The Recorder
The Journal of Texas Municipal Courts
Volume 16 DECEMBER 2006 No. 1
©2006 Texas Municipal Courts Education Center, Austin. Funded by a grant from the Court of Criminal Appeals.

Case Law Update

by Ryan Kellus Turner, TMCEC General Counsel & Director of Education
and Elisabeth Gazda, TMCEC Program Coordinator

Except where otherwise noted, the following case law and opinions were handed down August 31, 2005 through October 1, 2006.

I. Search and Seizure

A. Search Warrants

1. May police lawfully conduct a search based on consent given by a person with common authority over an area, when another person with equal authority refuses to consent to the search?

***Georgia v. Randolph*, 126 S. Ct. 1515 (2006)**

No. A co-tenant has no recognized authority in law or social practice to prevail over the other co-tenant, and one co-tenant's disputed invitation, without more, gives police no better claim to reasonableness in entering than they would have had in the absence of any consent at all. Disputed permission is no match for the central value of the Fourth Amendment, which is freedom from unreasonable searches and seizures.

2. Is an anticipatory search warrant valid if it fails to state the triggering condition on the actual warrant?

***U.S. v. Grubbs*, 126 S. Ct. 1494 (2006)**

Yes. When an anticipatory warrant is issued, and the warrant becomes valid upon the triggering event (such as the defendant accepting the package containing contraband), then the triggering event establishes probable cause for the ensuing search. The lack of a triggering condition on the face of the warrant does not violate the Fourth Amendment. The "particularity" requirement of the Fourth Amendment does require that

Case Law continued on page 4

Traffic Safety Tips 2006

by Lois Wright, TMCEC Program Attorney

Envision your average trip to the grocery store. You leave your home, get into your automobile, drive out of your neighborhood to a thoroughfare, navigate to the nearest shopping area, find a parking space, purchase groceries, and make your way back home again. Throughout that mundane yet essential outing you employed defensive driving techniques, obeyed dozens of traffic signs and laws, complied with vehicle safety standards, and exhibited common courtesy to the vehicles sharing your roadways.

Or perhaps your average trip looks more like this: You get into your automobile and realize today is the first of the month, which means not only is your mortgage payment due, but your vehicle inspection sticker has gone from ripe to completely expired. You skate through the stop sign at the end of your street because the street is never heavily trafficked and no one else is visible as you approach. A green light awaits you as you exit your neighborhood but, since you have to turn left, you also have to yield to the heavy stream of oncoming traffic, all the while slowly creeping out into the intersection, knowing that the light will

Tips continued on page 28

INSIDE THIS ISSUE

Features

Columns

Texas Municipal Courts Education Center

1609 Shoal Creek Boulevard, Suite 302
Austin, Texas 78701
512/320-8274 or 800/252-3718
Fax: 512/435-6118
Website: www.tmcec.com

Fair and Impartial Justice for All

FY07 TMCA/TMCEC Officers

President: Robin Ramsay, Denton
President-Elect: Brian Holman, Lewisville
1st V.P.: Robert Doty, Lubbock
2nd V.P.: Ninfa Mares, Fort Worth
Secretary: Leisa Hardin, Crowley
Treasurer: Robert Richter, Missouri City
Past-President: Steven Williamson, Fort Worth

Directors

Gary Ellsworth, Spearman • Stewart Milner, Arlington • C. Victor Lander, Dallas • Elaine Coffman, Athens • Denn Whalen, Odessa • Julian E. Weisler, II, Brenham • Walter Dick Kettler, Beverly Hills • Donna Starkey, Alvin • Lester Rorick, Pasadena • Steven Kidder, Victoria

Staff

- Hope Lochridge, Executive Director
- Ryan Kellus Turner, General Counsel & Director of Education
- Margaret Robbins, Program Director
- Meichihko Proctor, Program Attorney & Deputy Counsel
- Lois Wright, Program Attorney
- Elisabeth Gazda, Program Coordinator
- Patricia Russo, Program Assistant II
- Margaret Danforth, Admin. Director
- Rey Guzman, Multimedia Specialist
- Carrie Harper, Registration Coordinator
- Herman Flores, Communications Assistant
- Noël Wells, Administrative Assistant
- Allison Attal, Research Assistant

Published by the Texas Municipal Courts Education Center through a grant from the Texas Court of Criminal Appeals. Subscriptions are free to all municipal judges, clerks, prosecutors, and support personnel employed by the municipal court. Others may purchase an annual subscription for $50.

Articles and items of interest not otherwise copyrighted may be reprinted with attribution as follows: "Reprinted from the *The Recorder: Journal of Texas Municipal Courts* with permission from the Texas Municipal Courts Education Center."

The views expressed are solely those of the authors and are not necessarily those of the TMCA Board of Directors or the staff of TMCEC.

AROUND THE STATE

TMCA Judge of the Year (2006) Announced

Houston Municipal Judge Gordon Marcum III was selected by the Texas Municipal Courts Association (TMCA) to receive the Association's Outstanding Judge Award for 2006. Judge Marcum was presented with the special judicial recognition award on September 15, 2006, before an audience of judges and clerks attending the TMCA Annual Conference at the San Luis Resort in Galveston.

The Award recognizes Judge Marcum for his outstanding contributions to the fair and impartial administration of justice in the Houston area and throughout the state. Judge Marcum began as a Teen Court Judge in Midland and came to Houston in 1995, where he now serves as Presiding Judge of Municipal Court No. 13. Judge Marcum has served as volunteer counsel for the State Bar of Texas juvenile counsel program and has given countless hours to charitable organizations, such as the Coalition for the Homeless. He is also actively involved in creating ministries of the Nehemiah Center (an after-school and daycare center) and the Shepherd Center (a center to assist homeless and unemployed citizens).

Judge Marcum is a graduate of the University of Oklahoma, where he also received his law degree. The judge's childhood was spent in Sweetwater and Midland, Texas. He has been a member of TMCA since he became a judge in 1988.

TMCA President Robin Ramsay (right in both photographs) awards Judge Gordon Marcum and Phyllis Dickerson with the TMCA 2006 Outstanding Service Awards.

TMCA Announces Court Support Staff Member of the Year!

Granbury Court Administrator Phyllis Dickerson has been selected by the Texas Municipal Courts Association (TMCA) to receive the Court Support Staff Member of the Year for 2006. Ms. Dickerson was presented with the special recognition award on September 15, 2006, before an audience of judges and clerks attending the TMCA Annual Conference at the San Luis Resort in Galveston.

The Award recognizes Ms. Dickerson for her outstanding contributions to the fair and impartial administration of justice. Ms. Dickerson has served as Granbury Municipal Court since 1997 and has been Court Administrator for the last three years.

Ms. Dickerson manages the municipal court in a growing community and has worked to promote professionalism and teamwork among her support personnel since being appointed Court Administrator. Additionally, she is active in the Granbury community, serving as her church's secretary and a member of the choir. She is also a burn counselor at I-THONKA-CHI Burn Camp each summer.

Statewide Warrant Roundup Planned for March 2007

by David Galvan, Court Administrator, Irving Municipal Court

Your time is up! That message will spread across Texas during the month of March. Municipal courts are seeking compliance as law enforcement officers from across the State of Texas join together in the Statewide Warrant Roundup beginning March 3, 2007.

Over the past several years, cities have joined together to hold warrant roundups at the same time. Last year over 60 jurisdictions from the Austin, Dallas, Fort Worth, and Waco areas held roundups on the same day and had great results! They found that working together provided greater media attention and created the public impression that criminals had no place to hide.

The Statewide Warrant Roundup is scheduled for the week of March 3-10, 2007. All courts, police departments and marshal services are invited to join this statewide effort. By joining together, defendants will understand that they must take care of their business with the court, or the court will hold them responsible!

Each agency is required to track and report statistics that will be compiled and released to the media at the end of the roundup. The reporting period will be from February 16 to March 10, 2007.

Once the warrant notices are mailed by the court, the clerk will have the bulk of the work because the majority of activity will be voluntary compliance prior to the roundup. Each agency will determine its own level of involvement during the roundup period and will plan its own operations. Everyone is encouraged to participate to the fullest extent possible. If an agency does not follow up with an actual arrest, however, it becomes an empty threat for next year.

For the best results, it is recommended that each agency mail out notices by February 16, 2007. Agencies should provide their local media with a press release and the local law enforcement officers should make arrests from March 3-10, 2007.

If you wish to join this statewide effort, you may obtain additional information and a registration form by logging on to the following websites: TMCEC at www.tmcec.com, TCCA at www.texascourtclerks.org, TMCA at www.txmca.com, or the NTCCA at www.ntcca.com. The websites have sample flyers, general information, a list of participants, press releases, post cards, registration forms, and a statistics report to help you with the process.

Courts of all sizes, from Lago Vista (population 5,573) to Houston (population 2,016,582), have already signed up to participate. All courts interested should complete a registration form and forward it to Sgt. Mike Hollier by December 15, 2006. For additional information you may contact any of the following.

Sgt. Mike Hollier, Arlington Police Department, at hollierm@ci.arlington.tx.us

Rebecca Stark, Austin Municipal Court, at Rebecca.Stark@ci.austin.tx.us

David Galvan, Irving Municipal Court, at dgalvan@ci.irving.tx.us

Leisa Hardin, Crowley Municipal Court, at lhardin@ci.crowley.tx.us

As of November 13, 2006, the following courts and agencies have pledged to participate in the Texas Statewide Roundup:

Arlington
Austin
Bastrop
Brenham
Bryan
Burleson
Carrollton
College Station
Colleyville
Comal County Sheriff's Office
Corpus Christi
Crowley
Dallas
Dalworthington Gardens
Denton
Farmers Branch
Fort Worth
Galveston
Georgetown
Haltom City
Hewitt
Houston
Hurst
Irving
Killeen
Lago Vista
Lavaca County Attorney's Office
Leander
Liberty Hill
Lockhart
Marble Falls
North Richland Hills
Odessa
Pflugerville
Randal County Sheriff's Office
Round Rock
San Angelo
San Marcos
Temple
Tyler
Travis County Constable's Office, Precincts 1-4
University of Texas Police Department
Washington County JP Precinct 3
Wichita Falls
Williamson County Constable's Office, Precincts 2 & 4
Winnsboro

If you are unable to participate in the 2007 statewide warrant roundup, make plans now to join us in the 2008 roundup.

Case Law continued from page 1

the person or place to be searched be stated with particularity, but does not require that the conditions precedent to the search be stated with particularity (or at all).

3. May a magistrate issue a warrant based on an officer's affidavit describing the smell of drugs, even though the affidavit did not contain information as to the officer's experience or training?

***Davis v. State*, 202 S.W.3d 149 (Tex. Crim. App. 2006)**

Yes. A search warrant affidavit must be read with common sense and in a realistic manner. Reasonable facts may be inferred from reading the facts contained in the four corners of the affidavit. In this case, the affiant was a police officer, who detected the smell of methamphetamine production. The magistrate is inferring the officer's ability to discern the smell that methamphetamine production creates is not unreasonable. The court, however, notes that inferences and conclusions should not have to be made in an ideal situation, because the affidavits will be clear enough facially. Including the affiant officer's experience and background in an affidavit for a warrant is highly recommended.

4. If the signature page on a search warrant uses the same language as the one found on the affidavit in support of the search warrant, does the judge sign both documents only in his capacity as an officer authorized to administer oaths, and thus the search warrant is not signed and dated by a magistrate?

***Cole v. State*, 200 S.W.3d 762 (Tex. App.—Texarkana 2006)**

No. While a warrant that is not signed and dated by a magistrate is not valid (and the evidence collected as a result of that warrant should be suppressed), there is a good-faith exception to Article 18.04, Code of Criminal Procedure (Contents of a Warrant). The good-faith exception, found in Article 38.23(b), Code of Criminal Procedure, allows evidence seized by officers relying in good-faith on a warrant they believe to be issued based on probable cause and signed and dated by a neutral magistrate. In this case, the officer who prepared the forms witnessed the judge sign both documents and the warrant facially appeared to meet all statutory requirements. Therefore, it can be reasonably concluded that the officers who acted on the search warrant acted in good-faith.

B. Exceptions to the Warrant Requirement

1. Does the Fourth Amendment allow a warrantless search of person who is on parole and subject to a parole search, but not suspected of any criminal wrongdoing?

***Samson v. California*, 126 S. Ct. 2193 (2006)**

Yes. This case resulted from a California statute that required every prisoner eligible for parole to agree in writing to allow police to search him or her without a warrant or without cause. A prisoner agreed to these terms and was later searched by a police officer who found methamphetamine on his person. The court found that while parolees are still allowed Fourth Amendment protections, their expectation of privacy is lessened because they are on the "continuum" of state-imposed punishment, and must abide by the terms and conditions of parole. Additionally, California's interest in decreasing recidivism and promoting good citizenship among parolees warrants intrusion by police officers into the privacy of parolees. The court reasoned that the concern that such a statute gives officers unbridled discretion to search is counter-balanced by the fact the statute prohibits arbitrary and harassing searches.

2. May law enforcement officers enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury?

***Brigham City v. Stuart*, 126 S. Ct. 1943 (2006)**

Yes. The basic rule is that police officers may not enter a home without a warrant based on probable cause, or based on a warrant exception (exigency, *etc.*). One exception to the warrant requirement is the exigency of assisting someone who is in immediate risk of bodily injury. Officers may enter a home without a warrant to render emergency assistance or to protect someone who is in danger of harm. The standard by which the officers' actions will be judged is an objective standard (a reasonableness standard)—the officers' subjective intent is irrelevant. Therefore, if a reasonable person would believe someone in a home was at risk of harm, officers can enter a home to assist without a search warrant.

3. Is a car in a parking lot, not described in a warrant or within the curtilage of the building, within the automobile warrant exception?

***Mack v. City of Abilene*, 461 F.3d 547 (5th Cir. 2006)**

No. In this case, the vehicle was in an assigned parking spot at an apartment complex and was not within the curtilage of the complex. Without a search warrant or probable cause, consent, exigency, or fear for officer safety, the search was in violation of the Fourth Amendment. This should be contrasted with defendant's other vehicle in the case: he was stopped shortly after getting into his truck and driving out of the parking lot. A car being driven will fall within the automobile exception to the warrant requirement; therefore, no warrant was

needed to search the vehicle if there was probable cause.

4. Is a Resident Advisor (RA) at a university dormitory acting in concert with police when he enters a dorm room with police officers behind him?

***Grubbs v. State*, 177 S.W.3d 313 (Tex. App.—Houston [1st Dist.] 2005)**

No. Here, an RA responded to a complaint about the odor of marijuana coming from a dorm room by calling the police. After the police arrived, the RA unlocked the defendant's dorm room door and stepped inside the room while the officers waited in the hall. The RA did not open the door for the police or consent to them searching the dorm room (defendant gave consent to a search).

The Court of Appeals held the RA was not acting in concert with the police, but was acting as a trained resident-hall staff member attempting to maintain order in his dormitory. The Resident Handbook authorized the RA to enter a dorm room upon reasonable suspicion of activities that endangered the community—use of illegal drugs would constitute such a dangerous activity. Once the police arrived, the RA did nothing to assist the police in entering defendant's room. The police did not initiate the search, the RA did. There was ample evidence proving the RA acted on his own initiative, not based on instructions by the police.

5. Are police officers justified in making an arrest under the suspicious places exception where defendant was occupying a vacant garage apartment four weeks after the crime defendant alleged committed?

***Buchanan v. State*, 175 S.W.3d 868 (Tex. App.—Texarkana 2005, pet. granted)**

No. Few places are inherently suspicious. A dwelling is not suspicious just because it is dilapidated. While there is no bright-line rule as to what constitutes a suspicious place, the time between the crime and the apprehension of the person in the suspicious place is a very important factor. If the time between the crime and the apprehension is short, the location of the arrest is more likely to be found as a suspicious place, and will fall under the warrant exception.

6. Can probable cause for an arrest on public intoxication charges exist based on endangerment of self, when defendant's vehicle is so badly injured that it is no longer capable of being driven?

***Meek v. Tex. Dept. of Pub. Safety*, 175 S.W.3d 925 (Tex. App.—Dallas 2005)**

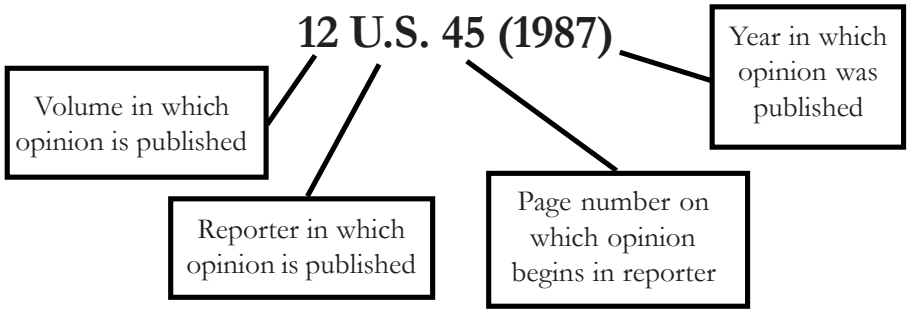
Yes. The totality of defendant's conduct may be considered when determining whether defendant endangers himself. In this case, defendant was acting in an intoxicated manner and registered a blood alcohol content of over twice the legal limit, and did not appear to understand the dangerousness of his conduct. These factors together gave the arresting officer probable cause to arrest defendant for public intoxication.

C. Suppression Issues

1. Is suppression of evidence an appropriate remedy for failure to

How to Read a Legal Citation

Although legal citations may look confusing at first glance, once you know what the various numbers and abbreviations stand for, it is really quite simple. The standard format of a citation is the following:



You may also see court designations in the parentheticals at the end of the citation (*i.e.* ,"Tex. Crim. App. 2006"). This signifies the court that is publishing the opinion. You may see the following:

- Tex. Crim. App.= Texas Court of Criminal Appeals
- Tex.= Texas Supreme Court
- Tex. App.—[city]= Texas Court of Appeals, in various districts throughout Texas
- 5th Cir.=Fifth Circuit Court
- No court designation= United States Supreme Court

Legal citations are useful because if you know how to read them, you can look up a case in a reporter with ease. Typing a citation into Lexis, Loislaw or Westlaw will also enable you to pull up a case for reference.

provide an alien with information concerning consular notification?

***Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006)**

No. Article 36(1)(b) of the Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this sub-paragraph." There is no judicial remedy contained in the Vienna Convention treaty, and as such, the courts may not create a judicial remedy. Additionally, the exclusionary rule applies to improper searches and seizures; this has nothing to do with a search or seizure. Article 36 does not guarantee detainees any rights at all, but merely requires a consular be informed of the detainee's detention.

2. Is suppression of evidence an appropriate remedy for "knock and announce" violations?

***Hudson v. Michigan*, 126 S. Ct. 2159 (2006)**

No. The "knock and announce" rule provides that prior to entering a residence, police should generally knock and announce their presence, and allow the occupants of the house an opportunity to answer the door. The Supreme Court has rejected a broad application of the exclusionary rule, applying it only when the deterrent effects outweigh the "substantial social costs." The knock and announce rule only protects the privacy and dignity of occupants of a home, but it does not protect the occupants from the officers seeing or taking items that are listed on a valid search warrant. And when weighing the deterrent effect of the rule versus social costs, the court found that the social costs—more complicated litigation, the release of more criminals, and increased questioning of violations of the rule—far outweigh the deterrent effect. The court held that civil suits and internal police discipline could work to deter police misconduct.

II. Substantive Law Issues

A. Transportation Code

1. License Plate Frame Cases

(a) Did a peace officer have the right to stop the defendant in light of the court's previous decision in *Granado*?

***U.S. v. Contreras-Trevino*, 448 F.3d 821 (5th Cir. 2006)**

Yes. Amendments to the Texas Transportation Code have altered the legal landscape on which the *Granado* decision rested (see, *U.S. v. Granado*, 302 F.3d 421 (5th Cir. 2002)). A plain reading of Section 502.409 of the Texas Transportation Code (as amended in 2003) now proscribes the use of license plate frames that obscure certain protected features of the vehicle's license plate.

(b) Does violation of the Texas "License Plate Frame" statute give rise to probable cause?

***U.S. v. Flores-Fernandez*, 418 F. Supp. 2d 908 (S.D. Tex. 2006)**

Yes. In denying the defendant's motion to suppress, the trial court ruled that because the license plate frame on defendant's vehicle, viewed objectively, violated both Sections 502.409(a)(6) and 502.409(a)(7)(B) of the Texas Transportation Code, the peace officer had probable cause to stop the vehicle.

(c) Did the trial court err in finding that an obstructed license plate does not give rise to reasonable suspicion?

***State v. Johnson*, 198 S.W.3d 795 (Tex. App.—San Antonio 2006)**

Yes. A police officer stopped the vehicle being driven by defendant solely because the license plate on the vehicle was partially obscured by the dealer-installed license plate frame. Defendant was subsequently charged with felony driving while intoxicated. Before trial, defendant moved to suppress all items of evidence and fruits of his arrest and search because the arrest was without warrant and without reasonable suspicion to stop or probable cause to arrest. The trial court granted the motion. On appeal, the court found that it was beyond dispute that the license plate frame on defendant's vehicle entirely covered the phrase "THE LONE STAR STATE" and probably covered the images of the space shuttle and the starry night; the images and phrase were all original design elements of the plate. Accordingly, the officer had reasonable suspicion of a violation of Transportation Code Section 502.409(a)(7) and a valid basis to make the stop. The trial court erred in granting defendant's motion to suppress.

2. Can a person be convicted of Accident Involving Damage to a Vehicle if he never actually hit the vehicle of the victim?

***Gillie v. State*, 181 S.W.3d 768 (Tex. App.—Waco 2005)**

Yes. A defendant does not have to actually strike the vehicle of another driver to be convicted of an Accident Involving Damage to a Vehicle (Section 550.022, Transportation Code). If the defendant caused the accident, he can be deemed to have been involved in the accident, and convicted of Accident Involving Damage to a Vehicle. In this case, the defendant pulled in front of the accident victim and immediately slammed on his brakes, causing the victim to lose control of her vehicle. The defendant was found to have caused the accident through his conduct.

3. Did the complaint accusing the defendant of violation of promise to appear (VPTA) give him sufficient notice of the act he allegedly committed?

***Azeez v. State*, No. 14-05-00539-CR, 2006 Tex. App. LEXIS 7821 (Tex. App.—Houston [14th Dist.] Aug. 29, 2006)**

Yes. A complaint must be specific enough for the accused to be able to identify the statute under which the State intends to prosecute—the defendant must be provided with notice of his alleged crime. In this case, the court surmised that the defendant was charged with violation of promise to appear (VPTA), a Transportation Code offense that requires willful conduct, but the complaint alleged knowing conduct. Citing Section 6.02(d) of the Penal Code, the court explained that there are four prescribed mental states: intentional, knowing, reckless and criminal negligence. "Willful" is not among the four culpable mental states, but using willful as a culpable mental state does make a statute fundamentally defective. Instead, it must be determined whether the statute clearly dispenses with the mental requirement: factors such as legislative history, whether the crime is done with or without fault, language of the statute, and subject of the statute must be considered. Use of willful as a culpable mental state does not clearly dispense with a culpable mental state to hold the offender strictly liable. Therefore, intent, knowledge or recklessness must be used as a mental state. So since knowing was used as the culpable mental state in the complaint, it was acceptable.

This case is a real doosy and a testament to how confusing the law can become. The opinion states that appellant claimed he was charged with failure to appear (FTA) (Sec. 38.10, Penal Code), the prosecutor claimed that the defendant was charged with a local city ordinance relating to non-appearance. Ultimately, the court concluded that the defendant was charged with VPTA although the complaint alleged the mental state for FTA. Confused? It's OK, as the court explains on page eight of the opinion: "The statutory requirements do not require the complaint to specifically identify the statute or ordinance with which the defendant is being charged. A charging instrument must, however, contain on its face every element of the offense that must be proven at trial."

4. Does the Texas Department of Transportation (TxDOT) have authority to place cameras on state highway right-of-ways to enforce compliance with traffic-control signals?

Op. Tex. Atty. Gen. No. GA-440 (2006)

Yes. The Texas Transportation Commission, which has broad authority over the state highway system, governs TxDOT, and pursuant to this authority TxDOT may install cameras on state highway right-of-ways. Local authorities, on the other hand, must seek the permission of TxDOT before placing cameras on state highway right-of-ways to enforce compliance with traffic control signals. Section 221.002, Transportation Code, provides that the Texas Transportation Commission and a municipality may agree to provide for the control and supervision of a state highway in a municipality, and establish responsibilities and liabilities of both the Commission and the municipality.

B. Penal Code

1. Can the movement of a motor vehicle after an order to desist by a peace officer constitute interference with public duties?

***Barnes v. State*, No. PD-0939-05, 2006 Tex. Crim. App. LEXIS 831 (Tex. Crim. App. Apr. 26, 2006)**

Yes. The defendant's vehicle was pulled over by a police officer. As the officer was speaking with dispatch, defendant began to slowly move her vehicle forward on the shoulder and disrupted his efforts to issue a citation. She drove approximately 70 feet before coming to a halt. At different times during this encounter the appellant refused to roll down her window, refused to exit her automobile, read a book, and when the glass was knocked out of her windows and she was extracted from the vehicle ordered her child to run proclaiming, "They will kill him!" The Court of Criminal Appeals, reversing the Court of Appeals, found that the defendant's actions were inconsistent with the officer's authority to detain her because she ignored his instructions to desist, and created the possibility of flight. The possibility of flight required the officer to take extra safety precautions to prevent the defendant from leaving the scene. Defendant's acts constituted behavior punishable under Section 38.15, Code of Criminal Procedure (Interference with Public Duties).

2. Is a petition for expunction a "government record" for purposes of committing the offense of Tampering with a Governmental Record?

***State v. Vasilas*, 187 S.W.3d 486 (Tex. Crim. App. 2006)**

Yes. The court concluded that pleadings filed with a court could be governmental records under Section 37.01(2)(A), which stated that governmental records included court records, defined in Section 37.01(1) as records issued by a court. "Including" is a term of enlargement, so the definition of a governmental record did not exclude a pleading, even though a court did not issue it.

3. You can pick your friends, you can pick your nose, but you can't pick your friend's nose. Nor can you necessarily pick the offense of your prosecution. Thirsty anyone?

***Ex parte Smith*, 185 S.W.3d 887 (Tex. Crim. App. 2006)**

As you may recall from last year's update, Mr. Smith was an Alpha Phi Alpha fraternity member at Southern Methodist University (SMU) who was accused of aggravated assault by means of forcing excessive water consumption (A.K.A. "water intoxication"). On appeal, he argued, *in pari materia*, that the more appropriate charge was the offense of hazing as defined in the Education Code. The Court of Criminal Appeals concluded that such an argument could not be advanced via a pretrial writ of *habeas corpus*.

C. Local Government Code

Must local governmental entities require persons who seek to contract with local governmental entities to comply with Chapter 176, Local Government Code (Disclosure of Certain Relationships with Certain Governmental Officials) before entering into a contract with the local government entity?

Op. Tex. Atty. Gen. No. GA-446 (2006)

No. This lengthy AG Opinion is a virtual lexicon of information on Chapter 176. But the question asked above is perhaps the most important one, because its answer takes a lot of the teeth out of Chapter 176. Cities have no affirmative duty to require vendors to comply with Chapter 176. Nor does a local governmental entity have an affirmative responsibility to enforce Chapter 176. Vendors must not even be informed of the requirements of Chapter 176. Failure to comply with Chapter 176 does not void a contract, but local governmental entities may choose to provide for the voidability of a contract that does not comply with Chapter 176 if they so desire.

III. Procedural Law Issues

A. Reasonable Conditions of Bail and Magistrate Issues

1. In a child endangerment case, was the bond condition requiring restrictions on defendant's possession and visitation with her other children an unreasonable bond condition set by the magistrate?

***Burson v. State*, 202 S.W.3d 423 (Tex. App.—Tyler 2006)**

No. Pursuant to Article 17.40 of the Code of Criminal Procedure, a magistrate may impose reasonable bond conditions related to the safety of the victim or the community. The court found that the condition imposed that restricted access to the defendant's children worked to ensure her presence at trial, and continued presence in the community. Though magistrates statutorily have the authority to order any reasonable conditions, the court concluded in this instance that a specific rule applied (Article 17.41(d), Code of Criminal Procedure), and that that restriction on visitation of a child-victim could only be limited to 90 days.

2. May municipal police officers set reasonable bail for both misdemeanor and felony arrestees?

Op. Tex. Atty. Gen. No. GA-457 (2006)

Yes. Article 17.20, Code of Criminal Procedure, allows municipal police officers to set reasonable bail for misdemeanors, and Article 17.22 allows municipal police officers to set bail for felony arrestees if no prosecution has yet been filed. Article 17.21 provides that the court must fix bail if prosecution is pending in a felony case. However, a sheriff may but is not required to accept into his county jail a defendant whose bail has been set by municipal police officers. A defendant charged with a misdemeanor whose bail is set by a municipal court officer, but who is detained in jail must be brought before a magistrate within 24 hours of arrest if a magistrate has not determined that probable cause exists to believe the person committed the offense. Likewise, a defendant charged with a felony whose bail has been set by a police officer but who is detained in jail must be brought before a magistrate within 48 hours of arrest if a magistrate has not determined if probable cause exists.

3. Do all magistrates have an equal mandatory duty to perform magistrate duties under Article 15.17 of the Code of Criminal Procedure, or does only a justice of the peace have a mandatory duty?

Op. Tex. Atty. Gen. No. GA-426 (2006)

Yes, all magistrates have an equal mandatory duty. Article 15.17 of the Code of Criminal Procedure requires magistrates of the county to provide statutory warnings to an arrested person brought before them. Magistrates of the county who have a mandatory duty to provide warnings under Article 15.17 include district judges, county judges, judges of the county courts at law, judges of statutory probate courts, justices of the peace, and mayors, recorders, and judges of the municipal courts of incorporated cities or towns. The frequency with which a particular magistrate of the county performs this duty may depend upon factors such as the magistrate's location and the hours when the magistrate is available to individuals who have an arrested person in custody.

B. Trial Procedure

1. Is a judge disqualified from presiding over a case if he prosecuted the original action?

***Ex parte Richardson*, 201 S.W.3d 712 (Tex. Crim. App.—2006)**

Generally, yes. Article V, Section 11, provides no judge shall preside in any case when the judge shall have been counsel in the case; Article 30.01, Code of Criminal Procedure, provides that no judge shall sit in any case where he has been counsel for the State or accused. In this case, however, the defendant opted not to ask the judge to recuse himself. He then attempted to use the judge's prior role as a prosecutor in his request for *habeas corpus* relief. The court denied his request because his argument should have been raised in the trial court or on appeal and not through *habeas corpus*.

2. Did the trial court err by allowing the consolidation of more than one offense on the day of trial despite defendant's objections?

***White v. State*, 190 S.W.3d 226 (Tex. App.—Houston [1st Dist.] 2006)**

Yes, but such an error is not immune from a harmless error analysis. Citing *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997), the court explained that except for certain federal constitutional errors labeled by the U.S. Supreme Court as structural, no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement is categorically immune. To the extent that the Court of Criminal Appeals stated severance is never subject to harm analysis in *Warmowski v. State*, 853 S.W.2d 575 (Tex. Crim. App. 1993), that language was disavowed in *Llamas v. State*, 12 S.W.3d 469 (Tex. Crim. App. 2000). In this case, no harm was shown.

3. Did the trial court err in not allowing a peace officer to testify as an expert witness on the difference between assault on a public servant and terroristic threat?

***Anderson v. State*, 193 S.W.3d 34 (Tex. App.—Houston [1st Dist.] 2006)**

No. Not when the testimony relates exclusively to statutory construction. Such issues are questions of law. Experts are not allowed to testify as to issues that are purely questions of law. They may however testify as to mixed questions of law and fact.

4. Does the trial court have a duty to appoint a licensed interpreter if the defendant or witness does not understand the English language?

***Ridge v. State*, No. 10-05-00277-CR, 2006 Tex. App. LEXIS 7921 (Tex. App.—Waco 2006)**

Yes. A trial court has an independent duty to appoint a licensed interpreter if it was made aware that a defendant or witness did not speak or understand the English language. An exception to this rule would be if the defendant or witness waived their right to a licensed interpreter.

Note: Section 57.002(c), Government Code, describes situations in which a court need not appoint a licensed interpreter, but all interpreters must be qualified as experts under the Texas Rules of Evidence.

5. Did the trial court err by excusing a venire member for economic reasons?

***Gray v. State*, 174 S.W.3d 794 (Tex. App.—Corpus Christi 2005, pet. granted)**

Yes. It was not harmless error, and was in violation of Section 62.110(c), Government Code, a provision enacted to ensure the right that the venire be composed of a fair cross-section of the community. Relying on *Ford v. State*, 73 S.W.3d 923 (Tex. Crim. App. 2002), the court concluded that the trial judge subverted the process of assembling the venire in a way that made it impossible to state with fair assurance that the error was harmless.

6. Is a 15-minute per side time limit on *voir dire* unreasonable?

***Wappler v. State*, 183 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2005)**

Yes, in this case. A court may impose reasonable restrictions on the conducting of *voir dire*, including the amount of time spent on *voir dire*. There is no brightline rule as to how long each side should have to *voir dire*, or when the time limit on *voir dire* is too short, so analysis must be done on a case-by-case basis. In this case, counsel for both sides managed their time appropriately and did not attempt to prolong the jury selection process, and counsel was still questioning a juror who was ultimately seated on the jury when time was called. When counsel requested additional time in *voir dire*, his request was denied. Such conduct by the trial court was not considered a reasonable restriction.

7. Is the failure to timely elect punishment ineffective assistance of counsel?

***Ross v. State*, 180 S.W.3d 172 (Tex. App.—Tyler 2005)**

It depends. In this case, trial counsel failed to elect that the jury assess punishment for defendant, and therefore defendant alleged counsel denied him the opportunity to be tried by a jury. The two-pronged test for ineffective assistance of counsel, based on *Strickland v. Washington*, 466 U.S. 668 (1984) is: (1) the defendant must show counsel performance was "deficient" in that counsel was not acting as the counsel guaranteed by the Sixth Amendment, and (2) there must

be a reasonable probability that, but for counsel's deficient conduct, the outcome of the case would have been different. Review of the trial counsel's performance is highly deferential, and the *Strickland* test is historically very difficult to satisfy. Here, trial counsel represented defendant vigorously throughout the trial, and it is unclear what advice the trial counsel gave defendant regarding assessment of punishment. Because the record does not clearly show how trial counsel's performance was deficient, the first prong of the *Strickland* test cannot be met.

8. The Sixth Amendment: Confrontation Clause Issues

(a) Are a defendant's Sixth Amendment Confrontation Clause rights implicated regarding the content of an emergency 911 call; put another way, are statements made during a 911 call "testimonial"?

***Davis v. Washington*, 126 S. Ct. 2266 (2006)**

It depends. Viewed objectively, it must be determined whether or not a 911 call contains information that can be viewed as testimonial information. In this case, the caller to 911 described present circumstances that required police assistance, and did not describe the details of a past crime (which might be testimonial in nature). The court contrasted the 911 call with the testimony of another witness to the crime, who spoke with police when they arrived at the scene of the crime. The second witness' statements were considered testimonial because they detailed a crime that had already occurred, and her interrogation was part of a police investigation in progress.

***Kearney v. State*, 181 S.W.3d 438 (Tex. App.—Waco 2005)**

It depends. The Sixth Amendment provides "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." Testimony of witnesses who made "testimonial statements" is admissible only if the defendant had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36 (2004). Testimonial statements are those that are similar to in-court testimony, and are formal in nature, usually not spontaneous, and are not merely responses to initial police questioning at a crime scene. Calls made to 911 should be evaluated on a case-by-case basis to see whether the content is testimonial. In this case, the call was made to report a robbery in progress and ask for police assistance—a non-testimonial call for help. Therefore, the defendant did not have a Sixth Amendment right to cross-examine the person who made the 911 call.

(b) Are a defendant's Sixth Amendment Confrontation Clause rights violated when he is denied the opportunity to cross-examine a confidential informant?

***Ford v. State*, 179 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2005)**

It depends. *Crawford v. Washington*, 541 U.S. 36 (2004), states that a defendant must be afforded an opportunity to cross-examine a witness who has made testimonial statements before such statements may be admitted into evidence. Here, while the defendant was not allowed to cross-examine the confidential informant, none of the informant's statements were used in executing a search warrant, and therefore, none of the informant's statements were admitted into evidence via the search warrant. There was therefore no violation of defendant's Sixth Amendment rights.

(c) Is the Sixth Amendment violated when an adult witness is allowed to testify while wearing a disguise?

***Romero v. State*, 173 S.W.3d 502 (Tex. Crim. App. 2005)**

Yes. The Sixth Amendment Confrontation Clause reflects a strong preference for face-to-face confrontation. By wearing a disguise, a witness can lessen the physical presence effect of confrontation, and also the ability for the demeanor of the witness to be observed. There is no compelling interest that is advanced by permitting a witness to testify in disguise.

9. Deferred Issues

(a) Can a defendant appeal a municipal court's determination to proceed to adjudication when a defendant violates conditions of deferred disposition?

***Jamshedji v. State*, No. 14-05-0051-CR, 2006 Tex. App. LEXIS 6230 (Houston [14th Dist.] July 20, 2006)**

Yes. As the court explains: "[W]hen chapter 45 of the Code of Criminal Procedure, governing municipal courts, does not provide a rule of procedure relating to any aspect of a case, the other general provisions of the code are to be applied as necessary. *See* Tex. Code Crim. Proc. Ann. art. 45.002. Article 45.051 allows adjudication to be deferred and defendants placed under supervision in much the same way as Section 5 of Article 42.12 of the Code. *See* Tex. Code Crim. Proc. Ann. arts. 42.12 & 45.051. Texas law does not provide for the direct appeal from a trial court's determination to proceed to adjudication when a defendant violates conditions of community supervision under Article 42.12. *See* Tex. Code Crim. Proc. art. 42.12 § 5(b); *see also Hogans v. State*, 176 S.W.3d 829 (Tex. Crim. App. 2005). We can find no legal authority or rationale to conclude that a greater right of appeal exists with regard to Article 45.051 than Article 42.12. Accordingly, we have no

jurisdiction to hear this appeal, and it is dismissed."

Note: TMCEC thanks the Houston City Attorney's Office for requesting that this decision be reconsidered for publication.

(b) Can the State properly pursue a defendant with a *capias pro fine* if the term of deferred adjudication has expired and no motion to adjudicate has been filed?

Op. Tex. Atty. Gen. No. GA-396 (2006)

No. Article 42.12, Code of Criminal Procedure is the State's community supervision statute. Article 42.12(5)(h) states that a court retains jurisdiction over a defendant beyond the deferred adjudication period if before the expiration of the period, the State files a motion to proceed with the adjudication and a *capias* is issued for the arrest of the defendant. The AG Opinion construed Article 42.12 narrowly to not allow the court to maintain jurisdiction over a defendant whose adjudication period has expired when the State has not filed a motion to adjudicate before the expiration of the period, and the State may not pursue a defendant with a *capias pro fine.*

Note: Once again, it is critical that readers distinguish between "deferred adjudication" and "deferred disposition." GA-396 is limited in scope, as it only addresses deferred adjudication and makes no reference to deferred disposition. It has no application to deferred disposition. While the distinction between the two statutes remains unapparent to many, case law reflects that though they may be similar, they are not exactly the same. *See Jamshedji v. State* and *Houston Police Department v. Berkowitz*, 95 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2002). *See also* Ryan Kellus Turner, D*eferred Disposition is not Deferred Adjudication 11:7* Recorder, 13 (August 2002).

10. Jury Charges: Is it harmful error for a court to not require a jury to unanimously agree on which of two criminal offenses a defendant is guilty on a jury charge?

***Dolkart v. State*, 197 S.W.3d 887 (Tex. App.—Dallas 2006, no pet.)**

Yes, it is egregious harm that is so severe, appellant need not have objected at trial in order to preserve error. In this case involving an SMU Law School professor who ran down a cyclist in the street, the jury charge did not require jurors to unanimously decide whether the defendant was guilty of assault by threat or bodily injury—two separate and distinct crimes. The language of the charge never required a unanimous verdict be returned. Since it was impossible to tell from the record if a unanimous verdict had indeed been returned, the court concluded that defendant suffered egregious harm.

11. Plea Bargains: Does the defendant have the right to withdraw a plea when the State violates terms of a plea bargain?

***Bitterman v. State*, 180 S.W.3d 139 (Tex. Crim. App. 2005)**

Yes. In this case, the court of appeals erred in concluding that because defendant did not object at the sentencing hearing, defendant had no grounds to appeal. The Court of Criminal Appeals disagreed and held that due process allows the defendant to withdraw a plea once the State violates the plea bargain, and defendant preserves error by bringing the violation to the trial court's attention as soon as error could be cured, in a motion for a new trial.

12. Appeals

(a) May the State appeal an order dismissing prosecution on the grounds that it proceeds upon an unconstitutional ordinance, if the trial court delays its ruling until after both parties have submitted their evidence at a trial on the merits but before the issue of guilt or innocence has been resolved?

***State v. Stanley*, 201 S.W.3d 754 (Tex. Crim. App. 2006)**

Yes. At least 14 defendants were issued citations pursuant to a city ordinance that prohibited street activity in school zones. The defendants were protesting at a clinic that was located across the street from a school. The cases were consolidated and tried in the Waco Municipal Court where the defendants were found guilty. In a consolidated trial *de novo* in the county court at law, defendants filed a motion to dismiss, contending that the ordinance was unconstitutionally vague and overbroad. The county court-at-law declined to rule on the motion during a pretrial hearing. After the state's case in chief, the judge granted the motion to dismiss. The 10th Court of Appeals dismissed the state's attempted appeal on the grounds that Article 44.01(a)(1), Code of Criminal Procedure, only allows the state to appeal an order dismissing a charging instrument before trial on the merits begins.

Reversing the lower courts, the Court of Criminal Appeals held that such appeals are allowed because a trial judge should not reach the issue of guilt or innocence before first addressing the motion to dismiss. The court also decided that the judge's granting of the motion to dismiss did not amount to an acquittal: no determination of guilt was made, so double jeopardy would not bar an appeal.

(b) Upon granting a defendant's motion to suppress evidence, must a trial court grant a timely request for findings of fact and conclusions of law?

***State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006)**

Yes. Because an appellate court's review of a trial court's ruling is restricted by an inadequate record of the basis for the trial court's ruling, the Court of Criminal Appeals, creating a new rule, found it necessary to require trial courts to express its findings of fact and conclusions of law when requested by the losing party.

For trial courts, this is debatably the most significant decisions that the Court of Criminal Appeals handed down during the 2005-2006 term. It is safe to say that most municipal and justice courts are not accustomed to issuing findings of facts and conclusions of law. Nor are most county level courts accustomed to receiving findings of fact and conclusions of law from non-record courts. While some at first may be skeptical that this case has any bearing on suppression issues in municipal and justice court, they shouldn't be. The court was careful to couch its opinion in terms of "trial courts" and "appellate courts." Furthermore, it has only been about a year since the Court of Criminal Appeals discussed the state's right to appeal pre-trial issues from non-record trial courts and related jurisdictional issues. *See State v. Alley*, 158 S.W.3d 485 (Tex. Crim. App. 2005).

(c) Did the defendant timely appeal her conviction from the municipal court of record?

***State v. Guevara*, 172 S.W.3d 646 (Tex. App.—San Antonio 2005)**

In an interesting conclusion to a case that began in July 1998 and reached the Court of Criminal Appeals in June 2004, the Court of Appeals concluded that the county court at law lacked jurisdiction to hear the initial appeal of a defendant appealing the constitutionality of the San Antonio "queuing" ordinance. While pertinent provisions of Chapter 30 of the Government Code were amended in 1999, the defendant under then existing law failed to file a notice of appeal and appeal bond within 10 days of being denied a new trial. Furthermore, there was nothing presented on appeal to establish that the defendant sought or was granted an extension to file the appeal.

13. Consequence of Conviction for Class C Misdemeanor

Does Class C assault conviction under Section 22.01(a)(3), Penal Code, constitute a crime of violence or domestic violence for purposes of deportation?

***Gonzalez-Garcia v. Gonzales*, 166 Fed. Appx. 740 (5th Cir. 2006)**

No. On appeal it was held that the defendant's conviction for assaulting his wife pursuant to Section 22.01(a)(2-3), Penal Code, was not a crime of violence, as defined by 18 U.S.C. § 16 and therefore could not be a crime of domestic violence for purposes of determining eligibility for deportation. The circuit court held that Section 22.01(a)(2-3) could be committed without the intentional use of physical force needed to constitute domestic violence, conduct for which an alien can be deported.

14. Expunction

Can insufficient evidence be a basis for an expunction?

***In re Expunction of C.V.*, No. 08-05-00243-CV, 2006 Tex. App. LEXIS 7888 (Tex. App.—El Paso Aug. 31, 2006)**

No. The right to an expunction is a statutory privilege and all conditions laid out by Article 55.01, Code of Criminal Procedure, must be met for a record to be expunged. In order for an expunction to remain, evidence must show the decision to indict was based on incorrect facts, mistake of fact, or other reasons indicating a lack of probable cause, but not insufficient evidence.

15. Extraordinary Remedies

(a) Is *habeas corpus* an appropriate remedy to seek the return of currency seized and transferred pursuant to Articles 59.02 and 59.03, Code of Criminal Procedure (Seizure of Contraband)?

***City of Dallas v. Lopez*, 180 S.W.3d 428 (Tex. App.—Dallas 2005)**

No. A writ of *habeas corpus* is a remedy to be used when an individual's liberty has been restrained in some manner. It is directed at a person, not an object being restrained. Therefore, a trial court cannot grant a writ of *habeas corpus* for the return of money.

(b) Is *mandamus* relief proper when a minor's underlying case is still pending in municipal court?

***In re A.F.*, No. 05-05-01435-CV, 2006 Tex. App. LEXIS 5483 (Tex. App.—Dallas June 13, 2006)**

No. *Mandamus* relief is not proper if the defendant still has an adequate remedy at law; such a remedy is only used in extreme cases. If a case is still pending in municipal court, guilt or innocence must still be decided. Once that is done, the defendant may request a trial *de novo* in county court (assuming the court involved is a municipal court and not a municipal court of record). So an adequate remedy exists for defendant.

Additionally, a defendant may not request declaratory relief, claiming a criminal statute is unconstitutional, if a case is still pending in municipal court, without also alleging that the enforcement of the criminal statute would result in irreparable injury. A defendant may argue before his trial date that a law is unconstitutional, but if the court disagrees, the defendant must wait until appeal to argue the same point again.

IV. Municipal Law Issues

A. Ordinances

1. Is the Bedford sound ordinance void for vagueness?

***State v. Holcombe*, 187 S.W.3d 496 (Tex. Crim. App. 2006)**

As you may recall from last year, this case involved a defendant convicted of DWI. The probable cause for his arrest stemmed from his alleged violation of the Bedford sound ordinance that prohibits unreasonable noise. In this instance, the noise emanated from the defendant's automobile sound system. Citing the 14th Amendment, the trial court declared the ordinance unconstitutionally vague. Affirming the reversal of the trial court's decision, the Court of Criminal Appeals found that the ordinance was couched in terms of objective reasonableness and contained criteria that do not permit arbitrary enforcement.

2. Is the Austin smoking ordinance void for vagueness?

***RK & Hardee L.P. v. City of Austin*, 394 F. Supp. 2d 911 (W.D. Tex. 2005)**

No. But the trial court did enjoin the City of Austin as to a portion of the ordinance relating to enforcement provisions regarding fines, permits and licenses. In its order, the court enjoined the City from suspending or revoking any required permits without allowing for judicial review. The court also held that under the recently amended language of Section 6.02(f) of the Penal Code that the City could only impose a maximum fine of $500.

3. Are the City of Waco School Zone and Parade Ordinances constitutional?

***Knowles v. City of Waco*, 462 F.3d 430 (5th Cir. 2006)**

No. The School Zone Ordinance prohibited activities that could distract drivers while school zones were active. There was a "wingspan exception" to this rule that permitted otherwise "distracting" activity if the people so engaged stood at arm's length. The court found the wingspan exception did not further narrow tailoring, and that the ordinance swept far more broadly than necessary to enhance the safety and welfare of schoolchildren and others using public rights of way. The court also found that the word "reasonable" was within the bounds of the law, but when coupled with "anticipation" of "obstructing the normal flow of traffic," no one could be certain what conduct was covered by the statute (meaning it was overbroad).

The Parade Ordinance defined "parade" and "street activity" in the same, overbroad way as School Zone Ordinance. The Parade Ordinance also required that a permit be obtained for demonstrations by a handful of people; the court found this not to be narrowly tailored. The Parade Ordinance's exemptions, such as funeral processions, did not promote traffic safety.

4. Is a city ordinance that requires landlords to consent to administrative searches of rental properties in violation of the Fourth Amendment?

***Dearmore v. City of Garland*, 400 F. Supp. 2d 894 (N.D. Tex. 2005)**

Yes. The Fourth Amendment requires that for property to be searched, a search warrant must be issued or consent of the owner must be given voluntarily. A business owner too has an expectation of privacy in his commercial property, and therefore business owners have the right to be free from unreasonable searches and seizures. Therefore, an ordinance dealing with landlords and administrative searches should allow landlords to choose to permit searches and should contain a warrant procedure for cases when the landlord refuses consent.

5. Is a challenge to a city's prior signage ordinance mooted by the enactment of a new signage ordinance?

***Brazos Valley Coalition for Life v. City of Bryan*, 421 F.3d 314 (5th Cir. 2005)**

Yes. In this case, the Brazos Valley Coalition for Life challenged the prior sign ordinance, but did not challenge the new ordinance (which was enacted two weeks after Brazos Valley filed suit, but before summary judgment). The circuit court found that to the extent the new ordinance remedied the problems alleged in the prior ordinance, Brazos Valley's claim was moot. The court also found that, unlike in previous cases, nothing indicated that the City of Bryan intended to reenact the former sign ordinance as soon as litigation had been concluded.

6. Is coercion/duress to pay a local fire registration fee present when there are no economic or business repercussions for failing to pay the fee, and when the maximum punishment is a $2000 fine in municipal court?

***City of Dallas v. Lowenberg*, 187 S.W.3d 777 (Tex. App.—Eastland 2006)**

No. A person who pays a government fee or tax voluntarily does not have a claim for repayment even if the fee or tax is later found to be unlawful. In this case, the defendants agreed to pay the City's fire safety registration fee in exchange for the City agreeing to drop fines pending in municipal court. But there was nothing in the record that indicated that the defendants were subjected to any economic or business hardships and the defendants failed to challenge the validity of the ordinance. Additionally, if defendants failed to pay the fee, they would be prosecuted in municipal court and fined not to more than $2000. The court found none of these factors to constitute

duress or coercion; therefore, defendants were found not to be entitled to reimbursement.

7. Should a City be estopped from enforcing an ordinance designed to promote traffic safety through the regulation of exits and entrances leading to businesses?

***City of White Settlement v. Super Wash*, Inc., 198 S.W.3d 770 (Tex. 2006)**

No. Super Wash, Inc. was seeking to estop the City from enforcing the fence requirement so that it could build a second entrance/exit to assist with traffic flow. Super Wash had been operating for years without this second entrance/exit, and there was no evidence it was necessary for its continued operation. The Supreme Court found that this was not an exceptional case in which justice required estoppel. There were other remedies available to the business, such as seeking a variance or a repeal of the ordinance that it had yet to pursue, and the ordinance was a matter of public record and discoverable by the business before it purchased the lot. Estopping the City from enforcing the ordinance would have prevented it from freely performing at least one of its governmental functions—regulating traffic.

8. Does a controversy exist when the City fails to give formal notice to the corporation that owns the building (but does give notice to the property manager), and the corporation is not allowed an administrative appeal of the building inspector's finding that the building is substandard?

***OHBA Corp. v. City of Carrollton*, No. 05-05-00215-CV 2006 Tex. App. LEXIS 7389 (Tex. App.—Dallas Aug. 22, 2006)**

No. No charges were filed against the corporation, only against an agent of the property management corporation. Because the corporation brought suit when it lacked standing, the court sanctioned it by having the case dismissed with prejudice. The City acted properly in only giving notice to the property manager, and was not required to give notice to the corporation.

9. Can a city charter grant a home-rule city commission the power to amend the charter by ordinance?

Op. Tex. Atty. Gen. No. GA-433 (2006)

No. A home-rule city may adopt or amend its charter in any way it wants, as long as it abides by the Texas Constitution and general laws of the State. Article XI, Section 5 of the Texas Constitution allows home-rule cities to adopt or amend their charters by a majority vote of the qualified voters in the city, at an election held for that purpose. A charter that allows a city to forego submitting amendments to the city charter to the city's qualified voters is not valid. Any amendments made by the city commission are void *ab initio* (from the start).

10. May a city building official rely on a professional engineer's seal and certification that all code provisions, as adopted by the city, have been met?

Op. Tex. Atty. Gen. No. GA-439 (2006)

No. The thrust of this question is whether or not a building official who relies on a professional engineer's seal and certification is relieved of any responsibility or duty, the violation of which would form the basis for a civil action. Section 1001.402, Occupations Code, does not address this, and the liability upon the violation of a code provision would likely be determined by the facts of an individual case. Section 1001.402 does require a city official to accept a proffered plan or plat from a professional engineer only it if bears the engineer's seal. A seal is evidence that the engineer has complied with all federal, state and local requirements.

B. Municipal related civil rights lawsuits

1. Does a municipality's jail strip search policy violate the Fourth Amendment?

***Beasley v. City of Sugar Land*, 410 F. Supp. 2d 524 (S.D. Tex. 2005)**

No, when the policy allows for searches based on reasonable suspicion that there may be a *threat* to facility safety. When the policy allows searches out of a generalized interest in facility safety (*i.e.*, when there is no suspicion of a threat), this type of policy has been found to be in violation of the Fourth Amendment prohibition against unreasonable searches. The test for whether a policy is constitutional or not is a reasonableness test.

2. Can *res ipsa loquitor* be used to establish the liability of a city under 42 U.S.C. Section 1983 [Civil Action for Deprivation of Rights]?

***Gast v. Singleton*, 402 F. Supp. 2d 794 (S.D. Tex. 2005)**

No. *Res ipsa loquitur* is typically applied to personal injury claims of ambiguous origins, and neither the Supreme Court nor the Fifth Circuit has ever held that this liability theory may be used to prove city liability under Section 1983. A city is not liable for the intentional torts of its employees under Section 1983 unless an official policy, custom or practice led to those torts.

V. Immunity Issues

A. Is a showing of the absence of probable cause an essential element in a retaliatory prosecution case?

***Hartman v. Moore*, 126 S. Ct. 1695 (2006)**

Yes. In this case, Postal Service investigators investigated a company and its chief executive officer, and charges were brought against both in federal court. The charges were ultimately dismissed for lack of evidence. The CEO alleged the inspectors had violated his First Amendment freedom of speech because he was targeted for prosecution as a result of his lobbying activities, and because the inspectors pressured the federal prosecutor into pressing charges. The defendants claimed immunity. Although it had been previously held that in a retaliatory-prosecution suit, lack of probable cause was not a required element, the court held that to bring a retaliatory-prosecution action, plaintiff must allege and prove a lack of probable cause for the underlying criminal charges.

B. Did a trial court err by denying a City's plea to jurisdiction (alleging governmental immunity) when the complainant was injured while performing community service in lieu of paying a municipal court fine?

***City of Pasadena v. Thomas*, No. 01-05-00333-CV, 2006 Tex. App. LEXIS 7685 (Tex. App.—Houston [1st Dist.] Aug. 31, 2006)**

Yes. Cities are generally immune from liability for person injury, except for "personal injury . . . so caused by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Section 101.021(2)l, Civil Practices & Remedies Code. In suits against governmental units, a plaintiff must affirmatively demonstrate the court's subject matter jurisdiction by alleging a valid waiver of governmental immunity. Subject matter jurisdiction is a question of law.

In this case, the complainant alleged the City failed to provide him with protective gloves to shield his hands from the blade of the machete he was using, and failed to supervise him properly. As a result, he alleged, he cut three of his fingers with the machete blade. The Court of Appeals held neither the City's failure to provide protective gear nor its failure to give enough information to complainant on the use of the machete waived the City's immunity—the lack of tangible personal property is not the same as the use of tangible property, and instructions are too abstract a concept to be considered a "use of tangible property."

C. Is a city attorney necessarily entitled to governmental employee sovereign immunity or common-law official immunity?

***Welch v. Milton*, 185 S.W.3d 586 (Tex. App.—Dallas 2006)**

No. Not when a genuine issue of material fact exists as to whether the city attorney (1) formed a personal attorney-client relationship with the plaintiff (a former city employee), or (2) was acting in the scope of his authority when he advised the plaintiff.

D. Is a lawyer acting as prosecuting attorney entitled to immunity despite neither being hired by the local governing body nor having taken an oath of office?

***Charleston v. Pate*, 194 S.W.3d 89 (Tex. App.—Texarkana 2006)**

Yes. Immunity for prosecutors stems from their functions as lawyers representing the government in filing and presenting criminal cases as well as other acts associated with the judicial process. It is the nature of an attorney's actions, not one's title or qualifications that give rise to prosecutorial immunity. In this instance, the court found that the attorney was acting as a "*de facto* assistant district attorney."

E. Is a city immune from prosecution when an inmate in a city jail hangs himself with his shoelaces after tying them to the top of his jail bunk bed?

***Nunez v. City of Sansom Park*, 197 S.W.3d 837 (Tex. App.—Fort Worth 2006)**

Yes. A city's governmental immunity acts to defeat a trial court's subject matter jurisdiction unless the city expressly consents. However, the Texas Torts Claims Act subjects a city to liability for personal injury that results from the city's use of personal and tangible property that would subject the city, if it were a private person, to liability. Here, the city did not "use" the shoestrings or bunk bed by allowing the inmate to use them—"use" does not merely mean, "to make available." The allegations that the city used the bunk bed and shoestrings were too attenuated.

VI. Juvenile Issues

A. Is it proper to require a juvenile defendant to produce evidence of a causal connection between the violation of the parental notification requirements and a confession in order to have the confession suppressed?

***Pham v. State*, 175 S.W.3d 767 (Tex. Crim. App. 2005)**

Yes. The burden is on the defendant as the moving party in a motion to suppress evidence obtained in violation of the law to produce evidence demonstrating a causal connection between the wrongful conduct and the confession. The burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal connection was, in fact, broken.

B. Does the seven-day filing deadline for a student's failure to attend school case require a case to be filed with the court within seven days of the child's tenth absence?

Op. Tex. Atty. Gen. No. GA-417 (2006)

Yes. When read in context, Section 25.0951(a) of the Education Code, requiring a school district to file a complaint "within seven school days of the student's *last absence*" (emphasis added), refers to the child's tenth unexcused absence. Accordingly, a school district must file a complaint against a student for failure to attend school within seven school days of the student's tenth unexcused absence within a six month period. Failure to file the complaint within seven school days of the tenth unexcused absence mandates the statutory dismissal of the complaint by the trial court.

If a complaint is dismissed for the school district's failure to timely file, any subsequent refiling of the complaint based upon the same 10 unexcused absences also must be dismissed for untimeliness. While judges may construe the statute to prohibit any of the tainted absences from being used in a subsequent complaint, the Attorney General opined that the statute lends itself to at least one other construction: "If the student has failed to attend school without excuse since the original complaint was filed, … the statute can be read to require the school district to file a new complaint within seven school days of the latest absence that lists the latest absence as well as some or all of the absences listed in the original complaint." (GA-0417 at 4). While this part of the opinion may not please readers looking for a single construction of the statute, it serves to remind us that the final construction of a statute ultimately depends on the interpretation of judges. For the math phobic, a word of warning: such cases when plotted on a timeline begin to look a lot like story problems from an algebra class.

The guidelines set out by Section 25.0951 of the Education Code are commonly referred to as "permissive filing" (three days or part of days within a four week period) and "mandatory filing" (10 days or part of days within a six-month period in the same school year). The Attorney General opined that a school district is precluded from permissive filing under Section 25.0951(b) once a student has accumulated 10 unexcused absences. Notably, the seven-day filing deadline does not apply to permissive filing, only to mandatory filing.

VII. First Amendment Cases

A. Is a government employee's speech made pursuant to official duties and addresses and subject to First Amendment protections a matter of public concern?

***Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)**

No. When a government employee is acting in his official capacity, he is not a citizen for First Amendment purposes. For that reason, a manager may reprimand him for the content of his speech at his place of employment. Exposing government inefficiency and misconduct is an important matter.

B. Does a trial court's dismissal of a complainant's suit seeking judicial review of a State Commission on Judicial Conduct's denial of his judicial misconduct complaint equate to a denial of complainant's First Amendment right to judicial review?

***Smith v. State Commn. on Judicial Conduct*, 2005 Tex. App. LEXIS 10219 (Tex. App.—Fort Worth Dec. 8, 2005)**

No. There are no statutory or constitutional grounds for a trial court's judicial review of a decision made by the State Commission on Judicial Conduct. There are no core interests implicated by the Commission's grievance procedure, therefore procedural due process does not mandate a review of an administrative decision. Equal protection issues are not raised because the Commission rules do not provide for judicial review of the Commission's decisions; since there is no provision for equal protection, a complainant cannot argue he is being denied the same treatment as anyone else.

Does this issue of *The Recorder* look different to you? You probably noticed a modified masthead and a uniform format for referencing the law. Moreover, after conferring with many courts regarding the important archival value of *The Recorder,* we will now refer to the publication as a journal rather than a newsletter. All past issues of *The Recorder* are still available online at www.tmcec.com free of charge.

Along with these modifications, TMCEC adopted a new style manual: *ALWD Citation Manual: A Professional System of Citation*. Copies may be obtained by calling Aspen Publishers at 800/638-8437 or at www.aspenpublishers.com. The ALWD manual was selected over other citation manuals for its clarity, brevity and the resultant ease with which our readers will be able to effectively locate cited sources within this work.

In adopting this new citation manual, you may see some new symbols in this and subsequent editions of *The Recorder*:

§ - Section
¶ - Paragraph
§§ - Consecutive Sections
¶¶ - Consecutive Paragraphs
& - Ampersand (*and*)

Questions? Comments? As always, we welcome your input regarding any changes in the form or substance of our work product. Additionally, TMCEC encourages members of its constituency to submit articles on effective municipal court procedures and practices, pertinent issues involving municipal courts, or letters that raise noted concerns experienced by our readership. Please submit articles and letters to TMCEC, 1609 Shoal Creek Blvd., Suite 302, Austin, Texas 78701 or at tmcec@tmcec.com, Subject: Submission to *The Recorder*. We look forward to hearing from you.

RESOURCES FOR YOUR COURT

ReportMyTeen.com

ReportMyTeen.com is a hotline that monitors teen drivers. The program offers bumper stickers with a toll-free number and a service that notifies parents when their teens are seen driving recklessly. It is similar to the commercial unsafe driving programs often noted on the back of trucks. Motorists who spot the sticker can telephone in their concerns. The recorded call is instantly routed as an attachment to a parent's email address. Simply having the stickers on vehicles serves as a reminder to teens to slow down and pay attention to the details of driving.

Judge Lacy Britten uses the system as a sentencing tool in the Hurst-Euless-Bedford Teen Court Program for teens that appear in court for speeding and other traffic-related issues. Judge Britten offers deferred status to the offenders who use the sticker system on their vehicles during their probationary period. In addition, the teen court coordinator offers 20 community service hours to teens who sign up to use the monitor system on the night their cases are heard in teen court. A computer system routes calls made regarding the teen's sticker to the parent's email as well as to a contact in the courts who tracks the calls.

Statistics show that one out of four teens will have a crash within the first year of driving. In addition, motor vehicle crashes are the leading cause of death among teens. Teens are the least likely to use seatbelts and the most expensive age group to insure. If a court is interested in piloting the program, the company is willing to donate stickers to determine if the system would be an appropriate condition for deferral and if it helps curb further delinquent behavior.

For further information, contact Kristi Boekhove at 972/241-TEEN (8336), or kristi@reportmyteen.com or visit the website: www.reportmyteen.com. Actual examples of calls are available to hear on the website (under the demo login). Judge Britten can be reached at 817/416-6311 or ldbritten@comcast.net.

Stop Illegal Dumping Seminars

The North Central Texas Council of Governments (NCTCOG) is hosting a series of workshops to further strengthen the Stop Illegal Dumping program that has been in operation for 10 years. This program has built a network of enforcement and education throughout the North Central Texas region and is now focusing on training judges, prosecutors and city officials on legal responses to types of environmental crimes.

The workshop series will consist of identical workshops entitled *Civil and Criminal Responses to Illegal Dumping*. The workshops will be held in convenient locations throughout the North Central Texas Region continuing through Spring 2007. Each of the classes will last 4½ hours. The schedule is as follows:

February 22, 2007	Ruthie Jackson Center, Grand Prairie (8:00 a.m. - 12:30 p.m.)
March 29, 2007	Chandor Gardens, Weatherford (1:00 - 5:30 p.m.)
April 4, 2007	The Center for American and International Law, Plano (8:00 a.m. - 12:30 p.m.)

The objective of these workshops is to provide judges, senior public officials, local prosecutors, and government civil attorneys with the knowledge and tools needed to effectively use Texas criminal and civil law to respond to environmental crimes in their jurisdictions.

The NCTCOG has worked closely with the Texas Illegal Dumping Resource Center and Roger Haseman, Assistant District Attorney for the Harris County DA's Office, to develop a quality curriculum that is relevant to the illegal dumping issues in this state. Attendees will be provided with the reference materials for use in the future. Registration information may be accessed at www.nctcog.org/envir/events.asp. For additional information, contact Katy Skipper at 817/695-9229 or kskipper@nctcog.org.

MCLE Fees

As we announced in the December 2005 *Recorder*, the TMCA/TMCEC Board of Directors adopted a policy to charge a mandatory $50 registration fee to all program participants (including attorney and non-attorney judges, clerks, court administrators, bailiffs, and warrant officers) for programs not offered at the TMCEC office in Austin. This fee is effective September 1, 2006.

In addition, the Board adopted an optional $100 fee that will only apply to attorney judges who wish to submit attendance at a TMCEC program to the State Bar of Texas for MCLE credit. This optional fee is also effective September 1, 2006.

I am an Attorney Judge. Must I pay the fee?

There are notable exemptions from the $100 fee. For example, if attorney judges choose to take their judicial exemption or do not need or want the MCLE credit, they will not pay the $100 fee. Should a judge choose to take the judicial exemption, they will still receive judicial education credit. Further, any member of the Texas Bar who is 70 years of age or older shall be exempt from MCLE requirements and therefore not required to pay the $100 fee to TMCEC.

How do I file for a judicial exemption from MCLE reporting?

Judges can change their MCLE status online at www.texasbar.com. Enter "mybarpage" and go to "View/ Update MCLE Records." Once there, under "Compliance Year," choose the option "Change Exemption Status." Select "Judical Exemption" and save it. This will change the MCLE status for the State Bar.

If I choose to take the judicial exemption or do not seek MCLE credit at this time, but change my mind in four months, what are my options?

The State Bar will allow us to add names of those who took one of our courses at anytime. Therefore, if you choose to pay the Center the MCLE fee after you attend a school, we will submit your name for the number of MCLE credit hours you attended to the State Bar upon receipt of your payment.

Why Pay the Fees?

The Board chose to adopt these nominal fees to offset the rising costs of fuel which increase TMCEC training expenses including travel costs for faculty and staff, freight costs, and course material costs. Additionally, the 79th Texas Legislature approved increasing travel allowances from $80 to $85 a night for lodging, from $30 to $36 a night for meals, and from 35 cents to 45.5 cents for mileage. No additional grant funds were allocated for judicial education. Given these economic realities, the Board adopted these new fees rather than cut TMCEC programs or staff.

How do I pay the MCLE Fees?

The MCLE fees will be payable to Texas Municipal Courts Education Center by check with the registration forms or in person at the programs. Credit card payments will be accepted with a $2 processing fee.

Letters of concern regarding the new fees may be sent to the Honorable Robin A. Ramsay, President of the TMCEC Board of Directors. Address letters to 601 E. Hickory, Denton, TX 76205 or email raramsay@cityofdenton.com.

We look forward to working with you over the upcoming year as we strive to make each program we offer even more informative and helpful to you.

Be Prepared for Digital Government

2007 Courts and Local Government Technology Conference

January 30-February 1, 2007 at the Austin Convention Center in Austin, Texas.

Co-Sponsors: Texas Municipal Courts Education Center, Texas Association of Counties, Texas Center for the Judiciary, Texas Justice Court Training Center, Judicial Committee on Information Technology, Texas Judicial Academy, and the Texas Association of Governmental Information Technology Managers.

Computers do things today that were no more than science fiction a few years ago. Because of this, the public expects instant access to government documents and public records, and at a reduced cost. Are you *prepared* to make the critical decisions necessary to optimize your digital government?

Being prepared takes on new meaning in today's local governments and courts where documents and records are created, stored and transferred digitally. *Being prepared* to function in a digital environment is a big job. Government officials, court staff and information

technology specialists need new ways of thinking and new skill sets to address the challenge.

The *2007 Courts and Local Government Technology Conference* focuses on key aspects of digital government with special emphasis on paperless and electronic applications. Registration for this conference will also admit you to the major events and exhibits at the Government Technology Conference offered at the same location. In addition, your registration includes specialized pre-conference educational workshops on January 30.

Special Features

- National Keynote Speakers
- Best Practices Topics
- Specialized Educational Tracks
- Pre-conference training specific to your court
- Trade show of vendors with products specifically for local governments

Schedule of Events:

Tuesday, January 30, 2007

9 a.m. – 5 p.m. Pre-Conference Workshops
Justice Court Training
Municipal Court Training
Information Technology Training
General Technology Training

Wednesday, January 31, 2007

8:30 a.m. – 5 p.m.

General Sessions and Concurrent Workshops

Thursday, February 1, 2007

8:30 a.m. – noon

General Sessions and Concurrent Workshops

Continuing Education

Attendance **does not** fulfill requirements for mandatory judicial education for municipal judges. Attendance does offer credit toward clerk certification.

Registration

The registration fee for the entire conference, including pre-conference training, is $150 BEFORE January 1st and $175 AFTER January 1st. Registrations are transferable. Requests for refunds (less a $10 administrative fee) must be received in writing by January 1st. After that date, requests will be subject an administrative fee equal to one-half of the registration fee. For more information, contact the TMCEC at 800/252-3718.

Hotel

The Conference is at the **Austin Convention Center**, 201 East Second Street in Austin, Texas. Hotel accommodations are at the **New Courtyard by Marriott-Austin Downtown Hotel, 300 East 4th Street, 512/236-8008**. Please request the "*Texas Association Counties Room Block*." The rates are $109 King and $129 Queen (queen is limited). Make your hotel reservation as soon as possible. The guaranteed reservation deadline is January 8th. (Note: There is also a charge per day for parking at the hotel.) TMCEC is **not** providing housing nor meals for this conference.

Registration Form

2007 Courts and Local Government Technology Conference – January 30 - February 1, 2007

Registration Fee: $150 / $175 after Jan. 1

Name _____

City _____

Email _____

Address _____

City _____

Zip _____

Telephone _____

Fax _____

☐ Check enclosed ☐ Credit Card info

($2.00 service charge per registrant. Indicate clearly if combining registration fees with a single payment)

Credit Card Number_____

Expiration Date _____ ***Verification Number***_____

Credit card type: ☐ MasterCard ☐ Visa

Name as it appears on card (print clearly):

_____

Authorized Signature:

_____

Please make checks payable to Texas Municipal Courts Education Center

or fax to: TMCEC
1609 Shoal Creek Blvd.
Austin, TX 78701
Fax to 512/458-6118

If special accommodations are needed, please contact Carrie Harper at 800/252-3718 or harper@tmcec.com.

First Friday Webinars

The Texas Municipal Courts Education Center is proud to present live and interactive web-based training programs. Webinars are offered on the first Friday of each month from 10:30 – 11:30 a.m. and are free of charge to participants, but may include local charges normally incurred through internet usage. Feel free to sign up for as many seminars as you choose – create your own personal training plan. Participants will need a computer, an internet connection, and a telephone line for toll-free teleconferencing. Each Webinar class lasts approximately 60 minutes and participants will need to log on a few minutes prior to 10:30 a.m. All levels of computer-users are encouraged to participate; the programs run themselves. Upon registration, you will receive more information on how to participate. To register, please log on to: http://tmcec.netspoke.com.

Should I Sign Up? Webinars are designed for all court personnel: judges, court administrators, clerks, bailiffs, warrant officers, and prosecutors. Court personnel may participate individually or along with other court employees. With a wide array of topics, you can participate in them all, or participate in only those most beneficial to you or your court. Embrace the opportunity to enhance your knowledge, refresh your understanding, and compare your court's processes to those of other courts. Call TMCEC at 800/252-3718 for registration assistance.

November 3, 2006 10:30 a.m.
[View this and all previously concluded webinars at www.tmcec.com/webinar.html.]
Seminar Topic: *What's New in the 2006 Forms Book?*
Presenter: Ryan Turner, TMCEC General Counsel & Director of Education

December 1, 2006 10:30 a.m.
[View this and all previously concluded webinars at www.tmcec.com/webinar.html.]
Seminar Topic: *What is a Crime?*
Presenter: Meichihko Proctor, TMCEC Program Attorney & Deputy Counsel

January 5, 2007 10:30 a.m.
Seminar Topic: *Dual Officeholding Dilemmas**
Presenter: Julian Grant, Municipal Affairs Section, Office of the Attorney General

Watch the TMCEC website for the TMCEC spring webinar series.

NOTE: Webinars do NOT fulfill the mandatory requirements for judicial education for judges. Webinars do NOT count toward TCLEOSE credit. Participation DOES count toward continuing education for the clerks' certification program.
*MCLE credit is being submitted to the State Bar of Texas.

Orientation for New Judges and Clerks

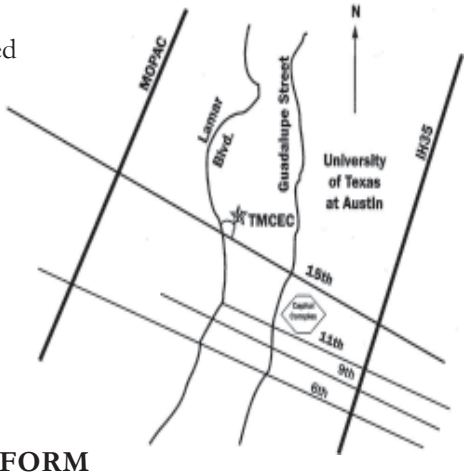
Meet with TMCEC staff members to discuss key concepts and processes for municipal courts in Texas. This orientation carefully examines procedures related to Driving Safety Courses (DSC) and Deferred, and will strengthen your understanding of the structure of Texas non-municipal courts.
Not mandatory for judicial education credit.

10:00 a.m. - 3:30 p.m. (Wednesday) — Lunch provided at no charge.

Check the Orientation date that you would like to attend:

- ☐ Wednesday, February 14, 2007
- ☐ Wednesday, April 18, 2007

There is no registration fee for this program.



ORIENTATION REGISTRATION FORM

Name: _____ Title: _____

Court Represented: _____ Hire Date: _____

Court Address: _____ City: _____ Zip: _____

Telephone Number: _____ Fax Number: _____ E-mail: _____

Call to enroll: 800/252-3718 or 512/320-8274 or fax registration form: 512/435-6118

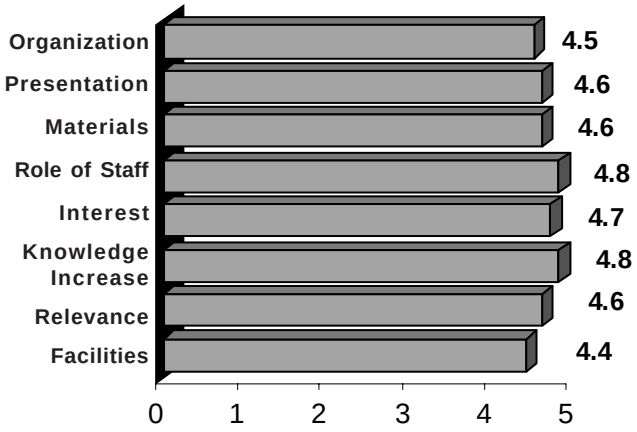
Looking Back on Last Year

A review of the overall evaluations for last year indicates that the Center's programs were well received by the TMCEC constituency. TMCEC, however, is always looking for ways to improve its program. If you have questions, comments or suggestions, please do not hesitate to call Hope Lochridge, TMCEC Executive Director at 800/252-3718.

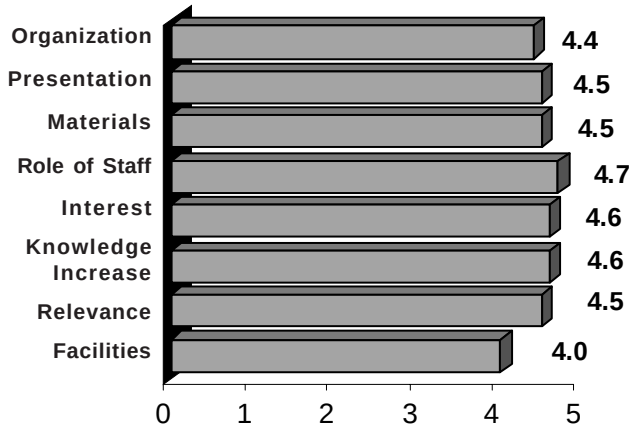
Rating System

1 Poor
2 Fair
3 Adequate
4 Good
5 Excellent

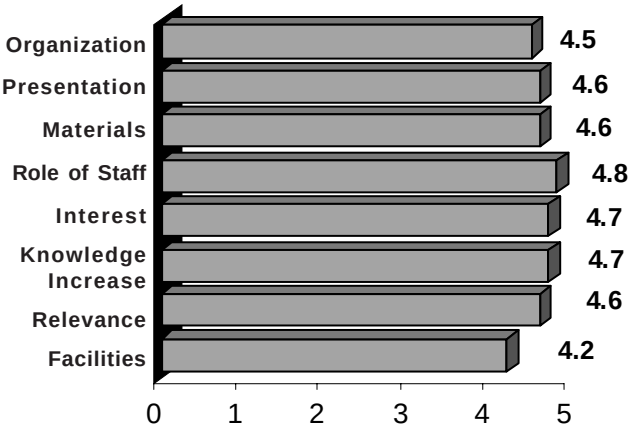
Judges 12-Hour Regional Programs



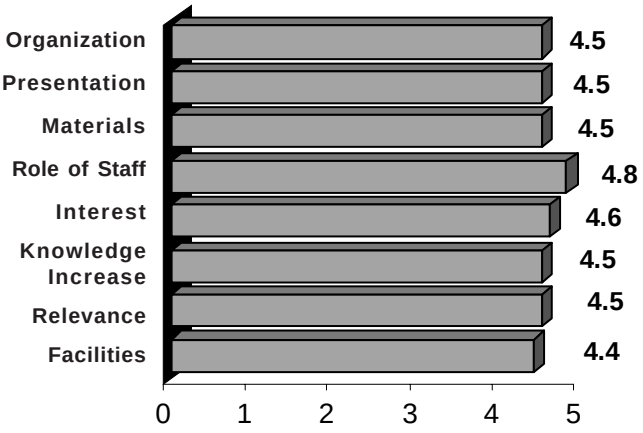
Clerks 12-Hour Regional Programs



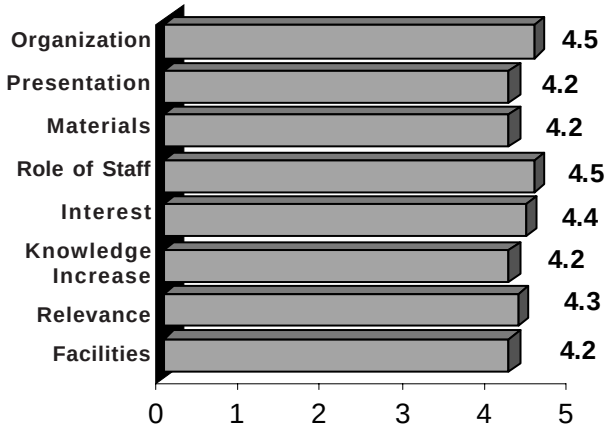
Judges 32-Hour Programs



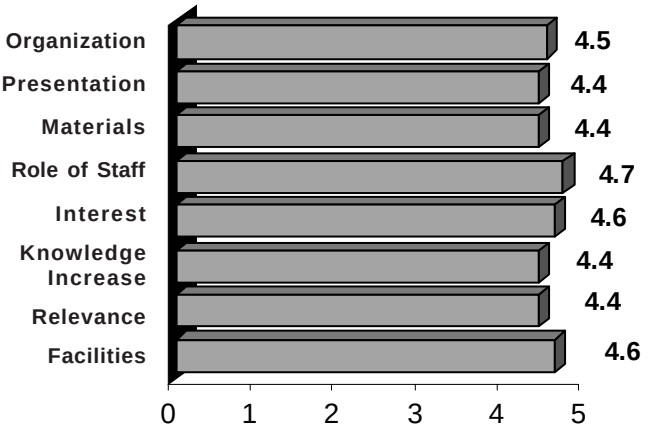
Court Administrators Programs



Prosecutors Programs



Bailiffs/Warrant Officers Programs



2006-2007 TMCEC Academic Schedule At-A-Glance

Conference	Date(s)	City	Hotel Information
12-Hour Prosecutors	January 16-17, 2007	Austin	Omni Hotel Southpark, 4140 Governor's Row
Court Administrator Special Topic: Human Resource Management	January 16-18, 2007	Austin	Omni Hotel Southpark, 4140 Governor's Row
12-Hour Regional Judges and Clerks	January 30-31, 2007	San Antonio	Omni San Antonio Hotel, 9821 Colonnade Blvd.
Courts & Local Government Technology	Jan. 30 - Feb. 1, 2007	Austin	Austin Convention Center
Level III Assessment Clinic	February 9-11, 2007	New Braunfels	John Newcombe Tennis Ranch, 325 Mission Valley
12-Hour Regional Judges and Clerks	February 26-27, 2007	Houston	Omni Houston Hotel, Four Riverway
12-Hour Low Volume Seminar	March 8-9, 2007	Abilene	MGM Elegante Suites, 4250 Ridgemont Drive
12-Hour Regional Judges and Clerks	March 22-23, 2007	Richardson	Richardson Hotel, 701 East Campbell Road
12-Hour Regional Judges and Clerks	April 12-13, 2007	Amarillo	Ambassador Hotel, 3100 I-40 West
12-Hour Low Volume Seminar	April 24-25, 2007	Tyler	Holiday Inn Tyler, 5701 South Broadway
12-Hour Regional Clerks	May 1-2, 2007	S. Padre Island	Radisson South Padre Island, 500 Padre Blvd.
12-Hour Regional Judges (Attorneys)	May 7-8, 2007	S. Padre Island	Radisson South Padre Island, 500 Padre Blvd.
12-Hour Regional Judges (Non-Attorneys)	May 9-10, 2007	S. Padre Island	Radisson South Padre Island, 500 Padre Blvd.
12-Hour Prosecutors	May 23-24, 2007	Houston	Omni Houston Hotel at Westside, 13210 Katy Freeway
12-Hour Bailiffs/Warrant Officers	June 11-12, 2007	Corpus Christi	Omni Corpus Christi Hotel Marina Tower, 707 North Shoreline
12-Hour Court Administrators	June 13-14, 2007	Corpus Christi	Omni Corpus Christi Hotel Marina Tower, 707 North Shoreline
12-Hour Regional Judges and Clerks	June 27-28, 2007	Odessa	MCM Elegante, 5200 E. University
32-Hour New Judges and Clerks	July 16-20, 2007	Austin	Omni Hotel Southpark, 4140 Governor's Row
2007 Legislative Updates:	August 7, 2007	Lubbock	Holiday Inn Hotel & Towers, 801 Avenue Q
	August 14, 2007	Houston	Omni Westside, 13210 Katy Freeway
	August 17, 2007	Austin	Omni Southpark, 4140 Governor's Row

TEXAS MUNICIPAL COURTS EDUCATION CENTER FY07 REGISTRATION FORM

Conference Date: _____ **Conference Site:** _____

Check one: ☐ Non-attorney Judge ($50 fee) ☐ Clerk ($50 fee) ☐ Prosecutor ($250 fee)
☐ Attorney Judge **not seeking CLE credit** ($50 fee) ☐ Court Administrator ($50 fee) ☐ Prosecutor **not requiring a room** ($100 fee)
☐ Attorney Judge **seeking CLE credit** ($150 fee) ☐ Assessment Clinic ($100 fee) ☐ Bailiff/Warrant Officer* ($50 fee)

TMCEC computer data is updated from the information you provide. Please print legibly and fill out form completely.

(Please print legibly): Last Name: _____ First Name : _____ MI: _____
Names also known by: _____ Female/Male: _____
Position held: _____
Date appointed/Hired/Elected:_____ Years experience: _____ Emergency contact:_____

HOUSING INFORMATION

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

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

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

STATUS (*Check all that apply):*

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

***Bailiffs/Warrant Officers:** Municipal judge's signature required to attend Bailiff/Warrant Officer programs.
Judge's Signature: _____ Date: _____
Municipal Court of: _____

I certify that I am currently serving as a municipal judge, prosecutor or court support personnel in the State of Texas. I agree that I will be responsible for any costs incurred if I do not cancel five (5) working days prior to the conference. I will cancel by calling the Center. If I must cancel on the day before the seminar due to an emergency, I will call the TMCEC registration desk at the conference site. If I do not attend the program, TMCEC reserves the right to invoice me or my city for meal expenses, course materials and, if applicable, housing ($85 plus tax per night). I understand that I will be responsible for the housing expense if I do not cancel or use my room. If I have requested a room, I certify that I live at least 30 miles or 30 minutes driving time from the conference site. Participants in the Assessment Clinics must cancel in writing two weeks prior to the seminar to receive refund. Payment is due with registration form. **Registration shall be confirmed upon receipt of registration form and payment.**

Participant Signature _____ *Date* _____

PAYMENT INFORMATION

☐ Check Enclosed *(Make checks payable to TMCEC.)*
☐ Credit Card *(Complete the following; $2.00 will be added for each registration made with credit card payment.)*

Credit Card Registration: (Please indicate clearly if combining registration forms with a single payment.)

		Credit Card Number	***Expiration Date***	***Verification Number***
Credit card type:				*(found on back of card)*
☐ *MasterCard*	*Name as it appears on card (print clearly):*			
☐ *Visa*	*Authorized Signature:*			

Please return completed form with payment to TMCEC at 1609 Shoal Creek Boulevard, Suite 302, Austin, TX 78701.
Fax registration forms with credit card information to 512/435-6118.

CLERK'S CORNER

by Margaret Robbins, Program Director, TMCEC

Because of their importance to all courts, the following issues raised by questions asked on TMCEC's 800 line are being addressed in this article.

Q. Should a court clerk also act as the prosecutor's secretary?

A. No. The clerk is not the prosecutor's secretary. This issue comes up most frequently when cases are filed in the court that can be enhanced; for example, offenses involving minors for Alcoholic Beverage Code offenses and tobacco offenses, failure to display driver's license, public intoxication, and disorderly conduct.

The problem arises when clerks know that the defendant has a prior conviction, but the citation does not allege that the current offense is a second or subsequent offense. Clerks must file the document as it is given to them for filing. They cannot change the document and enhance it, nor, ethically, should they act as the prosecutor's secretary by contacting the prosecutor and asking the prosecutor if he or she wants to enhance the charge. The prosecutor can, however, devise a system of checking cases to determine if he or she wants to enhance a case for prosecution.

Q. Are court clerks part of law enforcement?

A. No. Some clerks, however, perform law enforcement duties when they serve a summons by mail. Article 23.03 of the Code of Criminal Procedure provides that service of a summons can be in person or by mail, or it can be left at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing therein. In municipal courts, Article 45.202, Code of Criminal Procedure, provides that a peace officer or marshal of the city serves municipal court process under the same rules as sheriffs and constables.

Although municipal court clerks cannot serve criminal process, they can send courtesy notices to defendants. These should be identified as a "notice" on the notice. A courtesy notice should never state that it is a summons since a summons is an official court order issued by the judge.

Q. May clerks grant a driving safety course or deferred disposition "at the window"?

A. No. Clerks do not have the legal authority to grant a driving safety course (DSC) or deferred disposition. However, clerks may process applications for deferred and DSC and collect the required cost at the window. Clerks usually give defendants information about taking the driving safety course or the terms of deferred disposition required by the judge. Ultimately, the judge must review the paperwork and sign orders.

Article 45.0511 of Code of Criminal Procedure, providing for driving safety courses, requires the judge to accept the defendant's plea, enter judgment on the plea, and defer imposition of the judgment for 90 days. After deferring imposition of the judgment, the judge grants the driving safety course; not when the clerk hands the defendant paperwork at the window.

Article 45.051 of the Code of Criminal Procedure provides that deferred disposition is at the discretion of the judge. When a judge makes the decision to grant deferred (usually in the best interest of justice for the defendant), the judge signs an order granting it. Hence, when clerks process paperwork at the window, the judge must still review the defendant's request, accept the plea, set the terms of the deferred, and sign an order granting the deferred disposition.

Q. When a defendant completes a driving safety course or the terms of deferred disposition, does the clerk automatically note the dismissal in the docket?

A. No. The clerk cannot note the dismissal in the docket until the judge signs a judgment dismissing the case. In the instance of deferred, if the judge wants to also assess a special expense fee, after dismissing the complaint, the judge must order the special expense fee to be paid. If the judge does not include the order for the special expense fee, the court cannot collect the special expense fee.

Likewise, if a defendant does not complete a driving safety course or the terms of deferred disposition, the judge must enter a judgment assessing the fine and costs before requiring payment of the fine or issuing a *capias pro fine*.

Q. May clerks automatically double the fines for offenses that are alleged to have occurred in a construction or maintenance work zone when workers are present?

A. No. Only the judge can make the decision to double the fines. See Section 542.404 of the Transportation Code, which makes the minimum and maximum possible punishments double but does not require the judge to double the fine as long as the minimum fine is at least double. Clerks collect the fines that judges set and assess.

Q. May courts assess the $50 warrant fee on juvenile cases?

A. It depends! Courts may not issue standard custodial warrants of arrest for any offense that occurred while the defendant is under the age of 17. The court may, however, issue nonsecure custody orders. If those are served by a peace officer and the juvenile is convicted, the court must assess $35 for service of the nonsecure custody order. (Article 102.011(a)(4), C.C.P.)

If a juvenile fails to pay a judgment on a conviction that occurs while under the age of 17, and the court follows all necessary requirements under Article 45.045 of the Code of Criminal Procedure to issue the *capias pro fine* at age 17, the court may assess the $50 warrant fee on the *capias pro fine* on those cases that occurred when the defendant was a juvenile.

TMCEC presents Court Interpreter's Program

TMCEC will be offering a Court Interpreter's program on December 5, 2006 in Austin and May 23, 2007 in Houston. The Austin program will be held at the Omni Southpark located at 4140 Governor's Row (zipcode: 78744; telephone: 512/448-2222). The Houston program will be held at the Omni Westside located at 13210 Katy Freeway (zipcode: 77079; telephone 281/558-8388). Both programs will begin at 8 a.m. and end at 5 p.m.

Topics will include:

- Laws and Regulations Affecting Court Interpreters
- Interpreters' Ethics
- Courtroom Participants: Roles and Responsibilities
- Courtroom Terminology
- Panel Discussion on Trial Courts Procedure and Magistration
- Municipal Court Jurisdiction
- Caselaw Update on Interpreters
- Ethics: Questions and Conundrums

On-site registration will be held from 6:45-8:00 a.m. on the day of the conference. Breakfast and lunch will be provided.

The course will constitute eight hours of continuing education for Licensed Court Interpreters. Credit for this course may be counted towards court clerks' mandatory certification requirements.

Court interpreters who are municipal court employees or court interpreters who are contracted with a municipal court on a full-time basis are invited to attend. Interpreters must be licensed to interpret (Sections 57.002(a) & (b), Gov't Code), unless the interpreter may be unlicensed by statute (Sections 57.002(c) & (d)). If space permits, court supervisors (*i.e.*, court administrators) may also attend.

The registration fee is $50. TMCEC will pay for a single occupancy hotel room for each participant, but be prepared to post a deposit or present a personal credit card for incidentals (*movies, telephone calls, or room service*).

The participant will pay any parking fees, incidental charges, and costs incurred for bringing additional family members. Please register early. After the housing deadline, a room can no longer be guaranteed.

If you live within a 30-mile radius of the seminar site or less than a 30-minute drive, TMCEC cannot pay for a hotel room.

Cancellations must be received at least five working days before the seminar date by calling TMCEC at 800.252.3718. Costs for meals, course materials, and housing will be charged to late cancellations.

Attorneys: Mandatory IOLTA compliance is online at www.teajf.org/compliance. Every saved dollar provides more funding for legal services to the poor.

Starting a Marshal's Office

By Andy Kerstens, Bailiff, City of Webster

Marshal or warrant officer?

Marked or unmarked vehicles?

Uniform or plainclothes officer?

When a court begins to develop a marshal or warrant officer position to collect unpaid fines, there are many things to consider. The three questions generally asked when a city is developing a warrant collections program are: What is the difference between marshals and warrant officers? Should they have a marked or unmarked vehicle? Should they wear a uniform or not? This article will address these questions and give some pros and cons for each. I am not advocating one position or the other. I am a warrant officer. I drive a marked vehicle, and I wear a uniform. These options work well in the City of Webster but may not work as well in your city. You must base your decision on your city's cultural makeup, citizens' expectations, city policy, and the experience of your officer(s).

Marshal or Warrant Officer

What is the difference? Both are peace officers as defined in the Code of Criminal Procedure, Chapter 2, Article 2.12(3). They both have the same duties as defined under Article 2.13, Code of Criminal Procedure. Chapter 341 of the Local Government Code gives municipalities the power to create police officer and marshal positions. Subchapter A regulates the creation of a regular police force, which is where the warrant officer position is derived. Subchapter C regulates the creation of a marshal. Section 341.021(c) states, "The marshal or a deputy marshal shall be available to the municipal court when it is in session and shall promptly and faithfully execute writs and process issued by the court. The marshal may execute writs and serve process within each county in which the municipality is located, both inside and outside the municipal boundaries."

Simply put, the difference between a marshal and a warrant officer is: Who they work under and who assigns their duties.

Marshal

A marshal works for the court and is a separate agency from the police department. His or her duty is to the court and the service of the court. State law does not restrict a marshal from performing other law enforcement duties, such as writing citations or making arrests without a warrant. The court the marshal works under may have special guidelines for this type of activity that will vary from city to city.

A marshal's work may include any function deemed necessary by the court. A marshal will not be subject to being used or moved out of the position by the police department and may be more committed to the service of the court than a warrant officer.

Having a city marshal requires creating a new agency or department, a separate budget, training requirements, policies, and other issues. If you have a one-person marshal's office, you may be without security when your marshal is not available, on vacation, or away for school. Some cities have had issues with their marshals not having a good working relationship with the police department. The police department may see a marshal as just a court bailiff or as an outsider trying to take over part of their work. If the police department was paying overtime for officers to serve outstanding warrants or work as the court bailiff, there may be some resentment towards a new marshal. It is important for the marshal to have a good working relationship with the police department. This relationship sometimes can mean the difference between the marshal succeeding or failing. There is nothing wrong with the marshal helping the police department when they can. In return, the police department will help your marshal.

Warrant Officer

A warrant officer is a police officer on loan from the police department. He or she is a police officer who works within the police department, but whose assigned duties are to work in court. Warrant officers are usually sent to training through the police department. Court bailiff and service of court process are not common topics for police officer schools. The TMCEC and Texas Marshals Association (TMA) offer training specific to process service and court bailiffs, and are usually promoted by the court office. Warrant officers are included within the police department budget, although some of their pay may come from the court security fund. If the warrant officer is unavailable, another police officer can be sent to assist with courtroom security or warrant service.

The warrant officer may be pulled back into the police department if budget or personnel shortages require. They may also be required to assist the police department with daily functions not associated with court. The warrant officer may be rotated out periodically to allow other officers to gain training in the court or for other internal police department issues. This can cause strain on the court personnel by having to retrain the new officer in proper court procedure and how your court operates. It often takes time for the new warrant officer to adjust to the procedures in court and gain the knowledge to successfully garner compliance from persons with warrants.

Marked or Unmarked Vehicles

Visibility and officer safety are the main issues when deciding whether to mark your agency's vehicles. Agencies with more than one vehicle assigned to the marshal or warrant officer or with pool vehicles may not have to address this question. You may have access to whatever type of vehicle the situation requires.

Unmarked

Unmarked vehicles are great if you are doing a lot of surveillance or have persons eluding you. You can blend in with other vehicles and surroundings and are less likely to be recognized as a police officer. However, you may encounter the neighbor who calls the local police to report a strange person sitting in a vehicle watching a residence or place of business. Unless the local police department knows where you will be and what you are driving, you may get a visit from the local patrol officer. Even if you take all of the proper steps of letting everyone know what you are doing, you may still have people wanting to know what you are doing or receive a visit from an alert patrol officer. Traffic stops in an unmarked vehicle are difficult for several reasons. The person you are stopping may not recognize you as a peace officer because of the vehicle, and officer safety is more difficult without a properly marked and equipped vehicle.

Marked

Marked vehicles are just that; they stand out and yell, "Here I am!" A marked vehicle lets everyone know exactly who you are and where you are. They are difficult to conceal and conduct surveillance in, although, with a little patience and practice, you can hide a marked vehicle. You may still get the local busy-body who has to know what the police are doing sitting in the parking lot or in their neighborhood. However, you are less likely to get a visit from the local police. They may call you or your agency to make sure nothing serious is happening in their area. Traffic stops in a marked vehicle are safer, and the person being stopped should have no question as to who is stopping them. Their only question may be, "What did I do?"

Uniformed Officer or Plainclothes

Again, this is a matter of visibility and safety. Do you want everyone to know who you are? Or do you want to be able to walk up on people and surprise them?

Non-uniformed

Plainclothes officers, unless they have that "I'm a cop" look and manner about themselves, can usually go unnoticed. This is great if you have to walk into a business to locate someone where everyone normally runs for the back door at the first sign of a police uniform. The same for when you knock on a door and they see you as anything but a police officer. Wearing a ballistic vest is not feasible in plainclothes, nor is carrying all the equipment that is usually found on the duty belt of a uniformed officer. Plainclothes officers could have difficulties if they have someone resist them or try to flee. Citizens and other officers may not know you are a plainclothes officer and could take action against you. Plus, you may destroy your best suit or pair of slacks.

Uniformed

Uniformed officers are visible and known on sight. At least, they should be. Training and experience have shown persons respond differently to officers in uniform. Persons are less likely to resist or flee, and other officers and citizens have little doubt as to who you are. Officers in uniform will be able to wear ballistic vests and will have all the gear supplied on their duty belts.

Starting a Marshal's Office

Many cities are creating warrant collection positions and actively pursuing outstanding fines. Law enforcement officers who work in the court and whose primary duty is warrant service are either warrant officers or city marshals. To create a city marshal's office, the first step is to draft and have the city council pass an ordinance creating the position. From there, you must complete all the steps for creating a new police force, which a marshal's office is. This includes, but is not limited to, obtaining an identifying Originating Agency Identifier (ORI) number, notifying the State of Texas, filing the necessary paperwork, and obtaining funding. The Texas Marshals Association has many members who have worked to create marshal's offices or have assisted cities with creating the offices. If your city needs assistance creating a marshal's office, you may contact any of the officers or regional directors at the information listed on the TMA website: www.texasmarshals.org.

Tips continued from page 1

probably turn red before you get a chance to make your turn.

Depending on your mood, you do or don't let drivers merge in front of you on the interstate; you do or don't honk at minor annoyances; you do or don't wave a "thank you" to considerate drivers. At the store, you drive across the parking lot weaving through a couple of aisles and a few cars and trucks to locate the best possible space, still acres from the entrance. And if the pandemonium in the parking lot is any reflection of what's inside, you are not looking forward to the next hour.

Driving is such a vital part of our daily lives that it becomes effortless to live with statistics that show motor vehicle crashes as the leading cause of death for people aged 3 to 33. Many of the causes of fatal accidents begin with voluntary factors—things which, on any other day, may not have resulted in the loss of human life. In 2005, alcohol was the most common factor found in collisions involving traffic fatalities (39%), followed by speeding (38%), youthful drivers (24%), older drivers (15%), and large trucks (12%). Municipal courts have a great responsibility to treat the traffic cases before them with a high level of gravity.

Deference for law enforcement and the court is a verifiable deterrent for committing traffic offenses. For example, the *Click it or Ticket!* campaign has increased seat belt usage among thousands of Texans. The increase can be accredited to four main factors: (1) successful advertising and information dissemination by TxDOT; (2) the Texas Legislature passing laws that not only criminalize not wearing a seat belt but allow an offender to be cited for a seat belt violation completely independent of any other violations; (3) police officers' stringent enforcement of the laws; and (4) the municipal courts' proper adjudication of seat belt violators.

Using that campaign's success as a model, here are some facts and tips on various traffic topics that increase driving safety and keep traffic fatalities at a minimum:

Bicycles and Motorcycles

Remember that cyclists are considered vehicle operators and are required to obey the same rules of the road as other vehicle operators, including obeying traffic signs, signals and lane markings. Tex. Transp. Code ch. 551. When driving, it is important to regard the bicycles around you as the same as any other vehicles on the road.

There is no statewide law requiring bicyclists to wear helmets, but your city government may have enacted ordinances that require helmets to be worn by certain age groups or in certain areas. Motorcyclists must wear helmets unless they are over 21 years old and have either successfully completed a motorcycle safety course or have proof of health insurance with a minimum of $10,000 coverage for injuries resulting from a motorcycle crash. Tex. Transp. Code § 661.003.

TIPS:

- Watch for bicyclists especially in urban areas and at non-intersection locations, and during the months of June, July and August between the hours of 5 p.m. and 9 p.m.
- Share the road. Allow at least three feet clearance when passing a bicycle, and yield to cyclists at intersections.
- Bicyclists should increase their visibility by wearing brightly colored, reflective clothing and using a front light and red reflector or flashing rear light at night.
- Motorcyclists should avoid the center of the lane where debris and oil build up.

Highway Driving

Speeding is the second most common factor in traffic fatalities. Controlling speed on highways is challenging for law enforcement, TxDOT, city government, and the municipal court system. Obeying the speed limit means adjusting your speed to the current conditions. Tex. Transp. Code § 545.351. Whether there is rain, fog, sleet, snow, heavy traffic, or construction, adjust your speed accordingly.

Speed must be considered when passing stopped emergency vehicles as well. In 2003, legislation was passed requiring vehicles to move one lane away from a stopped emergency vehicle with lights flashing or slow down to 20 miles per hour below the posted speed limit. Tex. Transp. Code § 545.157.

TIPS:

- Use this test to gauge if you are maintaining a safe following distance: When the vehicle in front of you passes a fixed object, count two full seconds; if you have already passed the same object, increase the distance between your vehicle and the one in front of you.
- Signs indicating that the left lane is for passing only let you know that the left lane on a divided highway is not a "fast" lane. After passing a vehicle, move back to the right lane.
- When passing trucks, don't move back into the lane until you can see both truck headlights in your rearview mirror.

Seat Belts and Safety Seats

Seat belts are proven lifesavers! Research shows that front-seat passenger safety belt usage can reduce chances of dying from a crash by 50%. Three out of four persons who are completely ejected from a vehicle

during a collision are killed, but the chances of total ejection are reduced drastically with the addition of a seat belt.

Remember that proper installation of child safety seat systems is vital to their effectiveness. Read vehicle manufacturer information and safety seat instructions before installing a seat, and do not move your child out of a safety seat system until he or she has reached the seat's height or weight limit.

TIPS:

- Lap belts should fit snugly across the hips, not over the stomach.
- Shoulder belts go over the shoulder and across the center of the chest. Never tuck one under your arm or behind your back.
- Always secure safety seat chest clips even with a child's underarms, and fasten harness straps snugly against the body.
- Use a rear-facing seat until your infant reaches the seat's height or weight limit (usually around age 12 months).
- Children may ride in a forward facing seat when they are at least one year old and weigh at least 20 pounds.
- Use a booster seat until your child reaches the seat's height or weight limit (usually around age 8).
- Children age 12 and under should sit in the rear seat to avoid the possible force of a deploying air bag.

Cellular Telephones

One in four crashes is due to a distracted driver, and a popular device causing serious distractions is the cellular telephone. Although there are no blanket laws in Texas prohibiting using cell phones while driving, it is illegal for teens under the age of 18 to use a cell phone while driving during the six-month period after they first become licensed drivers. Tex. Transp. Code § 545.424. Additionally, passenger bus drivers may not use cell phones while operating a bus carrying a minor passenger unless the bus is stopped or in case of emergency. Tex. Transp. Code § 545.425.

TIPS:

- It is safest to pull over if you need to make a telephone call or wait until you reach your destination to use the telephone.
- Consider creating an office-wide policy that cell phone calls will not be answered or placed while employees are driving.

Railroad Crossings

You are 40 times more likely to be killed in train crashes than in crashes with other automobiles, so observing crossing gates and signal devices is imperative. It is against the law to not stop at train tracks if a train is visible and hazardously close, if signal devices are flashing, or if crossing arms have been lowered. Tex. Transp. Code § 545.251.

TIPS:

- Reduce speed when approaching crossings, and look both ways.
- Turn down your stereo and listen for a train.
- Never stop directly on the train tracks. A train going 50 m.p.h. needs a mile and a half to completely stop.

Flash Floods

Flash flooding is the leading cause of weather-related deaths in Texas often caused by drivers being misinformed about the ability of their vehicle to handle wet conditions. A vehicle can float in as little as six inches of water. It is illegal to disobey, move, tamper with, or drive around barriers blocking a low-water crossing. Tex. Transp. Code §§ 472.021-472.022.

TIPS:

- If you encounter a flooded passage, turn around.
- Never try to walk, swim or drive through swift water.
- If your vehicle stalls in deep water, leave it and attempt to get to higher ground.

Pedestrians and School Buses

Drivers should always yield to pedestrians in crosswalks (Tex. Transp. Code §§ 552.002, 552.003), but pedestrians should always yield to vehicles before crossing streets at non-crosswalk protected areas. Tex. Transp. Code § 552.005.

Drivers should also stop for school buses discharging or receiving students, regardless of whether you are behind the bus or approaching it in oncoming traffic. Tex. Transp. Code § 545.066.

TIPS:

- Watch for pedestrians especially between 3 p.m. and 7 p.m., and on Fridays, Saturdays and Sundays.
- Stay on sidewalks and the right-hand side of crosswalks.
- If a road has no sidewalk, walk on the left side of the road facing traffic.
- As a passenger, get in or out of a car on the curb side of the street.
- Watch for children entering and exiting school buses as well as crossing traffic to approach the bus.
- Make children aware of the dangers of running to catch the bus or running home after exiting the bus.
- Have children stand far back from the street to wait for the bus.

Tips continued on page 31

Municipal Traffic Safety Initiative: News You Can Use

Truck Crash Facts

- In 2004, 5,190 people died in truck crashes, an increase of 154 fatalities over 2003. Also, in 2004 there was nearly a five (5) percent increase in the number of truck drivers killed in crashes.
- In fatal crashes involving a truck and a passenger vehicle, 98% of those killed are the occupants of the passenger vehicle.
- Large trucks make up just four (4) percent of all registered vehicles and seven (7) percent of all vehicle miles traveled, but are involved in 11 percent of all crash fatalities.
- The annual death toll from truck-related crashes is the equivalent of a major airline crash every week of the year.
- Truck driver fatigue is a major safety problem. Some studies, including two by the National Traffic Safety Bureau (NTSB), indicate that truck driver fatigue is a factor in 30-40 percent of severe crashes.
- The Hours of Service Rule issued in August 2005 by the Federal Motor Carrier Safety Administration (FMCSA) will allow truck drivers to drive over 300 hours in a month. Commercial airline pilots often fly only about 30 hours a month.
- Several researchers have shown that even small amounts of sleep loss and fatigue result in serious impairment similar to being legally drunk. Two studies showed that impairment from sleep loss and long working hours were about the same as the slowed mental and reaction times associated with 0.05% blood alcohol, and that being awake for 24 hours has about the same dangerous effects as 0.10% blood alcohol—above the level now nationally recognized as being legally drunk (0.08%).

Reprinted from *The Truck Safety Advocate* newsletter, No. 3, Summer/Fall 2005.

Truck Crash Survivors Guide

You are not alone…

Contact Citizens for Reliable and Safe Highways (CRASH) and Parents Against Tired Truckers (PATT) at (888) 353-4572 to contact a network volunteer.

Our national network of volunteers are actual truck crash victims working to help you.

Practical Tips for Survivors

- Take care of yourself.
- Do not be made to feel guilty.
- Make sure you have someone to talk to.
- Ask for help from people you trust: a close friend, a relative, or a volunteer from CRASH or PATT.
- It is important that you hire an attorney who is very experienced in handling truck crash cases to protect and pursue your own investigation of the case.
- Ask to speak with prior clients about the handling of their truck crash cases.

Crucial Information

The days and weeks following the crash require important decisions and careful attention to detail.

- Ask for help from people you can trust.
- Never sign anything under pressure–ask for our helpful suggestions to consider when choosing an attorney.
- Take photographs and/or video of the crash site and the vehicles involved.
- Do not sell or otherwise dispose of the vehicle involved in the truck crash.
- Legal proceedings after a truck crash generally take two forms: a criminal case and a civil case.
- Collect and preserve evidence after the crash.

Note: The Truck Crash Survivors Guide is suitable for placement on the court bulletin board or used as a handout.

- Contact the investigating authority immediately.

For detailed information, please see the *Truck Crash Survivor Guide* brochure found at: www.patt.org and www.trucksafety.org

Reprinted from *The Truck Safety Advocate* newsletter, No. 3, Summer/Fall 2005. For more information, go to: www.trucksafety.org.

Note: In FY06, TMCEC offered two important courses related to truck drivers: *CDL, DSC, & Deferrred Update* and *The Ethical Price of Masking*. The audio tapes and course materials may be accessed on the new traffic safety page at www.tmcec.com. Please log on if you did not attend the 12-hour FY06 regional judges' programs or if you would like a refresher course on these topics.

Tips continued from page 29

Work Zones and Road Signs

More than 140 people, mostly motorists, are killed in work zones in Texas each year. Two leading causes of work zone crashes are excessive speed and failure to remain alert while driving, and one in three work zone crashes is a rear-end collision. Fines may double for moving violations committed in work zones while workers are present. Tex. Transp. Code § 542.404.

TIPS:

- Observe work zone warning signs.
- Keep a safe distance between yourself and other vehicles or barriers.
- Be especially cautious driving at night through active work zones.
- Pay attention to flaggers directing traffic.
- Merge at the first notice of a lane closure or change.
- Avoid distractions. Don't use your cell phone, eat, drink, or adjust radio settings.
- Warning signs indicate unexpected conditions. The signs can be yellow or orange and are usually shaped as diamonds, pentagons or circles.
- Regulatory signs display traffic laws and can be red, black or white and are usually triangles, octagons or vertical rectangles.
- Guiding signs provide helpful information and can be green, blue or brown and are usually horizontal rectangles.

Bar Provides Criticism "Hotline"

The State Bar of Texas is now providing a "hotline" for judges facing unfair criticism.

According to the Bar, the administration of justice depends in large part on public confidence. Unjust criticism of judges or of the judicial system erodes that public confidence.

To help educate the public, the State Bar has created a response program for judges who feel that inaccurate reporting of a court procedure or unfair criticism of a judge has taken place.

Under this response program, judges may call 800/204-2222, extension 2013. They will be connected to a State Bar of Texas staff member in charge of Public Information.

The State Bar staff will gather background information regarding the matter. The staff will then recommend an appropriate course of action to the State Bar President. The President may provide advice to the judge involved to develop an appropriate public response on behalf of the State Bar of Texas or elect not to issue public response.

The following are situations in which a public response might be warranted:

- When the criticism displays a misunderstanding of a judge's role in the legal system and a response would enhance the public's understanding of the proper functioning of the legal system;
- When the criticism is materially inaccurate;
- When a report does not contain enough of the facts involved to be fair.

The following are examples of when a public response to criticism might not be appropriate:

- When the criticism is a fair comment or opinion;
- When the criticism arises during a political campaign and a response may be construed as an endorsement of a particular judicial candidate;
- When the response might prejudice a pending judicial proceeding;
- When the controversy is insignificant.

Judges needing more information on the response program should contact the State Bar of Texas at the hotline number.

Reprinted by permission from the Texas Municipal Courts Justice Court News (P.O. Box 2605, Midland, Texas 79702-2605).

TEXAS MUNICIPAL COURTS EDUCATION CENTER
1609 SHOAL CREEK BLVD., SUITE 302
AUSTIN, TX 78701
www.tmcec.com

Presorted Standard
U.S. Postage
PAID
Austin, Texas
Permit No. 114

TMCEC MISSION STATEMENT

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

Change Service Requested