

## CHAPTER 7 TRIAL PROCEEDINGS

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

If the prosecutor is not present at trial—both bench and jury—the court may: (1) postpone the trial to another date; (2) appoint an attorney pro tem; or (3) proceed to trial. Art. 45.031, C.C.P. (Note that as a result of amendments to Art. 2.07, C.C.P. by the 86th Legislature in 2019, municipal courts no longer have express statutory authority to appoint an attorney pro tem. See Ch. 1 of *The Municipal Judges Book*, footnote 242.) If the judge opts to proceed to trial, the State’s failure to present a prima facie case of the offense alleged in the complaint entitles the defendant to a directed verdict of “not guilty.” Art. 45.032, C.C.P. In this instance, State’s witnesses, such as the peace officer, may be present at the trial but unable to testify for the State unless called by the prosecutor.

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

### 1. The Non-Jury Trial (Bench Trial)

Checklist 7-1	Script/Notes
<p><input type="checkbox"/> 1. Opening Ceremony and Remarks:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Opening announcement given by bailiff or court clerk.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Judge’s opening statements:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Explain court procedures.</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) The court may want to repeat the admonishments made on first appearance.</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. Call the case for trial:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Prosecution and defense announce ready for trial, make motions for continuance, or present pretrial motions (e.g., motion to suppress).</p> <p><input type="checkbox"/> 2. The prosecutor reads the complaint:</p>	<p>“All rise! The Municipal Court of the City of _____ is now in session. The Honorable _____, judge presiding.”</p> <p>See Checklist 4-1.</p> <p>“I call the case of the State of Texas vs. (<i>Defendant’s name</i>).”</p>

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|
| <p><input type="checkbox"/> a. The defendant is entitled to a copy of the complaint at least one day before trial, but the defendant can waive that right.</p>                                                                                                                                               | <p>Art. 45.018(b), C.C.P.</p>                                  |
| <p><input type="checkbox"/> b. Ask the defendant if he or she understands the charge and the rights explained earlier. The defendant must be provided a reasonable amount of time to secure counsel. If the defendant does not waive a jury trial in writing, the case must be docketed as a jury trial.</p> | <p>Art. 45.025, C.C.P.</p>                                     |
| <p><input type="checkbox"/> 3. Defendant enters a plea:</p>                                                                                                                                                                                                                                                  |                                                                |
| <p><input type="checkbox"/> a. A judge may not accept a plea of guilty or 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.</p>                                                                     | <p>Art. 45.0241, C.C.P.</p>                                    |
| <p><input type="checkbox"/> b. Ask the defendant if he or she waives his or her right to a jury trial, and have the defendant sign a written waiver.</p>                                                                                                                                                     | <p>See <i>TMCEC 2022 Forms Book</i>: Plea Form: In Person.</p> |
| <p><input type="checkbox"/> c. The defendant then enters a plea of:</p>                                                                                                                                                                                                                                      |                                                                |
| <p><input type="checkbox"/> (1) Guilty;</p>                                                                                                                                                                                                                                                                  |                                                                |
| <p><input type="checkbox"/> (2) Nolo contendere (no contest);</p>                                                                                                                                                                                                                                            |                                                                |
| <p><input type="checkbox"/> (3) Not guilty; or</p>                                                                                                                                                                                                                                                           |                                                                |
| <p><input type="checkbox"/> (4) Special plea (double jeopardy).</p>                                                                                                                                                                                                                                          |                                                                |
| <p><input type="checkbox"/> d. If the defendant refuses to enter a plea, the court must enter a plea of not guilty for the defendant.</p>                                                                                                                                                                    | <p>Art. 45.024, C.C.P.</p>                                     |
| <p><input type="checkbox"/> e. If the defendant pleads guilty or nolo contendere, then the only remaining issue is the amount of the fine, and the court determines the punishment.</p>                                                                                                                      | <p>Art. 45.022, C.C.P.<br/>See Checklist 8-1.</p>              |

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

Rule 614, T.R.E.

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

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

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

“You must not converse with each other or with any other person about the case, and you are not to read any report of or comment upon the testimony in the case while under ‘The Rule.’ You may, however, discuss the case with attorneys in the case outside the presence of other witnesses. Please remain outside until called.”

For a violation of “The Rule,” contempt may be an option. See *The Municipal Judges Book*: Chapter 6.

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

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

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

Art. 45.032, C.C.P.

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

Art. 45.041(d), C.C.P.  
See the *TMCEC 2022 Forms Book* for a variety of judgment forms.

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

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

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

The procedure may vary for courts of record.

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

See Chapter 10 in this book.

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### 2. The Jury Trial – Before Trial

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

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

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

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

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

- (3) Filing objections to the complaint;
  - (4) Filing recommendations, or exceptions to the jury charge;
  - (5) Requests for interpreter; or
  - (6) Other motions.
2. Sign an order for the clerk to summon a sufficient number of jurors for the type of case.
- a. Consider summoning 30 to 40 persons for a misdemeanor trial.
  - b. Prospective jurors may be randomly selected from:
    - (1) Driver’s license records, if available;
    - (2) Utility records;
    - (3) Tax rolls; and
    - (4) Voter registration rolls.
  - c. Prospective jurors must live within the city.
3. Court may reschedule prospective jurors to a later date. Clerk may postpone juror’s service if:

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

See *TMCEC 2022 Forms Book: Order to Summon Venire*.

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

Sec. 62.501, G.C.

Tex. Atty. Gen. Op. GA-0161 (2004).  
See *TMCEC 2022 Forms Book: Official Model Jury Summons and Questionnaire; Jury Service Cover Letter*.

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

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**3. The Jury Trial –Trial Day**

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

Checklist 7-3	Script/Notes
<input type="checkbox"/> 1. Instruct the clerk of the court to prepare a jury list containing the name of each juror in the order in which he or she was chosen.	See <i>TMCEC 2022 Forms Book</i> : Jury Panel List (Venire Panel).
<input type="checkbox"/> 2. Seat jurors in the order in which they were selected.	
<input type="checkbox"/> 3. Distribute a copy of the numbered list of jurors to the prosecutor and the defendant or defense counsel.	Art. 35.11, C.C.P.
<input type="checkbox"/> a. The judge may, at his or her discretion, ask each attorney to read and sign an admonishment against distributing juror information contained on the juror information cards to the media.	Generally, juror information may not be disclosed unless permitted by the court after a showing of good cause on application by a party in the trial or a bona fide member of the news media. Art. 35.29, C.C.P.
<input type="checkbox"/> 4. Verify that an absent juror has not established his or her exemption by filing a signed statement with the clerk of the court prior to the appearance date or been given a postponement by the clerk.	Art. 35.04, C.C.P.; Secs. 62.0142 and 62.0143, G.C.
<input type="checkbox"/> a. If desired, set contempt hearings and issue attachments for missing jurors not exempt.	Art. 45.027, C.C.P. See Chapter 14 in this book, concerning Contempt. See <i>TMCEC 2022 Forms Book</i> : Show Cause Notice: Juror Contempt. See <i>The Municipal Judges Book</i> : Chapter 6.
<input type="checkbox"/> 5. Opening Ceremony and Remarks:	
<input type="checkbox"/> a. Opening announcements may be given by the bailiff or court clerk.	“All rise! The Municipal Court of the City of _____ is now in session. The Honorable _____, judge presiding.”

☐ 6. Judge’s opening remarks.

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

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

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

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

Art. 35.02, C.C.P.

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

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

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

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

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

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

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

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

“Are you 18 years of age or older?”

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

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

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

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

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

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

Sec. 62.106, G.C.

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

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

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

a. The person is over 70 years of age;

“Are you over 70 years of age?”

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

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

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

Art. 35.08, C.C.P.

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

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

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

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

Only one shuffle is permissible by law.

- 20. The motion must be made before the State’s voir dire begins.
- 21. After a jury shuffle, seat the panel in the order their names were drawn.
- 22. Seating the Panel:

- a. After considering and determining qualifications, exemptions, and excuses, the remaining jurors should be seated. The panel at this stage should consist of no fewer than 12 persons. This will allow the prosecution and the defense to exercise three strikes each and still have at least six persons available to serve on the jury.

- b. There is no authority for the selection of alternate jurors in municipal court cases.

- 23. Announcement of the Case and Introductions:

- a. Introduce yourself.

- b. Call the case.

- c. Introduce lawyers.

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

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

Art. 33.011, C.C.P.

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

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

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

d. Introduce defendant.

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

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

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

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

24. Preliminary instructions:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32. Emphasize the importance of a fair trial.

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

- ❑ 33. Explain why the attorneys for each side, or the defendant, if pro se, will question them.
  
- ❑ 34. Allow prosecutor to proceed with his or her voir dire. After prosecutor has finished with voir dire, allow defense to proceed with voir dire.
  
- ❑ 35. After voir dire is completed, allow prosecutor and defense to exercise their peremptory challenges.
  - ❑ a. The prosecutor and the defense may each exercise as many as three strikes (that is, ask that a potential juror be excused) without having to explain why the strikes were made unless a *Batson* challenge is raised.
  
  - ❑ b. Each side takes its jury list supplied by the court and marks through as many as three names.
  
  - ❑ c. The two lists are returned to the clerk, who makes a list of the first six names that have not been marked through. Those six persons then take their position in the jury box. The clerk delivers the original list to the judge and gives a copy of the list of six jurors to both the prosecutor and the defendant or the defendant’s attorney.
  
- ❑ 36. Seat and administer oath to jury at the conclusion of the voir dire proceedings.

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

Art. 35.25, C.C.P.

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

Art. 33.01, C.C.P.

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

For instructions for a “pickup jury,” see Art. 45.028, C.C.P., and *TMCEC 2022 Forms Book: Other Jurors Summoned (“Pickup Jury”)*.

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

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

a. Oath.

b. Preliminary instructions.

38. Explain how the trial will proceed.

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

Art. 35.22, C.C.P.

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

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

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

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

“The trial will proceed as follows:”

“The prosecutor may make an opening statement;”

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

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

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

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

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

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

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

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

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

Art. 36.01, C.C.P.

Art. 45.0241, C.C.P.

Art. 45.023, C.C.P.

Art. 45.024, C.C.P.

(1) If the defendant pleads guilty or nolo contendere, then the court determines the punishment.

Art. 45.022, C.C.P.

(2) The defendant in a misdemeanor case may be absent and appear by counsel with the consent of the State.

Art. 33.04, C.C.P.

The prosecuting attorney has unrestricted discretion in consenting to defendant's absence in a jury trial.

40. Place witnesses under "The Rule."

a. At the request of either the defense or prosecution, or on the judge's own motion, the judge may prevent witnesses from hearing the testimony of other witnesses.

b. Determine all witnesses.

c. Give oath to witnesses.

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

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

- d. Instruct the witness in the language of “The Rule.”
- e. Before a victim, close relative of a victim, or a guardian of a victim can be excluded under “The Rule,” the moving party must show, and the court must determine that:
  - (1) The victim (or relative or guardian) will testify; and
  - (2) The testimony of the witness/victim would be materially affected if the witness/victim is not excluded under “The Rule.”
- f. If either side asks the judge to make an exception for a particular witness (for example, an expert witness), the judge may grant the exception if determining that the witness’ testimony will not be tainted or influenced if that person is allowed to remain in the courtroom during the trial and to hear the testimony of the other witnesses in the case.
- 41. Opening statements:
  - a. Prosecution opens first.
  - b. Defense opens second or may reserve opening statement until after the State rests its case-in-chief.
  - c. Should the prosecution waive its opening statement, the defense may not make an opening statement until the prosecution concludes its case-in-chief.
- 42. Presentation of evidence.

Rule 613 of the Rules of Evidence.

“Ladies and gentlemen, ‘The Rule’ has been invoked.’ The Rule’ means that the witnesses who are not parties to this case must remain outside the hearing of the courtroom at all times while testimony is being heard, except when testifying or until discharged. If you are a witness, you must stay close enough so that you may be reached when needed. You must not discuss this case among yourselves or allow it to be discussed in your presence except in the presence of your attorney and under the orders of the court. You must not read any report, newspaper article, correspondence, or comment on the testimony in the case while you are under ‘The Rule.’ Please remain outside until called.”

Art. 36.01, C.C.P.

Art. 36.01, C.C.P.

- a. Prosecution’s case-in-chief.
  - (1) State’s direct evidence.
  - (2) Defendant’s cross-examination.
  - (3) State’s redirect examination, if any.
  - (4) Defendant’s recross-examination, if any.
- b. State rests.
- 43. Motion for directed verdict:
  - a. At this point, the defense is permitted to bring a motion for directed verdict of acquittal. The motion is based upon the belief of the defense that the State has failed to bring up some evidence on an element of the offense.
  - b. If the court believes that the defense is correct, the judge should instruct the jury to return a verdict of not guilty.
    - (1) Granting the motion has the same practical effect of ending the trial in an acquittal. Overruling the motion results in a continuation of the trial, and the defense would then be allowed to present its case.
- 44. Defendant’s case:
  - a. Defendant’s direct examination.
  - b. State’s cross-examination.
  - c. Defendant’s redirect examination, if any.
  - d. State’s recross-examination, if any.
- 45. Rebuttal evidence:

Art. 45.032, C.C.P.

It may prove necessary to clear the jury from the courtroom. Motions for directed verdict are often made and argued outside the presence of the jury.

Art. 36.01, C.C.P.



- 50. Closing arguments:
  - a. Prosecution argues first (may waive).
  - b. Defense makes its argument.
  - c. Prosecution has the right to argue last.
- 51. Before submitting the case to the jury, determine whether the defendant elected jury sentencing:

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

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

See Checklist 7-5 on preparing a jury charge.

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

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

It is unclear whether the law allows a defendant in a municipal court who exercised the right to a jury trial to elect, in the event of conviction, whether the fine will be set by the jury or judge. The Court of Criminal Appeals says that Art. 37.07, C.C.P. can be read to support both a negative and positive answer to that question. See *In re Yeager*, 601 S.W.3d 356 (Tex. Crim. App. 2020). The checklists below assume the jury is determining punishment. If the jury is not determining punishment, adjust the checklists accordingly.

- a. If the defendant elected to have the jury determine punishment, instruct the jury to assess a fine if they find the defendant guilty of the offense.
  
- b. If the defendant did not elect the jury to determine punishment, instruct the jury to only render a verdict of “Not Guilty” or “Guilty. If the verdict is “Guilty,” the judge will assess a fine.
  
- 52. Submit the case to the jury for deliberations:
  - a. Instruct the jury.

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

“You must appoint a presiding juror.”

“The verdict must be unanimous.”

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

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

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

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

See *TMCEC 2022 Forms Book: After Jury Verdict and After Jury Verdict (Juvenile)*. Art. 45.036, C.C.P

- b. Provide the jury with copies of:
  - (1) Jury charge;

- |                                                                                                                                                                                                                                                                                                                                                     |                             |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| <ul style="list-style-type: none"><li><input type="checkbox"/> (2) Jury instructions; and</li><li><input type="checkbox"/> (3) Verdict Forms</li></ul>                                                                                                                                                                                              |                             |
| <input type="checkbox"/> 53. The verdict.                                                                                                                                                                                                                                                                                                           | Art. 45.036, C.C.P.         |
| <ul style="list-style-type: none"><li><input type="checkbox"/> a. The judge should see that the verdict is in the proper form (if guilty, the verdict should include assessment of punishment).</li><li><input type="checkbox"/> b. Read the verdict in open court.</li><li><input type="checkbox"/> c. Enter the verdict on your docket.</li></ul> | Art. 45.017, C.C.P.         |
| <ul style="list-style-type: none"><li><input type="checkbox"/> (1) If the jury is deadlocked, give an <i>Allen Charge</i>.</li><li><input type="checkbox"/> (2) If a verdict cannot be reached and it is improbable that an agreement can be reached, the jury should be discharged and the case tried again.</li></ul>                             | See Checklist 7-6(5).       |
| <input type="checkbox"/> 54. Poll jury on request of prosecution or defense.                                                                                                                                                                                                                                                                        | Art. 37.05, C.C.P.          |
| <input type="checkbox"/> 55. Discharge jury.                                                                                                                                                                                                                                                                                                        | See Chapter 8 in this book. |

**CHAPTER 7 TRIAL PROCEEDINGS**

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

**4. The Jury Trial – *Batson* Challenges**

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

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

*Williams v. State*, 767 S.W.2d 872 (Tex. App.—Dallas 1989, no pet.).

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

*Williams v. State*, 767 S.W.2d 872 (Tex. App.—Dallas 1989, no pet.).

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

*Prosper v. State*, 788 S.W.2d 625 (Tex. App.—Houston [14th] 1990, no pet.).

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

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

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

**CHAPTER 7 TRIAL PROCEEDINGS**

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

**5. The Jury Trial – Jury Charge**

Checklist 7-5	Script/Notes
<p><input type="checkbox"/> 1. The judge must charge the jury before either the defense or prosecution presents closing arguments. The charge may be made orally or in writing. However, the charge must be in writing if required by law:</p> <p><input type="checkbox"/> a. Delete any allegations of alternative means of committing the offense for which no evidence was presented.</p> <p><input type="checkbox"/> b. Obtain a copy of the complaint and statute or ordinance alleged to be violated.</p> <p><input type="checkbox"/> c. Request submission of any specially requested charges by the parties and make a ruling on each.</p> <p><input type="checkbox"/> d. Give each party a reasonable time to inspect and object to the charge intended to be given.</p> <p><input type="checkbox"/> 2. Caption:</p> <p><input type="checkbox"/> a. Insert the:</p> <p><input type="checkbox"/> (1) Cause number;</p> <p><input type="checkbox"/> (2) Court; and</p> <p><input type="checkbox"/> (3) Defendant’s name.</p>	<p>Art. 45.033, C.C.P.</p> <p>A written jury charge is specifically required in municipal courts of record. Art. 36.14, C.C.P.</p> <p>Art. 36.14, C.C.P.</p> <p>Art. 36.14, C.C.P.</p> <p>CAUSE NUMBER _____</p> <p>THE STATE OF TEXAS</p> <p>§ IN THE MUNICIPAL          § COURT OF          § (City) § (County), TEXAS</p> <p>CHARGE TO THE JURY</p>

3. Commencement:

a. Insert the:

- (1) Name of the offense;
- (2) Name of the city;
- (3) Date of the offense; and
- (4) Defendant’s plea.

4. Abstract Charge:

- a. Describe the offense as specifically as possible from the statute and complaint.
- b. Consider quoting verbatim actual statutory language applicable.

5. Definitions:

- a. Define the culpable mental state, if any.

MEMBERS OF THE JURY:

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

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

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

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

c. Reasonable Doubt.

6. Application Paragraph:

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

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

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

d. Apply law without commenting on weight of evidence.

7. Converse charge:

a. Insert the converse charge.

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

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

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

8. Evidentiary instructions:

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

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

9. Defenses:

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

10. Presumptions:

- a. Add any evidentiary presumption authorized by law.
- b. Include the general instructions relating to presumptions found in Section 2.05, P.C.

The jury is instructed relative to this presumption:

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

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

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

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

- 11. Range of punishment:

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

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

- ❑ 12. General instructions:
  - ❑ a. Add general instructions.

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

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

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

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

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

13. Verdict Form:

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

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

“Your verdict must be unanimous.

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

CAUSE NUMBER \_\_\_\_\_

THE STATE OF TEXAS

§ IN THE MUNICIPAL  
COURT OF

§ ( *City* )

§ ( *County* ), TEXAS

VERDICT

(Choose one of the following)

We, the Jury, find the defendant not guilty.

\_\_\_\_\_  
Presiding Juror

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

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

\_\_\_\_\_  
Presiding Juror

- 14. Objections to the main charge:
  - a. Allow each party to make objections to the charge.
- 15. Make any needed changes to the charge:
  - a. Do not indicate in the charge which party requested the instruction.
- 16. Read the charge to the jury.

**CHAPTER 7 TRIAL PROCEEDINGS**

**6. The Jury Trial – Jury Deliberation**

Checklist 7-6	Script/Notes
<ul style="list-style-type: none"> <li><input type="checkbox"/> 1. Have the bailiff ensure that the jury room is ready and equipped with chairs, pencils, writing pads, etc.</li> <li><input type="checkbox"/> 2. Remand jurors to the bailiff and instruct jurors that they are to follow the bailiff’s instructions when not in the jury room.</li> <li><input type="checkbox"/> 3. The jury should be advised by the bailiff where he or she will be stationed should he or she be needed.</li> <li><input type="checkbox"/> 4. Jury questions during deliberation:               <ul style="list-style-type: none"> <li><input type="checkbox"/> a. If jury communicates with court in writing, use reasonable diligence to secure presence of defendant, defense counsel, and prosecutor.</li> <li><input type="checkbox"/> b. Show question and proposed answer to defendant and both counsel for objections or exceptions.</li> <li><input type="checkbox"/> c. If unable to secure presence of defendant and both counsel, answer appropriately.</li> <li><input type="checkbox"/> d. Read written answer in open court unless defendant expressly waives.</li> <li><input type="checkbox"/> e. If the jury disagrees as to the testimony of a witness, have read back to them the specific portion in dispute.</li> <li><input type="checkbox"/> f. If there are no court reporter notes, the witness may be recalled to repeat testimony only as to the point in dispute.</li> </ul> </li> </ul>	<p data-bbox="998 819 1209 850">Art. 36.27, C.C.P.</p> <p data-bbox="998 1480 1421 1827"><i>Brown v. State</i>, 870 S.W.2d 53 (Tex. Crim. App. 1994). The jury must disagree about the testimony before the statement of a witness may be read to them; a simple request for testimony does not, by itself, reflect disagreement. <i>Moore v. State</i>, 874 S.W.2d 671 (Tex. Crim. App. 1994); Art. 36.28, C.C.P.</p>

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

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

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

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

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

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

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

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

Art. 37.05, C.C.P.

Art. 36.31, C.C.P.

**CHAPTER 7 TRIAL PROCEEDINGS**

**7. The Jury Trial - Master Checklist**

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

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

Art. 45.032, C.C.P.

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

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

32. Motion for new trial.

33. Appeal

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

See Chapter 10 in this book.

Procedures for appeal differ for municipal courts of record and non-record municipal courts. See Chapter 10 in this book.