2), C.C.P.</p> <p>Art. 45.045(3), C.C.P. See Checklist 13-17.</p> <p>Art. 45.045(c), C.C.P. See Checklist 13-19.</p>

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Expunction

22. Expunction Under Article 45.0216, C.C.P.

Checklist 13-22	Script/Notes
<p><input type="checkbox"/> 1. Determine if the offense is covered by Article 45.0216, C.C.P.</p> <p><input type="checkbox"/> a. Article 45.0216, C.C.P., applies to offenses described by Sections 8.07(a)(4) and (5) and 43.261, P.C.</p> <p><input type="checkbox"/> b. These offenses include Penal Code offenses and Education Code offenses except failure to attend school, and penal ordinance offenses.</p>	<p>Art. 45.0216(b), C.C.P.</p> <p>Art. 45.0216(g)(1), C.C.P. Transportation Code offenses and traffic ordinances are an exception to this expunction provision.</p> <p>Article 45.0216, C.C.P., does not apply to status offenses under the Alcoholic Beverage Code. They have a separate provision in Section 106.12, A.B.C. See Checklist 13-24.</p> <p>Art. 45.0216, C.C.P., does not apply to status offenses under the Health and Safety Code. They have a separate provision in Section 161.252, H.S.C. See Checklist 13-25.</p> <p>Article 45.0216, C.C.P., does not apply to the Failure to Attend School offense. It has a separate provision in Article 45.0541, C.C.P. See Checklist 13-15.</p>
<p><input type="checkbox"/> 2. Article 45.0216, C.C.P., applies also to a conviction and dismissal pursuant to Article 45.051 (deferred disposition) or Article 45.052 (teen court) for offenders under the age of 17.</p>	<p>Art. 45.0216(h), C.C.P.</p>
<p><input type="checkbox"/> 3. All eligible offenders, and any parents, must be informed in open court of their rights and provided with a copy of Article 45.0216, C.C.P.</p>	<p>Art. 45.0216(e), C.C.P. “You have the right to request the court to expunge the offense of _____.”</p> <p>Here is a copy of the law regarding your right to expunction. Please take time to read this information.”</p>

- 4. Eligibility requirements:
 - a. Defendant must not have been convicted of more than one offense covered by these provisions;
 - b. Defendant must be at least 17 years of age; and
 - c. Offense must have been committed before turning 17.

- 5. Procedures are instigated by request of the defendant:
 - a. In writing;
 - b. Identifying the case to be expunged;
 - c. Stating that the person has not been convicted of another offense under these provisions; and
 - d. Made under oath.

- 6. The court shall require a person who requests expunction under this article to pay a reimbursement fee in the amount of \$30 to defray the cost of notifying state agencies of orders of expunction.

- 7. The provisions do not require notice or a hearing.

- 8. If the court finds the person was not convicted of any other covered offense while the person was a child, the court shall order the following items expunged:
 - a. Conviction;
 - b. Complaints;
 - c. Verdicts;
 - d. Sentences;
 - e. Prosecutorial records;

Art. 45.0216(i), C.C.P.

Art. 45.0216(f), C.C.P.

- f. Law enforcement records; and
- g. Any other documents related to the offense.
- 9. Order the appropriate entities to return the relevant records to the court or to destroy them.

- 10. Give the order to the clerk to serve on the appropriate entities.
- 11. Destroy the records and delete computer references.
- 12. Further order that the person is released from all disabilities resulting from the conviction and that the conviction may not be shown or made known.
- 13. Provide a copy of the order to the movant/defendant.
- 14. Seal the order and make no computer or index reference to it.

The order should contain a list of agencies, officials, and persons who are subject to the order. The clerk sends by certified mail/return receipt a copy of the order to all that are subject to the order.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Expunction

23. Expunction for State Offenses Under the Alcoholic Beverage Code

Alcoholic Beverage Code offenses have their own expunction provision and are specifically excluded from the general juvenile expunction procedures in Article 45.0216, C.C.P.

Checklist 13-23	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Eligibility requirements: <ul style="list-style-type: none"> <input type="checkbox"/> a. Must be at least 21 years of age; <input type="checkbox"/> b. Must have been convicted of or arrested for (and not convicted) only one Alcoholic Beverage Code Offense; and <input type="checkbox"/> c. Must pay a reimbursement fee in the amount of \$30 to defray the cost of notifying state agencies of orders of expunction. <input type="checkbox"/> 2. Must file an application with the court requesting expunction. <ul style="list-style-type: none"> <input type="checkbox"/> a. The application shall contain the applicant’s sworn statement that he or she was not convicted of any violation of this code except for the one that he or she seeks to have expunged; or <input type="checkbox"/> b. The application must contain the applicant’s sworn statement that the applicant was not arrested for a violation of this code other than the arrest the applicant seeks to expunge. <input type="checkbox"/> 3. The court may, but does not have to, conduct a hearing in open court. The court, upon finding that the applicant’s statement is true (statement that they had only one conviction or arrest), shall prepare an order that requires all disabilities resulting from the conviction be removed from the applicant’s record. 	<p>Sec. 106.12, A.B.C.</p>

- 4. Order the appropriate entities to return the relevant records to the court or to destroy them.
- 5. Give the clerk the order to serve.
- 6. Destroy the records and delete computer references.
- 7. Further order that the person is released from all disabilities resulting from the conviction and that the conviction may not be shown or made known.
- 8. Provide a copy of the order to the movant/defendant.
- 9. Seal the order and make no computer or index reference to it.

The order should contain a list of agencies, officials, and persons who are subject to the order. The clerk sends by certified mail/return receipt a copy of the order to all that are subject to the order.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Expunction

24. Expunction of Status Tobacco Offenses

Checklist 13-24	Script/Notes
<p><input type="checkbox"/> 1. An individual convicted for an offense under Section 161.252, H.S.C., may apply to court to have conviction expunged.</p> <p><input type="checkbox"/> a. Defendant must apply to court on or after the individual’s 21st Birthday;</p> <p><input type="checkbox"/> b. Court must find defendant satisfactorily completed tobacco awareness program or tobacco-related community service ordered by the court; and</p> <p><input type="checkbox"/> c. The court shall require a person who requests expunction under this article to pay a fee in the amount of \$30 to defray the cost of notifying state agencies of orders of expunction.</p> <p><input type="checkbox"/> 2. If above satisfied, court shall order that the conviction may not be shown or made known for any purpose and order the following expunged from the record:</p> <p><input type="checkbox"/> a. Conviction;</p> <p><input type="checkbox"/> b. Complaint;</p> <p><input type="checkbox"/> c. Verdict;</p> <p><input type="checkbox"/> d. Sentence; and</p> <p><input type="checkbox"/> e. Any other document relating to the offense.</p> <p><input type="checkbox"/> 3. Mail certified copies of order to:</p> <p><input type="checkbox"/> a. Alcohol awareness course provider; or</p>	<p>Sec. 161.255, H.S.C.</p> <p>There is no requirement that defendant have only one conviction under Section 161.252 to qualify for expunction.</p> <p>General expunction procedures found in Article 45.0216, C.C.P., do not apply to tobacco violations</p>

- b. Community services provider; and
- c. Chief of your city's police department.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Expunction

25. Expunction Procedures for Truancy Offenses

H.B. 2398 (84th Legislature) repealed the offense of Failure to Attend School along with former Articles 45.054 and 45.055 of the Code of Criminal Procedure related the expunction of Failure to Attend School offenses. The new Article 45.0541, C.C.P., provides that an individual who has been convicted of the former offense of Failure to Attend School, or who has had a complaint dismissed, is entitled to an expunction, regardless whether the person petitions for the expunction. No expunction fee authorized.

Checklist 13-25	Script/Notes
<p><input type="checkbox"/> 1. An individual who has been convicted of a truancy offense or has had a complaint for a truancy offense dismissed is entitled to have the conviction or complaint and records relating to the conviction or complaint expunged.</p>	<p>A “truancy offense” means a Failure to Attend School offense. Art. 45.0451(a), C.C.P.</p>
<p><input type="checkbox"/> 2. A petition for expunction is not required.</p>	<p>Art. 45.0451(c), C.C.P.</p>
<p><input type="checkbox"/> 3. A court in which an individual was convicted or a complaint for a truancy offense was filed shall order the following related to the offense to be expunged from the person’s record:</p> <p><input type="checkbox"/> a. Convictions;</p> <p><input type="checkbox"/> b. Complaints;</p> <p><input type="checkbox"/> c. Verdicts;</p> <p><input type="checkbox"/> d. Sentences;</p> <p><input type="checkbox"/> e. Prosecutorial records;</p> <p><input type="checkbox"/> f. School Records;</p> <p><input type="checkbox"/> g. Any other documents relating to the offense.</p>	<p>Art. 45.0451(c), C.C.P.</p>
<p><input type="checkbox"/> 4. After entry of the order, the individual is released from all disabilities resulting from the conviction or complaint, and the conviction or complaint may not be shown or made known for any purpose.</p>	<p>Art. 45.0451(c), C.C.P.</p>

- b. A criminal justice agency for criminal justice purposes;
- c. The Department of Public Safety;
- d. An attorney for a party to the proceeding;
- e. The child defendant; or
- f. The defendant's parent, guardian, or managing conservator.

Sec. 411.082, G.C.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

27. Juvenile Contempt

Article 45.050, C.C.P. gives municipal and justice courts two distinct options when dealing with children who do not comply with court orders. The first option is to refer the child to juvenile court for delinquent conduct. Art. 45.050(c)(1). The second option is to retain the matter and proceed to conduct a contempt hearing. Art. 45.050(c)(2).

Checklist 13-27	Script/Notes
<p><input type="checkbox"/> 1. Court gives the child notice of the hearing.</p>	<p>Art. 45.050(c), C.C.P.</p>
<p><input type="checkbox"/> 2. Court issues a summons for the parent(s) to appear with the child.</p> <p><input type="checkbox"/> a. If the child appears, court conducts a hearing; and</p> <p><input type="checkbox"/> b. Parent(s) must appear with child. If summons has been served and parent fails to appear, court may waive presence of parent; if summons has not been served, reset hearing.</p>	<p>Art. 45.0215(a)(2)(B), C.C.P.</p>
<p><input type="checkbox"/> 3. Hearing is informal. Explain to the child why the court is conducting the hearing, the consequences of waiving jurisdiction, and the consequences of retaining jurisdiction.</p>	<p>“If I determine that your actions constitute contempt and I decide to keep jurisdiction over you, I can assess a fine of up to \$500. This is in addition to the fines that you still owe this court. Also, I can order the Texas Department of Public Safety to suspend or deny issuance of your driver’s license until you have completely complied with all of this court’s orders.”</p> <p>“If I decide to transfer you to the juvenile court, this conduct is considered delinquent conduct by the juvenile court.”</p>
<p><input type="checkbox"/> 4. Court decides whether to transfer the child to juvenile court or to retain jurisdiction.</p>	<p>Art. 45.050(c)(1), C.C.P.</p>

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| <p><input type="checkbox"/> a. If the court transfers the child to juvenile court, further action against the child ceases in municipal court. (The child is still liable for payment of the fine on the original charge(s).)</p> <p><input type="checkbox"/> b. If the court retains jurisdiction, the court may:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Find the child in contempt and order the child to pay a fine of up to \$500; and/or</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) Order DPS to suspend or deny issuance of the child's driver's license.</p> <p><input type="checkbox"/> 5. If the child turns age 17 before paying the fine, see Checklist 13-22.</p> | <p>Art. 45.050(c)(1), C.C.P.
The court may not refer to the juvenile court a child who has turned age 17 by the time that the municipal court conducts the contempt hearing. Art. 45.050(g), C.C.P.</p> <p>Art. 45.050(c)(2)(A), C.C.P.
Court may not find a child in contempt of another court's order.</p> <p>Art. 45.050(c)(2)(B), C.C.P.</p> <p>Art. 45.045, C.C.P.</p> |
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CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Magistrate’s Warning for a Written or Oral Juvenile Confession of a Child, Section 51.095, Family Code

28. Written Confession

Checklist 13-28	Script/Notes
<input type="checkbox"/> 1. Identify yourself to the child.	“My name is _____. I am the Judge of _____ Court.”
<input type="checkbox"/> 2. Determine if the child sufficiently understands the English language or possesses any impairments.	
<input type="checkbox"/> 3. If necessary, swear a person to act as an interpreter.	Art. 38.30, C.C.P.
<input type="checkbox"/> 4. If the child is deaf, obtain the services of an interpreter as provided by Article 38.31, C.C.P., to interpret the warning.	Art. 15.17(c), C.C.P. See Checklist 12-5.
<input type="checkbox"/> 5. All activities must take place in a setting approved by the juvenile board. This means the juvenile processing office, or the office or official designated by the juvenile court as required in Section 52.02, F.C.	A “juvenile processing office” should not be confused with the “juvenile curfew processing office” found in Article 45.059, C.C.P., or a “place of nonsecure custody” described in Article 45.058, C.C.P.
<input type="checkbox"/> a. Be sure that you know the policy set out by your local juvenile court or juvenile board as to where a child might be taken for receipt of a statement.	
<input type="checkbox"/> 6. Advise the child of the following warning:	Sec. 51.095(a)(1)(A), F.C.
<input type="checkbox"/> a. “You may remain silent and not make any statement at all and that any statement that you make may be used in evidence against you.”	
<input type="checkbox"/> b. “You have the right to have an attorney present to advise you either prior to any questioning or during the questioning.”	

- c. “If you are unable to employ an attorney, you have the right to have an attorney appointed to counsel with you before or during any interviews with peace officers or attorneys representing the State.”

- d. “You have the right to terminate the interview at any time.”

- 7. Advise the child as follows:
 - a. “You will not be penalized for not making a statement.”
 - b. “Any prior oral statements made by you are not admissible except if the statement contains assertions of facts or circumstances that are found to be true, and which tends to establish your guilt.”

- 8. Sign the written warning noting the date and time.

- 9. After the statement is reduced to writing, a magistrate must again give a proper warning to the child before the written statement is signed by the juvenile in the presence of the magistrate.

- 10. No law enforcement official or prosecuting attorney can be present except that a magistrate may require a bailiff or law enforcement officer to be present to ensure the safety of the magistrate and other court personnel. The bailiff or law enforcement officer may not carry a weapon in the presence of the child.

- 11. The magistrate must certify in writing that he or she is convinced that the child understands the nature and contents of the statement and signs it voluntarily.

When an attorney is requested, a police officer must stop asking the accused questions until he is provided with an attorney. However, a request for counsel must be sufficiently clear that a reasonable police officer would understand the statement to be a request for an attorney. *Stanley v. State*, 2015 Tex. App. LEXIS 767 (Tex. App. San Antonio 2015).

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Magistrate’s Warning for a Written or Oral Juvenile Confession of a Child, Section 51.095, Family Code

29. Oral Confession

Checklist 13-29	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Comply with items 1–7 in Checklist 13-28. <input type="checkbox"/> 2. The warning must be part of the recording. <input type="checkbox"/> 3. At the time of the warning, the magistrate may require that the officer return the child and the recording to the magistrate at the conclusion of questioning. <ul style="list-style-type: none"> <input type="checkbox"/> a. The magistrate may then view the recording with the child or have the child view the recording in order to determine whether the child’s statement was given voluntarily. <input type="checkbox"/> b. The magistrate’s determination of voluntariness must be reduced to writing and signed and dated by the magistrate. <input type="checkbox"/> c. If a magistrate invokes Section 51.095(f), F.C., a child’s confession is not admissible unless the magistrate determines that statement was given voluntarily. <input type="checkbox"/> 4. The child must knowingly and voluntarily waive each right stated in the warning. <input type="checkbox"/> 5. The recording device must be capable of making an accurate recording. <input type="checkbox"/> 6. The operator of the device must be competent to use the device. 	<p>Sec. 51.095(a)(5)(A), F.C.</p> <p>Sec. 51.095(f), F.C.</p> <p>Note: While subsection (f) is discretionary, magistrates should be prepared to explain why they did or did not invoke the option.</p> <p>See <i>TMCEC 2020 Forms Book: Magistrate’s Determination of Voluntariness – Recorded Statement of Child.</i></p>

CONTEMPT OF COURT

CHAPTER 14 CONTEMPT OF COURT

1. General Contempt

The contempt power of the court should be used sparingly. A person accused of contempt has the rights of a criminal defendant, regardless of whether the contempt is considered civil or criminal (discussed below). A more thorough discussion of contempt of court is contained in Chapter 6 of TMCEC *The Municipal Judges Book*. **Juvenile contempt under Article 45.050, C.C.P., is covered in Checklist 13-27.**

Checklist 14-1	Script/Notes
<p>Definitions:</p> <p>“Contemnor” is a person held in contempt.</p> <p>“Contempt”: Although there is no statutory definition of contempt, common law defines it as conduct that tends to impede the judicial process by disrespectful or uncooperative behavior in open court or by unexcused failure to comply with clear court orders.</p> <p><input type="checkbox"/> 1. Contempt can be direct or indirect.</p> <p><input type="checkbox"/> 2. “Direct contempt” is an act which occurs in the judge’s presence and under circumstances that require the judge to act immediately to quell the disruption, violence, disrespect, or physical abuse. “Presence of the court” does not necessarily mean in the immediate presence of the judge or court. Examples of direct contempt may include:</p> <p><input type="checkbox"/> a. A physical altercation occurring at the door of the courtroom although the court was not able to see the physical act itself;</p> <p><input type="checkbox"/> b. Disruptive act or event in the courtroom or just outside the courtroom while court is in session;</p> <p><input type="checkbox"/> c. Refusal to rise on the entrance and exit of the judge;</p> <p><input type="checkbox"/> d. Tampering with jurors in the jury room;</p> <p><input type="checkbox"/> e. An abusive letter delivered to the judge in chambers while trial was in short recess; or</p>	<p><i>Ex parte Norton</i>, 191 S.W.2d 713 (Tex. 1946).</p> <p><i>Ex parte Chambers</i>, 898 S.W.2d 257 (Tex. 1995).</p> <p><i>Ex parte Knable</i>, 818 S.W.2d 811 (Tex. Crim. App. 1991).</p> <p><i>Ex parte Daniels</i>, 722 S.W.2d 707 (Tex. Crim. App. 1987).</p> <p><i>Ex parte Aldridge</i>, 334 S.W.2d 161 (Tex. Crim. App. 1959).</p> <p><i>Ex parte Krupps</i>, 712 S.W.2d 144 (Tex. Crim. App. 1986).</p>

- f. Refusal to answer questions in court.

Note that an affront to a judge’s personal sensibilities should not be confused with obstruction to the administration of justice. Offensive comments, even though spoken in open court, are not contemptuous unless they are disruptive or boisterous.

- 3. In many instances, direct contempt is punished summarily by the offended court at the time the act occurs. However, there is no requirement that direct contempt be punished immediately; a judge has discretion to set the matter for hearing at a later time.

The trial court’s authority to punish contemptuous conduct summarily requires an act which occurs in the judge’s presence and under circumstances that require the judge to act immediately to maintain order. If the contemnor can be afforded due process protections without disrupting the orderly trial process, the Due Process Clause of the 14th Amendment mandates that the contemnor should be afforded these protections.

- 4. “Indirect contempt” is an act that occurs outside the court’s presence. Examples of indirect contempt include:

- a. Failure to comply with a valid court order.
- b. Failure to appear in court.
- c. Attorney being late for trial.
- d. Offensive papers filed in court.

- 5. Indirect contempt requires the contemnor to be notified of the charges, the right to trial or hearing in open court, and the right to counsel.

- 6. Contempt can be civil or criminal:

Ex parte Flournoy, 312 S.W.2d 488 (Tex. 1958).

In re Bell, 894 S.W.2d 119 (Tex. 1995).

See *Ex parte Knable*, 818 S.W.2d 811 (Tex. Crim. App. 1991).

Ex parte Gordon, 584 S.W.2d 686 (Tex. 1979).

Ex parte Cooper, 657 S.W.2d 435 (Tex. Crim. App. 1983).

Ex parte Hill, 52 S.W.2d 367 (Tex. 1932).

Ex parte O’Fiel, 246 S.W. 664 (Tex. Crim. App. 1923).

See *TMCEC 2020 Forms Book* for five different show cause notices in Chapter XIV, Enforcement.

Civil contempt is willfully disobeying a court order or decree.

Criminal contempt is an act that disrupts court proceedings, obstructs justice, is directly against the dignity of the court, or brings the court into disrepute.

- ☐ 7. Statutory authority for contempt proceedings.
 - ☐ a. In municipal courts, contempt is generally punishable by up to three days confinement in jail and/or a fine up to \$100.
 - ☐ b. Some statutes provide for specific contempt fines and do not allow confinement in jail:
 - ☐ (1) Failure by sheriff or officer to execute summons, subpoena, or attachment is punishable for contempt by a fine of \$10 to \$200.
 - ☐ (2) Failure to appear for jury duty is punishable for contempt by a maximum fine of \$100.

- ☐ 8. Special procedures for officers of the court:

- ☐ a. Upon proper motion, release contemnor on personal recognizance bond.
- ☐ b. Refer case to the presiding judge of the administrative district where alleged contempt occurred.

Ex parte Powell, 883 S.W.2d 775 (Tex. App.—Beaumont 1994).

See Step 15: Sentencing Goals.

Sec. 21.002(c), G.C.

Art. 2.16, C.C.P.

Art. 45.027(c), C.C.P.
 See *TMCEC 2020 Forms Book: Contempt: Failure to Appear for Jury Service (Complaint and Judgment)*.

Officers of the court include attorneys, peace officers, clerks, bailiffs, court reporters, interpreters, and others on whom the court relies for its operation and enforcement of its orders. Note: the defendant and witnesses are not officers of the court.

Sec. 21.002(d), G.C.

The presiding judge will assign a judge to conduct a contempt hearing. (You may be called as a witness.)

- c. An officer of the court is essentially entitled to a trial de novo on request.
- d. An attorney may be held in direct contempt primarily for misconduct at trial:
 - (1) Expressing indifference to what court may hold or do on account of his or her improper remarks and misconduct.
 - (2) Making continuous frivolous objections amounting to obstruction of the orderly progress of the trial.
- 9. Determine whether act constitutes direct or indirect contempt.
 - a. Direct contempt:
 - (1) Act occurred in the presence of the court or in its immediate vicinity while the court was in session. Judge is aware of all facts constituting contempt.
 - (2) Immediate action is necessary to quell disruption, violence, disrespect, or to allow trial or proceeding to continue.
 - b. Indirect contempt:
 - (1) Act occurred outside the presence of the court. Judge does not personally witness act.
 - (2) Immediate action is not required to quell disruption, violence, disrespect, or physical abuse.
 - (3) Act requires testimony or production of evidence to establish its existence.

Ex parte Avila, 659 S.W.2d 443 (Tex. Crim. App. 1983).

Ex parte Norton, 191 S.W.2d 713 (Tex. 1946).

Ex parte Crenshaw, 259 S.W.587 (Tex. Crim. App. 1924).

If both of these conditions are met, summary proceedings are authorized and you may go to Step 10: Direct Contempt Procedure below.

Due process requires notice and hearing. Go to Step 11: Indirect Contempt Procedure below.

<ul style="list-style-type: none"> <input type="checkbox"/> (4) Most common violation — disobeying a court order: <ul style="list-style-type: none"> <input type="checkbox"/> (a) Court order must be in effect at the time of the act; <input type="checkbox"/> (b) Contemnor must be aware of the order; and <input type="checkbox"/> (c) A written order must be served on the contemnor. 	
<ul style="list-style-type: none"> <input type="checkbox"/> 10. Direct contempt procedure: 	<p>See <i>TMCEC 2020 Forms Book: Judgment of Direct Contempt: Adult</i>.</p> <p>Example: Any act that disrupts court proceedings or offends the dignity of the court. Contemnor argues combatively, uses curse words or threatening acts.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> a. If the act is in disobedience to a court order or admonishment, and the contemnor disobeys or fails to cease the undesirable conduct: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Announce that contemnor is in contempt of court. <input type="checkbox"/> (2) Optional: Give contemnor opportunity to explain: <ul style="list-style-type: none"> <input type="checkbox"/> (a) If explanation is not accepted or if conduct persists, contempt exists. <input type="checkbox"/> (b) If explanation is accepted, no contempt. 	<p>Factors to consider: egregious conduct; danger if contemnor not immediately removed.</p> <p>Announce “You are in contempt of court.”</p> <p>Sec. 21.002(c), G.C.</p> <p>See Step 13 below.</p> <p>Skip rest of this section.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> 11. Indirect contempt procedure: 	<p>See <i>TMCEC 2020 Forms Book: Indirect Contempt: Adult</i>.</p>

- a. If disobedience to a court order is alleged, notice to contemnor must:
 - (1) Contain the order;
 - (2) Specify when and how contemnor was notified of the order;
 - (3) Specify contemnor’s alleged act in disobedience of the order;
 - (4) Specify when and where act occurred; and
 - (5) Specify that the act took place after the contemnor became aware of the order.
- b. Otherwise, notice must:
 - (1) Specify contemnor’s alleged contemptuous act; and
 - (2) Specify when and where act occurred.
- 12. Right to counsel:
 - a. Contemnor has right to have counsel represent him or her.
 - b. Appoint counsel to represent contemnor if:
 - (1) the contemnor is indigent; and
 - (2) jail time is imposed as part of contempt punishment.
- 13. Contempt Hearing for Direct Contempt:

See *TMCEC 2020 Forms Book* for contempt show cause notices in Chapter XIV, Enforcement.

Ex parte Goodman, 742 S.W.2d 536 (Tex. App.—Fort Worth 1987). Appointed counsel is not necessary for contempt punishment limited to fine-only sanctions under Arts. 2.16 and 45.027(c), C.C.P.

- a. An act of direct contempt occurring in the presence of the court generally requires neither notice nor hearing since there is no factual dispute concerning the contemptuous conduct. Contemnor may be convicted and sentenced for the direct contempt as it occurs.
- b. Summary punishment is permissible on the theory that immediate action is necessary to control courtroom proceedings. If the court postpones conviction and punishment until after the trial, for example, the justification for dispensing with due process requirements disappears.

14. Contempt hearing for indirect contempt:

- a. Since indirect contempt involves an offense not observed by the court, due process requires the contemnor to be given notice and hearing.
- b. If disobedience to a court order is alleged:
 - (1) Provide evidence contemnor was properly notified of the order;
 - (2) Provide evidence contemnor willfully disobeyed the order after notified of it; and
 - (3) Provide evidence for no satisfactory explanation or defense for disobedience.
- c. If court order not involved:
 - (1) Provide evidence contemnor committed the alleged act; and

Ex parte Krupps, 712 S.W.2d 144 (Tex. Crim. App. 1986).

See Step 15 below.

Ex parte Smith, 467 S.W.2d 411 (Tex. Crim. App. 1971). If a contemnor is summarily held in contempt, the fact that the court waits a day to enter the contempt order does not affect its validity.

Possible defenses include: court lacks personal or subject matter jurisdiction; order of court lacked clarity or specificity or was ambiguous; contemnor not given adequate notice; and order was not based on same acts set forth in charge of contempt.

- (2) Provide evidence for no satisfactory explanation or defense for act.
- d. Ensure contemnor’s constitutional rights are protected:
 - (1) Right to counsel;
 - (2) Right to confront and cross-examine witnesses;
 - (3) Privilege against self-incrimination;
 - (4) Protection against double jeopardy; and
 - (5) Right to public trial.

There is no right to trial by jury in most contempt hearings. Texas courts generally have the right to adjudicate contempt proceedings without a jury.

Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976).

Contemnor is entitled to a jury trial if the contempt is classified as a serious rather than petty offense. One factor in determining whether the offense should be treated as serious or petty is the amount of the fine imposed. The imposition of a minor fine does not elevate the offense from the classification of petty to a serious crime.

Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976).

15. Sentencing goals:

a. Civil Contempt.

Purpose of civil contempt is remedial and coercive in nature. Judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant.

Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976).

b. Criminal contempt (Punitive).

The sentence is not conditioned upon some promise of future performance because the contemnor is being punished by fine and imprisonment for some completed act that affronted the dignity and authority of the court.

Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976).

Examples: disruptive conduct that prevents trial from proceeding; attempting to bias jury panel by handing them pamphlets.

16. Order and commitment:

a. Describe the act found to be in contempt.

See *TMCEC 2020 Forms Book*: Judgment of Direct Contempt: Adult; and Judgment of Indirect Contempt: Adult.

b. If act was disobeying a court order:

- (1) Include written order or reduce verbal order to writing.
- (2) Specify when and how contemnor was notified of the order.
- (3) Specify that the act was in disobedience of the order.
- (4) State that the act was committed after contemnor was aware of the order.

c. Remedial sanction:

- (1) Specify exactly what contemnor must do to purge the contempt.
- (2) Order sheriff or chief of police to place person in jail.
- (3) If contemnor purges himself or herself of contempt, order his or her release.

No particular form is required for commitment. Directive that a person be placed in jail and detained may be contained in an authenticated copy of the court's order. *Ex parte Barnett*, 600 S.W.2d 252 (Tex. 1980).

d. Punitive Sanction:

- (1) Specify the punishment.
- (2) If jail time is part of punishment, order sheriff or chief of police to place contemnor in jail for specified time.
- (3) If fine is part of punishment, order contemnor to pay fine by a specific date.
- (4) If more than one act of contempt, specify a separate punishment for each act.

Normally, maximum punishment is three days and \$100. Check specific statutes; some authorize fine-only. See Arts. 2.16 and 45.027(c), C.C.P.

Punishment should be assessed for each act even if sentences run concurrently. If one punishment is assessed for multiple acts and one of those acts is not contempt, the entire judgment is void. *Ex parte Lee*, 704 S.W.2d 15 (Tex. 1986).

CORPORATIONS AND ASSOCIATIONS

<ul style="list-style-type: none"> <input type="checkbox"/> b. The corporation or association has until 10:00 a.m. on the Monday after the 20th day after service to answer. 	<p>Art. 17A.03 (a)(3), C.C.P.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> c. Service must be by a peace officer on the registered agent or a high managerial agent. 	<p>Arts. 17A.04 and 17A.05, C.C.P.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> d. No individual may be arrested upon a complaint filed against a corporation or association. 	<p>Art. 17A.03(b), C.C.P.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> 2. Appearance: 	<p>Arts. 17A.07(a) and 17A.06, C.C.P</p>
<ul style="list-style-type: none"> <input type="checkbox"/> a. The corporation or association must appear through counsel. 	
<ul style="list-style-type: none"> <input type="checkbox"/> (1) Appearance is for the purpose of entering a plea. 	
<ul style="list-style-type: none"> <input type="checkbox"/> (2) Ten full days must elapse after the day of appearance before the corporation may be tried. 	<p>.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> b. If a corporation or association does not appear in response to a summons, or appears but fails or refuses to plead: 	<p>Art. 17A.07(b), C.C.P.</p>
<ul style="list-style-type: none"> <input type="checkbox"/> (1) It is deemed to be present in person for all purposes; 	
<ul style="list-style-type: none"> <input type="checkbox"/> (2) The court shall enter a plea of not guilty on its behalf; and 	
<ul style="list-style-type: none"> <input type="checkbox"/> (3) The court may proceed with the trial, judgment, and sentencing. 	
	<p>This is the only instance in a criminal case where a defendant may be tried <i>in absentia</i>. Because a corporation or association cannot be taken into custody pursuant to Article 17A.03(b), C.C.P., it is presumed that such defendants cannot be charged with Failure to Appear (Sec. 38.10, P.C), which requires a showing that a person was lawfully released from custody.</p>

<ul style="list-style-type: none"><input type="checkbox"/> (b) Certified copies of the judgment, sentence, and complaint on which the judgment and sentence were based. <input type="checkbox"/> e. The benefits of adult probation laws shall not be available to corporations or associations.	<p>Art. 17A.08, C.C.P. This may be construed to include deferred disposition.</p>
<ul style="list-style-type: none"><input type="checkbox"/> 5. Enforcement of judgment:<ul style="list-style-type: none"><input type="checkbox"/> a. No individual may be arrested upon judgment or sentence entered against a corporation or association. <input type="checkbox"/> b. When the sentence against a defendant corporation or association is for fine and costs, it shall be discharged after:<ul style="list-style-type: none"><input type="checkbox"/> (1) The amount has been fully paid; <input type="checkbox"/> (2) The execution has been fully satisfied; or <input type="checkbox"/> (3) The judgment has been satisfied in any other manner.	<p>Art. 17A.03(b), C.C.P.</p> <p>Sec. 43.01, C.C.P.</p> <p>A municipal judge may order the fine and costs collected by execution against the defendant's property in the same manner as in a civil suit. Art. 45.047, C.C.P.</p>

EVIDENCE

CHAPTER 16 EVIDENCE

Evidence is something presented at trial to prove or disprove the existence of an alleged fact. *Black's Law Dictionary*. Not all facts, recollections, records, opinions, or physical items are evidence. Each of the mentioned proofs must meet certain legal standards before they can be called evidence. In determining whether an offered proof is evidence, the court determines if the proof meets the legal threshold of admissibility, but not whether the proof is conclusive, credible, believable, or true. The factual credibility of the evidence is determined by the fact finder after hearing all the evidence. Rule 104, T.R.E.

The most common form of evidence is oral statements of witnesses based on personal knowledge. In limited circumstance, evidence can be opinions of a witness. Evidence can also be physical items, such as records, photos, recordings, etc. Demonstrative evidence is proof offered as illustrations or explanations of the witness's recollections and perceptions. This includes physical demonstrations by the witness, drawings created during or before testimony, experiments, lists, items that are introduced that look like items observed by the witness, or any other item that demonstrates other properly introduced evidence.

1. When Do the Texas Rules of Evidence Apply?

Checklist 16-1	Script/Notes
<input type="checkbox"/> 1. The Rules of Evidence apply in all trials before the court or a jury. <ul style="list-style-type: none"> <input type="checkbox"/> a. They apply in all adversary hearings before the court except: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Preliminary hearings to determine if competency is an issue; <input type="checkbox"/> (2) Initial appearance before a magistrate for a hearing and setting of bail; <input type="checkbox"/> (3) Applications for search or arrest warrants; <input type="checkbox"/> (4) Pre-trial hearings on the admissibility of confessions or other evidence outside the presence of the jury; and/or <input type="checkbox"/> (5) Proceedings in a direct contempt determination. 	<p>Art. 45.011, C.C.P.</p> <p>Rule 101(e)(3)(B), T.R.E.</p> <p>Rule 101(e)(3)(C), T.R.E.</p> <p>Rule 101(e)(3)(E), T.R.E.</p> <p>Rules 101(e)(1 and 104(a), T.R.E.</p> <p>Rule 101(e)(3)(F), T.R.E. See Chapter 14 in this book.</p>

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|---|---------------------------|
| <p>❑ 2. The rules of privilege always apply. A right of privilege is the right to refuse to testify or answer certain questions. The privileges recognized by the Rules of Evidence, in addition to the constitutional privilege against self incrimination, include the following:</p> | |
| <p>❑ a. The lawyer-client privilege:</p> <p>Attorneys, their staff, clients of an attorney, and representatives of the client, may all refuse to disclose information concerning lawyer-client communications made pursuant to lawful representation.</p> | <p>Rule 503, T.R.E.</p> |
| <p>❑ b. The marital privilege:</p> | <p>Rule 504, T.R.E.</p> |
| <p>❑ (1) The spouse has a privilege not to take the stand, except in cases of domestic violence.</p> | <p>Art. 38.10, C.C.P.</p> |
| <p>❑ (2) The spouse can also refuse to answer questions concerning communications made during the marriage, unless they were made in furtherance of a crime or in cases of domestic violence. The marital communications privilege survives both death and divorce.</p> | |
| <p>❑ c. The clerical or confessor privilege.</p> | <p>Rule 505, T.R.E.</p> |
| <p>❑ d. There is no physician-patient privilege in criminal proceedings, except a limited privilege for those voluntarily seeking alcohol or drug abuse treatment.</p> | <p>Rule 509, T.R.E.</p> |
| <p>❑ c. The journalist’s qualified testimonial privilege in criminal proceedings.</p> | <p>Art. 38.11, C.C.P.</p> |
| <p>❑ 3. Certain information as well as certain communications are privileged:</p> | |
| <p>❑ a. A person’s vote in any election; and</p> | <p>Rule 506, T.R.E.</p> |

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| <ul style="list-style-type: none">❑ b. Privileges created by statutes that require certain records be kept, except where the privilege is asserted to conceal fraud.
❑ 4. Special statutory rules of evidence are used in hearings on sentencing or revocation. | <p>Rules 502, 507 (Trade Secrets), and 508 (Police Informants), T.R.E.</p>
<p>Art. 38.37, C.C.P. (Evidence of Extraneous Offenses or Acts)</p> |
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CHAPTER 16 EVIDENCE

2. Ways to Prove a Fact

Checklist 16-2	Script/Notes
<p><input type="checkbox"/> 1. Judicial notice:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Certain matters may be deemed by the court to be self-evident, well known, or conclusively proven so that the court can simply declare them established by “judicial notice” at the request of a party or on its own initiative.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. The court may take judicial notice when:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) A fact is “generally known in the jurisdiction;”</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) A fact is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;” or</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) The fact in issue is the existence or wording of a municipal or county ordinance or other such government regulation, provided the movant present the court with a proper copy of such ordinance.</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. The court must allow both sides to be heard when taking judicial notice.</p> <p><input type="checkbox"/> 2. By the testimony of competent witnesses.</p> <p><input type="checkbox"/> 3. By the introduction of properly predicated and introduced records or other physical evidence.</p> <p><input type="checkbox"/> 4. Arguments by attorneys, parties, witnesses, or any statements by others not sworn and examined are not evidence and not to be considered by the fact finder as evidence.</p> <p><input type="checkbox"/> 5. Plea bargains, plea negotiations, and plea discussions are not admissible.</p>	<p>Rule 201(c) and (d), T.R.E.</p> <p>Rule 201(b), T.R.E.</p> <p>Rule 204, T.R.E.</p> <p>Rules 201(e) and 204, T.R.E.</p> <p>See Rule 601, T.R.E., concerning competency of witnesses.</p> <p>Rule 410, T.R.E.</p>

CHAPTER 16 EVIDENCE

3. How Objections are Made and Ruled on by the Court

Checklist 16-3	Script/Notes
<p><input type="checkbox"/> 1. Objections:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Objections must be made by a party. Objections can never be made by a witness or the court. <input type="checkbox"/> b. The objection is made to the court and not to the opposing party, witness, or jury. <input type="checkbox"/> c. The objection should be respectful and not argumentative. <input type="checkbox"/> d. The objection should be timely made. The objection must be made when the objectionable question or answer is made or given. <input type="checkbox"/> e. Objections must be made every time a matter is raised to preserve the matter for review on appeal unless the court grants a “running objection” on the record, outside the presence of the jury. <input type="checkbox"/> f. Objections that raise matters important to the court’s ruling, but not appropriate for the jury to hear, should be made outside the earshot or presence of the jury. <ul style="list-style-type: none"> <input type="checkbox"/> (1) Removal may be made at either party’s request or on the court’s own suggestion. 	<p>A defendant cannot object if represented by counsel.</p> <p>State the legal basis for objection to the proffered question or answer</p> <p>Rule 103(a), T.R.E. Proper objection: “Your Honor, I object to that <u>question/answer</u> because it is <u>hearsay/not relevant/a leading question/ etc.</u>”</p> <p><i>Ethington v. State</i>, 819 S.W.2d 854 (Tex. Crim. App. 1991).</p> <p>Rule 103(c), T.R.E.</p>
<p><input type="checkbox"/> 2. Responses:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. The court has broad discretion in ruling on objections. <input type="checkbox"/> b. The court has no obligation to listen to responses, but should do so if hearing the response would aid the court in making a proper ruling. 	<p>Rule 103, T.R.E.</p> <p>Proper response: “Your Honor, may I respond to the objection?”</p>

- c. Remember that responses are often best made outside of the jury’s hearing.
- 3. Offers of proof:
 - a. To properly consider excluded evidence on appeal, the reviewing court must be able to study that evidence.
 - b. The party tendering the excluded evidence is responsible for getting the excluded evidence into the record.
 - c. The offer of proof is always made outside the presence of the jury.
 - d. The party making the offer of proof may be granted substantial latitude in the means of producing said evidence.
 - e. The offer of proof may be made by:
 - (1) Sworn statement;
 - (2) Placement in the record of a physical object not admitted into evidence;
 - (3) Questions to and answers of a witness; or
 - (4) A summary by counsel of the questions and answers expected.
 - f. Offers of proof do not have to be made at the time of the objection and may be made at any time during the trial, so as to facilitate an orderly presentation of the evidence at trial.

Dopico v. State, 752 S.W.2d 212 (Tex. App.— Houston [1st Dist.] 1988, pet. ref’d); and Rule 103(a)(2), T.R.E.

This is obligatory if requested. Rule 103(b), T.R.E.

CHAPTER 16 EVIDENCE

4. Hearsay

Checklist 16-4	Script/Notes
<input type="checkbox"/> 1. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	Rule 801(d), T.R.E.
<input type="checkbox"/> 2. Hearsay testimony is not admissible unless it falls under an exception to the hearsay rule.	Rule 802, T.R.E.
<input type="checkbox"/> 3. Hearsay includes non-verbal conduct if intended as a substitute for verbal expression.	Rule 801(a), T.R.E.
<input type="checkbox"/> 4. To be hearsay, the statement must be offered to prove the content of the statement. If the statement is offered to prove that the statement was made and not that the statement is true, it is not hearsay.	
<input type="checkbox"/> 5. Statements defined by the rules as not hearsay:	Rule 801(e), T.R.E.
<input type="checkbox"/> a. Prior statements by the witness.	
<input type="checkbox"/> b. Statements by a party offered against that party.	
<input type="checkbox"/> 6. Statements that are hearsay, but admissible under an exception to the hearsay rule:	
<input type="checkbox"/> a. A present sense impression.	Rule 803(1), T.R.E.
<input type="checkbox"/> b. Excited utterances.	Rule 803(2), T.R.E.
<input type="checkbox"/> c. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition.	Rule 803(3), T.R.E.
<input type="checkbox"/> d. A statement made for the purpose of medical diagnosis or treatment.	Rule 803(4), T.R.E.
<input type="checkbox"/> e. A prior written record by the witness about matters that he or she once had personal knowledge, but now is unable to recall if such a record was reliably created when the matters were fresh in his or her mind.	Rule 803(5), T.R.E.

<p><input type="checkbox"/> f. Regularly kept business, public, official, medical, commercial, or family records must:</p> <p><input type="checkbox"/> (1) Be kept in the regular course of these other enterprises;</p> <p><input type="checkbox"/> (2) Be recorded by persons with personal knowledge; and</p> <p><input type="checkbox"/> (3) Have some indicia of trustworthiness.</p>	<p>Rule 803(6)-(15), and (17), T.R.E.</p>
<p><input type="checkbox"/> g. Authenticated documents over 20 years old.</p>	<p>Rule 803(16), T.R.E.</p>
<p><input type="checkbox"/> h. Learned treatises when used to question experts.</p>	<p>Rule 803(18), T.R.E.</p>
<p><input type="checkbox"/> i. Reputation testimony.</p>	<p>Rule 803(19)-(21), T.R.E.</p>
<p><input type="checkbox"/> j. Judgments of previous conviction against the defendant.</p>	<p>Rule 803(22), T.R.E.</p>
<p><input type="checkbox"/> k. Statements made by the declarant that were against his or her monetary, legal, or social interest.</p>	<p>Rule 803(24), T.R.E.</p>
<p><input type="checkbox"/> l. Statements made exposing the declarant to criminal liability must be corroborated.</p>	<p>Rule 803(24), T.R.E.</p>
<p><input type="checkbox"/> 7. Some hearsay statements are admissible only if the declarant is not available as a witness due to privilege, refusal to testify, lack of memory, death or infirmity, or lack of the witness's attendance at trial due to no fault of the party seeking the testimony. The following are not excluded from evidence if the declarant is unavailable as a witness:</p>	<p>Rule 804, T.R.E.</p>
<p><input type="checkbox"/> a. Former testimony where both parties were able to fully cross-examine the witness.</p>	<p>Rule 804(b), T.R.E.</p>
<p><input type="checkbox"/> b. Dying declarations of the declarant.</p>	
<p><input type="checkbox"/> c. Statement of personal or family history.</p>	<p>Rule 804(b), T.R.E.</p>

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| ❑ 8. If a hearsay statement comes into evidence, the credibility of the declarant of the hearsay statement is put at issue and may be challenged by other evidence. | Rule 806, T.R.E. |
| ❑ 9. Hearsay within hearsay is not excluded if an exception is provided for each part of the combined statement. | Rule 805, T.R.E. |

CHAPTER 16 EVIDENCE

5. Objections Concerning Nature of Questions, Answers, or Courtroom Behavior

Checklist 16-5	Script/Notes
<p><input type="checkbox"/> 1. Leading questions are questions that suggest the answer desired by the questioner. Leading questions are proper and preferred during cross-examination or during any examination of a hostile witness.</p>	<p>Rule 611(c), T.R.E.</p>
<p><input type="checkbox"/> 2. Scope of cross-examination: A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.</p>	<p>Rule 611(b), T.R.E.</p>
<p><input type="checkbox"/> 3. Narrative answers - All examinations should be done in a question and answer format. Failure to follow this format causes opposing counsel to be unable to object to particular matters. Testimony that moves from topic to topic without interspersed questions is narrative and improper. However, in some situations, the court may permit narrative responses.</p>	
<p><input type="checkbox"/> 4. Badgering the witness: A trial should be a formal and civilized proceeding. Undue dramatics, improper aggression, or just plain bad manners may be controlled by the court on a proper objection. The court, if necessary, may act on its own to stop certain conduct.</p>	<p>Rule 611(a), T.R.E.</p>
<p><input type="checkbox"/> 5. Sidebar comments and arguing with the witness: During testimony, the attorney’s and/or pro se defendant’s role is to ask questions; they are not sworn and they may not testify. Counsel and pro se defendants should not be allowed to comment on witness’ answers, opposing counsel’s questions, or the court’s rulings in a verbal or non-verbal fashion. Counsel and pro se defendants must convey the ideas they wish to express to the jury through proper questions and during closing arguments. Objections, as noted earlier, should be addressed to the court and not to the witness, opposing counsel, pro se defendant, or jury.</p>	<p>An example of sidebar comments would include: “Oh, I’m sure that is what you saw.” “Please, Your Honor, that is such a stupid question.” “Objection . . . Like he’s never going to sustain one of my objections.”</p>

- ❑ 6. Non-responsive answers: The court should require witnesses to answer proper, clearly stated questions as asked. During cross-examination, witnesses should be limited to answering questions as asked.
- ❑ 7. The court shall exercise reasonable control over witnesses and the presentation of evidence. The efficient presentation of evidence and actual ascertainment of the truth should be the constant goals of the court.
- ❑ 8. Ethically, the court must require order and decorum in all proceedings. These objections are all based on conduct rather than content and may provide the court with a tool to control courtroom behavior.

To properly make this objection, counsel must ask clear, simple questions that do not call for an explanation.

Rule 611, T.R.E.

Canon 3B(3), *Texas Code of Judicial Conduct*

CHAPTER 16 EVIDENCE

6. Objections to the Introduction of Physical Evidence

Checklist 16-6	Script/Notes
<p><input type="checkbox"/> 1. Predicate: Before introduction of a piece of physical evidence, the party offering the evidence must establish certain preliminary facts:</p> <p><input type="checkbox"/> a. The item is authentic; and</p> <p><input type="checkbox"/> b. If the item is perishable or alterable, the party offering the evidence must show either that the evidence has been in a secure “chain of custody” or that the item has not been altered or changed since it was gathered.</p> <p><input type="checkbox"/> 2. Photographs and recordings must be shown to accurately reflect what the witness initially observed. If such testimony is not available, photographs and recordings are admissible under the rules in Step 1 above.</p> <p><input type="checkbox"/> 3. Demonstrative evidence need only be shown to be helpful to the jury, and be explained by the witness.</p>	<p>For a quick and complete listing of proper predicates, please refer to <i>Predicates</i> published by the Texas District and County Attorneys Association (512.474.2436).</p>

ANIMALS

CHAPTER 17 ANIMALS

One area of municipal court civil jurisdiction is cases involving animals under the Health and Safety Code. State law provides procedures for the seizure, hearing, and disposition of dogs that are a danger to persons and animals that are cruelly treated; however, there are many lingering questions and uncertainties when it comes to handling these civil cases.

Many municipalities have enacted ordinances regulating these animal cases. Such local ordinances are contemplated in Sections 822.007 and 822.047 of the Health and Safety Code. Cities should be aware of the state laws as well and consider whether ordinances may be preempted by state law.

These checklists only discuss the procedures under state law contained in Chapters 821 and 822 of the Health and Safety Code.

1. Definitions

Checklist 17-1	Script/Notes
<p>“Animal control authority” is a municipal or county animal control office with authority over the area in which the dog is kept or the county sheriff in an area that does not have an animal control office.</p>	<p>Secs. 822.001(1) and 822.041(1), H.S.C.</p>
<p>In an incorporated municipality with a population of more than 1,000 that is a county seat of a county with a population of less than 1,600, the police department is the animal control authority for the municipality in all areas in which a dog is kept and that are subject to the authority of the police department.</p>	<p>Secs. 822.0012 and 822.0411, H.S.C.</p>
<p>“Dangerous dog” is a dog that:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Makes an unprovoked attack on a person that causes bodily injury and occurs in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own; or <input type="checkbox"/> b. Commits unprovoked acts in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person. 	<p>Sec. 822.041(2)(A), H.S.C.</p> <p>Sec. 822.041(2)(B), H.S.C.</p>
<p>“Dog” is a domesticated canine.</p>	<p>Sec. 822.041(3), H.S.C.</p>
<p>“Owner” is a person who owns or has custody or control of the dog.</p>	<p>Sec. 822.041(5), H.S.C.</p>

“Secure” means to take steps that a reasonable person would take to ensure a dog remains on the owner’s property, including confining the dog in an enclosure that is capable of preventing the escape or release of the dog.

Sec. 822.001(4), H.S.C.

“Secure enclosure” means a fenced area or structure that is locked; capable of preventing the entry of the general public, including children; capable of preventing the escape or release of a dog; clearly marked as containing a dangerous dog; and in conformance with the requirements for enclosures established by the local animal control authority.

Sec. 822.041(4), H.S.C.

“Serious bodily injury” is an injury characterized by severe bite wounds or severe ripping and tearing of muscle that would cause a reasonably prudent person to seek treatment from a medical professional and would require hospitalization without regard to whether the person actually sought medical treatment.

Sec. 822.001(2), H.S.C.

CHAPTER 17 ANIMALS

A county, justice, or municipal court has original jurisdiction to hear cases involving a dog attack, bite, or mauling that causes serious bodily injury or death to a person. These hearings are governed by Subchapter A, Chapter 822 of the Health and Safety Code.

2. Dogs that Cause Death or Serious Bodily Injury to a Person

Checklist 17-2	Script/Notes
<p><input type="checkbox"/> 1. Hearings to Determine if a Dog Has Caused Death or Serious Bodily Injury to a Person.</p> <p><input type="checkbox"/> a. Any person including the county attorney, city attorney, or a peace officer, may file a sworn complaint alleging that a dog attack, bite, or mauling caused the death of or serious bodily injury to a person.</p> <p><input type="checkbox"/> b. The complaint must be supported by an affidavit setting forth sufficient facts to establish probable cause to believe that the dog caused death or serious bodily injury by attacking, biting, or mauling a person.</p> <p><input type="checkbox"/> c. When a sworn complaint showing probable cause is filed, the court must issue a warrant authorizing the animal control authority to seize the dog and impound it in secure and humane conditions until the court orders the disposition of the dog.</p> <p><input type="checkbox"/> d. The court must set a time for a hearing to determine whether the dog caused the death of or serious bodily injury to a person by attacking, biting, or mauling the person. The court must give written notice of the time and place of the hearing to the owner of the dog or the person from whom the dog was seized and the person who made the complaint.</p> <p><input type="checkbox"/> e. The hearing must be set within 10 days of issuing the warrant.</p>	<p>This type of hearing is used to determine if a dog caused the death of or serious bodily injury to a person by attacking, biting, or mauling the person. Secs. 822.002 and 822.003, H.S.C.</p> <p>Sec. 822.002(a)(1-2), H.S.C. See <i>TMCEC 2020 Forms Book: Affidavit for Warrant to Seize Dog that Caused Serious Bodily Injury or Death.</i></p> <p>Sec. 822.002(a)-(b), H.S.C. See <i>TMCEC 2020 Forms Book: Seizure Warrant for Dog that Caused Serious Bodily Injury or Death.</i></p> <p>Sec. 822.003(b), H.S.C. See <i>TMCEC 2020 Forms Book: Notice of Hearing for Dog that Caused Serious Bodily Injury or Death.</i></p> <p>Sec. 822.003(a), H.S.C.</p>

- ❑ f. Any interested person, including the county or city attorney, may present evidence at the hearing.
- ❑ g. A “preponderance of evidence” standard may be used to make the required findings.

Preponderance of the evidence is “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Black’s Law Dictionary*.

- ❑ h. If the court determines at the hearing that the dog caused the death of a person, the court must order the dog be destroyed.

The dog must be destroyed by a licensed veterinarian, trained animal shelter or humane society personnel, or trained animal control authority personnel.

- ❑ i. If the court determines the dog caused serious bodily injury to the person, the court may order the dog be destroyed.

- ❑ j. The court may not order the dog to be destroyed if:

- ❑ (1) The dog was being used to protect persons or property; the attack, bite, or mauling occurred in a properly marked enclosure in which the dog was being kept that was reasonably certain to prevent the dog from escaping and provided notice of the dog’s presense; and the injured person was at least eight years old and was trespassing in the enclosure;

Sec. 822.003(c), H.S.C.

It is statutorily unclear whether a “reasonable doubt” or a “preponderance of the evidence” standard should be used in this determination. However, in *Timmons v. Pecorino*, 977 S.W.2d 603, (Tex. Crim. App. 1998), the Court of Criminal Appeals implicitly acknowledged the civil nature of these cases but refused to answer the question for lack of jurisdiction.

Sec. 822.003(d), H.S.C.
See *TMCEC 2020 Forms Book: Order: Dog Caused Serious Bodily Injury or Death*.

Sec. 822.004, H.S.C.

Sec. 822.003(e), H.S.C.

Sec. 822.003(f)(1-5), H.S.C.

- (2) The dog was not being used to protect persons or property; the attack, bite, or mauling occurred in an enclosure in which the dog was being kept; and the injured person was at least eight years old and was trespassing in the enclosure;
 - (3) The dog was being used for law enforcement purposes and the attack, bite, or mauling occurred during an arrest or other law enforcement action;
 - (4) The dog was defending a person from an assault or defending property from damage or theft by the injured person; or
 - (5) The injured person was under eight years of age and the attack, bite, or mauling occurred in a secure enclosure designed to prevent a person under eight years of age from entering.
2. There is no right to appeal a court's determination provided in the subchapter.
3. An owner may face criminal liability if the owner fails, with criminal negligence, to secure the dog, and the dog's unprovoked attack causes serious bodily injury to (3rd degree felony) or the death of (2nd degree felony) a person.

Sec. 822.005, H.S.C
Watson v. State, 369 S.W.3d 865
(Tex.Crim. App. 2012).

CHAPTER 17 ANIMALS

Subchapter A, Chapter 822 of the Health and Safety Code, provides procedures for what to do if a dog attacks and causes death or serious bodily injury. What if the dog causes injury that does not rise to the level of serious bodily injury? The court cannot order a dog be destroyed if it causes just bodily injury to a person unless the dog has been determined to be a “dangerous dog,” as defined in Section 822.041(2) of the Health and Safety Code.

There are three distinct types of hearings dealing with dangerous dogs that can originate in a county, justice, or municipal court. These proceedings are all governed by Subchapter D, Chapter 822 of the Health and Safety Code. A county or municipality may place additional requirements or restrictions on dangerous dogs if the requirements or restrictions are not breed specific and are more stringent than restrictions provided under Subchapter D. Sec. 822.047, H.S.C. It is a Class C misdemeanor for a person who owns or has custody or control of a dangerous dog to fail to comply with Section 822.042 or Section 822.0422 (b) or an applicable municipal ordinance relating to dangerous dogs, and a subsequent offense is a Class B misdemeanor. Sec. 822.045, H.S.C.

Note that none of these procedures apply when a dog attacks another animal. There is no municipal court involvement, under state law, when a dog attacks an animal.

3. Dangerous Dogs

Checklist 17-3	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. Appeal from Animal Control Authority Determination that Dog is a Dangerous Dog. <ul style="list-style-type: none"> <input type="checkbox"/> a. If a person reports an incident where a dog either: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Makes an unprovoked attack on a person that causes bodily injury and occurs in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own; or <input type="checkbox"/> (2) Commits unprovoked acts in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person. 	<p style="text-align: center;">Sec. 822.0421(a), H.S.C.</p> <p style="text-align: center;">Sec. 822.041(2)(A), H.S.C.</p> <p style="text-align: center;">Sec. 822.041(2)(B), H.S.C.</p>

Then, the animal control authority may investigate the incident and determine if the dog is a “dangerous dog” according to Section 822.041(2), H.S.C. The animal control authority shall notify the owner in writing if the dog is determined to be dangerous.

- b. Notwithstanding any other law, including a municipal ordinance, an owner may appeal the animal control authority determination to the county, justice, or municipal court of competent jurisdiction within 15 days of being notified of the determination.

- c. To file an appeal, the owner must:
 - (1) File a notice of appeal with the court;
 - (2) Attach a copy of the determination from the animal control authority; and
 - (3) Serve a copy of the notice of appeal on the animal control authority by mailing the notice through the United States Postal Service.

- d. The owner may appeal the municipal court’s decision under Sec. 822.0421(b) in the manner described by Section 822.0424.

2. Municipal Court Determination that Dog is a Dangerous Dog.

- a. If city has not adopted an ordinance electing to be governed by Section 822.0422, skip to number 3, as this portion does not apply.

- b. If city has adopted an ordinance electing to be governed by Section 822.0422, any person may report to the court an incident where a dog either:

Sec. 822.0421(a)

Sec. 822.0421(b), H.S.C.
 There are no statutory procedures for how the municipal court should handle or dispose of the appeal. Tex. Atty. Gen. Opp. GA-0660 (2008) interprets “court of competent jurisdiction” to refer to territorial jurisdiction and not as requiring the municipal court be a court of record.

Sec. 822.0421(c), H.S.C.

Sec. 822.0421(d), H.S.C.

Sec. 822.042(a), H.S.C.

Sec. 822.0422(b), H.S.C.
 See *TMCEC 2020 Forms Book: Complaint: Dangerous Dog Incident*.

<p><input type="checkbox"/> g. Any interested person, including the county or city attorney, may present evidence at the hearing.</p>	<p>Sec. 822.0423(c), H.S.C.</p>
<p><input type="checkbox"/> h. A “preponderance of evidence” standard may be used to make the required findings.</p> <p>Preponderance of the evidence is “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” <i>Black’s Law Dictionary</i>.</p>	
<p><input type="checkbox"/> i. At the hearing, the court must determine if the dog is a dangerous dog, according to the definitions in Section 822.041(2), H.S.C.</p>	<p>See <i>TMCEC 2020 Forms Book: Dangerous Dog Judgment</i>.</p>
<p><input type="checkbox"/> j. If the court determines the dog is a dangerous dog, the court may order the dog continued to be impounded until the court determines if the owner(s) comply with the requirements in Step 3.</p>	<p>Presumably, if the court declines to find that the dog is a dangerous dog, the court should order the dog be released to the owner or person from whom the dog was seized.</p>
<p><input type="checkbox"/> k. The court shall determine the estimated costs to house and care for the impounded dog during the appeal process and shall set the amount of bond for an appeal adequate to cover those estimated costs.</p>	<p>Sec. 822.0423(c-1), H.S.C.</p>
<p><input type="checkbox"/> l. The owner or person who filed the complaint may appeal the municipal court’s decision in the manner provided for the appeal of cases from the municipal court.</p>	<p>Sec. 822.0423(d) The <i>In re Loban</i> case, highlighted a problem when it found that there was no court to which a decision from a court of record could be appealed. 243 S.W.3d 827 (Tex. App.—Fort Worth 2008).</p>
<p><input type="checkbox"/> m. The owner shall pay any cost or fee assessed under Section 822.042(d) for seizing the dog.</p>	<p>Sec. 822.0422(f), H.S.C. A city can enter into a contract for the collection of unpaid fines, fees, or court costs in civil cases. Sec. 140.009, L.G.C.</p>
<p><input type="checkbox"/> 3. Appeal of Municipal Court Dangerous Dog Determination</p>	<p>Sec. 822.0424, H.S.C.</p>

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| <p><input type="checkbox"/> (4) Comply with any applicable municipal ordinances or county regulations.</p> | <p>Sec. 822.042(a)(4), H.S.C.</p> |
| <p><input type="checkbox"/> c. If the owner does not comply with the requirements, he or she must deliver the dog to the animal control authority not later than 30 days after learning the dog is a dangerous dog.</p> | <p>Sec. 822.042(b), H.S.C.</p> |
| <p><input type="checkbox"/> d. The animal control authority must register all dangerous dogs located within its jurisdiction if the owner pays an annual \$50 fee and presents proof of:</p> | <p>Sec. 822.043(a)(2), H.S.C.</p> |
| <p><input type="checkbox"/> (1) Current liability insurance or financial responsibility;</p> | <p>Sec. 822.043(a)(1)(A), H.S.C.</p> |
| <p><input type="checkbox"/> (2) Current rabies vaccination; and</p> | <p>Sec. 822.043(a)(1)(B), H.S.C.</p> |
| <p><input type="checkbox"/> (3) The secure enclosure for the dog.</p> | <p>Sec. 822.043(a)(1)(C), H.S.C.</p> |
| <p><input type="checkbox"/> e. The animal control authority must issue to the owner a registration tag for the dangerous dog, which must be put on the dog's collar.</p> | <p>Sec. 822.043(b)(1), H.S.C.</p> |
| <p><input type="checkbox"/> f. If the owner sells or moves the dog, the owner has 14 days to notify the animal control authority in the new jurisdiction of the dog's relocation. If the owner presents proof of prior registration and pays a \$25 fee, the new animal control authority must accept the new registration and issue a new tag to be worn on the dog's collar.</p> | <p>Sec. 822.043(c), H.S.C.</p> |
| <p><input type="checkbox"/> g. An owner of a registered dangerous dog must notify the animal control authority of any attacks the dog makes on people. An unprovoked attack by a dangerous dog, outside the dog's enclosure, causing bodily injury is a Class C misdemeanor offense against the owner.</p> | <p>Secs. 822.043(d) and 822.044, H.S.C. The court may order the dog be destroyed if the owner is convicted.</p> |
| <p><input type="checkbox"/> h. An owner may face criminal liability if the owner knows the dog is a dangerous dog and the dog's unprovoked attack causes serious bodily injury to (3rd degree felony) or the death of (2nd degree felony) of a person.</p> | <p>Sec. 822.005, H.S.C.</p> |

5. Non-compliance Hearing

a. Any person may file an application with the court alleging that a dog is dangerous or that the owner of a dangerous dog has failed to comply with the requirements under Section 822.042(a), H.S.C.

Sec. 822.042(c), H.S.C.
See *TMCEC 2020 Forms Book*:
Application: Dangerous Dog
Owner Failed to Comply.

b. The court must set a hearing and give written notice of the time and place of the hearing to the owner of the dog or the person from whom the dog was seized and the person making the complaint.

Sec. 822.0423(a)-(b), H.S.C.
See *TMCEC 2020 Forms Book*:
Notice of Hearing: Owner Failed
to Comply.

c. The hearing should be held not later than 10 days after the dog is seized or delivered.

Sec. 822.0423(a), H.S.C.

There is a contradiction in the methodology for dangerous dog hearings set forth in Chapter 822. Specifically, Section 822.042(c) states that if, “**after notice and hearing**” to determine whether an owner of a dangerous dog has failed to comply with the requirements of Section 822.042(a), H.S.C., the court finds a failure to comply, it shall order the seizure of the dog. However, Section 822.0423(a) states that such a compliance hearing must be held not later than 10 days **after** the seizure. This apparent conflict can be resolved if the dog is seized pursuant to another seizure provision (e.g., a quarantine or dog-at-large ordinance). Otherwise, courts may set the hearing for not later than 10 days from the date the owner is notified.

d. At the hearing, any interested party, including the city or county attorney, may present evidence.

Sec. 822.0423(c), H.S.C.

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| <p><input type="checkbox"/> e. The court shall determine the estimated costs to house and care for the impounded dog during the appeal process and shall set the amount of bond for an appeal adequate to cover those estimated costs.</p> | <p>Sec. 822.0423(c-1), H.S.C.</p> |
| <p><input type="checkbox"/> f. If the court finds a lack of compliance, it shall order the seizure of the dog and impound the animal in secure and humane conditions pending the owner’s compliance. The owner has 10 days to comply with the requirements to own a dangerous dog. If the owner does not comply, on the 11th day after seizure, the court must order the humane destruction of the dog.</p> | <p>Sec. 822.042(e), H.S.C.
See <i>TMCEC 2020 Forms Book: Dangerous Dog Judgment: Owner Failed to Comply; and Seizure Warrant for Dangerous Dog: Owner Failed to Comply.</i></p> |
| <p><input type="checkbox"/> g. If the court orders the seizure of the dog, but is unable to locate the owner, the court may order the humane destruction of the dog 15 days after the date of impoundment.</p> | <p>Sec. 822.042(f), H.S.C.</p> |
| <p><input type="checkbox"/> h. The owner is liable for all fees or costs assessed for the seizure, acceptance, impoundment, or destruction of the dog.</p> | <p>Sec. 822.042(d), H.S.C.
A city can enter into a contract for the collection of unpaid fines, fees, or court costs in civil cases. Sec. 140.009, L.G.C.</p> |
| <p><input type="checkbox"/> i. The owner or person filing the action may appeal the municipal court’s determination in the manner as described by Section 822.0424.</p> | <p>Sec. 822.0423(d), H.S.C.</p> |
| <p><input type="checkbox"/> j. An owner who fails to comply with the requirements of Section 822.042 can also be charged with a Class C misdemeanor.</p> | <p>A person may be charged with a Class C misdemeanor for failing to comply with requirements unders Sec. 822.042, Sec. 822.0422(b), or other applicable regulations under an ordinance, and subsequent offenses are Class B misdemeanors. Sec. 822.045, H.S.C.</p> |

CHAPTER 17 ANIMALS

There are two avenues for protecting animals from cruel treatment under state law: criminal prosecution of the actor under the Penal Code, and the civil remedy to remove animals from the owners under Chapter 822 of the Health and Safety Code. These cases can be presented originally to a judge of a justice or municipal court or to a magistrate for a hearing in the justice or municipal court.

4. Disposition of Cruelly Treated Animals

Checklist 17-4	Script/Notes
<p>Definitions:</p> <p>“Cruelly treated” includes tortured, seriously overworked, unreasonably abandoned, unreasonably deprived of necessary food, care, or shelter, cruelly confined, or caused to fight with another animal, or subject to conduct prohibited by Section 21.09, Penal Code.</p> <p>“Magistrate” means any officer as defined in Article 2.09, C.C.P., except that the term does not include justices of the supreme court, judges of the court of criminal appeals, or courts of appeals, judges or associate judges of statutory probate courts, or judges or associate judges of district courts that give preference to family law matters or family district courts unders Subchapter D, Chapter 24, G.C.</p> <p>“Owner” includes a person who owns or has custody or control of an animal.</p> <p><input type="checkbox"/> 1. Seizure of Cruelly Treated Animal(s).</p> <p><input type="checkbox"/> a A peace officer or an animal control officer may apply to municipal court in the municipality in which the animal is located for a warrant to seize the animal.</p> <p><input type="checkbox"/> b. On a showing of probable cause to believe that the animal has been or is being cruelly treated, the court shall issue the warrant and set a time within 10 calendar days for a hearing in the municipal court to determine whether the animal has been or is being cruelly treated.</p> <p><input type="checkbox"/> c. The officer executing the warrant impounds the animal and must give written notice to the owner of the animal of the time and place of the hearing.</p>	<p>Sec. 821.021(1), H.S.C. Sec. 21.09, P.C., prohibits bestiality.</p> <p>Sec. 821.0211, H.S.C.</p> <p>Sec. 821.021(3), H.S.C.</p> <p>Sec. 821.022, H.S.C.</p> <p>Sec. 821.022(a), H.S.C. See <i>TMCEC 2020 Forms Book: Affidavit for Warrant to Seize Cruelly Treated Animal(s)</i>.</p> <p>Sec. 821.022(b), H.S.C. See <i>TMCEC 2020 Forms Book: Seizure Warrant for Cruelly Treated Animal(s)</i>.</p> <p>Sec. 821.022(c), H.S.C.</p>

2. Hearing to Determine if an Animal has been Cruelly Treated.

a. Each interested party is entitled an opportunity to present evidence at the hearing.

Sec. 821.023(c), H.S.C.
There is no definition of “interested party.”

Sec. 821.023(a-1), H.S.C.
A finding in a court of competent jurisdiction that a person is guilty of an offense under Section 21.09, Penal Code (Bestiality), is prima facie evidence that any animal in the person’s possession has been cruelly treated, regardless of whether the animal was subjected to conduct prohibited by Section 21.09, Penal Code.

b. If the court finds that the animal’s owner has cruelly treated the animal, the owner shall be divested of ownership of the animal, and the court shall:

Sec. 821.023(d), H.S.C.
See *TMCEC 2020 Forms Book*: Order: Cruelly Treated Animal(s) Hearing.

(1) Order a public sale of the animal by auction;

(2) Order the animal be given to a municipal or county animal shelter or a nonprofit animal welfare organization; or

“Nonprofit animal welfare organization” means a nonprofit organization that has as its purpose (A) the prevention of cruelty to animals; or (B) the sheltering of, caring for, and providing homes for lost, stray, and abandoned animals. Sec. 821.021(2), H.S.C.

(3) Order the animal be humanely destroyed if the court decides that the best interests of the animal or the public health and safety would be served by doing so.

c. After a court that finds that an animal’s owner has cruelly treated the animal, the court shall order the owner to pay all court costs, including costs of:

Sec. 821.023(e), H.S.C.

- (1) the administrative costs of:
 - (a) investigation;
 - (b) expert witnesses; and
 - (c) conducting any public sale ordered by the court; and
- (2) the costs incurred by a municipal or county animal shelter or a nonprofit animal welfare organization in:
 - (a) housing and caring for the animal during its impoundment; and
 - (b) humanely destroying the animal if destruction is ordered by the court.
- d. After a finding that an owner has cruelly treated the animal, the court shall determine the estimated costs likely to be incurred by a municipal or county animal shelter or a nonprofit animal welfare organization to house and care for the impounded animal during the appeal process.
- e. When entering the judgment, the court shall set an amount for an appeal bond equal to the sum of the costs ordered under Subsection (e) and the amount of estimated costs under Subsection (e-1).

Sec. 821.023(e-1), H.S.C.

Sec. 821.023(e-2), H.S.C.
 The court may **not** require a person to provide a bond in an amount greater than or in addition to the amount determined by the court under subsection (e-2). Sec. 821.023(e-3), H.S.C.

The amount of court costs that a court may order and the amount of bond that a court determines are excluded in determining the court's jurisdiction under the Government Code. Sec. 821.023(e-4), H.S.C.

<p><input type="checkbox"/> f. The court may order that an animal subject to public sale or given to a municipal or county animal shelter or nonprofit animal welfare organization be spayed or neutered at the cost of the receiving party.</p>	<p>Sec. 821.023(f), H.S.C.</p>
<p><input type="checkbox"/> g. The court shall order the animal returned to the owner if the court does not find that the animal's owner has cruelly treated the animal.</p>	<p>Sec. 821.023(g), H.S.C.</p>
<p><input type="checkbox"/> 3. Sale or Disposition of Animal.</p>	
<p><input type="checkbox"/> a. Notice of an auction must be posted on a public bulletin board where other public notices are posted for the county or municipality.</p>	<p>Sec. 821.024, H.S.C.</p>
<p><input type="checkbox"/> b. At the auction, a bid by the former owner of a cruelly treated animal or the owner's representative may not be accepted.</p>	
<p><input type="checkbox"/> c. Proceeds from the sale of the animal shall be applied first to any costs owed by the former owner. The officer conducting the auction shall pay any excess proceeds to the court ordering the auction. The court shall return the excess proceeds to the former owner of the animal.</p>	
<p><input type="checkbox"/> d. If the officer is unable to sell the animal at auction, the officer may cause the animal to be humanely destroyed or may give the animal to a municipal or county animal shelter or nonprofit animal welfare organization.</p>	
<p><input type="checkbox"/> 4. Appeal.</p>	
<p><input type="checkbox"/> a. An owner divested of ownership of an animal under Section 821.023 may appeal the order to a county court or county court at law in the county in which the justice or municipal court is located.</p>	<p>Sec. 821.025(a), H.S.C. Notwithstanding any other law, a county court or county court at law has jurisdiction to hear an appeal filed under this section. Sec. 821.025(g), H.S.C.</p>

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| <p><input type="checkbox"/> b. As a condition of perfecting an appeal, not later than the 10th calendar day after the date the order is issued, the owner must file a notice of appeal and a cash or surety bond in an amount determined by the court under Section 821.023(e-2).</p> | <p>Sec. 821.025(b), H.S.C.
See <i>TMCEC 2020 Forms Book</i>:
Appeal Bond: Cruelly Treated
Animal(s) Case.</p> |
| <p><input type="checkbox"/> c. A person filing an appeal is not required to file a motion for new trial to perfect an appeal.</p> | <p>Sec. 821.025(f), H.S.C.</p> |
| <p><input type="checkbox"/> d. Not later than the fifth calendar day after the date the notice of appeal and bond is filed, the court shall deliver a copy of the clerk's record to the county court or county court at law to which the appeal is made.</p> | <p>Sec. 821.025(c), H.S.C.</p> |
| <p><input type="checkbox"/> e. Not later than the 10th calendar day after the date the county court or county court at law receives the record, the court shall consider the matter de novo and dispose of the appeal. A party is entitled to a jury trial on request.</p> | <p>Sec. 821.025(d), H.S.C.</p> |
| <p><input type="checkbox"/> f. The decision of the county court or county court at law under this section is final and may not be further appealed.</p> | <p>Sec. 821.025(f), H.S.C.</p> |
| <p><input type="checkbox"/> g. While an appeal under this section is pending, the animal may not be:</p> | <p>Sec. 821.025(h), H.S.C.</p> |
| <p><input type="checkbox"/> (1) sold or given away as provided by Sections 821.023 and 821.024, H.S.C.; or</p> | |
| <p><input type="checkbox"/> (2) destroyed, except under circumstances which would require the humane destruction of the animal to prevent undue pain to or suffering of the animal.</p> | |

EXPUNCTIONS

Expunctions

CHAPTER 18 CHAPTER 55 EXPUNCTIONS

Chapter 55 of the Code of Criminal Procedure allows an acquitted person and certain others to petition for an expunction of criminal records. Prior to the 85th Legislature, only district courts had jurisdiction to accept these petitions. The ability to order expunctions in municipal courts was considerably more restrained, generally limited to certain juvenile convictions or dismissals. An individual that was acquitted or that had charges dropped for a Class C misdemeanor in a municipal court had to file an expunction petition in district court. In an effort to ease the administrative burden on the persons seeking such an order, H.B. 557 (2017) created concurrent jurisdiction for the expunction of Class C misdemeanors between district court, municipal courts of record, and justice courts. Notably absent from courts given expunction authority under Chapter 55 are non-record municipal courts.

1. Chapter 55 Expunction in Municipal Courts of Record

Checklist 18-1	Script/Notes
<p><input type="checkbox"/> 1. A municipal court of record may expunge all records and files relating to the arrest (in the county) of a person under the procedure established under Article 55.02 if:</p> <p><input type="checkbox"/> a. A person charged with a fine-only misdemeanor is acquitted by the trial court;</p> <p><input type="checkbox"/> b. A person convicted of a fine-only misdemeanor is subsequently pardoned, including on the basis of actual innocence;</p> <p><input type="checkbox"/> c. A person charged with a fine-only misdemeanor is released, has no final conviction, and a charge is no longer pending;</p> <p><input type="checkbox"/> d. A person is tried and convicted of a fine-only misdemeanor and acquitted by the Court of Criminal Appeals, court of appeals, or if before trial expunction is recommended by the prosecutor; or</p>	<p>Art. 55.02, C.C.P.</p> <p>Art. 55.01(a)(1)(A), C.C.P. If the offense arose out of a criminal episode, and the person was convicted of or may still be prosecuted for another offense during the criminal episode, then the person is not eligible for expunction.</p> <p>See <i>TMCEC 2020 Forms Book: Admonishment for Expunction on Acquittal</i>.</p> <p>Art. 55.01(a)(1)(B), C.C.P.</p> <p>Art. 55.01(a)(2), C.C.P.</p> <p>Art. 55.01(b), C.C.P.</p> <p>Art. 45.051(e), C.C.P.</p>

- e. A person complies with an order of deferred disposition, and the complaint is dismissed.
- 2. After acquittal, the trial court should notify the acquitted of expunction.
 - a. Expunction can be requested in the trial court by either the defendant or the prosecutor.
 - (1) If the defendant requests expunction, the prosecutor must be notified;
 - (2) If the prosecutor requests expunction, the acquitted person must consent;
 - b. If the defendant has an attorney, the attorney must prepare the expunction order. For pro se defendants, the prosecutor shall prepare the order for the court's signature.
 - c. Upon request of the acquitted person, an order of expunction shall be entered not later than the 30th day after the date of acquittal.
- 3. A person requesting expunction under Chapter 55 for a fine-only misdemeanor (other than after acquittal in the trial court) must file a petition for expunction in a district court, a justice court, or a municipal court of record in the county in which:
 - a. The petitioner was arrested; or
 - b. The offense was alleged to have occurred.

See *TMCEC 2020 Forms Book: Admonishment for Expunction on Acquittal and Order of Expunction*. Art. 55.02. Sec. 1, C.C.P.

While no petition is required, the requesting party must provide all of the information required of a petition to the court. See the list in step 4 below.

Art. 55.02, Secs. 2(a) and (a-1), C.C.P.

Additionally, an ex parte petition may also be filed by a Department of Public Safety representative. Art. 55.02, Sec. 2(e), C.C.P.

- 4. A petitioner seeking expunction shall pay a fee of \$100 for filing a petition for expunction to defray the cost of notifying state agencies of orders of expunction.
 - a. The fee shall be waived if the petitioner seeks expunction for an offense of which the person was acquitted, and the petition is filed not later than the 30th day after the date of acquittal.
 - b. A court that grants a petition for expunction may order that any fee, or portion of a fee, be returned to the petitioner.

- 5. A petition must be verified and include the following or an explanation for why one or more of the following is not included:
 - a. The petitioner's:
 - (1) Full name;
 - (2) Sex;
 - (3) Race;
 - (4) Date of birth;
 - (5) Driver's license number;
 - (6) Social security number; and
 - (7) Address at the time of arrest;
 - b. The offense charged against the petitioner;
 - c. The date the offense charged was alleged to have been committed;
 - d. The date of arrest;

Art. 102.006(a-1), C.C.P.

Art. 102.006(b), C.C.P.

Art. 102.006(c), C.C.P.

While no circumstances are statutorily listed for the return of fees, judges could consider a petitioner's ability to pay.

Art. 55.02 Sec. 2(b), C.C.P.

A verified petition is one that is confirmed or substantiated by oath. Black's Law Dictionary.

- e. The name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;
- f. The name of the agency that arrested the petitioner;
- g. The case number and court of offense; and together with the applicable physical or e-mail addresses, a list of all:
 - (1) Law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
 - (2) Central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction; and
 - (3) Private entities that compile and disseminate for compensation criminal history record information that the petitioner has reason to believe have information related to records or files that are subject to expunction.
- 6. The court shall set a hearing no sooner than 30 days from the filing of the petition and shall give each official or agency or governmental entity named in the petition reasonable notice of hearing by:
 - a. Certified mail, return receipt requested; or
 - b. Secure electronic mail, electronic transmission, or facsimile transmiss
- 7. If the court does not find that the petitioner is entitled to expunction, enter an order denying expunction.

Art. 55.01 Sec. 2(c), C.C.P.
See *TMCEC 2020 Forms Book*:
Notice of Expunction Hearing.

See *TMCEC 2020 Forms Book*:
Order Denying Expunction.

- ❑ 8. If the court finds that the petitioner is entitled to expunction of any records and files that are the subject of the petition, enter an order of expunction.

- ❑ 9. When the order of expunction is final, the clerk of the court shall send a certified copy of the order to the Crime Records Service of the Department of Public Safety and to each official or agency or other governmental entity of this state or of any political subdivision of this state named in the order. The certified copy of the order must be sent by secure electronic mail, electronic transmission, or facsimile transmission or otherwise by certified mail, return receipt requested. In sending the order to a governmental entity named in the order, the clerk may elect to substitute hand delivery for certified mail under this subsection, but the clerk must receive a receipt for that hand-delivered order.

- ❑ 10. If an order of expunction is issued under this article, the court records concerning expunction proceedings are not open for inspection by anyone except the person who is the subject of the order unless the order permits retention of a record. The clerk of the court issuing the order shall obliterate all public references to the proceeding and maintain the files or other records in an area not open to inspection.

- ❑ 11. Except in the case of a person who is the subject of an expunction order on the basis of an acquittal, the clerk of the court shall destroy all the files or other records maintained not earlier than the 60th day after the date the order of expunction is issued or later than the first anniversary of that date unless the records or files were released.

- ❑ 12. Not later than the 30th day before the date on which the clerk destroys files or other records, the clerk shall provide notice by mail, electronic mail, or facsimile transmission to the attorney representing the state in the expunction proceeding. If the attorney representing the state in the expunction proceeding objects to the destruction not later than the 20th day after receiving notice under this subsection, the clerk may not destroy the files or other records until the first anniversary of the date the order of expunction is issued or the first business day after that date.

Art. 55.01 Sec. 2(c), C.C.P.
See *TMCEC 2020 Forms Book*:
Order of Expunction.

Art. 55.02 Sec. 3(c), C.C.P.

Art. 55.02 Sec. 5(c), C.C.P.

Art. 55.02 Sec. 5(d), C.C.P.

Art. 55.02 Sec. 5(d-1), C.C.P.

- ❑ 13. The clerk shall certify to the court the destruction of files or other records under Subsection (d) of this section.

Art. 55.02 Sec. 5(e), C.C.P. See *TMCEC 2020 Forms Book: Certification of Destruction of Records Subject to Expunction Order*.