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Handling Requests for Court Records

By Ted Wood, Special Counsel for Trial Courts, Office of Court Administration, Austin

Last summer, Ryan Turner, Program Attorney and Deputy Counsel for TMCEC, asked me to teach a class for the 12-hour judges program. The topic? How municipal courts should deal with requests for records. Thankfully, Ryan gave me plenty of lead time to prepare.

In the first place, I was not particularly well-versed on the matter. Secondly, after a couple of afternoons of reading about open records, I realized that my subject was kind of difficult to explain. There were a lot more laws and rules on access to records than I had ever thought. But talking about the details

of a particular rule wouldn't be the hard part. The trick would be getting everyone to understand when a certain rule did and did not apply.

What I needed to teach was not so much the answers to specific questions, but rather what questions to ask. And when to ask them. The more I thought about my task, the more I thought a flowchart might work – a flowchart that if followed from start to finish would cause a person to ask all of the right questions at all of the right times.

This issue of the *Municipal Court Recorder* contains the flowchart that I first

envisioned several months ago. You can also find the flowchart and an accompanying step-by-step commentary at www.courts.state.tx.us/mc_records.asp. I'm confident you can use the flowchart to correctly analyze any request for records your court may receive.

This article uses the flowchart to examine a typical records request. In fact, this is the records request that we studied at the TMCEC Dallas 12-hour school in response to a suggestion from one of the judges in the audience. I invite you to roll up your sleeves and

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Writ of *Procedendo* Enforcing Judgments Post Appeal

By Ryan Kellus Turner, Program Attorney and Deputy Counsel, TMCEC

Though most cases in municipal and justice court are not appealed, the following scenario occurs on a regular basis: Defendant is found guilty, a judgment is entered, the defendant is informed that he or she has 10 days to perfect an appeal by filing an appeal bond with the local trial court. More than 10 days later, the defendant arrives with bond in hand. Pursuant to Article 45.0426(a) of the Code of Criminal Procedure, the appeal is untimely.

Should the court inform the defendant that the appeal bond was not timely

filed and deny the defendant's appeal? Alternatively, should the court go through the effort of sending the bond and related paper work to the appellate court knowing that the defendant did not perfect the appeal?

The Code of Criminal Procedure provides that it is not the role of the municipal or justice court to act as the gatekeeper of appeals. Without reference to whether the bond is filed in a timely manner, Article 45.043 states that when a defendant files the bond,

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AROUND THE STATE

GCAT Annual Meeting

On June 2-4, 2004, the Annual Meeting of the Government Collectors Association of Texas (GCAT) will be held in Galveston at the San Luis Resort Conference Center. Call 512/936-7557 for more information. The agenda is designed for judges and court support personnel for all trial courts in Texas. Municipal judges and court support personnel who have attended in the past have highly rated the program for its practical, yet innovative approach to increasing court collections rates. The program will feature many similar speakers and topics to the TMCEC Fines & Fees Conference that was held in March 2004. The program is highly recommended to courts that seek to improve their collections rates.

TMCA Annual Meeting

On September 9-11, 2004, the Annual Meeting of the Texas Municipal Courts Association will be hosted at the Doral Tesoro Hotel and Golf Club, located in the DFW area. The focus of the conference will be courtroom security, fine and collection techniques, computer software and technology. For additional information, watch the TMCA website (www.txmca.com) or contact the TMCA President, Judge Sharon Hatten, Midland Municipal Court, P.O. Box 1152, Midland, Texas 79702, or by telephone, 432/685-7303.

Task Force Reviews Canons

The Texas Supreme Court has created a task force composed of members of the bench, bar, and general public to review the Code of Judicial Conduct and make recommendations "for revisions required by law, to make suggestions on improving the effectiveness of existing canons, and to suggest other modifications consistent with the Code's broad purpose of upholding the integrity, independence and competence of the judiciary." Charles L. Babcock of Dallas chairs the Task Force and Justice Wallace B. Jefferson is the Court's liaison to the Task Force. Judge Monica Gonzalez (San Antonio Municipal Court) is the representative for municipal courts on the Task Force, as well as the Commission on Judicial Conduct. The Task Force is meeting via videoconference throughout the spring and possibly summer. For more information or to submit comments, contact Charles L. Babcock, Jackson Walker, L.L.P. at 1401 McKinney Street, Suite 1900, Houston, Texas 77010, by telephone 713/752-4210 or by email at address cbabcock@jw.com.



FROM THE GENERAL COUNSEL

W. Clay Abbott

Jail Credit and Community Service

Most of you noted the significant change in jail credit and community service credit that was made during the last legislative session. HB 2424 amended Articles 45.048 and 45.049, Code of Criminal Procedure. The credit for each period of time designated by the court under Article 45.048(b), C.C.P.—not less than eight (8) hours or more than 24 hours—and the credit for each eight (8) hours of community service was modified. The previous credit for the respective periods was \$100 (no more than \$100, no less than \$100, \$100 exactly). That amount was modified to “no less than \$50.” This provided not only a more effective collections opportunity, it more importantly provided for judicial discretion and local adaptation. It is rare that a legislative action has been met with such universal glee. Courts could lower the rate, leave it, or even raise it. The problem is, in their euphoric use of the changes, some courts have been jumping the gun.

The sections of HB 2424 amending Articles 45.048 and 45.049, C.C.P., (Sections 65 and 66) specifically designated an effective date of January 1, 2004. Those changes apply “only to a defendant serving a sentence for an offense committed on or after the effective date of this section.” Further, each section goes on to state that:

A defendant serving a sentence for an offense committed before the effective date of this section is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this subsection, an offense is committed before the effective date of this section if any element of the offense occurs before that date.

This means that courts must continue to give the credit required under the previous law to any defendant charged with an offense committed before January 1, 2004. The date of offense controls over the dates of incarceration, community service, judgment or issuance of *capias pro fine*. Since the defendant’s constitutional rights to due process and the protections against *ex post facto* application are implicated, the risk of action in federal court under Section 1983, U.S.C., is high. The complicated issue of jail credit is made even more perilous for a time by these changes.

While we celebrate a positive legislative development, we need to be careful in its application.

Juvenile Racing is Back

A recent A.G. Opinion may have an impact on many of our courts. While the Opinion will be covered in depth

in our annual analysis of Attorney General Opinions in a later issue of the *Municipal Court Recorder*, let me give you a quick warning about Opinion GA-0157. Due to inadvertent omissions in the new drag racing statute—Section 545.420, Transportation Code—it was not included in the list of other Transportation Code offenses prosecutable in county juvenile court under the Family Code. The Attorney General opined that these new Class A or B misdemeanors and felonies were under the jurisdiction of municipal and justice courts as fine-only misdemeanors. You may also go to www.tmcec.com to find a link to Attorney General Opinion GA-0157.

A Quick Correction

With assistance of the able eye of the Honorable Mitch Solomon, an Austin Municipal Judge, we have discovered an error in the 2004 *TMCEC Forms Book*. The age of 18 was improperly included in the form while the age of 17 was proper under the statute. We hope there was no confusion generated by this error. A corrected copy of *Application For Expungement Penal Offenses (Art. 45.0216, C.C.P.)* can be found on page 17 of this publication. The original appeared on page 175 of the 2004 *TMCEC Forms Book*.

“all further proceedings in the case in the justice or municipal court shall cease.”

But wait a minute. Chapter 45 only applies to proceedings in municipal and justice courts, right?¹ And Article 45.0426(a) provides that “When the appeal bond has been filed with the justice or judge who tried the case not later than the 10th day after the day the judgment was entered, *the appeal in such case shall be held to be perfected.*”² Then doesn’t the italicized clause suggest that it is the role of the local trial court judge to determine if the appeal is perfected?³

On its surface, it would appear so. However, this appears to be an instance where, during legislative drafting, the “cut and paste” technology of word processing has caused some confusion. Article 45.0426 has not always been a part of Chapter 45. Prior to being moved in 1999, it was formerly Article 44.14 (Chapter 44 is entitled Appeal and Writ of Error).

Reading the law in context of its former location – Chapter 44 – it becomes more readily apparent that it is the appellate court’s function (generally a county court) to hold the appeal perfected, not the municipal or justice court. Considering that the American judicial system was built around the adage “one appeal as a matter of right,” it seems hardly fair that a judge who found a defendant guilty can also unilaterally deny a defendant the opportunity to appeal. Accordingly, Texas law leaves the decision making up to a different court. As provided in Article 45.0426(b), “if an appeal bond is not timely filed, the appellate court does not have jurisdiction over the case and shall remand the case to the justice or municipal court for execution of the sentence.”

Because of the possible appearance of

obstructionism, a number of municipal and justice courts leave it up to the appellate court to remand the case pursuant to Article 45.0426(b).

But how exactly does such a remand occur? The Code of Criminal Procedure provides no express guidance or name for such procedure. Alas, in such situations, what can a city or county attorney do to ensure that the judgment of the original trial court is executed?

It Rhymes with Innuendo (and not much else)

While its use has become obsolete in some states, the writ of *procedendo* remains alive but obscure in Texas law. While originally “*procedendo*” was a writ used to compel a judge to proceed to judgment, in Texas “*procedendo*” has come to mean an appellate court order for an inferior court to execute **judgment**.⁴ The writ of *procedendo* is the appropriate remedy for the State to utilize when seeking to have a case effectively remanded from county to municipal or justice court when a defendant has not perfected his or her appeal in criminal cases.⁵

It is “Extraordinary”

As previously stated, the writ of *procedendo* is an “extraordinary writ,” meaning an original action in an appellate court. Other extraordinary writs include the writ of *certiorari* (which enables an appellate court to direct a court of inferior jurisdiction to transmit to it the record of some proceeding for review), the writ of prohibition (an order from a court of superior jurisdiction to prevent an inferior court from acting beyond its jurisdiction), and a writ of *quo warranto* (an order from a court of superior jurisdiction to determine disputed questions about whether a person is entitled to hold public office and exercise the office’s legal authority).

Authority to Issue

While the Texas Supreme Court and

Texas Court of Criminal Appeals have express authority to issue the writ of *procedendo*,⁶ the authority of a county court to issue the writ stems from its constitutional and statutory authorization to issue any writ necessary to exercise supervisory jurisdiction of the local trial courts (*e.g.*, municipal and justice courts).⁷ The authority of the county trial court of limited jurisdiction to exercise authority over local trial courts of limited jurisdiction is known as incidental appellate jurisdiction.⁸

Illustrations of Application

When a county court has obtained jurisdiction of an appeal from a non-record municipal or justice court, the judgment of the local trial court is essentially annulled.⁹ To the chagrin of city attorneys who have not obtained the consent of the county attorney to prosecute the *trial de novo*,¹⁰ once the appeal has been perfected, any dismissal (including a voluntary dismissal by the State) is not merely the end of the appeal but a dismissal of the entire case as if it had never been filed in municipal or justice court. Consequentially, efforts to execute the judgment of the local trial court following dismissal at the county trial court by means of *procedendo* would be erroneous.¹¹

Consider another instance where the defendant appeals from the local trial court to the county court. Assume the defendant perfects the appeal, but thereafter fails to appear for trial. May the county court dismiss the appeal, and issue a writ of *procedendo* ordering the local trial court judge to issue a *capias pro fine* ordering the defendant to be committed to jail in satisfaction of the local trial court’s original judgment?

The answer, once again, is “No.” In *Ex parte Swift*, the Court of Criminal Appeals held that once the appeal was perfected, *procedendo* was no longer an option.¹² Rather, the Court issued a

writ of *habeas corpus* and stated that in such circumstances, a county court should enter an order forfeiting the defendant's bond.

But what if the defendant appeals from municipal court and afterwards it is discovered in county court that there is a defect in the bond? In *Martin v. State*, the county court dismissed the appeal from the judgment of the municipal court due to the defendant's failure to specify to which county court at law notice of the appeal was made.¹³ The Court of Criminal Appeals disagreed with the county court's hyper-technical construction of the statute that is now Article 45.0425(b), Code of Criminal Procedure. In doing so, the Court stated that "It has long been the rule that a criminal appeal, dismissed for want of sufficient bond, will be reinstated upon motion accompanied by a sufficient bond."¹⁴

Article 44.15, Code of Criminal Procedure, provides that when an appellate court determines that a bond is defective, at its discretion, the court may allow the appellant to amend such bond by filing a new bond on such terms as the court may prescribe. What if the appellant fails to avail him or herself of the opportunity provided by the appellate court? Such was exactly the case in *Lopez v. State*.¹⁵ Lopez was convicted in a municipal court of record. He appealed. A defect was discovered in the bond. Lopez was afforded time to correct it. No effort was made to do so and the appeal was held to be properly dismissed.


Would this be a circumstance that could warrant *procedendo*? In light of *Mann v. Brown*, the answer would be "Yes."

Conclusion

In complying with the mandate of Article 45.0426, C.C.P., many county courts act in the spirit of *procedendo* on a regular basis, though they may or

may not know it. In simplest terms, *procedendo* is merely the means by which the county court remands the case as contemplated in Article 45.0426(b).

While in *Mann* the county judge ordered the county clerk to issue the writ of *procedendo*, prosecutors should be prepared to apply for the writ, especially in instances where there is reason to believe that the appeal to the county court is untimely or where the county court has held the appeal to not be perfected but nevertheless fails to *procedendo* to the local trial court on its own motion.

It is recommended to prosecutors that in making application for *procedendo*, a copy of the writ should be provided (see page 6 in this newsletter). Along with prairie dogs and horn frogs, forms for *procedendo* are sparse. Two years ago, I went on a quest for a copy of the writ that led me all the way to the Court of Criminal Appeals. With the assistance of the municipal prosecutors listserv, TMCEC developed related forms that were incorporated in the prosecutor's section of the 2004 *TMCEC Forms Book*. While presumably the joint application (see page 7) could be used in defunct appeals stemming from municipal courts of record, for reasons previously stated in this article, it is not applicable in perfected appeals stemming from non-record courts. The State's application, on the other hand, can be used regardless if the appeal comes out of a record or non-record local trial court. 

¹ Correct. See, Article 45.001 and 45.002, Code of Criminal Procedure.

² Italics added for emphasis.

³ No, but please read on.

⁴ *Cavazos v. Hancock*, 686 S.W.2d 284, 285 (Tex. App. Amarillo 1985).

⁵ *Mann v. Brown*, 516 S.W.2d 22 (Tex. App. Tyler 1974) citing *Minchew v. State*, 366 S.W.2d 942 (Tex. Crim. App. 1963).

⁶ Tex. Const. Art. V. Sect. 3 and 5.

⁷ Tex. Const. Art. V. Sect. 16; Section

25.004, Government Code.

⁸ Texas is one of only six states in the nation to utilize incidental appellate jurisdiction among its courts of limited jurisdiction. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Organization* (1998).

⁹ Article 44.17, Code of Criminal Procedure, instructs that the proceeding in county court are conducted "as if the proceedings had been originally commenced in that court."

¹⁰ Article 45.201(c), Code of Criminal Procedure.

¹¹ 6 Tex. Jur. 3d Appellate Review Sect. 919 (2003).

¹² 358 S.W.2d 629 (Tex. Crim. App. 1962).

¹³ 346 S.W.2d 840 (Tex. Crim. App. 1961).

¹⁴ *Id.*

¹⁵ 649 S.W.2d 165 (Tex. App. El Paso 1983).

TexasOnline TicketPay

TexasOnline, the State's official website, provides the public a simple, safe and convenient means to pay traffic and parking tickets using the Internet. Currently, two municipal courts—Houston and Mesquite—offer this secure online ticket payment service. Using the Internet, citizens may pay fines, fees and most other court assessments by entering their ticket number(s) and credit card information. TexasOnline issues the citizen a receipt and confirmation number to verify that the payment has been received. To participate in the TicketPay system, courts first contract with BearingPoint/TexasOnline and then provide ticket information including ticket number, case number and amount owed. TexasOnline handles the funds processing and transfer. For more information, visit the TexasOnline TicketPay webpage at www.texasonline.com or contact Thomas Sparks at TexasOnline, 512/542-5377.

WRIT OF *PROCEDENDO*

CAUSE NUMBER: _____

STATE OF TEXAS
VS.

§
§
§

IN THE MUNICIPAL COURT
CITY OF _____
_____ COUNTY, TEXAS

On this the ____ day of _____, 200__, the Court considered and granted the Application for the Writ of *Procedendo*.

IT IS HEREBY ORDERED that the appeal in the above styled and numbered cause be abated, dismissed, and remanded to the Municipal Court of _____, _____ County, Texas, as a final judgment.

SIGNED this ____ day of _____, 200__.

Judge Presiding

ADDED 8/03

WRIT OF *PROCEDENDO*: JOINT APPLICATION

CAUSE NUMBER: _____

STATE OF TEXAS
VS.

§
§
§

IN THE MUNICIPAL COURT
CITY OF _____
_____ COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the undersigned Defendant and the State of Texas, by and through the City Attorney/Deputy City Attorney/Designated Municipal Prosecutor, in applying for a Writ of *Procedendo*.

This application stems from the appeal of a conviction in the Municipal Court of _____, Docket No. _____. Pursuant to a judgment in said cause, dated (insert date, name of month, and year), the Defendant was convicted of the offense of _____ and ordered to pay fine and costs in the amount of \$ _____. Thereafter, the Defendant appealed to this Honorable Court.

The Defendant now requests to abate and dismiss said appeal.

The State has no objection to dismissing the appeal and requests with the Defendant that the above styled and numbered cause be dismissed and remanded to the Municipal Court of _____, _____ County, Texas, for the entry of a final judgment.

Wherefore, the undersigned parties now pray that this Application for a Writ of *Procedendo* be granted.

Respectfully submitted,

Defendant *Pro Se*

Prosecuting Attorney

Defense Counsel

ORDER

On this _____ day of _____, 200__ came to be heard the preceding Joint Application for a Writ of *Procedendo*.

The application is **HEREBY**:

_____ GRANTED _____ DENIED

SIGNED this _____ day of _____, 200__.

Judge Presiding

ADDED 8/03

WRIT OF *PROCEDENDO*: STATE APPLICATION

CAUSE NUMBER: _____

STATE OF TEXAS
VS.

§
§
§

IN THE MUNICIPAL COURT
CITY OF _____
_____ COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the State of Texas, by and through the City Attorney/Deputy City Attorney/Designated Municipal Prosecutor, in applying for a Writ of *Procedendo*.

This application stems from the appeal of a conviction in the Municipal Court of _____, Docket No. _____. Pursuant to a judgment in said cause, dated (insert date, name of month, and year), the Defendant was convicted of the offense of _____ and ordered to pay fine and costs in the amount of \$_____. Thereafter, the Defendant appealed to this Honorable Court.

- The State now requests that the Defendant's appeal be abated and dismissed for the following reason:
 - The Defendant's appellate bond is defective and invalid (*Minchew v. State*, 366 S.W.2d 942 (Crim.App.1963)).
 - The Defendant's appeal bond was not timely filed (Article 45.0426, Code of Criminal Procedure).
- The State has no objection to dismissing the appeal and requests with the Defendant.

Wherefore, the State now prays that this Application for a Writ of *Procedendo* be granted and that the above styled and numbered cause be dismissed and remanded to the Municipal Court of _____, _____ County, Texas, for the entry of a final judgment.

Respectfully submitted,

Prosecuting Attorney

ORDER

On this _____ day of _____, 200__ came to be heard the preceding Joint Application for a Writ of *Procedendo*.

The application is HEREBY:

_____ GRANTED _____ DENIED

Signed this _____ day of _____, 200__.

Judge Presiding

ADDED 8/03

step through the flowchart with me.

The Records Request

We receive a written request for “all of the traffic tickets in the court’s files that were written by Officer Kent Smith.”

Officer Smith is employed by the municipal police department.

Analysis

We begin with Step 1 – Request for record received. The request is in writing. We’re ready to move on to Step 2. But what if the request had been oral? This is when a look at the online commentary that accompanies the flowchart might be a good idea. A look at the commentary associated with Step 1 reveals that an oral request is okay, but we may want to have the request reduced to writing for a variety of reasons. Don’t forget to use the commentary as an aid.

Step 2 asks us our first question – Is the record in the court’s custody? (The questions are in the unshaded boxes with rounded corners.) In this example, more than one record is being requested. So we rephrase the question in plural form: “Are the records in the court’s custody?” (From this point forward, all of the questions will be rewritten in plural form.) The answer to this question is “Yes.” Officer Smith writes lots of traffic tickets and they are interspersed throughout many of the court’s individual case files. Accordingly, we follow the “Y” (Yes) arrow out of the Step 2 box and move on to Step 3. (We do not follow the “N” (No) arrow to Step 4.)

Step 3 states that the records are held by the judiciary and that the Public Information Act (PIA) does not require release of the records. The Public Information Act (formerly known as the Open Records Act) is codified as Chapter 552 of the Texas Government Code. The PIA requires a “governmental body” to release records (subject to certain exceptions). The important thing for municipal judges to know is that the

term governmental body is defined so as not to include the judiciary. Accordingly, municipal courts, as a part of the judiciary, are not one of the governmental bodies that the PIA requires to release records. So you really don’t need to know anything more about the PIA. The PIA will never require a municipal court to release a record the court holds.

Records held by the court are known as “records of the judiciary.”

Please note that sometimes a municipal court is asked for records that are maintained by the court but that are also maintained by another entity. For example, perhaps the city police department also has copies of the traffic tickets written by Officer Kent Smith. The city police department is a governmental body and is therefore subject to the PIA. The flowchart we are following is specifically designed for municipal courts and not for municipal police departments or any other entity. The flowchart is concerned with how municipal courts must respond to records request. How a different type of entity is required to respond to requests for records is a separate topic.

So we have determined that the PIA does not require us to release the traffic tickets written by Officer Smith. But this is not the end of inquiry. While the PIA doesn’t require release of the tickets, another law might. There are many different sources of law requiring the release of records and our analysis is not finished just because we have concluded that the PIA does not apply. Accordingly, we move on to Step 7.

Step 7 asks us whether the requested records are accident reports. They are not. The requested records are traffic tickets. The reason we ask the question is that a specific statute in the Transportation Code controls the release of accident reports. If the requested records were accident reports, we would follow the “Y” arrow to Step 8 and proceed to determine whether the

records need to be released. But because the requested records are not accident reports, we follow the “N” arrow to Step 14.

Step 14 asks whether the requested records are juror information sheets. Again, this question is asked because there are specific statutes dealing with the release of juror information. Because the records requested here are not juror information sheets, we follow the “N” arrow to Step 16.

Step 16 inquires whether the requested records are affidavits in support of a search warrant. If the records were such affidavits, we would follow the “Y” arrow which would require us to release the records pursuant to a specific state statute. But the records requested here are not affidavits in support of a search warrant. Accordingly, we move on along the “N” arrow to Step 17.

A special statute deals with access to arrest warrants and affidavits in support of arrest warrants. Thus, Step 17 asks if the requested records are arrest warrants or supporting affidavits. Because they are not, we follow the “N” arrow to Step 18.

Now we are at Step 18. We have gone through all of the questions (7, 14, 16 and 17) asking if the requested records are the type of records subject to some specific statute. We have determined that they are not. Now we ask whether the records are “judicial records.”

The term “judicial records” is a term of art. Recall that in Step 3 we determined that the traffic tickets written by Officer Smith were held by the municipal court and were therefore “records of the judiciary” that were not required to be released by the PIA. One might initially think that the terms “judicial records” and “records of the judiciary” are identical and are simply two ways of saying the same thing. But this is not correct. The two terms are different.

All records held by the municipal court are “records of the judiciary.” But records of the judiciary can be split into

two groups. These two groups are (1) judicial records; and (2) court case records. So when Step 18 asks us whether the requested records are judicial records, we are being asked to identify which of the two types of records of the judiciary are being requested – judicial records or court case records. The reason the question is asked is that different rules apply to access to judicial records and access to court case records.

Rule 12 of the Rules of Judicial Administration deals with access to judicial records. (The Rules of Judicial Administration are promulgated by the Supreme Court of Texas pursuant to Section 74.024 of the Government Code.) Rule 12 does not deal in any way with court case records. So what is the difference between a judicial record and a court case record? Rule 12 answers this question by defining the term “judicial record.” Rule 12.2(d) states that a judicial record is:

a record made or maintained by a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record.

Put plainly, a judicial record would be something on the order of a personnel record or a telephone record that is held by the court. Records that pertain to a specific case are not judicial records. Such records would be court case records.

The records requested in our hypothetical situation (the traffic tickets written by Officer Smith) have to do with particular court cases. These records are not judicial records. Accordingly, Rule 12 does not apply. Consequently, we do not follow the “Y” arrow to Step 19. But this does not

mean our analysis is over. We have simply determined that Rule 12 does not apply. We follow the “N” arrow to Step 42.

Step 42 informs us that the requested records are court case records. We move on to Rule 43.

Step 43 inquires as to whether the records are records in a civil case. Only rarely will the court case records of a municipal court be records in a civil case. The flowchart deals with such an unusual situation in Step 44. But in our hypothetical situation, the traffic tickets written by Officer Smith deal with criminal cases and not civil matters. Accordingly, we answer the question “No” and move to Step 48.

Step 48 states the general rule that is applicable to the records in our example. The general rule is that a requestor is entitled to the requested record under the common law right of access to court records. Note that this right is not embedded in either the U.S. Constitution or the Texas Constitution. The right is not codified by any statute. Neither Rule 12 nor any other rule of court creates this right. Rather, the right of access to court records is a common law right that has been expressly identified by the United States Supreme Court in the case of *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 579 (1978).

Under the general rule stated above, the person requesting the traffic tickets written by Officer Smith is entitled to access the tickets. But we must move on to Step 49 to see if there is any exception to this general rule.

Step 49 asks whether the records, if released, would become a vehicle for improper purposes. When the United States Supreme Court identified the common law right of access to court records in the *Nixon* case, the Court declared that the right was not absolute. The Supreme Court suggested that

courts are not required to release court case records if the records might become vehicles for improper purposes. The Supreme Court also suggested that the “decision as to access is one best left to the sound discretion of the trial court.”

My personal opinion is that the situation would have to be exceptional before a municipal court should refuse to release records because the records might become vehicles for improper purposes. There appears to be nothing exceptional in our hypothetical request for the traffic tickets written by Officer Smith. Accordingly, we should answer the question posed in Step 49 in the negative and follow the “N” arrow on a long, circuitous route (around the edges of the flowchart) to Step 12.

Step 12 tells us that the traffic tickets written by Officer Smith need to be released. But before releasing those tickets, we need to determine whether any information contained in the tickets needs to be redacted.

Note that the flowchart forces us to ask the proper questions in the proper order. The first thing we need to determine in any analysis of a records request is whether the record must be released. Only if we determine that the record must be released do we reach the question of whether certain information (such as social security numbers) needs to be redacted from the record.

We move out of Step 12 to Step 50.

Step 50 asks whether the records contain any social security numbers. Some traffic tickets may contain social security numbers and some may not. A check of the tickets will answer the question. Let’s assume that at least some of the tickets contain social security numbers. Accordingly, we follow the “Y” arrow to Step 51.

Step 51 asks whether the social security numbers were obtained or maintained pursuant to a law enacted after October

1, 1990. We ask this specific question because not all social security numbers on municipal court records are confidential. Some social security numbers are confidential and must be redacted. Other social security numbers are not confidential and need not be redacted.

Federal law provides as follows:

Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.¹

Accordingly, if a social security number appears on the requested record (in this case, a traffic ticket written by Officer Smith) because a law enacted on or after October 1, 1990 requires the social security number to appear on the record, then the social security number is confidential and cannot be released. If, on the other hand, a social security number appears on a document because a law enacted prior to October 1, 1990 requires the social security number to appear on the document (or if there is no requirement that the social security number appear on the document at all), then the social security number is not confidential and can be released.

Generally, there is no requirement that a social security number appear on a traffic ticket. However, Section 543.201 of the Texas Transportation Code requires municipal courts to keep a record of each case in which a person is charged with a violation of law regulating the operation of vehicles on highways. Section 543.202 states that if the person charged with the violation was operating a commercial motor vehicle or was the holder of a commercial driver's license or commercial driver learner's permit, then

the record must contain the person's social security number. These legal requirements were enacted in 1995. Accordingly, a social security number contained within a record of a traffic case (such as a social security number on a traffic ticket) is considered to be obtained or maintained pursuant to a law enacted on or after October 1, 1990.

If any of the traffic tickets written by Officer Smith containing social security numbers are in cases where the driver was operating a commercial motor vehicle or where the driver held a commercial driver's license or learner's permit, the answer to the question in Step 51 is "Yes" (*i.e.*, the social security numbers were obtained or maintained pursuant to a law enacted on or after October 1, 1990). In regard to those particular tickets we move to Step 52. For those tickets written in cases not involving a commercial driver's license or learner's permit, we would move from Step 51 to Step 53. Let's follow the path for those tickets that need to have social security numbers redacted and go to Step 52.

Step 52 requires that social security numbers be redacted from the tickets. After redacting the social security numbers, go to Step 54.

Step 54 inquires as to whether the record contains any information identifying a crime victim. If the record did contain such information, the information would have to be redacted. But in our hypothetical case, the traffic tickets would be unlikely to contain any crime victim information. Accordingly, we answer the question "No" and go to Step 56.

Step 56 is the final step in our process. We have determined that the traffic tickets must be released. Some of the tickets have had social security numbers redacted from them. Now we release the records upon proper payment.

What is proper payment in this case? As the commentary to Step 56 points out,

there are no set fees that are to be charged in connection with providing court case records. The cost of copying must be provided by municipal ordinance (Sec. 552.266, G.C.), which in turn may comply with the amounts prescribed by the Texas Building and Procurement Commission (TBPC), formerly General Services Commission, for providing public information. (Sec. 552.262, G.C.) Let's see how the TBPC guidelines would work in our example.

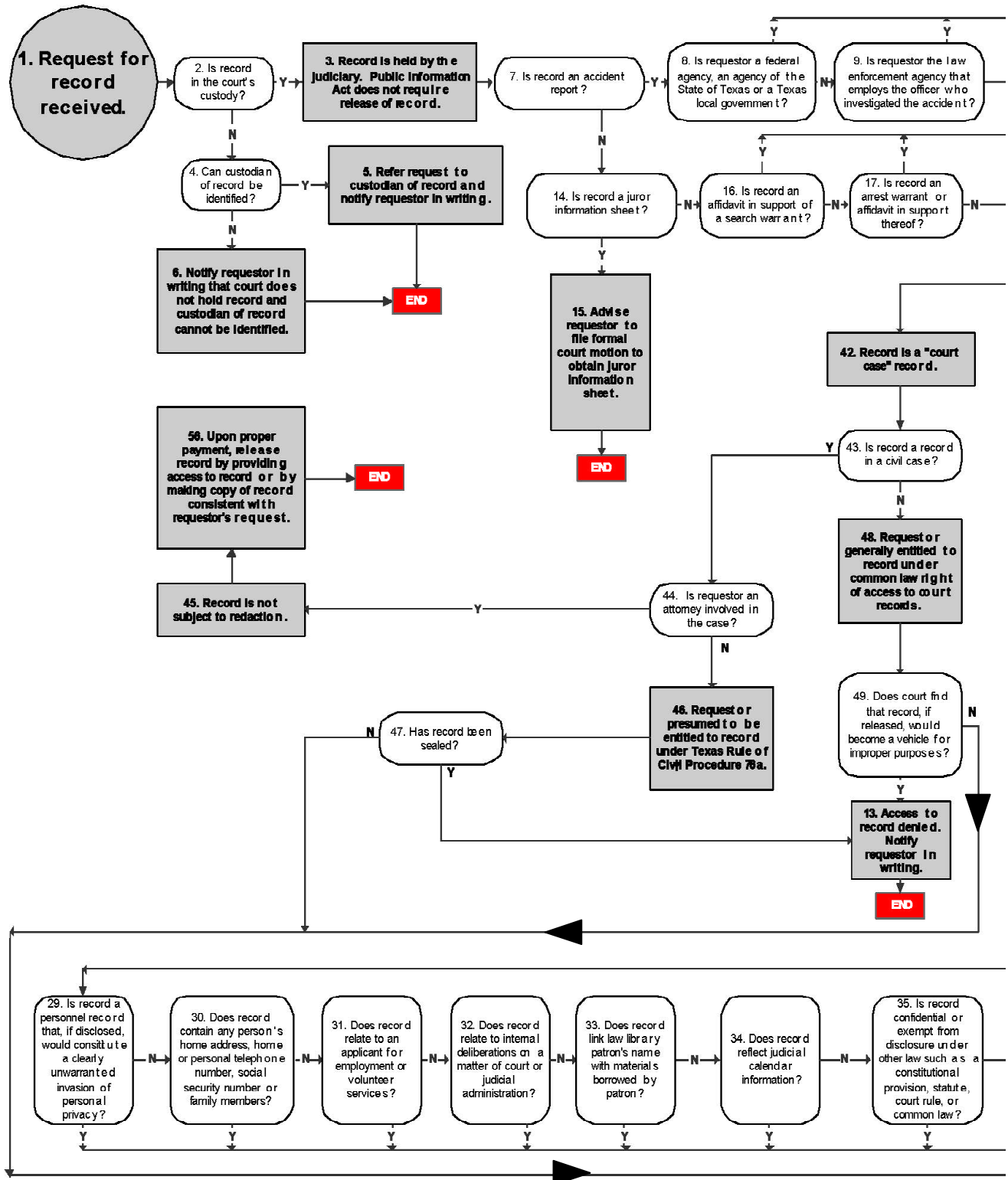
As mentioned earlier, the traffic tickets written by Officer Smith are not located in one particular file. Rather, the tickets are interspersed throughout the court's files. The fact that the request is for lots of tickets and the fact that the tickets are not conveniently located in one file does not mean that we don't have to release the records. We must treat the request for all of the tickets written by Officer Smith the same way we would treat a request for one particular ticket written by Officer Smith. But we can charge for the time involved in pulling these records together, checking the records for redaction purposes, redacting certain information from the records and copying the records. The charge that may be assessed for these personnel charges is \$15 per hour.

(Please note, however, that personnel charges are not to be assessed in connection with requests for 50 or fewer pages of paper records unless that documents to be copied are located in: (1) two or more separate buildings that are not physically connected to each other; or (2) a remote storage facility.

Suppose that the time involved in finding and preparing these records was 20 hours. We could charge \$300 (20 hours multiplied by \$15). This would be the personnel charge. Whenever a personnel charge is assessed, an overhead charge of 20 percent of the

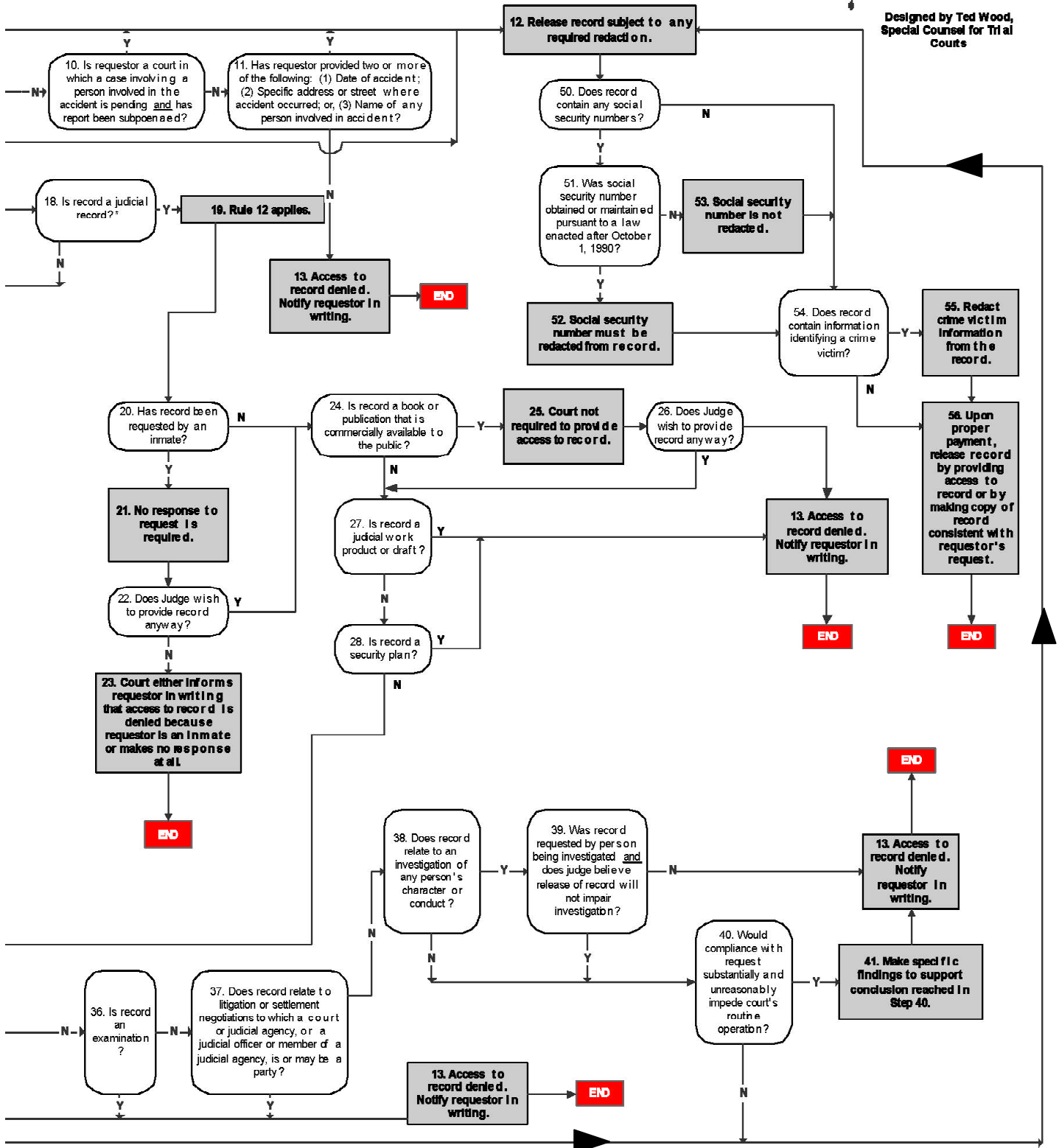
Handling Requests continued on page 14

RECORDS REQUEST FLOWCHART



FOR MUNICIPAL COURTS - February 2004

Designed by Ted Wood,
Special Counsel for Trial
Courts



Handling Requests continued from page 11

personnel charge can also be assessed. This would be \$60 (20 percent of \$300).

Let's also suppose that we found 300 tickets written by Officer Smith. Each ticket is a single page. We make a copy of each ticket to provide to the requestor. The suggested charge is 10 cents per page. Thus, we can charge \$30 (10 cents per ticket multiplied by 300 tickets) for the copying.

The total charge would be \$390 (\$300 personnel charge plus \$60 overhead charge plus \$30 copying charge).

A good practice is to estimate the costs up front and let the requestor know

how much obtaining the records will cost at the time the request is made. (Admittedly, an estimate in the example we have just worked through may be difficult.) This is not done to discourage the requestor (sometimes this will cause the requestor to drop or narrow the request), but rather to fully disclose the approximate amount the requestor will have to pay. While we ought to be helpful to requestors and fully comply with the laws requiring access to court records, there is no requirement that the records be provided free of charge or at a loss to the municipality.

Summary

I hope this walk through a sample records request has illustrated how the

flowchart works. I believe the flowchart can be a helpful tool in analyzing your next records request. On some requests, you may certainly want to visit with your city attorney about the proper course of action. Your city attorney may find the flowchart and commentary to be helpful as well.

Please feel free to contact me with any questions you may have. I can be reached by telephone at 512/936-1183 and by e-mail at ted.wood@courts.state.tx.us.

¹ 42 U.S.C. Section 405(c)(2)(C)(viii)(I) (2003).



FROM THE CENTER

Motto Contest!

TMCEC needs a motto! We are looking for a phrase or saying to inspire our work. It would be placed on TMCEC book bags and promotional materials. If you have an idea, please send it to Hope Lochridge at 1609 Shoal Creek Blvd., Suite 302, Austin, Texas 78701, or email to hope@tmcec.com. The winning submission will receive a TMCEC duffel suitcase on wheels (valued at \$50)!

Note: According to *Webster's Dictionary*, a motto is "1. a sentence, phrase or word inscribed on something as appropriate to or indicative of its character or use; 2. a short expression of a guiding principle."

Correction to Juvenile Expunction Form

Thank you Judge Mitch Solomons for submitting a correction to the *Application for Expungement Penal Offenses* form. The corrected form is found on page 17 of this newsletter. The original form had an error in the stated age of the petitioner. Please

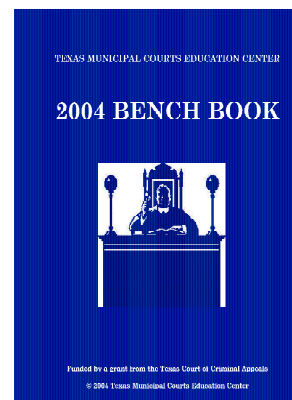
insert a copy of the new form in your *Forms Book* – page 175.

TMCEC Products Online

TMCEC t-shirts, totes, caps, koozies, books, videos and ties may now be purchased by mail. An order form may be downloaded from the TMCEC website: www.tmcec.com/products.htm.

Keep a Look Out!

TMCEC will be sending one complimentary copy of the recently revised *TMCEC Bench Book* to every municipal judge. The publication should be arriving at the courts in late May. Please contact TMCEC if you have not received your copy by June 1st.





RESOURCES FOR YOUR COURT

Rule 12 Decision Summaries

Rule 12.9 of the Rules of Judicial Administration provides that a person who is denied access to a judicial record may appeal the denial by filing a petition for review with the administrative director of the Office of Court Administration. A special committee of presiding judges is selected to review the petition. Rule 12.2(d) defines a judicial record as one made or maintained by or for a court in its regular course of business, but not pertaining to its adjudicative function. “A record of any nature created, produced or filed in connection with any matter that is or has been before a court is not a judicial record.” Shown below is a list of decisions made by the special committees since 1999. The text of these decisions may be accessed on the website of the Office of Court Administration: <http://www.courts.state.tx.us/openrecstate.asp#rule12>.

Decision No.	Date Issued	Summary of Decision
03-008 PDF HTML	1-23-04	Investigative file of Commission on Judicial Conduct not “judicial records.”
03-006 PDF HTML	10-21-03	Custodians of judicial records provided required access.
03-005 PDF HTML	10-16-03	Docket sheets of a municipal court are not judicial records.
03-004 PDF HTML	8-18-03	Records related to municipal court cases are not judicial records.
03-003 PDF HTML	8-18-03	Misdemeanor convictions are not judicial records.
03-002s PDF HTML	8-18-03	Portions of complaints that reflect confidential information should be withheld.
03-002 PDF HTML	7-16-03	Copies of complaints filed against a municipal judge are open.
03-001 PDF HTML	4-24-03	Access to inquest records governed by statutory law, not Rule 12.
02-005 PDF HTML	12-23-02	Traffic citations not “judicial records.”
02-004 PDF HTML	11-06-02	Oaths of office and anti-bribery statements not in judge’s custody.
02-003 PDF HTML	06-28-02	Records of administrative judge “intended to instruct, assist or guide judges in the exercise of their contempt power” are “judicial records.”
02-002 PDF HTML	06-17-02	Traffic citation records not “judicial records.”
02-001 PDF HTML	06-07-02	Judge who did not have records relating to investigation and consultation should have attempted to determine custodian and notified requestor.
01-005 PDF HTML	11-02-01	Investigative file of Commission on Judicial Conduct not “judicial records.”
01-003 PDF HTML	06-22-01	Trial record in court of appeals not “judicial records.”
01-002 PDF HTML	07-19-01	Investigative file of Commission on Judicial Conduct not “judicial records.”
01-001 PDF HTML	05-31-01	Appeal not timely from denial of access to judicial records of county community supervision and corrections department.
00-007 PDF HTML	12-19-00	Court’s denial of a fee waiver did not include the required language about reasons for denial, the right to appeal, and the OCA director’s name and address.
00-006 PDF HTML	10-25-00	Visiting judge records were “judicial records;” judge did not refer request to proper custodian.
00-005 PDF HTML	10-23-00	Records of associate judge retention committee were “judicial records,” but were exempt from disclosure.

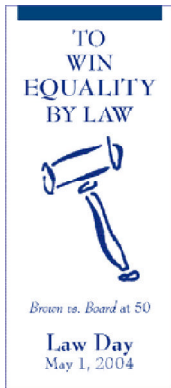
Decision No.	Date Issued	Summary of Decision
00-003 PDF HTML	04-27-00	Names of individuals on community supervision/probation in eight counties are not “judicial records.”
00-002 PDF HTML	04-10-00	Records custodian not required to respond to request from prisoner.
00-001 PDF HTML	02-07-00	Traffic citation records not “judicial records.”
99-002 PDF HTML	01-14-00	“Judicial records” of unauthorized practice of law committee were exempt from disclosure.
99-001 PDF HTML	08-31-99	“Judicial records” of unauthorized practice of law committee were exempt from disclosure.

Criminal Law

When asked to speak to community and school groups, judges and clerks sometimes need to know the “bigger” picture of what is happening in the field of criminal justice.

One way is to browse the Texas Law Blog (<http://texaslaw.blogspot.com>). This is a web log devoted to Texas law, legal issues and politics. The site monitors the U.S. Supreme Court, 5th Circuit, Texas Supreme Court, Texas Court of Criminal Appeals, various courts of appeals, Texas Legislature, major Texas newspapers, and legal websites. Quotes and summaries of articles and cases are included.

Law Day 2004



Each year on May 1st, *Law Day* provides an opportunity for everyone to reflect on our legal heritage, the role of law, and the rights and duties that are the foundation of peace and prosperity in this country. *Law Day 2004* will

celebrate the 50th anniversary of *Brown v. Board of Education*. By commemorating this historic case in *Brown*, *Law Day* can help illuminate the meaning of equality in our democracy and the role of law, advocates and courts in establishing and protecting our rights. The 1954 *Brown* ruling held that the U.S. Constitution did not allow laws segregating public schools by race.

In the late 1950s, the American Bar Association instituted May 1 as *Law Day* to draw attention to both the principles and practice of law and

justice. President Dwight D. Eisenhower established *Law Day* by proclamation in 1958. The ABA website offers many resources to help

schools, courts and local bar associations celebrate locally (www.abanet.org/publiced/lawday/guidemain.html).

APPLICATION FOR EXPUNGEMENT PENAL OFFENSES (Art. 45.0216, C.C.P.)

CAUSE NUMBER: _____

STATE OF TEXAS
VS.

§
§
§

IN THE MUNICIPAL COURT
CITY OF _____
_____ COUNTY, TEXAS

Now, comes _____ convicted of the offense of _____
on the _____ day of _____, 200__ in the _____ Municipal Court in Cause
Number _____.

Petitioner is now at least the age of seventeen (17) years.* Petitioner, being duly sworn, states under oath that he/she has not
been convicted of any other misdemeanor punishable by fine only other than public intoxication or violation of a penal ordinance of
a political subdivision.

Petitioner requests that all records of said conviction be expunged pursuant to **Article 45.0216, Code of Criminal Procedure**,
and the Court order expungement of all documents, records, and references thereof and release _____
from all disabilities resulting from said conviction. Petitioner further requests that said conviction may not be shown or made known
in any manner for any purpose. Attached to this petition is a list of agencies, officials, and others who have records or files regarding
this conviction.

Defendant-Petitioner

Sworn and subscribed before me by _____, a credible person, on this _____ day of
_____, 200__.

(Deputy Clerk)(Clerk)(Notary Public in and for the State of Texas)

*(municipal court seal or
notary public seal if sworn
before a notary public)*

REV. 05/04*

The National Judicial College Presents Problem Solving Courses

Registration now open, and scholarships available. For more information, call 800/255-8343, email registrar@judges.org, or access the website at www.judges.org. Course applications are available at www.judges.org/downloads.

Please share this message with colleagues who may benefit from this training!

Co-occurring Mental and Substance Abuse Disorders

September 20-23, 2004

Reno, NV

Tuition: \$945 / Early Discount \$845 by 6/22/04

Conference Fee: \$190

The issues in many criminal cases involve alcohol and other drug addictions. Some persons with alcohol and drug addictions also suffer from major mental health disorders. Judges who handle such cases should have a thorough understanding of substance abuse, mental health and co-occurring disorder issues as they affect the justice system. After taking this course, participants will be able to describe the physiological and pharmacological aspects of substance abuse; identify and assess individuals with major mental disorders; select appropriate judicial strategies and tools for

treatment and monitoring; and design a plan for implementation of systems or ideas to address co-occurring disorder issues.

Managing Cases Involving Persons with Mental Disabilities

October 13 - 14, 2004

Reno, NV

Tuition: \$550.00 / Early Discount: \$500.00 by 07/13/2004

Conference Fee: \$115.00

Unfortunately, persons with mental disabilities are too often caught in a revolving door, coming in contact again and again with the justice system. Such contact may be through the criminal docket for issues such as substance abuse or minor public infractions, through the probate docket when a family member must step in to assist or through the family docket when problems, usually related to the disability, arise. This course is designed to provide judges with an understanding of mental health issues that affect and are affected by the justice system. After attending this course, participants will be able to identify and assess individuals with mental health disorders and employ judicial strategies to address mental health issues.

Remaining TMCEC FY04 Academic Programs

<i>Dates</i>	<i>School</i>	<i>Hotel/City</i>	<i>Address & Telephone</i>
6/15-16/04	Special Topics Judges (<i>Magistrate</i>)/ Court Administrators	Hyatt Regency Austin	208 Barton Springs 78704 512/477-1234
6/24-25/04	Bailiffs and Warrant Officers	Inn of the Hills Kerrville	1001 Junction Highway 78028 830/895-5000
7/6-7/04	12-Hour Regional Judges/Clerks	Camino Real El Paso	101 S. El Paso Street 79901 915/534-3000
7/19-23/04	32-Hour New Judges/Clerks	Lakeway Inn Austin	101 Lakeway Drive 78734 512/261-6600
7/30-8/1/04	Level III Clerk Certification Assessment Clinic	Doubletree Dallas Campbell Centre	8250 North Central Expy 75206 214/691-8700

TMCEC 2003-2004 REGISTRATION FORM

Program Attending: _____ Program Dates: _____
[city]

Judge Clerk Court Administrator Bailiff/Warrant Officer* Prosecutor

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

Last Name: _____ First Name: _____ MI: _____
Names also known by: _____ Male/Female: _____
Position held: _____
Date Appointed/Elected/Hired: _____ Years Experience: _____
Emergency Contact: _____

HOUSING INFORMATION

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

- I need a private, single-occupancy room.
 I need a room shared with a seminar participant. Please indicate roommate by entering seminar participant's name:
_____ (Room will have 2 double beds.)
 I need a private double-occupancy room, but I'll be sharing with a guest. (I will pay additional cost, if any, per night.)
I will require: 1 king bed 2 double beds
 I do not need a room at the seminar.

Date arriving: _____ Smoker Non-Smoker

COURT MAILING ADDRESS

It is TMCEC's policy to mail all correspondence directly to the court address.

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

Attorney Non-Attorney Full Time Part Time

Status: Presiding Judge Associate/Alternate Judge Justice of the Peace Mayor
 Court Clerk Deputy Clerk Court Administrator Bailiff/Warrant Officer*
 Prosecutor
 Assessment Clinic (A registration fee of \$100 must accompany registration form.)
 Other: _____

***Warrant Officers/Bailiffs: Municipal judge's signature required to attend Bailiff/Warrant Officers program:**

Judge's Signature _____ Date: _____
Municipal Court of _____

I certify that I am currently serving as a municipal judge, city prosecutor, or court support personnel in the State of Texas. I agree that I will be responsible for any costs incurred if I do not cancel five (5) working days prior to the seminar. If I have requested a room, I certify that I live at least 30 miles from the seminar site and have read the cancellation and no show policies in the General Seminar Information section located on pages 16-17 in the Academic Schedule. Payment is required ONLY for the assessment clinics; payment is due with registration form. Participants in the assessment clinics must cancel in writing two weeks prior to seminar to receive refund.

Participant Signature

Date

Appeals - Myths and Facts

By Margaret Robbins, Program Director, TMCEC

Appeals are handled differently in non-record municipal courts than appeals in municipal courts of record. *The Municipal Court Recorder* addressed some of the differences in the March 2003 issue. That issue presented checklists regarding appeals for both types of courts. This column does not address the procedures in the checklists but does talk about other appeal issues frequently asked on TMCEC's 800 line. The topics included here are appeals of convictions of city ordinances, appeals after failure to complete a driving safety course or terms of deferred disposition, and what happens when the appeal bond is late or the fine is already paid when an appeal bond is filed.

Ordinances

Myth

Defendants convicted of violations of municipal ordinances do not have the right to appeal.

Fact

Defendants have a right to appeal convictions of any type of offense filed in municipal court.

Article 44.02, C.C.P., provides that a defendant in any criminal action has the right of appeal. Violations of municipal ordinances are criminal offenses. Hence, a defendant convicted of violating a municipal ordinance has the right to appeal the conviction.

Driving Safety Course

Myth

Defendants who fail to complete driving safety courses do not have a right to an appeal.

Fact

Defendants may appeal a conviction after failing to complete a driving safety course.

When a court grants a driving safety course, the court enters judgment on the plea of guilty or *nolo contendere*. The court, however, defers imposition of the judgment for 90 days. Hence, there is not a final judgment and, therefore, nothing to appeal.

In a non-record municipal court, when a defendant does not complete the driving safety course or fails to present evidence timely and the court imposes the judgment, there is now a conviction that the defendant may appeal.

If a defendant in a record municipal court fails to complete a driving safety course, the defendant may appeal the judgment of conviction only with permission of the court. Article 44.02, C.C.P.

Deferred Disposition

Myth

Defendants who fail to complete the terms of deferred disposition cannot appeal.

Fact

Defendants who fail to complete the terms of deferred disposition are assessed a fine and have the right to appeal.

Before a court may grant deferred disposition under Article 45.051, C.C.P., the defendant must make a plea of guilty or *nolo contendere*, or there must be a finding of guilty. This statute, unlike the driving safety course statute, does not require the court to enter a judgment and defer imposition of the judgment before granting deferred. Initially, the court takes the plea, collects court costs, and then grants deferred disposition. If, at the end of the deferral period, the defendant fails to comply with the terms of the deferred, the court may impose the fine assessed or impose a lesser fine.

You are probably confused now. Article 45.051, C.C.P., does not require the court when granting deferred to assess a fine. Subsection (d) of Article 45.051, however, presumes that the court, upon accepting the plea or guilty or *nolo contendere* or upon a finding of guilt, assessed a fine when deferred was granted although there was no judgment.

When a defendant fails to comply with the terms of the deferral, the court is required to assess the fine. In a non-record municipal court, since the order assessing the fine would be a final order of the court, the assessment of the fine could be appealed.

If a defendant in a record municipal court fails to complete the terms of deferred disposition, the defendant may appeal the assessment of the fine only with permission of the court. Article 44.02, C.C.P.

Bond Filed Past the Time Limit

Myth

If an appeal bond is presented past the time deadline, the municipal court can refuse to file the bond and not allow the appeal.

Fact

Municipal courts may not refuse to accept and file an appeal bond, even if it is past the time limitation, and the court must forward the appeal to the appellate court.

If a bond is not filed within the statutory time limitations, Article 45.0426(b), C.C.P., requires the appellate court to remand (send back) the case to the municipal court. Consequently, in order for the appellate court to send the case back to the municipal court, the municipal court must accept the appeal bond and send the case to the appellate court. The appellate court makes the decision whether or not to accept the appeal, not the municipal court.

Once the appeal goes to the appellate court, the court must send the case back to the municipal court. The appellate court uses the writ of

procedendo to send the case back. See Ryan Turner's article in this newsletter on page 1 for information on the writ of *procedendo*.

Fine Is Paid

Myth

A defendant making payments on a fine and costs may not appeal the conviction because the fine has been partially paid.

Fact

If a defendant files an appeal bond after partially paying the fine and costs assessed, the court must accept the bond and forward the appeal to the appellate court.


If a defendant voluntarily and fully satisfies a judgment by paying the entire fine and costs, the case is terminated and the appeal is moot.¹ A case is "moot" when a determination is sought on a matter that, when rendered, cannot have any practical effect on the existing controversy (the appeal). In other words, the appeal presents no actual controversy because the issues have ceased to exist upon payment of the judgment. The key to this issue is that the fine and costs are fully paid. If the fine and costs are

only partially paid, an issue may still exist that may be appealed.

There is an exception if the plea or payment were coerced or made under duress and not made voluntarily. In this instance, the defendant has not lost the right to appeal.²

Regardless of whether the fine and costs are fully paid or not, the municipal court should allow a defendant to appeal. The municipal court may not make a decision for the appellate court whether the appellate court will take jurisdiction.

Conclusion

The Texas Court of Criminal Appeals has characterized the role of the court clerk in the appellate process as being a mandatory ministerial duty and not a matter within the discretion of the clerk.³ Hence, municipal court clerks do not have discretion to refuse to file appeal bonds and must send all appeals to the appellate court. 

¹ *Fouke v. State* 529 S.W.2d 772 (Tex. Crim. App. 1975)

² *Hogan v. Turland*, 430 S.W.2d 720 (Tex. Civ. App.-Austin 1968)

³ *Whitsitt v. Ramsay*, 719 S.W.2d. 333 (Tex. Crim. App. 1968)

Order DPS Driving Records Online

In April 2004, the Texas Department of Public Safety will begin allowing the public to complete an application to order a copy of their driving record via the Internet. The Department provides driving record information for Texas licensees who may need this for employment purposes, deferred adjudication or defensive driving courses as ordered by a court.

Type 1, Type 2, Type 2A, Type 3, Type 3A (Certified Complete 5-year History Record which is the only acceptable record type that may be used in conjunction with a defensive driving course for deferred adjudication), and a Certified Abstract of Driving Record may all be ordered online. Only the licensee may purchase a driving record using this application. Upon successful request and payment of the driving record, the printed record will be

postal-mailed to the licensee.

The fee for all records ordered online will be the current Department of Public Safety statutory fee for such records plus an additional \$2. Utilizing this new application will significantly reduce processing time. The service can be accessed by visiting www.texasonline.com, the official website of the State of Texas, or the Texas Department of Public Safety website at www.txdps.state.tx.us.



COURT SECURITY

Top 10 Things for Bailiffs to Do During Trial Other than Catching Up on Sleep

By W. Clay Abbott, General Counsel, TMCEC

- 10. Be visible.** The appearance of a uniformed professional adds to the decorum and authority of the court. Humans are natural mimics; in the courtroom, your demeanor and attitude are likely to be followed by others who are not sure how to act. People who intend to do harm are very aware of security and authority. Your presence assures the aggressive power grabber that there is no power vacuum in your court. The bailiff's high visibility also reassures court staff, witnesses, victims and other nervous court participants.
- 9. Keep the bail.** The original bailiffs were responsible for safekeeping property in dispute in trial. One security issue in municipal courts involves making sure the property of the court and funds in court are protected. Treat the courtroom like it is placed in your care. Abuse of furnishings and fixtures quickly turns to abuse of personnel. Make sure the courtroom is treated with respect, and it leads to the court being treated with respect.
- 8. Handle exhibits.** In county and district courts, this is the responsibility of the court reporter. But, in non-record courts and record courts without court reporters, this is a
- bailiff responsibility. Make sure that evidence introduced or offered is secured. Take special care that only exhibits that are admitted by the court go to the jury room or the jury box. Trials are serious occasions; items carefully admitted should not be left haphazardly cluttering the courtroom overnight or during breaks. The jury is entitled to be furnished admitted exhibits during deliberation. Art. 36.25, C.C.P.
- 7. Handle jury notes.** If the jury wants to ask questions to the court during deliberations, the questions should be reduced to writing. Art. 36.27, C.C.P. The bailiff should take the question and present it directly to the court. Neither side should get sneak peeks. The bailiff should also summon the defendant and prosecutor before the court receives a question. The judge may answer the question in front of the jury or send a written response through the bailiff.
- 6. Enforce decorum.** Keep an eye on everyone in the courtroom. Make sure dress, conduct and attitudes are appropriate. Sometimes, even staff needs a reminder that guests (jurors) are present. Be aware of potential disruptions.
- Tempers can fly in court. The bailiff subtly moving closer to the court participant working up to blow off steam often prevents an outbreak.
- 5. Secure witnesses.** A bailiff has a duty to secure witnesses unless they are released by the court. Art. 36.05, C.C.P. Make sure there is a place outside the courtroom for witnesses. Remember that it is often wise to separate victims and defense witnesses for the safety of both. Special care and planning should be made in domestic violence cases. Victims have a right to a secure and separate waiting area. Art. 56.02(a)(8), C.C.P. Provide a place and procedures to make sure witnesses placed under "The Rule" (Rule 614, Rules of Evidence and Art. 36.03, C.C.P.) do not talk about their own or other witnesses' testimonies with anyone except the prosecutor or the defense attorney/*pro se* defendant.
- 4. Provide information to parties and witnesses.** Judges must take great care to avoid private conversations with any party or witness; they also appropriately avoid even the appearance of giving advice. The bailiff should also be very zealous in avoiding the appearance of favoritism to any



person or giving advice to parties. *Pro se* defendants are often specially in need of advice and counsel, but it is absolutely improper for the bailiff to give it.

On the other hand, who better than the bailiff—the second-most visible authority in the courtroom—to ask about how court proceeds? Even frequent court participants often take for granted that they know what to do in a courtroom. Bailiffs should be traffic directors, schedule keepers, and etiquette and decorum experts. Bailiffs are a natural and proper source of information on court rules and procedures. Yet, bailiffs should never be legal advisors, counselors, advocates or confidants.

Even prosecutors and defense counsel can use logistic support and help on the use of court facilities, technology, and local rules and customs. A wise trial attorney once taught me that a conversation with the court's bailiff on security, rules, and logistics was an essential step in trial preparation.

- 3. Provide information to jurors.** There is nothing as stressful as being stuck in an unfamiliar place. Where are the restrooms? Places to eat? Pay telephones? Parking? The bailiff can reduce the stress of jury service by being a ready source of mundane information. Certain information about court procedures is also appropriate. "Trials usually last one day."


"No, this court usually does not sequester." "We will take frequent breaks." The bailiff is in a unique position to provide calming knowledge in a stressful situation. Hollywood creates a huge number of misconceptions about court and trial. The bailiff can be a great help in providing real information.

The bailiff should not discuss the cases, parties, or counsel. Any instruction on the law or legal issues must come from the court. Cases have been reversed where an overly helpful bailiff tried explaining legal issues.

- 2. Keep the jury and jury room secure.** The only duty assigned to bailiffs by law is "to attend the wants of the jury and act under the direction of the court." Art. 36.24, C.C.P. Jury deliberations are secret. No one, including the bailiff, should be present during or listening to jury deliberations. Arts. 36.215, 36.22 and 36.23, C.C.P. Violations of this rule are punishable by contempt. Jurors must be provided with separate bathrooms, necessary food and lodging, and may not be furnished alcoholic beverages. Art. 36.21, C.C.P. (Needless to say, there have to be some great stories behind some of these rules.) The bailiff acts as the gatekeeper and guard against intentional or inadvertent interruption, influence or invasion during jury deliberation. The bailiff should do homework making sure that the place the jury deliberates is secure. Check or lock extra doors, and make sure the deliberations will be uninterrupted.

- 1. Keep the judge and jury safe.** Security should always be the highest concern of the bailiff. Physical harm, threats and inappropriate confrontation should be prevented. Be aware and be proactive. Never believe that it cannot happen in your court. I have seen violence break out in courtrooms and have been lucky to always see quick and professional responses from bailiffs. During trial, keep aware of verbal and non-verbal direction from the court.

The bailiff's obligation does not end with the trial. Trials can be very traumatic for participants. Guilty verdicts can inspire some very hostile responses. Not guilty verdicts can too. Watch all of the folks at a trial, not just the defendant. As a prosecutor, I have been attacked by more saintly little mothers than big bad defendants.

Escort your jurors and judge to their vehicles following a trial. Many disgruntled participants think court rules stop at the court doors and will wait to confront or harm your charges as they leave court. Let jurors know that if threatened, they are to inform both you and the police immediately. If jurors are threatened or harmed, prosecute! We are a nation of laws. When this line is breached, we are all at the mercy of the most reprehensible of us. 



COLLECTIONS CORNER

Collections Tool: Skip Tracing

By Don McKinley, Assistant Collections Specialist, Office of Court Administration

Hopefully, you found last month's article on telephone collections beneficial. No court collection effort should overlook utilizing the telephone. This month our focus is on skip tracing. Skip tracing is a collections industry term for attempting to locate people who seem to have disappeared. A skip trace situation exists when there is no way to establish contact with an individual. For example, mail is returned, the telephone is disconnected, or the telephone numbers are wrong. If this occurs, what do you do? Issue a warrant? File the case with OmniBase? Or just file the case away and hope that law enforcement can eventually locate the individual? This no longer needs to be the end of the road. Equipped with the right connections and tools, just about anyone can be located.

Carefully review the case record and citation to see if there are any different telephone numbers (including cell phone numbers) or other contact information listed. Develop a good relationship with local law enforcement and use them as a resource to assist in clearing warrants. City and county law enforcement databases may provide information that will help locate someone. Establish contacts with utility departments for current addresses or telephone numbers. In addition, the local county tax assessor-collector is often a good source for information.

Another possible source of information is the local cable company. Video stores, such as Blockbuster or Hollywood Video, may also be a good source of information for addresses and telephone numbers.

Look for employment information. If an employer or company name is

available, a quick search may be possible using the Yellow Pages. If you have an individual's social security number, you can get employment information from the Texas Workforce Commission for a small fee. The Texas Workforce Commission may be contacted by mail at 101 East 15th Street, Austin, Texas 78778, or by telephone at either 512/463-2748 or 512/463-2423.

With a social security number, just about anyone can be located. With the Internet and a little money, you can usually find an individual's address, telephone number, and other personal information.

The Internet offers sites that are free and sites with various fee structures. It is important to know how much money has been allotted in the budget for skip tracing. The old adage "it takes a little money to make money" generally holds true for Internet searches.

One court experienced a return of \$4 back for every dollar spent on Internet searches. In some cases, the return is even higher. Using the Internet can also result in lower costs for postage, supplies and labor.

Some Internet sites of interest are listed below. (The Office of Court Administration does not recommend or endorse any of the sites listed.)

Free Sites:

www.anywho.com
www.switchboard.com
<http://ssdi.rootsweb.com/cgi-bin/ssdi.cgi> (social security death index)

Fee Sites:

www.classmates.com
www.555-1212.com
www.freeality.com

www.dcsinfosys.com
www.publicdata.com
www.pac-info.com
www.theultimates.com (be sure to type in "theultimates"—"theultimate" is a completely different website)
www.accurint.com

These sites can help locate individuals. Remember, people usually pay by contact not by contract. In other words, a signed contract does not guarantee payment. Locating an individual and making contact (by telephone or by mail) may generate revenue for the court and provide a way to resolve a case. Skip tracing is an important step in any successful collections program. If you would like additional information, the Office of Court Administration (OCA) is available to help. We can assist you by providing a collections presentation and/or an evaluation of your court's current collections process. We can also assist you in developing a collections program or offer suggestions and recommendations to improve your current collection efforts. There is no charge for our assistance. Contact one of OCA's collections specialists at the telephone numbers listed below.

Continued best wishes! ✍️

Don McKinley 512/936-7557
OCA-Assistant Collections Specialist

Jim Lehman 512/936-0991
OCA-Collections Specialist

Russ Duncan 512/936-7555
OCA-Assistant Collections Specialist



Judges: Putting Technology to Work for You

By Jo Dale Bearden, Program Coordinator, TMCEC

Many judges often ignore discussions on court technology. Technology to such judges is a job of the court clerk or court administrator, not the judge. Those of you who share this thought, give me a chance to dissuade you. Judges are responsible for the efficiency of the court.¹ What is the purpose of technology, if not to promote and encourage efficiency? Through technology as basic as a personal computer and an Internet connection, judges can drastically improve the efficiency of the court. How? By using word processing functions, having access to online resources, and being able to communicate with other judges.

Word Processing

Word processing in today's world is not just a software application; the phrase now refers to an idea of how work is done. Judges may use computers to take notes on cases while at the bench — those notes can be recorded straight to a case file through the case management software or in a separate document that the judge can refer to at a later date. A positive reason for using computers to take notes is the ability to search and find not only documents, but also text. For instance, if a document is created with notes from several cases saved under a name you cannot quickly recall, instead of opening every document, a quick text search allows you to find the document via defendant names or offenses, *etc.* If the court is using case management software, a judge can immediately access case files at the bench. No longer is there a need to send a clerk to pull a file or reschedule

a case due to a lost file. If judges add notes to the case file, they then have immediate access to those notes.

Judges may also work on jury charges at the bench while the trial is progressing. Many judges use a template for their jury charge including the basics, but having a jury charge open while the trial is in progress allows a judge to update the charge as the issues arise. This practice has the potential to decrease the amount of time a citizen is at the court for a jury trial—that dead time between both sides resting and the reading of the jury charge.

Tablet PCs are a cross between a laptop and a piece of paper, creating the ability for handwritten notes to be turned into text, immediate application of signatures (digitally), and to apply written data to documents that already exist (either as handwritten text or as typed text). Tablet PCs are very versatile, but the prices start at \$1599. If applying a signature digitally is a goal of the court, there are less expensive options. Most case management software packages and many of the desktop publishing packages will take a scanned signature and password protect it. Then the judge can apply his/her signature through a cut and paste process. Another inexpensive option is to add a signature capture device to the computer at the bench. These devices capture the signature and apply it to the document immediately. Depending on the technology, prices start at around \$60.²

Online Resources

You may be asking yourself “Why would I need Internet access at the bench?” The ability to access the Internet while at the bench allows judges to access documents, files and data that will improve the efficiency of the court. For example, a judge may access from TMCEC’s website, www.tmcec.com, the 2004 *TMCEC Forms Book* or *Bench Book*. TMCEC also has many of the charts that are published in *The Municipal Court Recorder* and in course materials on the website, including the new court costs charts and the juveniles and minors charts.

In addition, the Internet allows judges to access statutes immediately from Texas Legislature Online, www.capitol.state.tx.us. Whether you know exactly what you need, or you need to do a search for an issue, ALL codes and statutes for the State of Texas are available (including the Texas Constitution). Keep in mind that if you are working on a document that needs the exact wording from the statute, you can do a cut and paste from Texas Legislature Online instead of typing the entire statute.

The State Bar of Texas, www.texasbar.com, has a member directory that is searchable by first and last name and/or by bar number. A new judge—or and old judge who sees a new face—can quickly find out if the attorney in front of the court is eligible to practice law in the State of Texas. The Office of Court Administration offers an online judicial directory (<http://data.courts.state.tx.us/OCA/DirectorySearch.aspx>).

The amount of information on the World Wide Web continues to grow, but the ability to access the Internet has not kept pace. In a technology study done by OCA in 2001,³ 32 percent of municipal courts had no Internet access. Internet access continues to decrease in price; if you have not priced Internet access in recent past, do so again. Many services are now offering dial-up for \$14.99 a month and high-speed cable modem access for as low as \$29.99 a month. Your court could pay for Internet services (as well as most of the technology mentioned in this article) from the Technology Fund.⁴ Check your local telephone book for Internet providers.


Communicate with Other Judges

Collective learning, the idea that members' growth is based on each other's knowledge and insights, now thrives in our present day technological society. Municipal courts do not operate in a vacuum. There are 861 municipal courts across the State; rarely does a new scenario or situation arise that a municipal court somewhere has not seen. This idea of sharing knowledge

through collective learning is easily facilitated through a list server, also known as a listserv. Listservs⁵ allow users to contact large numbers of people at the same time through email. If a user posts or sends a message to the mail server, that message is sent to all the individuals who subscribe to that mail server as an email message.

TMCEC hosts a judges' and prosecutors' listservs that allows judges to post questions, comments and ideas of which other judges can then respond to, either as a personal response or as a mass response. For more information, visit www.tmcec.com/jlistserv.html.

Technology changes every day. This article only addresses a small portion of the technology available. Be cognizant of the role technology plays in the court, particularly its effect on efficiency. TMCEC writes often of the fact that the majority of the public sees the judicial system through municipal courts; they formulate opinions about the judicial system using perceptions formed during their experiences in municipal court. Judges have a duty to use available technologies to improve the efficiency and increase public

confidence in the judiciary. 

¹ Canon 3B(9), Code of Judicial Conduct.

² Serial PalmPal 302 Pen Tablet is priced at \$60.00. ID GEM Signature tablets that also contain fingerprint scanners are priced between \$250.00 and \$680.00. For more information, go to www.google.com and search for "signature capture devices."

³ *Technology Infrastructure: Trial Court Survey 2001*, JCIT. Access the study at www.courts.state.tx.us/jcit/REPORTS.HTM.

⁴ Article 102.0172, C.C.P. The Municipal Court Technology Fund allows a court to collect up to \$4 as a cost of court if the governing body of a municipality passes an ordinance. The fund is then designated for the purpose of purchasing and maintaining equipment for court technology. As the statute uses the term "including," a word that the Code Construction Act defines as a term of enlargement and not of limitations, Section 311.005(13). Nevertheless, Internet access is not specifically listed and TMCEC suggest talking to your city attorney before making any decisions regarding the Court Technology Fund.

⁵ For an in-depth look at List Servers, <http://nasje.unm.edu/archives/fall03/resources-tech.htm>, *Managing the Exchange of Ideas*, NASJE News.

Appreciation to Vendors

TMCEC expresses its appreciation to the vendors who participated in the March 2004 TMCEC Fines and Fees Collections Conference.

Organization Name	City	State	Phone
Accurant	Boca Raton	FL	888/332-8244
American Collections & Credit Inc. (ACCI)	Houston	TX	713/774-3235
American Municipal Services	Carrollton	TX	800/555-5160
Cardinal Tracking	Flower Mound	TX	800/285-3833
Enforcement Technology, Inc.	Irvine	CA	949/707-3832
GC Services	Houston	TX	713/777-4441
Infokall, Inc.	Santa Ana	CA	949/202-8025
InCode	Lubbock	TX	800/646-2633
Justice Systems Inc.	Albuquerque	NM	505/883-3987
Linebarger Goggan Blair & Sampson, L.L.P.	Austin	TX	512/447-6675
McCreary, Veselka, Bragg & Allen, P.C.	Austin	TX	512/451-9000 ext. 264
Municipal Services Bureau	Austin	TX	512/371-9995
Perdue, Brandon, Fielder, Collins & Mott, L.L.P.	Arlington	TX	817/461-3344
Revenue Plus	Vancouver	WA	888/282-7900



ETHICS UPDATE

Recent Ethics Opinions

The Judicial Ethics Committee of the Judicial Section of the State Bar of Texas issues opinions on ethical issues faced by Texas judges. Although these are not binding on the Judicial Conduct Commission, the reasoning of these opinions is insightful.

A municipal judge may request an ethics opinion by writing Justice Mack Kidd, Chair of the Judicial Ethics Committee. Justice Kidd's address is: 3rd Court of Appeals, P.O. Box 12547, Austin, Texas 78711-2547, telephone 512/463-1686.

Summer Internship Program

Ethics Opinion Number 286 (2003)

Question: May a judge receive the benefits of a law student serving as a summer judicial clerk/intern who receives a monetary stipend from money raised and distributed by a local bar association's foundation scholarship program funded by contributions from local law firms, businesses, private individuals and fundraisers sponsored by the bar association?

Answer: Yes, with certain qualifications regarding implementation of the program.

Canon 4B provides considerable latitude to a judge regarding activities to improve the law. The Committee perceives this summer internship program to be primarily an educational endeavor which furthers the administration of justice, and should be permitted. However, the judge should avoid participating in any of the fundraising activities that might violate Canon 4C(2). Additionally, although the summer interns will not

officially be employees of the judge to whom they are assigned, the Committee views them as court personnel who would be subject to all the provisions of the Code. Thus, the judge would be responsible for instructing the interns about their obligations and responsibilities under the Code.

Authorized Communication with Surety

Ethics Opinion Number 287 (2003)

Question: Is it considered an *ex parte* communication for a bail bondsperson to present an affidavit to surrender authorized by Sec. 17.19 of the Code of Criminal Procedure to a judge or magistrate in chambers or open court without the presence of the Principal/Defendant and/or his or her lawyer?

Answer: No. Canon 3B(8) generally prohibits *ex parte* communications concerning the merits of a pending or impending judicial proceeding, but it does not prohibit communications expressly authorized by law. See Canon 3B(8)(e) and Advisory Opinion No. 183 (1995).

Art. 17.19, C.C.P., specifically authorizes and requires that a surety submit an affidavit to a judge or magistrate in order to relieve the surety of liability on a bond. That article also requires that the affidavit state that the surety gave notice to the defendant's attorney of his intention to surrender.

Because the affidavit procedure is well-defined and specifically authorized by law, the presentment of the affidavit to the judge or magistrate would not violate the Code of Judicial Conduct.

Legal Representation by Part-time Municipal Judge

Ethics Opinion Number 288 (2003)

Question: May an associate (part-time) municipal judge of a city represent a police officer of that municipality in connection with a criminal investigation of an alleged conspiracy to violate civil rights of individuals by planting fake drugs on them?

Answer: No.

Canon 2A provides that "a judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 4A provides that "a judge shall conduct all of the judge's extra-judicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge . . ." The representation set out above does not promote the integrity and independence of the judiciary, and it creates an appearance of impropriety.

The Committee is also of the opinion that the representation constitutes business dealings that "reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves," which is prohibited by Canon 4D(1). Defendants charged with criminal offenses in municipal court should be able to reasonably anticipate that when they appear before the court their case will be heard by an entirely fair and

Recent Opinions continued on page 28


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unbiased judge. In the vast majority of municipal court cases, the municipality's main witness is often one of its police officers. A defendant who is aware of the fact that the judge hearing his case also privately represents police officers employed by that very same municipality could reasonably doubt that the judge was

impartial when considering the testimony of any police officer and the weight to be given thereto.

A built-in dilemma exists in our justice system when a part-time judge also maintains a law practice. Under the Texas Disciplinary Rules of Professional Responsibility, a lawyer has an obligation to zealously represent his client within the bounds of the law. When that lawyer

also serves as a judge, however, his duty as a judge is to be impartial and to promote public confidence in the integrity and impartiality of the judiciary. The Committee stresses to all part-time judges to keep this conflict in mind when choosing to accept representation.

This answer is specific to the query and does not overrule Opinion No. 132 (1989). 

**TEXAS MUNICIPAL COURTS
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**TMCEC MISSION
STATEMENT**

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

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