CHAPTER 6 PRETRIAL PROCEEDINGS

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

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

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

1. Conducting a Hearing

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

❒ f. Motions for continuance;

❒ g. Motions to suppress evidence;

❒ h. Motions for change of venue do not apply to municipal court, unless teen court has been granted;

❒ i. Discovery;

❒ j. Entrapment; and

❒ k. Motions for appointment of interpreter.

❒ 3. Other motions (including but not limited to the election of jury punishment).

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

❒ 4. Notice can be made in open court if the defendant or attorney of record is present, by personal service, or in writing depending on the order of the court.

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

❒ 5. The defense must have 10 days notice of trials or pretrials in which to file motions.

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

❒ 6. Matters not raised within seven days of the pretrial hearing are waived, except by permission of the court for good cause shown.

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

❒ 7. The defendant has the right to open and close the argument on all defense pleadings presented to the court.

Art. 28.02, C.C.P.

❒ 8. Testimony should be limited to the issue contained in the motion.

❒ 9. The Rules of Evidence may not apply in all pretrial proceedings.

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

❒ a. The parties should be provided the opportunity to cross-examine, rebut, or argue if the other side is permitted to present evidence or argue.

❒ 10. After the judge makes a decision on the motions presented, the judge announces:

❒ a. Granted; or

❒ b. Denied.

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

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2. Arraignment

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

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

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3. Motions for Continuance

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

❒ c. The State's first motion for continuance based on a missing witness must contain the witness's name and address, allegations of the efforts made to obtain the witness, and an assertion that the testimony is material.	Art. 29.04, C.C.P.
❒ d. Subsequent motions by the State, in addition to requirements above, must also show the facts to be established by the missing witness, that those facts are material, that the witness will be available at the next term of court, and that no other witness can testify to the same matter.	Art. 29.05, C.C.P.
❒ e. The defendant has similar requirements for both first and subsequent motions. The defendant must also show that the defendant did not cause the witness's absence and that the motion is not made for the sole purpose of a delay of trial.	Art. 29.06, C.C.P.
❒ 6. Motions may be by agreement or unopposed, subject to the court's approval. Agreed motions do not need to be argued, unless the court believes it is necessary.	Art. 29.02, C.C.P. These motions are presented in open court.
❒ a. When a hearing is conducted:	
❒ (1) The court is granted broad discretion in determining "sufficient cause."	Art. 29.02, C.C.P., and *Taylor v. State,* 612 S.W.2d 566 (Tex. Crim. App. 1981).
❒ (2) Opposing affidavits can be filed.	Art. 29.09, C.C.P.
❒ (3) The court may rule on affidavits or hear evidence or argument within its discretion.	
❒ 7. The court has broad discretion in granting or denying motions for continuance and in resetting the case once a motion is granted.	A continuance may be only for as long as is necessary. Arts. 29.02 and 29.03, C.C.P.
❒ 8. Motions for continuance during trial can only be granted if:	Art. 29.13, C.C.P.
❒ a. A surprise occurs;	

❒ b. Due diligence would not have prevented the surprise; and

❒ c. The surprise prevents a fair trial.

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4. Motions to Dismiss the Case

Checklist 6-4	Notes
❒ 1. Ascertain that a legal issue is raised and not a defense to prosecution.	
❒ a. Pretrial motions asserting innocence or a legal defense should be considered a plea of not guilty.	
❒ 2. Motions to dismiss must be based on statutory or constitutional grounds.	
❒ a. Statutory grounds:	
❒ (1) The only statutory special plea is based on prior trial (double jeopardy).	Arts. 45.023 and 27.05, C.C.P. A defendant who is detained in jail before trial for a fine-only offense may enter the special plea of double jeopardy while in jail.
❒ (2) A prior conviction, acquittal, mistrial, or reversal on appeal are statutory and constitutional grounds for dismissal.	
❒ (3) A prior trial finding requires that a previous trial prosecuting the same offense took place.	
❒ (4) Dismissal for statute of limitations; the charging instrument shows it was filed more than two years after the date of the commission of the offense.	Arts. 12.02 and 12.04, C.C.P. The day on which the offense was committed and the day on which the complaint is filed are excluded from the computation of time. Sec. 311.014, G.C.
❒ (5) The offense charged in the complaint must also be under the jurisdiction of the municipal court as set forth in Article 4.14, C.C.P., or Section 29.003, G.C.	Art. 4.14, C.C.P.; Sec. 29.003, G.C.

❒ (6) No such violation exists in statute, code, or ordinance. This kind of motion should be based on the complaint alone.

❒ b. Constitutional grounds:

U.S. Constitution, 14th Amendment. See *The Municipal Judges Book*: Chapter 4 for a more complete discussion of constitutional issues.

❒ (1) The defendant's constitutional right to a speedy trial has been violated leading to a denial of due process so great as to require dismissal based on demonstrable harm to the defendant. Evaluate legal issues presented regarding speedy trial issues with care.

Speedy trial motions are not available under Article 32A.02, C.C.P., as it was declared unconstitutional and repealed by the Legislature in 2005. *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987).

❒ 3. The State's attorney may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the setting out reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

Art. 32.02, C.C.P.

❒ 4. Dismissal is not the appropriate remedy to dispose of a case because the defendant is not competent.

See *The Municipal Judges Book*: Chapter 4 for a discussion of competency.

❒ a. A judge may not accept a plea of guilty or a plea of nolo contendere from a defendant in open court unless it appears to the judge that the defendant is mentally competent and the plea is free and voluntary.

Art. 45.0241, C.C.P.

❒ b. The conviction of an accused person while he is legally incompetent violates due process. To protect a criminal defendant's constitutional rights, a trial court must inquire into the accused's mental competence once the issue is sufficiently raised.

See *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) and *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003).

❒ 5. Dismissal is not an appropriate remedy for motions alleging:

❒ a. Statute or ordinance is void for vagueness in violation of the due process provisions of the 14th Amendment.	See Checklist 11-1. Relief for defendants making such constitutional attacks when deemed valid by the judge is acquittal (judgment of not guilty) at trial.
❒ b. Statute or ordinance in the instant case denies the defendant equal protection in violation of the Constitution.	
❒ c. Prosecutorial misconduct.	*State v. Johnson*, 821 S.W.2d 609 (Tex. Crim. App. 1991).

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5. Motions to Quash the Complaint

Checklist 6-5	Script/Notes
❒ 1. A complaint vests the municipal court with jurisdiction to try a case. Motions objecting to the complaint are called motions to quash the complaint. These motions are properly made to the allegations of the complaint on its face; they are not properly related to the evidence that would prove the allegations, or the sufficiency of that evidence.	Arts. 45.018 and 45.019, C.C.P.
❒ 2. The complaint shall commence:	Art. 45.019, C.C.P.
❒ a. "In the name and by the authority of the State of Texas."	
❒ 3. The complaint must state:	Art. 45.019, C.C.P. See *The Judges Book*: Chapter 4 for a discussion on complaints.
❒ a. The name or description of the defendant;	
❒ b. That the accused committed an offense;	
❒ c. A venue allegation that the offense was committed in the territorial limits of the municipality; and	
❒ d. The date on which the offense was committed and the date the complaint is signed (these dates must be within two years of each other).	Art. 12.02, C.C.P.
❒ 4. The complaint shall conclude:	
❒ a. "Against the peace and dignity of the State" (penal statutes) and it must, when appropriate, also conclude "Contrary to said ordinance" (municipal ordinances).	
❒ 5. Complaints must be sworn.	Art. 45.018, C.C.P.
❒ 6. The offense alleged in "plain and intelligible words" should include:	*Kindley v. State*, 879 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

❒ a. Every element of the offense;

❒ b. The facts sufficient to identify a particular offense to be defended against and sufficient facts to enable the defendant to plead the judgment in bar of further prosecution;

❒ c. The intent required under the statute or ordinance, if any;

❒ d. The name of the owner of property if that is an element of the offense;

❒ e. A specific description of property if that is an element of the offense;

❒ f. Language used in the allegation should be clear and concise; and

❒ g. The exact language of the statute or ordinance is usually most appropriate, but not required.

❒ 7. If the defendant does not object to a defect, error, or irregularity of form or substance in a complaint before the day trial commences, the defendant waives the right to object to the complaint.

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

Article 45.019(f), C.C.P., does not mean that a defendant must make a motion to quash before the date on which the case is set for trial.

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

The trial court is not prohibited from requiring that each objection to a complaint be made at an earlier time (e.g., pretrial hearing).

See Checklist 6-1.

❒ 8. Granting the motion to quash does not bar re-prosecution with a proper complaint if the new complaint is filed within the statute of limitations.

Art. 28.04, C.C.P.

❒ 9. The error can be cured if the complaint is dismissed and refiled with appropriate corrections. This must be done:

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

❒ a. In writing;

❒ b. Before the date of trial; or

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

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

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

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

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

6. Recusal and Disqualification

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

❒ c. The judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

❒ d. The judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;

❒ e. The judge participated as counsel, adviser, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

❒ f. The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

❒ g. The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

❒ (1) Is a party to the proceeding or an officer, director, or trustee of a party;

❒ (2) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

❒ (3) Is to the judge's knowledge likely to be a material witness in the proceeding; or

❒ h. The judge or the judge's spouse, or a person within the first degree of relationship to either of them, is acting as a lawyer in the proceeding.

Disqualification:

❒ 2. No justice or judge shall sit in any case where: — Art. 30.01, C.C.P.

- ❒ a. The judge may be the party injured;
- ❒ b. The judge has been of counsel for the State or the accused; or
- ❒ c. The accused may be connected with the judge by consanguinity or affinity within the third degree. — An individual's relatives within the third degree by consanguinity are the individual's parent, child, brother, sister, grandparent, grandchild, great-grandparent, great-grandchild, aunt, uncle, nephew, or niece. Sec. 573.023, G.C. Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual. Sec. 573.024, G.C.

Recusal or Disqualification Without a Motion: — Sec. 29.055, G.C.

❒ 3. If you choose to recuse or disqualify yourself, you are recused or disqualified. Go to step 5. — See *TMCEC 2022 Forms Book*: Order of Recusal or Disqualification.

Recusal or Disqualification Upon Party Motion: — Sec. 29.052, G.C.

❒ 4. If a motion has been filed to recuse or disqualify you from presiding over the case, you may do one of the following:

- ❒ a. Recuse or disqualify yourself (go to step 3); or — Sec. 29.055, G.C. See *TMCEC 2022 Forms Book*: Order of Recusal or Disqualification.
- ❒ b. Decline to recuse or disqualify yourself and request the Regional Presiding Judge of the Administrative Judicial Region to assign a judge hear the motion; and — See *TMCEC 2022 Forms Book*: Order of Referral upon Motion for Recusal or Disqualification.
  - ❒ (1) Forward a referral order, the motion, and statements to the Regional Presiding Judge.

❒ 5. If you are recused or disqualified, a determination must be made as to who will sit for you in the case.

Sec. 29.057, G.C.

❒ a. If you are the only municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.

❒ b. If you are the presiding municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.

❒ c. If you are not the presiding municipal judge in the municipality, you must request the presiding municipal judge of the municipality to assign another judge of the city to hear the case.

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7. Requests for Discovery

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

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

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

❒ 7. The defense attorney or any agent of the defense attorney may allow a defendant, witness, or prospective witness to view information acquired through discovery, but may not allow that person to have copies of the information, other than a copy of the witness's own statement.

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

❒ a. Before allowing a person to view a document or witness statement of another, the person possessing the information shall redact the address, telephone number, driver's license number, social security number, date of birth, and any bank acount or other identifying information in the document or statement.

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

❒ 8. No general right to discovery of inculpatory evidence exists. However, the defendant has the constitutional right to discover "Brady" evidence, or exculpatory evidence, that shows the defendant may not be guilty.

Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980); *Brady v. Maryland*, 373 U.S. 83 (1963).

❒ a. Prosecutors are statutorily required to promptly provide the defense with any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. This requirement applies upon discovery of such evidence at any time before, during, or after trial. A defendant need not request this information.

Art. 39.14(h) and (k), C.C.P.

❒ b. Prosecutors also have an ethical duty to provide the defense with both exculpatory and mitigating evidence. A defendant need not request this information.

Rule 3.09, Texas Disciplinary Rules of Professional Conduct.

❒ 9. If either party so requests, the court may order the parties to disclose the name and address of each person the party may call as a witness at trial. This is generally referred to as a "witness list." The judge shall specify when witness lists must be disclosed, no later than 20 days before trial.

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

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

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

8. Motions to Suppress

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

❒ b. Was the item seized within the scope of the warrant?

❒ 3. Was there an exception to the requirement of a warrant?

❒ a. Was the seizure in "plain view?"

❒ (1) The court must find that the officer was properly in the place where the discovery was made and it was immediately apparent the item was, in fact, evidence.

❒ b. Was the search made with consent of the defendant or another person with the right to consent to the search?

❒ c. Was the search or seizure only a temporary detention or "frisk" based on reasonable suspicion?

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

❒ d. Was the search of the person or the area within his or her reach incident to a proper arrest?

❒ e. Was the search based on an inventory policy of searching a properly seized vehicle?

❒ f. Was the seizure or stop based on a valid roadblock or traffic stop?

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

❒ g. Was the search based on emergency or exigent circumstances?

❒ 4. Has the defendant properly supported the motion to suppress with law and evidence? If so, the court grants the motion to suppress illegally obtained evidence.

❒ 5. If an illegal search or arrest leads to other evidence it too must be suppressed as "fruit of the poisonous tree."

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

❒ 6. Statements of the accused must be suppressed as violating the defendant's 5th Amendment right against self-incrimination if:

See *The Municipal Judges Book*: Chapter 4.

❒ a. The statements were involuntarily made;

❒ b. The statements were involuntary due to promises or threats made by the police;

❒ c. The statements were made subject to "custodial interrogation" (the defendant must be in legal custody and the statements must be the result of questioning) and the police failed to "Mirandize" the defendant; or

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

❒ d. The statements were made subject to "custodial interrogation" that does not comply with the requirement in Article 38.22, C.C.P., that the entire statement be recorded or in writing with the statutory warnings of that section included in the recording or writing.

❒ e. Exceptions to this section include:

Art. 38.22, C.C.P.

❒ (1) Any statements that contain any assertions of fact or circumstances which are later found to be true;

❒ (2) Prior testimony of the defendant;

❒ (3) Statements introduced for the purposes of impeaching the defendant's testimony at trial; or

❒ (4) Statements obtained by federal law enforcement in compliance with federal law or obtained in another state and in compliance with the laws of that state.

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

❒ f. If the defendant raises the issue of voluntariness as stated above, the court must hold a hearing outside the presence of the jury and make findings concerning the voluntariness of the statement.

❒ 7. An in-court identification of a defendant by a witness must be suppressed if the court finds that the identification was based on an improperly suggestive police identification procedure.

❒ a. Police misconduct in this situation must be of such an improper nature that it causes the court to believe that there is a substantial likelihood of irreparable misidentification by the witness.

❒ b. Factors to consider include:

❒ (1) The witness's opportunity to observe the defendant;

❒ (2) Nature of the suggestion;

❒ (3) Whether the in-court identification is based in any way on the improper procedure;

❒ (4) Accuracy of prior description;

❒ (5) Time between the offense and the identification; and

❒ (6) Totality of the circumstances.

❒ 8. In the hearing on a motion to suppress, the initial burden of establishing standing (or the right to complain) is upon the defendant. Once standing is established, the burden to show evidence was properly obtained shifts to the State.

❒ 9. Hearings on motions to suppress can often turn into a trial of the entire case. The court can and should limit pretrial testimony to only those legal and factual matters that must be developed for a proper ruling on the motion.

❒ a. After entry of judgment and if there is no appeal, the court may proceed to use available collection tools.

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

CHAPTER 6 PRETRIAL PROCEEDINGS

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

Motions About Evidence

9. Motions in Limine

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