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Insurance Support Organizations: Are Deferred Traffic Cases Coming Back to Haunt Defendants?

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Imagine this: after receiving a traffic citation, you request and are granted deferred disposition. The court explains that the complaint will be dismissed as long as you comply with certain conditions (such as taking a driver safety course). Your driving record will not reflect that you have been convicted of a traffic offense. Your automobile insurance company, which periodically checks the driving record of policyholders, will neither raise your insurance rate nor cancel your policy. Sounds like a good deal. Not so fast…

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Standing in the Corner: The Shifting Role of Magistrates in the Age of E-Warrants

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Editor's Note: This article is a continuation of the exploration that began with "Rounding the Corners: Criminal Application of the Four-Corners Rule (See, June 2012 issue of The Recorder). "Rounding the Corners" examined the changing application of the four-corners rule in the wake of the passage of House Bill 976 regarding the issuance of arrest warrants in 2011. In 2015, House Bill 326 brought similar, yet much more extensive, change regarding the issuance of search warrants.

Traditionally, the application of the four-corners rule in criminal law limited the focus of a magistrate reviewing affidavits, supporting the principle that no extraneous evidence should be used to interpret a

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Fair and Impartial Justice for All

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AROUND THE STATE

TMCEC SELECTS 18 MUNICIPAL COURTS AS TRAFFIC SAFETY AWARD WINNERS

TMCEC's Municipal Traffic Safety Initiatives (MTSI) grant, funded by the Texas Department of Transportation, recently sponsored a traffic safety awards competition to recognize those municipal courts that have demonstrated outstanding contributions to traffic safety and eliminating impaired driving in their respective communities. All municipal courts in the State of Texas were eligible and encouraged to apply.

Applicants were judged on their activities relating to increasing traffic safety while preventing impaired driving crashes, traffic fatalities, juvenile DUI's, child safety seat offenses, red light running, and other traffic related offenses. Eighteen courts were selected to receive awards: seven low volume (serving less than 30,000 people), nine medium volume (serving 30,000 to 149,999 people), and two high volume (serving 150,000+ people). Fifteen courts were also selected as honorable mentions.

From left: Judge Barbara McMillion, Linden Municipal Court; Terri Price, Linden Municipal Court; and Regan Metteauer, TMCEC

The following municipal courts were selected by a panel of judges as award winners: **Encinal, Forest Hill, Hollywood Park, Lakeway, Linden, Magnolia,** and **Melissa** in the low volume category; **Baytown, Bryan, College Station, Conroe, Edinburg, La Porte, Lufkin, Mesquite,** and **San Marcos** in the medium volume category; and **Arlington** and **Irving** in the high volume category. The municipal courts in **Alvin, Amarillo, Burleson, Cleveland, El Paso, Harker Heights, Helotes, Houston, Leander, Midland, Rosebud, Socorro, Sugar Land, Universal City**, and **Woodville** were selected to receive honorable mention for their traffic safety programs.

Award recipients were recognized at TMCEC's Annual Traffic Safety Conference, held March 20-22, 2016 at the Omni Dallas Hotel at Park West in Dallas. For more details on the award winners and information on applying next year, please visit http://www.tmcec.com/mtsi/mtsi-awards/ or contact Ned Minevitz at Ned@tmcec.com or 512.320.8274.

Judge Ed Spillane of College Station announces the MTSI Award Winners.

Update: Justice News

Department of Justice
Office of Public Affairs

Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices

The Department of Justice (DOJ) in March announced a package of resources to assist state and local efforts to reform harmful and unlawful practices in certain jurisdictions related to the assessment and enforcement of fines and fees. The resources are meant to support the ongoing work of state judges, court administrators, policymakers, and advocates in ensuring equal justice for all people, regardless of financial circumstances.

"The consequences of the criminalization of poverty are not only harmful – they are far-reaching," said Attorney General of the United States Loretta E. Lynch. "They not only affect an individual's ability to support their family, but also contribute to an erosion of our faith in government. One of my top priorities as Attorney General is to help repair community trust where it has frayed, and a key part of that effort includes ensuring that our legal system serves every American faithfully and fairly, regardless of their economic status."

The package, which was sent to state chief justices and state court administrators throughout the country, includes the following elements:

- **Dear Colleague Letter** from the Civil Rights Division and the Office for Access to Justice to provide greater clarity to state and local courts regarding their legal obligations with respect to the enforcement of court fines and fees. The letter addresses some of the most common practices that run afoul of the U.S. Constitution and/or other federal laws, such as incarcerating individuals for nonpayment without determining their ability to pay. The letter also discusses the importance of due process protections such as notice and, in appropriate cases, the right to counsel; the need to avoid unconstitutional bail practices; and due process concerns raised by certain private probation arrangements.
- **$2.5 million in competitive grants** through the Bureau of Justice Assistance (BJA) to state, local or tribal jurisdictions that, together with community partners, want to test strategies to restructure the assessment and enforcement of fines and fees. The grant program, titled *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees*, will provide four grants of $500,000 to agencies and their collaborative partners to develop strategies that promote appropriate justice system responses, including reducing unnecessary confinement, for individuals who are unable to pay fines and fees. BJA will award an additional grant of $500,000 to a technical assistance provider.
- **Support for the National Task Force on Fines, Fees and Bail Practices**, which is led by the Conference of Chief Justices and the Conference of State Court Administrators. The task force is being funded by BJA and is also supported by the State Justice Institute. It is comprised of leaders from the judiciary, state and local government, the advocacy community, and the academy. The task force will draft model statutes, court rules and procedures, and will develop an online clearinghouse of best practices. Department officials will also serve as ex officio members of the task force.
- **Resource Guide** that assembles issue studies and other publications related to the assessment and enforcement of court fines and fees. The resource guide, compiled by the Office of Justice Programs Diagnostic Center, helps leaders make informed policy decisions and pursue sound strategies at the state, local and tribal levels.

The Department of Justice announcement followed a seminal two-day convening held by the Justice Department and the White House in Washington, D.C., on December 2 and 3, 2015. Judges, court administrators, researchers, advocates, prosecutors, defense attorneys, and impacted individuals came together to discuss challenges surrounding fines and fees. The convening made plain the existence of unlawful and harmful practices in some jurisdictions and highlighted a number of promising reform efforts already underway. At the meeting, participants and department officials also discussed ways in which the Justice Department could assist courts in their efforts to make needed changes. Participants specifically asked the department to provide legal guidance to state and local actors; to highlight and help develop model practices; and to provide resources for local reform efforts.

The Justice Department is committed to reforming justice-system practices that perpetuate poverty and result in unnecessary deprivations of liberty. The department discussed many of these practices in its March 2015 report on the investigation of the Ferguson, Missouri, police department and municipal court. As discussed at the December 2015 convening, however, these practices can be found throughout the nation. And their effects are particularly severe for the most vulnerable members of our communities, often with a disproportionate impact on racial minorities. The resources released today are aimed at reforming these practices and mitigating their harmful effects.

Adapted from DOJ Press Release issued Monday, March 24, 2016. https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices.

Lessons from Ferguson: What Every Municipal Court Needs to Know

The tragic events of 2014 in Ferguson, Missouri in the wake of the shooting of Michael Brown by Officer Darren Wilson not only triggered protests and civil disorder; but placed a community of 20,000 people at the center of vigorous debate in the United States about the relationship between law enforcement officers and African-Americans, the militarization of the police, and the use-of-force doctrine in Missouri and nationwide.

In response to the shooting and subsequent unrest, the U.S. Department of Justice conducted an investigation into the policing practices of the Ferguson Police Department. In March 2015, the U.S. Justice Department announced they had determined that the Ferguson Police Department had engaged in misconduct against the citizenry of Ferguson by discriminating against African-Americans and applying racial stereotypes in a "pattern or practice of unlawful conduct." While the conclusions of the 100-page report were widely reported, media accounts predominantly focused on law enforcement practices. The report also detailed **practices in the municipal court** that imposed substantial and unnecessary barriers to defendants that undermined the court, eroded community trust, contributed to making policing less effective, and ultimately devastated the City of Ferguson.

In response, TMCEC is offering courses at the regional judges and clerks programs this year titled "What Every Judge Needs to Know About Ferguson" (judges) and "Lessons Learned from Ferguson" (clerks). A webpage on the TMCEC website [www.tmcec.com/ferguson/] offers additional information on the topic, including links to commission recommendations, news clippings, magazine articles, radio broadcasts, and other media coverage. Also on this webpage is a link to the TMCEC Online Learning Center where you may access webinars on "Commitments" and "Lessons on Ferguson," presented by Ryan Kellus Turner, General Counsel & Director of Education, TMCEC. A new TMCEC webpage entitled Fines, Costs & Fees is also available at www.tmcec.com/fines/.

www.tmcec.com/ferguson

U.S. Department of Justice
Civil Rights Division
Office for Access to Justice

Washington, D.C. 20530

March 14, 2016

Dear Colleague:

The Department of Justice ("the Department") is committed to assisting state and local courts in their efforts to ensure equal justice and due process for all those who come before them. In December 2015, the Department convened a diverse group of stakeholders—judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals—to discuss the assessment and enforcement of fines and fees in state and local courts. While the convening made plain that unlawful and harmful practices exist in certain jurisdictions throughout the country, it also highlighted a number of reform efforts underway by state leaders, judicial officers, and advocates, and underscored the commitment of all the participants to continue addressing these critical issues. At the meeting, participants and Department officials also discussed ways in which the Department could assist courts in their efforts to make needed changes. Among other recommendations, participants called on the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices. Accordingly, this letter is intended to address some of the most common practices that run afoul of the United States Constitution and/or other federal laws and to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully, as well as to suggest alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system.

Recent years have seen increased attention on the illegal enforcement of fines and fees in certain jurisdictions around the country—often with respect to individuals accused of misdemeanors, quasi-criminal ordinance violations, or civil infractions.[1] Typically, courts do not sentence defendants to incarceration in these cases; monetary fines are the norm. Yet the harm caused by unlawful practices in these jurisdictions can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community[2]; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.[3] Furthermore, in addition to being unlawful, to the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.[4]

To help judicial actors protect individuals' rights and avoid unnecessary harm, we discuss below a set of basic constitutional principles relevant to the enforcement of fines and fees. These principles, grounded in the rights to due process and equal protection, require the following:

(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;
(2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;
(3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;
(4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;
(5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;
(6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(7) Courts must safeguard against unconstitutional practices by court staff and private contractors.

In court systems receiving federal funds, these practices may also violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin.

As court leaders, your guidance on these issues is critical. We urge you to review court rules and procedures within your jurisdiction to ensure that they comply with due process, equal protection, and sound public policy. We also encourage you to forward a copy of this letter to every judge in your jurisdiction; to provide appropriate training for judges in the areas discussed below; and to develop resources, such as bench books, to assist judges in performing their duties lawfully and effectively. We also hope that you will work with the Justice Department, going forward, to continue to develop and share solutions for implementing and adhering to these principles.

1. Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Accordingly, the Supreme Court has repeatedly held that the government may not incarcerate an individual solely because of inability to pay a fine or fee. In *Bearden*, the Court prohibited the incarceration of indigent probationers for failing to pay a fine because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73; *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that state could not convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (holding that an indigent defendant could not be imprisoned longer than the statutory maximum for failing to pay his fine). The Supreme Court recently reaffirmed this principle in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), holding that a court violates due process when it finds a parent in civil contempt and jails the parent for failure to pay child support, without first inquiring into the parent's ability to pay. *Id.* at 2518-19.

To comply with this constitutional guarantee, state and local courts must inquire as to a person's ability to pay prior to imposing incarceration for nonpayment. Courts have an affirmative duty to conduct these inquiries and should do so sua sponte. *Bearden*, 461 U.S. at 671. Further, a court's obligation to conduct indigency inquiries endures throughout the life of a case. *See id.* at 662-63. A probationer may lose her job or suddenly require expensive medical care, leaving her in precarious financial circumstances. For that reason, a missed payment cannot itself be sufficient to trigger a person's arrest or detention unless the court first inquires anew into the reasons for the person's non-payment and determines that it was willful. In addition, to minimize these problems, courts should inquire into ability to pay at sentencing, when contemplating the assessment of fines and fees, rather than waiting until a person fails to pay.

Under *Bearden*, standards for indigency inquiries must ensure fair and accurate assessments of defendants' ability to pay. Due process requires that such standards include both notice to the defendant that ability to pay is a critical issue, and a meaningful opportunity for the defendant to be heard on the question of his or her financial circumstances. *See Turner*, 131 S. Ct. at 2519-20 (requiring courts to follow these specific procedures, and others, to prevent unrepresented parties from being jailed because of financial incapacity). Jurisdictions may benefit from creating statutory presumptions of indigency for certain classes of defendants—for example, those eligible for public benefits, living below a certain income level, or serving a term of confinement. *See, e.g.*, R.I. Gen. Laws § 12-20-10 (listing conditions considered "prima facie evidence of the defendant's indigency and limited ability to pay," including but not limited to "[q]ualification for and/or receipt of" public assistance, disability insurance, and food stamps).

2. Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.

When individuals of limited means cannot satisfy their financial obligations, *Bearden* requires consideration of "alternatives to imprisonment." 461 U.S. at 672. These alternatives may include extending the time for payment, reducing the debt, requiring the defendant to attend traffic or public safety classes, or imposing community service. *See id.* Recognizing this constitutional imperative, some jurisdictions have codified alternatives to incarceration in state law. *See, e.g.*, Ga. Code Ann. § 42-8-102(f)(4)(A) (2015) (providing that for "failure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service"); *see also Tate*, 401 U.S. at 400 n.[5] (discussing effectiveness of fine payment plans and citing examples from several states). In some cases, it will be immediately apparent that a person is not and will not likely become able to pay a monetary fine. Therefore, courts should consider providing alternatives to indigent defendants not only after a failure to pay, but also in lieu of imposing financial obligations in the first place.

Neither community service programs nor payment plans, however, should become a means to impose greater penalties on the poor by, for example, imposing onerous user fees or interest. With respect to community service programs, court officials should consider delineating clear and consistent standards that allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations. In imposing payment plans, courts should consider assessing the defendant's financial resources to determine a reasonable periodic payment, and should consider including a mechanism for defendants to seek a reduction in their monthly obligation if their financial circumstances change.

3. Courts must not condition access to a judicial hearing on prepayment of fines or fees.

State and local courts deprive indigent defendants of due process and equal protection if they condition access to the courts on payment of fines or fees. *See Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that due process bars states from conditioning access to compulsory judicial process on the payment of court fees by those unable to pay); *see also Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 502 (M.D. Ala. 1976) (holding that the conditioning of an appeal on payment of a bond violates indigent prisoners' equal protection rights and "'has no place in our heritage of Equal Justice Under Law'" (citing *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).[5]

This unconstitutional practice is often framed as a routine administrative matter. For example, a motorist who is arrested for driving with a suspended license may be told that the penalty for the citation is $300 and that a court date will be scheduled only upon the completion of a $300 payment (sometimes referred to as a prehearing "bond" or "bail" payment). Courts most commonly impose these prepayment requirements on defendants who have failed to appear, depriving those defendants of the opportunity to establish good cause for missing court. Regardless of the charge, these requirements can have the effect of denying access to justice to the poor.

4. Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and **fees.**

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *see also Turner*, 131 S. Ct. at 2519 (discussing the importance of notice in proceedings to enforce a child support order). Thus, constitutionally adequate notice must be provided for even the most minor cases. Courts should ensure that citations and summonses adequately inform individuals of the precise charges against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants

to fairly and expeditiously resolve their cases. And inadequate notice can have a cascading effect, resulting in the defendant's failure to appear and leading to the imposition of significant penalties in violation of the defendant's due process rights.

Further, courts must ensure defendants' right to counsel in appropriate cases when enforcing fines and fees. Failing to appear or to pay outstanding fines or fees can result in incarceration, whether through the pursuit of criminal charges or criminal contempt, the imposition of a sentence that had been suspended, or the pursuit of civil contempt proceedings. The Sixth Amendment requires that a defendant be provided the right to counsel in any criminal proceeding resulting in incarceration, *see Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), and indeed forbids imposition of a suspended jail sentence on a probationer who was not afforded a right to counsel when originally convicted and sentenced, *see Alabama v. Shelton*, 535 U.S. 654, 662 (2002). Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees. *See Turner*, 131 S. Ct. at 2518-19 (holding that, although there is no automatic right to counsel in civil contempt proceedings for nonpayment of child support, due process is violated when neither counsel nor adequate alternative procedural safeguards are provided to prevent incarceration for inability to pay).[6]

5. Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.

The use of arrest warrants as a means of debt collection, rather than in response to public safety needs, creates unnecessary risk that individuals' constitutional rights will be violated. Warrants must not be issued for failure to pay without providing adequate notice to a defendant, a hearing where the defendant's ability to pay is assessed, and other basic procedural protections. *See Turner*, 131 S. Ct. at 2519; *Bearden*, 461 U.S. at 671-72; *Mullane*, 339 U.S. at 314-15. When people are arrested and detained on these warrants, the result is an unconstitutional deprivation of liberty. Rather than arrest and incarceration, courts should consider less harmful and less costly means of collecting justifiable debts, including civil debt collection.[7]

In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant's driver's license to compel the payment of outstanding court debts. If a defendant's driver's license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "may become essential in the pursuit of a livelihood" and thus "are not to be taken away without that procedural due process required by the Fourteenth Amendment"); *cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (upholding revocation of driver's license after conviction based in part on the due process provided in the underlying criminal proceedings); *Mackey v. Montrym*, 443 U.S. 1, 13-17 (1979) (upholding suspension of driver's license after arrest for driving under the influence and refusal to take a breath-analysis test, because suspension "substantially served" the government's interest in public safety and was based on "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him," making the risk of erroneous deprivation low). Accordingly, automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.

Even where such suspensions are lawful, they nonetheless raise significant public policy concerns. Research has consistently found that having a valid driver's license can be crucial to individuals' ability to maintain a job, pursue educational opportunities, and care for families.[8] At the same time, suspending defendants' licenses decreases the likelihood that defendants will resolve pending cases and outstanding court debts, both by jeopardizing their employment and by making it more difficult to travel to court, and results in more unlicensed driving. For these reasons, where they have discretion to do so, state and local courts are encouraged to avoid suspending driver's licenses as a debt collection tool, reserving suspension for cases in which it would increase public safety.[9]

6. Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.

When indigent defendants are arrested for failure to make payments they cannot afford, they can be subjected to another independent violation of their rights: prolonged detention due to unlawful bail or bond practices. Bail that is set without regard to defendants' financial capacity can result in the incarceration of individuals not because they pose a threat to public safety or a flight risk, but rather because they cannot afford the assigned bail amount.

As the Department of Justice set forth in detail in a federal court brief last year, and as courts have long recognized, any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment. *See* Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 8 (M.D. Ala., Feb. 13, 2015) (citing *Bearden*, 461 U.S. at 671; *Tate*, 401 U.S. at 398; *Williams*, 399 U.S. at 240-41).[10] Systems that rely primarily on secured monetary bonds without adequate consideration of defendants' financial means tend to result in the incarceration of poor defendants who pose no threat to public safety solely because they cannot afford to pay.[11] To better protect constitutional rights while ensuring defendants' appearance in court and the safety of the community, courts should consider transitioning from a system based on secured monetary bail alone to one grounded in objective risk assessments by pretrial experts. *See, e.g.*, D.C. Code § 23-1321 (2014); Colo. Rev. Stat. 16-4-104 (2014); Ky. Rev. Stat. Ann. § 431.066 (2015); N.J. S. 946/A1910 (enacted 2015); *see also* 18 U.S.C. § 3142 (permitting pretrial detention in the federal system when no conditions will reasonably assure the appearance of the defendant and safety of the community, but cautioning that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person").

7. Courts must safeguard against unconstitutional practices by court staff and private contractors.

In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most of the business of the court is conducted by clerks or probation officers outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer, or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed and preserve "both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal quotation marks omitted); *see also* American Bar Association, MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rules 2.2, 2.5, 2.12.

Additional due process concerns arise when these designees have a direct pecuniary interest in the management or outcome of a case—for example, when a jurisdiction employs private, for-profit companies to supervise probationers. In many such jurisdictions, probation companies are authorized not only to collect court fines, but also to impose an array of discretionary surcharges (such as supervision fees, late fees, drug testing fees, etc.) to be paid to the company itself rather than to the court. Thus, the probation company that decides what services or sanctions to impose stands to profit from those very decisions. The Supreme Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). It has expressly prohibited arrangements in which the judge might have a pecuniary interest, direct or indirect, in the outcome of a case. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (invalidating conviction on the basis of $12 fee paid to the mayor only upon conviction in mayor's court); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) (extending reasoning of *Tumey* to cases in which the judge has a clear but not direct interest). It has applied the same reasoning to prosecutors, holding that the appointment of a private prosecutor with a pecuniary interest in the outcome of a case constitutes fundamental error because it "undermines confidence in the integrity of the criminal proceeding." *Young*, 481 U.S. at 811-14. The appointment of a private probation company with

a pecuniary interest in the outcome of its cases raises similarly fundamental concerns about fairness and due process.

The Department of Justice has a strong interest in ensuring that state and local courts provide every individual with the basic protections guaranteed by the Constitution and other federal laws, regardless of his or her financial means. We are eager to build on the December 2015 convening about these issues by supporting your efforts at the state and local levels, and we look forward to working collaboratively with all stakeholders to ensure that every part of our justice system provides equal justice and due process.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General
Civil Rights Division

Lisa Foster
Director
Office for Access to Justice

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1. *See, e.g.*, Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf (finding that the Ferguson, Missouri, municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (reporting on fine and fee practices in fifteen states); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf (discussing practices in Louisiana, Michigan, Ohio, Georgia, and Washington state).
2. Nothing in this letter is intended to suggest that courts may not preventively detain a defendant pretrial in order to secure the safety of the public or appearance of the defendant.
3. *See* Council of Economic Advisers, Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, at 1 (Dec. 2015), *available at* https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf (describing the disproportionate impact on the poor of fixed monetary penalties, which "can lead to high levels of debt and even incarceration for failure to fulfil a payment" and create "barriers to successful re-entry after an offense").
4. *See* Conference of State Court Administrators, 2011-2012 Policy Paper, *Courts Are Not Revenue Centers* (2012), *available at* https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf.
5. The Supreme Court reaffirmed this principle in *Little v. Streater*, 452 U.S. 1, 16-17 (1981), when it prohibited conditioning indigent persons' access to blood tests in adversarial paternity actions on payment of a fee, and in *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996), when it prohibited charging filing fees to indigent persons seeking to appeal from proceedings terminating their parental rights.
6. *Turner*'s ruling that the right to counsel is not automatic was limited to contempt proceedings arising from failure to pay child support to a custodial parent who is unrepresented by counsel. *See* 131 S. Ct. at 2512, 2519. The Court explained that recognizing such an automatic right in that context "could create an asymmetry of representation." *Id.* at 2519. The Court distinguished those circumstances from civil contempt proceedings to recover funds due to the government, which "more closely resemble debt-collection proceedings" in which "[t]he government is likely to have counsel or some other competent representative." *Id.* at 2520.
7. Researchers have questioned whether the use of police and jail resources to coerce the payment of court debts is cost-effective. *See, e.g.*, Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 527-28 (2011). This strategy may also undermine public safety by diverting police resources and stimulating public distrust of law enforcement.
8. *See, e.g.*, Robert Cervero, et al., *Transportation as a Stimulus of Welfare-to-Work: Private versus Public Mobility*, 22 J. PLAN. EDUC. & RES. 50 (2002); Alan M. Voorhees, et al., *Motor Vehicles Affordability and Fairness Task Force: Final Report*, at xii (2006), *available at* http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf (a study of suspended drivers in New Jersey, which found that 42% of people lost their jobs as a result of the driver's license suspension, that 45% of those could not find another job, and that this had the greatest impact on seniors and low-income individuals).
9. *See* Am. Ass'n of Motor Veh. Adm'rs, *Best Practices Guide to Reducing Suspended Drivers*, at 3 (2013), *available at* http://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3723&libID=3709 (recommending that "legislatures repeal state laws requiring the suspension of driving privileges for non-highway safety related violations" and citing research supporting view that fewer driver suspensions for non-compliance with court requirements would increase public safety).
10. The United States' Statement of Interest in *Varden* is available at http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/02/13/varden statement_ of_interest.pdf.
11. S*ee supra* Statement of the United States, *Varden*, at 11 (citing Timothy R. Schnacke, U.S. Department of Justice, National Institute of Corrections, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM, at 2 (2014), *available at* http://nicic.gov/library/028360).

The Evolution of Marriage and the Important Role of Judges and other Public Officials in Civil Marriage Ceremonies

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2015 was a historic year for judges across the United States who conduct civil marriage ceremonies. However, changes to the law and challenges to historic notions of marriages are hardly new. The concept of marriage has progressed through society's history, developing into both a legal status and a religious ceremony; however, as society continues to grapple with the "marriage" of the two concepts, the United States Supreme Court recently clarified that marriage is not a monolithic construct.[1] The Court stated that "[t]he history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages, and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution."[2] The distinction between civil unions and marriages is demolished. A basic family structure no longer has two separate names, but from now on will only be referred to as marriage.

I. Evolution of Marriage

The institution of marriage is dynamic, and does not have a set of fixed criteria.[3] Before marriage was instituted, family units and bonds were society's focus; as early as the Stone Age people were forming relationships to organize, control, and conduct their daily tasks.[4] Early in civilization's history, people accepted marriages without requiring any government involvement or religious ceremony.[5] However, over time, the concept of marriage became a strategic tool to secure economic and political gains. Some religions and cultures used arranged marriages and matchmakers for economic gain and networking, a tradition that is sometimes still practiced today.[6]

A. From Status to Sacrament

The concept of marriage as a title for gain turned into a legal status and then a religious sacrament. However, even in these early marriages, the ceremonies were conducted outside a church because it was believed that the union would result in original sin and the church did not want to encourage impurity.[7] In ancient Greece and ancient Rome, the aim of marriage was to reproduce legitimate children because legitimate children were the only ones entitled to an inheritance.[8] Marriage in Rome was solely governed by imperial law until the Catholic Church gained joint jurisdiction over marriage and made it a religious institution.[9] While it is a common belief that clerical celibacy has historically been the tradition, clergymen have married and had children for several hundred years after the Second Lateran Council deemed clerical marriages invalid in 1139.[10] Furthermore, priests and even popes still continued to marry and conceive children for several hundred years after that declaration.[11] By the 12th Century, Roman Catholic writers and philosophers considered marriage a sacred sacrament, but it was not until centuries later that marriage was officially deemed a sacred sacrament.[12] However, as quickly as the Church recognized marriage as a religious sacrament, the Church recognized "informal" marriages to ensure children were not left without a male provider.[13] These marriages were sometimes referred to as "Clandestine" marriages because of the same act's name that was created by the government and required couples to marry in a church, issue a marriage announcement, or obtain a license.[14] Along with informal marriages only allowed to be performed by the state, divorces were also only carried out through the legal process.[15] Early American colonists brought their marriage and divorce (depending on the region) traditions and law with them.[16]

B. American Colonialism

The colonists created diverse marriage regulations and laws according to the colonists' religious and social affiliations.[17] This diversity was short lived, and throughout the 19th century, the state regulated marriage directly and made marriage law more uniform.[18] Throughout the development of America, marriage grew into a legal title with religious ceremonies. During the early years of settlement, marriages were usually held at home and demonstrated rank and wealth. These informal practices continued as settlers traveled south and west. After 1750, formal ceremonies with clergy became more frequent.[19] By the Revolutionary era, the states controlled "who could marry whom and how, what marriages were invalid, what composed marital obligations, how a marriage could be terminated, and… [the] consequences for divorced or widowed partners."[20] The development of marriage as a legal title allowed people to not only obtain divorces, but also gain economic benefits, such as property, the right to marry for love instead of a dowry, and eventually social welfare benefits.[21] In 1877, the United States Supreme Court stated that state laws on solemnization were considered directory "because marriage is a thing of common right, because it is the policy of the State to encourage it."[22] Along with allowing or disallowing marriages, each state had control over enforcing the laws it created, for example, there was (and still is) punishment for failing to obtain a marriage license.[23] However, the majority of people ignored or rejected the idea of marriage through a religious ceremony or through state regulation because until the early 1900s, it was ambiguous as to what exactly constituted a legal marriage, and most of the population had trouble obtaining the proper documents or authorized personnel to perform the ceremony due to their rural location.[24]

II. The United States Constitution: Major Revisions to Marriage

The evolution of marriage can be attributed to the circular relationship of law and society, in which legal practice is continuously pressured by social growth and demands.[25] Within the last half century, lawmakers made many necessary revisions to the institution of marriage to uphold the Constitution's Equal Protection and Due Process Clauses of the 14th Amendment.[26]

A. Coverture, Chattel, and Constitutional Change

The argument that a fixed tradition should never change because it has always been that way is a contradiction because as the history of marriage demonstrates, marriage, although a long tradition, is fluid. Until the last century, the common law doctrine of coverture was dominant. Under coverture, a married woman was subordinate to her husband and all of her possessions and rights were converted to her husband.[27]Additionally, dowries were once a common bargaining tool in marriages, and both social custom and law viewed wives as a husband's chattel or property.[28] After women gained the right to vote in 1920, the concept of coverture disappeared and women legally had their own individuality and citizenship.[29] This is just one example of how equality has played a role in the construct of marriage. Another clear example is the race inequalities that Americans faced until the last century.

B. Landmark Case Law

Since ancient Roman times, laws against individuals of unequal social or civil status have existed for the sole purpose of preserving the ruling class at the time.[30] It has only been about 50 years since American law stopped nullifying and criminalizing intermarriage based on designations of race or color.[31] In the landmark case, *Loving v. Virginia*, the United States Supreme Court held that restricting the freedom to marry on racial classifications violated the Constitution.[32] In *Loving*, the Court summed up the legal right to marry: "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence

and survival."[33] However, *Loving* was neither the first nor the last time the Supreme Court had to define marriage.

Another landmark case that demonstrates the push away from marriage being only a religious sacrament with the tradition of marriage as a way to procreate is *Griswold v. Connecticut*. In *Griswold*, the Court held that the state's law violated the marital right of privacy to use birth control measures.[34] Then in *Eisenstadt v. Baird*, the Court first announced a historical reversal by denying a state's authority to distinguish citizens based on marital status. In *Eisenstadt*, the Court reasoned that citizens have the right to privacy in personal autonomy by stating: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget child."[35] This case demonstrated the shift in society's opinion to view "marriage-like relationships as marriage[s]," and was part of the vast reformations to laws regarding marriage and intimate relationships in America.[36] Additional landmark cases support the history of marriage's evolution based on societal needs, from invalidating same-sex intimacy as a crime to permitting inmates to marry.[37]

III. Marriage Today

Today, marriage is still regulated by each state legislature, unless the legislation is unconstitutional.[38] The concept of marriage as a status was fundamental to both societies and laws, but marriage has never been a typical contract because of the legal benefits and consequences it grants to the couple.[39] A couple may still be legally married even without a religious tradition, as long as they obtain the proper documents and have an authorized officiant, because there is no state statute that can constitutionally require the solemnization of marriage. Even in religious ceremonies, the legal requirements are present, from marital license requirements to witness requirements. Guests attending a religious solemnization expect to hear the clergy's officiating words, "by the authority vested in me by the state of…I now pronounce you husband and wife."[40] This relationship between marriage as a religious ceremony and as a legal status still exists, but there is no longer a legal distinction between religious marriages and civil unions.[41]

A. Texas Law

While other states were creating laws to allow same-sex marriage, Texas legislatures pushed back with fairly recent changes to the Texas Constitution. In 1997, the Texas Legislature amended Section 2.001 of the Family Code to state that "[a] license may not be issued for the marriage of persons of the same sex."[42] Then in 2003, the Legislature clarified its ban on same-sex marriage by adding Section 6.204 to the Family Code.[43] As if the two statutes banning same-sex marriages were not clear enough, Texas Proposition 2 was passed which amended the Texas Constitution to state that "[m]arriage in this state shall consist only of the union of one man and one woman."[44] While the Texas Legislature has a long history of viewing marriage conservatively, one recent United States Supreme Court case recently held state laws like those on the books in Texas prohibiting same-sex marriages to be unconstitutional.

B. Texas Law in Light of *Obergefell v. Hodges*

Last summer, the Supreme Court held in *Obergefell v. Hodges* that "states are required by the 14th Amendment to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex lawfully licensed and performed out of state."[45] What does this mean for the states? Plainly, it means that any provision of either state law or constitution that abridges or outright prohibits same-sex couples' right to marry or fails to recognize a legal marriage of same-sex couples from another state is unconstitutional.[46] What does that mean for the average citizen? As stated earlier, it means that there are no longer civil unions and marriages, just marriages. Furthermore, it means that "the government

cannot discriminate between couples of same or differing sexes."[47] What does this mean for judges who conduct marriages? "To be clear, in light of *Obergefell*, a Texas judge may not refuse to perform same-sex marriage ceremonies while continuing to perform opposite-sex marriage ceremonies."[48] However, a judge can choose to no longer conduct any marriage ceremonies.[49] Section 2.02(a)(4) of the Family Code authorizes judges to conduct marriage ceremonies but does not impose a duty on them.[50]

Texas authorizes persons who hold specific positions in church organizations and state legal positions to conduct marriage ceremonies.[51] However, there is a precaution to this privilege: a person who is authorized to conduct a marriage ceremony in Texas is legally prohibited from discriminating against an applicant who is competent to be married around the equal protection rules.[52] S.B. 2065 from the 84th Legislature amended Section 2.601 of the Family Code to permit a religious organization or a clergy or minister to refuse to solemnize a marriage "if the action would cause the organization or the individual to violate a sincerely held religious belief."[53] This new amendment upholds the right to freedom of religion, but it does not protect those individuals who act in an official capacity on behalf of a governmental entity who conduct marriage ceremonies. An authorized person who conducts marriage ceremonies and discriminates in conducting marriages could be removed from office.[54] Regardless of religious views, it is the duty of the individual who acts in an official capacity to comply with the law.[55]

Conclusion: The Public Expectation of Public Officials to Perform Civil Marriage Ceremonies

We live in a time where there is no "normal" way to conduct a wedding. We have choices on everything from the wedding destination or location to the size of the napkin rings, or even the small quirky photo booth props we will use for instagram pictures. Couples can choose to have their perfect wedding however they imagined it, and for some couples, getting married at a courthouse is their first choice. Marriage is both a public and private institution built around individual desires and social ideals.[56] However, that does not mean that every married couple must throw a huge, public marriage ceremony. Some couples may seek an intimate marriage ceremony, and the courthouse offers a small ceremony without the stress of inviting or not inviting people to a large wedding.[57] Not only is a courthouse wedding or other public official performed marriage intimate, but it can also be much cheaper for the couple.

In general, marriages conducted by public officials are cheaper than traditional, religious marriages. The average cost of a wedding in America, as of 2013, was $30,000.[58] The cost can vary depending on the location and the size of the guest list. Thanks to social media, couples who have large weddings are usually forced to publicize their wedding, which pressures couples to throw extravagant weddings and pay greater attention to details for their guests and the social platforms.[59] While the cost of the church may be free in a traditional religious marriage ceremony, there may be a donation given to the church by the couple who marries there.[60] The services of the minister, priest, or deacon are also free, but the couples customarily offer a stipend or honorarium for the services.[61] The costs of a wedding officiant's services and the use of a church can be anywhere from free to $1,000, depending on the type of ceremony and on the amount the couple "donates."[62] Couples who marry in a courthouse do not have to stress about a formal wedding dress, which averaged $1,281 in 2013.[63] This pricey average is due in part to reality shows such as "Say Yes to the Dress" and more designer gowns being offered at malls.[64]

While conducting a marriage ceremony at a courthouse can greatly reduce the price and stress of a wedding, some couples may want to get married at a courthouse because everyone, no matter their religion, is welcome. Some religions have strict requirements. For example, to get married in the Catholic Church, the couple must be of opposite sex; both partners must be baptized Christians; and at least one of the partners must be a Catholic.[65] A courthouse marriage cannot discriminate against a person's religion. Additionally, people who are not religious may feel more comfortable attending a wedding that is not performed at a church. Everyone, the couple and the guests, is welcomed at a courthouse wedding.[66]

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13. Raley, *supra* note 8 at 146-47.
14. *Id.*
15. *Ten Key Moments*, *supra* note 12.
16. Nichols, *supra* note 9 at 199.
17. Candeub & Kuykendall, *supra* note 5 at 773-74.
18. *Id.* at 774-75.
19. Cott, *supra* note 6 at 28.
20. *Id.* at 27.
21. See, Cott, *supra* note 6 at 157.
22. *Meister v. Moore*, 96 U.S. 76, 83 (1877).
23. See ,Cott, *supra* note 6 at 127.
24. Shirley A. Hill, Families: A Social Class Perspective 9 (David Repetto et. al. 2012).
25. Cott, *supra* note 6 at 8.
26. U.S. Const. amend. XIV.
27. See, Cott, *supra* note 6 at 11.
28. The Week Staff, *How Marriage has Changed Over the Centuries*, The Week, June 1, 2012.
29. Cott, *supra* note 6 at 165.
30. *Id.* at 41.
31. *Id.*; See, *Loving v. Virginia*, 388 U.S. 1 (1967).
32. *Loving*, 388 U.S. 1.
33. *Id.* at 12.
34. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
35. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).
36. Cott, *supra* note 6, at 212.
37. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Zablocki v. Redhail*, 434 U.S. 374 (1978).
38. *Stephens v. U.S.*, 146 F.2d 120, 123 (10th Cir. 1944).
39. Joseph Williams Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligations*,1 Stan. J. of CR. & CL. 1, 34 (2005).
40. Cott, *supra* note 6 at 2.
41. *Obergefell*, 135 S.Ct. 2584.
42. Section 2.001, Family Code.
43. Section 6.204, Family Code.
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46. *Id.*
47. *Id.*
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49. *Id.*
50. *Id.*
51. Section 2.202(a), Family Code (listing the authorized persons to conduct a marriage ceremony as: "a licensed or ordained Christian minister or priest; a Jewish rabbi; a person who is an officer of a religious organization and who is authorized by the organization to conduct a marriage ceremony; a justice of the supreme court, a judge for the court of criminal appeals, justice of the courts of appeals, judge of the district, county, and probate courts, judge of the county courts at law, judge of the courts of domestic relations, judge of the juvenile courts, retired justice or judge of those courts, justice of the peace, retired justice of the peace, judge of a municipal court, associate judge of a statutory probate court, retired associate judge of a statutory probate court, associate judge of a county court at law, retired associate judge of a county court at law, or judge or magistrate of a federal court of this state; and a retired judge or magistrate of federal court of this state.").
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53. S.B. 2065, 84th Leg. , Reg. Sess. (Tex. 2015).
54. Section 2.205(b), Family Code.
55. Elizabeth Brenner, *Marriage for All*, 78 Tex. B.J. 622 (September 2015).
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I. Has the Paradigm Changed?

Around 2010, the term "big data" emerged, indicating an era of business and economics defined by the collection and analysis of massive troves of electronic data.[1] According to the Harvard Business Review, "people who have been in business for at least a decade could define their careers as BBD or ABD, or Before Big Data and After Big Data."[2] This sea change coincided with the emergence of so-called "data mining," defined as "the process of analyzing data from different perspectives and summarizing it into useful information—information that can be used to increase revenue, [reduce] costs, or both."[3] Insurance companies have an interest in gathering as much data as possible to make rate determinations, prevent fraud, and assist with underwriting. To keep up with the enormous amounts of data available, companies began hiring third party organizations specializing in data collection to acquire the data for them rather than collecting it themselves.

In recent months, courts across Texas have reported an influx of open records requests from self-described "insurance support organizations." Texas law does not directly define insurance support organization, but other state laws do. California law defines it as "[any] person who regularly engages, in whole or in part, in the business of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution or agent for insurance transactions… ."[4] The requests by insurance support organizations have typically asked for bulk data reports of information related to all open and closed matters handled by the court. Some requests ask for an ongoing and automatic weekly data transmission.

Drivers History[5] and LexisNexis Risk Solutions[6] are examples of insurance support organizations that have been making such requests. In business since 2002, Drivers History maintains a comprehensive database of drivers' records, called DocIT™, which contains "court-based violation data with a level of detail that is often beyond what is available or shown on the state motor vehicle report."[7] Furthermore, according to Drivers History's website, because the violation data is acquired directly from the courts prior to its availability to a state's motor vehicles department, the data "contains a more robust representation of driving incidents."[8] In 2014, TransUnion, one of the largest credit bureaus in the United States, acquired a majority interest in Drivers History.[9] The acquisition, according to TransUnion, will "provide insurance carriers with exactly what they need: integrated solutions that increase underwriting precision and efficiency, while lowering overall cost."[10]

Insurance companies in Texas utilizing driving records in making rate determinations is, of course, nothing new. Such driving records, however, typically come from the Department of Public Safety (DPS) and reflect traffic *convictions*—not pre-trial complaints, dismissed cases, or deferred cases. Are insurance companies using these data reports as a way to obtain records of cases that are not included on the standard DPS driving record? If so, are they using them to increase premiums? This would explain why insurance companies have recently enlisted insurance support organizations to ferret out detailed court records.

II. Insurance Companies and the Free Market

Impaired and unsafe drivers have a remarkable fiscal impact on society. A National Highway Traffic Safety Administration study revealed that motor vehicle crashes cost society approximately $242 billion in direct costs in 2010.[11] Eight percent of this figure, or $19.36 billion, went toward insurance costs.[12] Insurance companies, like any other for-profit entity, are in the business of making money. There is an argument to be

made that insurance companies should be able to use any publicly available information they can acquire to set rates that will allow them to be profitable.

Insurance companies use a complicated methodology for rate computation and risk acceptance—the result of which can sometimes be counterintuitive. For example, a driver might expect favorable rates because he has no at-fault crashes on his record. However, this driver has multiple *not-at-fault* crashes on his record. The driver can bemoan the insurance company all he wants, but he is likely to see an increased premium based on his evident propensity to being involved in collisions, whether or not they were his fault. There is a comparison to be drawn between this hypothetical situation and using deferred cases to set rates. Even though there is no finding of guilt, the driver has still been issued one or more citations. Thus, an insurance company could cite the driver's history of receiving citations, for whatever reason, to justify increasing his rate.
It is worth noting that the practice of using deferred dispositions to set rates is subject to the same risk of failure as any new and unproven business practice. Insurance companies charge varying and competitive rates, and it is the insured's responsibility to decide which provider to use. If an insurance company is using dismissed or deferred cases to set rates, it could conceivably suffer a decline in market share if their higher rates become uncompetitive. As a result, the insurance carrier may well be forced to underweigh or eliminate deferred dispositions in their rate determinations.

III. Consumer Protection and the Debatable Misuse of Traffic Records

On the other hand, isn't the entire concept of deferred disposition eviscerated if insurance companies are permitted to use these cases in setting rates? The most attractive element of deferred disposition to defendants is undeniably the fact that the offense will be dismissed and will not appear on the standard DPS driving record. The deferred disposition statute states that "…[if] a complaint is dismissed under this article, there is not a final conviction and the complaint *may not be used against the person for any purpose*,"[13] (emphasis added). Whether this broad statement, which was written prior to the age of big data, can be applied to setting insurance rates, is unclear.

Another wrinkle is that the Transportation Code prohibits courts from reporting deferred cases to DPS. It states, "[a] justice of the peace or municipal judge who defers further proceedings, suspends all or part of the imposition of a fine, and places a defendant on probation under Article 45.051, Code of Criminal Procedure, or a county court judge who follows that procedure under Article 42.111, Code of Criminal Procedure, may not submit a written record to [DPS]… ."[14] Furthermore, violation of this provision by a judicial officer may be grounds for removal from office.[15] This begs the question: if courts are not allowed to report deferred cases to DPS, would it be fair for insurance support organizations to report this information to insurance companies?

These requests can also be burdensome to Texas courts. It is true that these reports are part of the public record and courts generally have a duty to allow for public inspections.[16] The insurance support organizations' requests, however, are rife with formatting and technical requirements that could baffle even the most tech-savvy courts. And these are not one-off requests. There have been reported instances where an insurance support organization set up a workstation in the court lobby for convenient and continuous access to court records. More commonly, the requests are for an automatic weekly report sent to the insurance support organization. Such requests can tax the precious time and resources of the court system, especially smaller courts.

IV. Expunging Deferred Dispositions

Defendants may seek to have deferred dispositions expunged from their record,[17] which would exempt the

case from any open records request. Frequently, however, defendants are not aware of this option because they chose not to hire a lawyer for a traffic offense. Defendants also sometimes believe that there is no advantage justifying the cost of seeking an expunction of traffic-related deferred dispositions. Mass record requests from insurance support organizations may prove to challenge this notion.

V. Questions & Conclusion

Should the Texas Legislature take a close look and determine if the Insurance Code needs to be amended limiting what insurance companies may consider in making rate determinations? Is the Texas Legislature even aware that insurance support organizations are making such traffic records requests from courts? While auto insurance rate determination guidelines have traditionally been subject to self-regulation, there are instances where state legislatures have stepped in. For example, Massachusetts made it illegal for insurance companies to consider consumers' credit scores in making auto insurance rate determinations.[18] If insurance carriers are using the fruits of these recent open records requests to increase auto insurance rates, Texas motorists may be at risk of having their dismissed cases come back to haunt them.

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13. Section 45.051(d), Code of Criminal Procedure.
14. Section 543.204(a), Transportation Code.
15. Section 543.206, Transportation Code.
16. See, Chapter 552, Government Code.
17. Sections 45.051(e), 55.01(a), Code of Criminal Procedure.
18. Section 4E, Chapter 175 (Insurance), Massachusetts General Laws.

Standing in the Corner *continued from pg. 1*

document.[1] In the 82nd Regular Legislative Session, Texas saw the beginnings of change with regard to the criminal application of the four-corners rule with the passage of House Bill 976. House Bill 976 amended Article 15.03 of the Code of Criminal Procedure, authorizing the use of technology to more quickly obtain an arrest warrant or summons by enabling a person to make oath before a magistrate electronically. This option of making an electronic appearance allows applicants to supplement written affidavits or, perhaps, to request warrants without any written oath at all. Any electronic appearance and request must be recorded and preserved until the case reaches disposition. Without the four corners of the written affidavit to explore, there must be some reliable evidence to review in order to determine the sufficiency of the probable cause. Applying the four-corners rule to a recording requires magistrates and reviewing courts to listen and watch for probable cause.

While this 2011 change saw the review of arrest warrants leap off of the page—altering our conceptions of the four-corners rule with respect to arrest warrants, requiring probable cause within the four corners of an affidavit has long been most strictly enforced with respect to search warrants. This ensured an adequate review of a magistrate's determination of probable cause, as the review was based on an objective and reliable record of the information taken under advisement by the magistrate as opposed to the review merely relying on the unreliable memories of witnesses.[2] Article 18.01(b) still anticipates "a sworn affidavit setting forth substantial facts establishing probable cause" to be filed with every search warrant request. In essence, magistrates should find probable cause within the four corners of the affidavit, and on review the State may not support a warrant's issuance by relying on information not present within the affidavit itself. However, the

judge's potential role in the issuance of a search warrant has drastically changed with the passage of House Bill 326 in the 84th Regular Legislative Session.

Changes to Search Warrants

In *Clay v. State*,[3] the Court held, in light of the specific facts of the case, that the telephonic administration of an oath for a search warrant did not run afoul of Article 18.01. The court found that the telephonic oath only worked if the situation involved "the same or an equivalent solemnizing function" that "corporal presence accomplishes."[4] In other words, there must be an opportunity to instill the appropriate gravity of the situation and to ensure the affiant understands the importance of telling the truth. With a person in the room, it may be easier to gauge a person's veracity, but perhaps it is not always necessary. In this case, the magistrate could verify the identification of the affiant because the magistrate recognized the officer's voice.[5] Dissenting, Judge Meyers stated that only the Legislature could expand the statute. Following the case, the Legislature did just that. House Bill 326 added Subsection (b-1) to Article 18.01 of the Code of Criminal Procedure authorizing the communication of information supporting the issuance of a search warrant by telephone or any other reliable electronic means. This change largely echoes the change to Article 15.03 of the Code of Criminal Procedure from 2011 applicable to arrest warrants.[6] It embraces technology and pulls Texas in line with federal rules that already allowed officers to provide information by fax, e-mail, or phone in addition to the traditional in-person method.

But House Bill 326 did not end with the mere acceptance of technological advances. Subsection (b-1) also permits the examination, under oath, of an applicant of another person. The information uncovered in the examination can lead to modifications of the warrant as initially sought. These new capabilities potentially place magistrates right in the middle—fleshing out the probable cause through conversation and scribbling additions, subtractions, and edits on the face of the warrant or affidavit. In other words, magistrates could be working within the four corners rather than just reviewing documents from a neutral and detached perspective. There are several reasons why magistrates may be wary of "standing in the corner."

The Complicated Process

If a search warrant submitted to a magistrate does indeed establish probable cause, then the magistrate should issue the warrant. However, if a warrant as presented fails to establish probable cause, the magistrate has new options under the new Article 18.01(b-1) of the Code of Criminal Procedure.

The magistrate can consider information communicated by electronic or other reliable electronic means. Ostensibly, the "information" mentioned in the statute could refer to the warrant itself, supplementary information, or testimony from an applicant or a person whose testimony supports the application. In fact, if an applicant or any person whose testimony supports the application is available, the magistrate may place the person under oath and examine him or her via electronic means.

This is an entirely new process and Article 18.01(b-1) uses brand new terms to describe it. It can get confusing. First, there is no statutory definition of "reliable electronic means." This probably anticipates fax, e-mail, and phone as all of these means of communication were already permitted under federal rules, but the reliability of these devices varies greatly. Magistrates may now have to differentiate and keep track of an "original search warrant," a "proposed duplicate original," and a "modified version." The "proposed duplicate original" is not a duplicate of the original, but a substitute that could take the place of or alter the "original search warrant" that was deficient. The magistrate uses the contents of the "proposed duplicate original" to modify the warrant. This leads to the third "modified version" that must be transmitted and filed.

If the "modified version" cannot be transmitted, the applicant is directed to modify their "proposed duplicate original," so they have their own "modified version." It is complicated, and magistrates may hesitate to participate in such a juggling and shuffling of papers.

The Additional Duties

If the magistrate chooses to consider information provided by electronic means or to examine someone under oath relating to the issuance of a search warrant, the magistrate takes on several additional duties. First, the magistrate must acknowledge in writing on the affidavit any attestation to the contents of the affidavit.[7] Second, the magistrate must ensure that any testimony is recorded verbatim by an electronic recording device, by a court reporter, or in writing.[8] Third, the magistrate must certify the accuracy of any electronic recording, court reporter notes, exhibits, or any other written record.[9] Finally, the magistrate must ensure that any recording, record, or exhibit is properly preserved.[10] Magistrates should take note of these additional responsibilities before employing the new process.

The Legal and Ethical Concerns

Determinations of probable cause justifying the issuance of a search warrant are to be made by neutral and detached magistrates. The Supreme Court explained it well in *Johnson v. United States*:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[11]

It may prove hard to claim neutral detachment when the magistrate has questioned officers and witnesses, searching for probable cause. It could certainly appear that the magistrate was not detached, but very much involved in not only determining whether probable cause existed, but in helping ferret it out. Recorded or transcribed conversations could also reveal a friendly familiarity with an officer the magistrate has worked with for many years. And while there may be no impropriety, an appearance of impropriety could exist in the eye of the beholder.[12]

The Repercussions and the Alternatives

Judges have long found some measure of comfort in the traditional application of the four-corners rule. If probable cause was not there on the face of it, the warrant was simply not issued. If the issuance of a warrant was challenged, appellate courts had everything necessary for review within the document. A magistrate's only presence existed in their signature at the bottom. Giving only a thumb up or down on someone else's work, magistrates watched and critiqued. Magistrates now can inject themselves into the action—no longer mere spectators, but helping to create the work they must later judge. A challenged warrant may now have corners that extend beyond the page. Standing within those corners could be the writing, the voice, and the thoughts of the magistrate. Appellate courts seeking clarity may find it necessary to speak to the issuing magistrate regarding the magistrate's thought process and reasoning as there could now, using the new Article 18.01(b-1) procedure, be so much more than on the written page. Are magistrates prepared to testify in criminal appeals or hearings related to preserved testimony, conversation, or their scribblings on the face of a warrant?

What if the judge issues a search warrant based on information provided through electronic means and

records it, but the recording is later corrupted when the city's servers go down?

It is possible that the use of the new Subsection (b-1) will facilitate the review and issuance of search warrants efficiently and effectively, but it is a brand new process. Magistrates should proceed with caution in this uncharted territory. Appellate courts have not explored many of these issues yet. Magistrates should anticipate requests from applicants seeking to put this new process to use and criminal defense attorneys eager to scrutinize its use. It should be noted that using Subsection (b-1) is not required under the law. The magistrate can always simply deny the issuance of a search warrant if probable cause does not exist. If applicants at first do not succeed, they can try, try again until the magistrate finds probable cause plainly within the four corners.

1. *Id.*
2. 40 Dix & Schmolesky, *Texas Practice: Criminal Practice &Procedure*, Sec. 9.19 (3d ed. 2011).
3. 391 S.W.3d 94 (Tex. Crim. App 2013).
4. *Id.* at 103.
5. See, *Id.* and 40 Dix & Schmolesky, *Texas Practice: Criminal Practice &Procedure*, Sec. 9.32.75 (3d ed. 2015-2016 Supplement).
6. House Bill 976 (82nd Regular Legislative Session) amended Article 15.03, Code of Criminal Procedure.
7. Article 18.01(b-1)(2), Code of Criminal Procedure.
8. Article 18.01(b-1)(2)(A), Code of Criminal Procedure.
9. Article 18.01(b-1)(2)(B) and (C), Code of Criminal Procedure.
10. Article 18.01(b-1)(2)(D), Code of Criminal Procedure.
11. *Johnson v. United States*, 333 U.S. 10, 13-14 (U.S. 1948).
12. Under Canon 2 of the Texas Code of Judicial Conduct, judges must avoid not only impropriety, but the appearance of impropriety in all of their activities.

Judicial and Courthouse Security Survey Results Overview

The Office of Court Administration (OCA) distributed on January 22, 2016 an electronic survey to all judges in the state for whom OCA has email addresses. The survey asked judges a series of questions regarding their opinions about courthouse and personal security for judges. The distribution included 2,579 judges (out of just over 3,300 total judicial officers), and 1,115 judges responded – representing a 43.2% response rate. The high response rate makes the survey generalizable to the broader population of judges with a confidence level of 99% and a margin of error of +/- 2.91. Responses were received from:

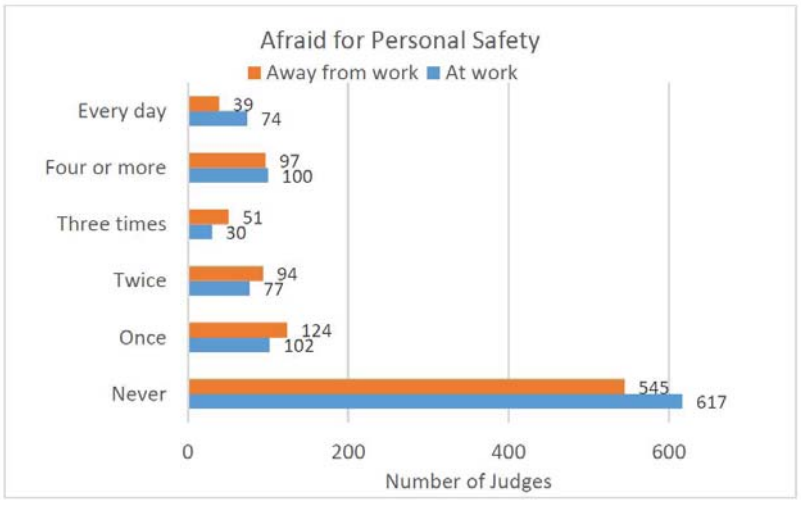
- 44/98 appellate judges (44.9%)
- 229/464 district judges (49.4%)
- 146/241 county court at law judges (60.6%)
- 14/18 statutory probate judges (77.8%)
- 87/254 constitutional county court judges (34.3%)
- 241/807 justices of the peace (29.9%)
- 254/1,272 municipal court judges (20.0%)
- 88/140 associate judges (62.9%)
- 48/300 assigned judges (16.0%)

While a full report of the results is not being made public due to security concerns, an overview of some of the key findings is below.

Judges' Personal Safety Concerns

While the majority of judges report never feeling afraid for their personal safety ***at work*** within the past two years, 10% report feeling afraid once, 10% four or more times, 8% twice, 3% three times, and 7% every day – a total of 38%. Judges' reasons for feeling insecure were most often related in stories detailed in the comments of the survey, while almost 40% were verbal or written threats.

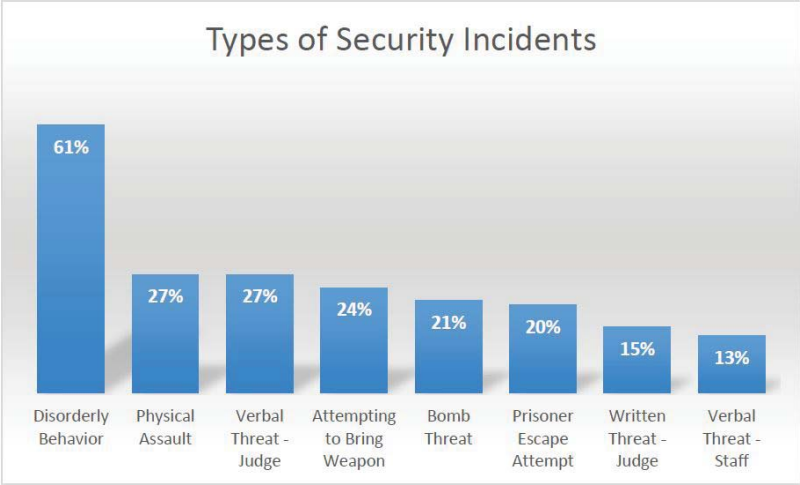
While 57% indicate never having felt afraid for their personal safety ***away from work***, 13% report feeling afraid once, 10% four or more times, 10% twice, 5% three times, and 4% every day – a total of 42%.



Reporting of Security Incidents

The survey confirmed that there is underreporting of security incidents to the state. Despite the statutory requirement for local administrative judges to notify OCA of security incidents, 64% of judges are unaware of the requirement. For those who are aware of the requirement, 72% have never made a report. Those judges familiar with the requirement indicate that local administrative judge (28%) is responsible for reporting the incident. Just over 25% indicate they do not know who is responsible for reporting.

Almost half of the judges indicate that they are unaware of a security incident in their courthouse within the past 10 years. However, 40% indicate an incident within the past two years (18% = past 6 months, 12% = last year, 10% = past two years). The most common occurrence (61%) is disorderly behavior, followed by physical assault (27%), verbal threat against the judge (27%) and attempting to bring a weapon into the courtroom or building (24%).



Courthouse Entrance & Parking

While a majority of the courthouses have a single point of entry for the public, few have a separate entrance for court/county staff or special entrances for judges. Secured parking for judges is infrequent and is a concern for the judges in the state.

Prohibited Weapons

Even though Penal Code 46.03 prohibits certain weapons in the courthouse, there is not uniformity in the prohibition of these weapons in courthouses. Firearms are prohibited in almost three-fourths of the courthouses, followed closely by illegal knives (64%) and brass knuckles (52%).

Courthouse Security Measures

Confirming that security measures in courthouses are based upon local decisions and protocols, almost half of the judges who sit in different courthouses report that the security situation in the courthouses is vastly different, with an additional 20% reporting the security situation is somewhat different.

An additional concern raised is that security screening at public entrances is inconsistent, with almost half of the courthouses containing no screening at public entrances. Movement inside the courthouse is generally unrestricted, with a significant number of courthouse containing no separation in hallways utilized by the public and judges.

Cameras in the courthouse are common, mostly in the entrances/exits to/from the building (54%) and areas around the courtroom (44%), while few have them in the courtroom. One-quarter report not having cameras. Even when a courthouse contains security equipment, there is often not a security command center where monitoring occurs.

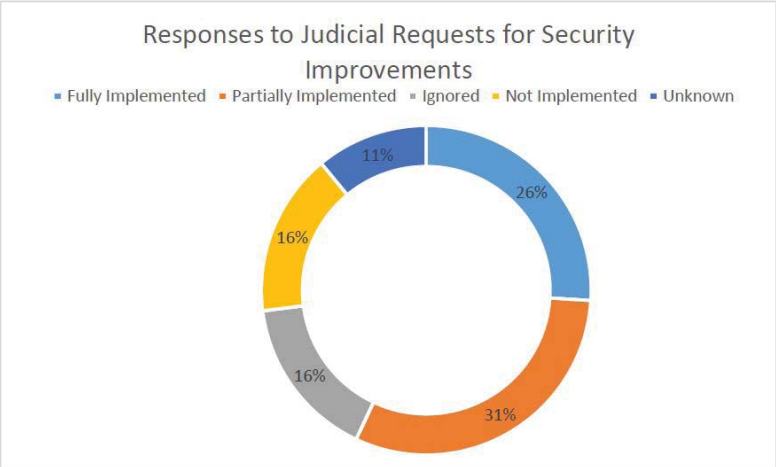
When there is an emergency occurring in the courthouse, most judges are notified person-to-person or by phone.

Court Security Training and Improvements

Only 22% of the judges report having been trained in court security measures.

Judges rated the quality of courthouse security services at their courthouse at 2.88 out of 5.

While 57% of judges have requested increased courthouse security in the past, only 57% report that the request was partially (31%) or fully implemented (26%). Thirty-two percent indicate that it was ignored (16%) or not implemented (16%). The most common reason given for not fully implementing the request was ***a lack of funding for staff (49%), lack of funding for equipment (38%), lack of will to make the change (37%), or lack of a recognized problem (35%).***



Judges ranked the need for improved courthouse security in the following order of importance:

1. Point of entry screening
2. Security and emergency preparedness training
3. Law enforcement officer and/or court security training
4. Physical security systems
5. Judge/judicial officer movement in the courthouse
6. Mail and package delivery screening
7. In-custody defendant movement in the courthouse, including holding cells

Home Security

Almost half of the judges who can have their home addresses unlisted find the process to be too difficult, while very few found the process to be simple.

Technology security training for judges is virtually nonexistent, with 80% reporting no training.

Training and Technical Assistance

Forty-four percent of judges are interested in technical assistance with courthouse or personal security, with another 29% possibly interested. Sixty percent of judges report being interested in attending a summit dedicated to educating judges about the best practices in courthouse and personal security for judges.

Interested in Court Security?

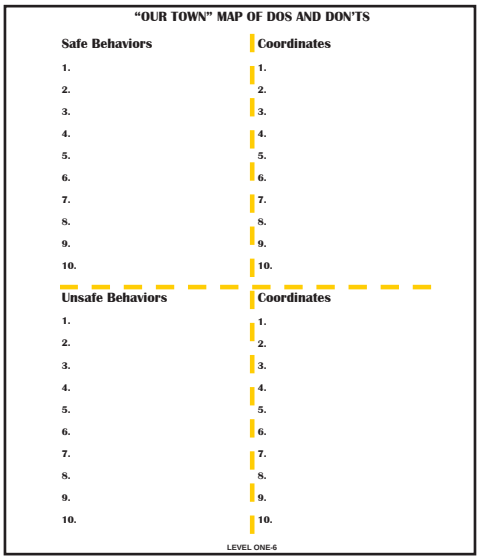
TMCEC is keeping a list of judges that would be interested in attending a summit dedicated to best practices in courthouse and personal security for judges and courts. Please email TMCEC if you would like to be included on the list to receive information: tmcec@tmcec.com.

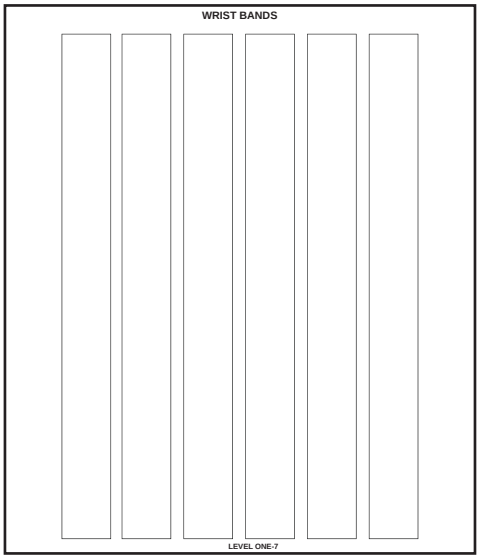
COMMUNITY OUTREACH, A SAMPLE LESSON

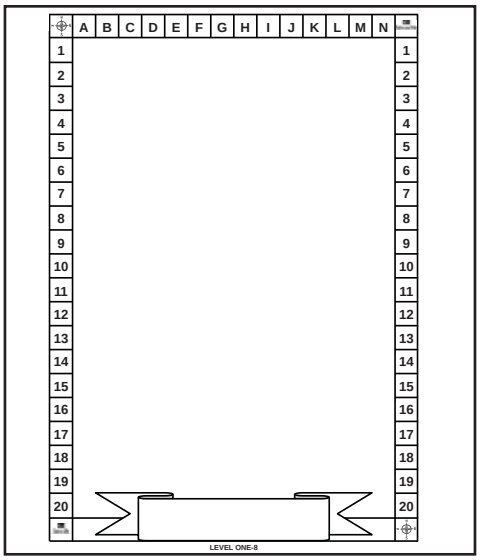
When giving a presentation concerning traffic safety, teaching the idea about what is a safe decision and what is an unsafe decision is paramount, especially for young students. These children are developing the skills and habits that will affect their lives and futures. Instilling the "safe choice" habit while these students are young is a lifesaving lesson! Even when presenting to adults, the concept of their daily decisions affecting their safety is crucial. These presentations help remind older students and parents that safety isn't just for kids, but is important for everyone to remember EVERY DAY. For these audiences, it sometimes isn't until that heart pounding moment when you realize you just saved your own life or the lives of your children or passengers, that the good safety habits instilled as children come to fruition.

Court personnel almost never hear about the lives they save because of a presentation they have given about traffic safety, but if even one life is saved because of something that judge or clerk taught that day, then the time and effort used to give this presentation was time well spent.

In this effort to save lives, Driving on the Right Side of the Road (DRSR) and TMCEC have developed curriculum to be used by classroom teachers, court personnel, safety professionals, and employers to help teach traffic safety. The sample lesson in this issue of *The Recorder* is about teaching the basics of what a safe behavior is and what an unsafe behavior is. It is called the *"Our Town" Map of Dos and Don'ts*. For teachers, these lessons are TEKS correlated, using socials studies, health and physical education. For court personnel, the lessons can be used in the order of the teaching strategy, or can be shortened for quick presentations. The handouts to the right may be downloaded from our website at www.tmcec.com/drsr/educators/lessons-and-curriculum/publications/. If you have any questions about how to present this lesson, or other lessons offered by DRSR, please do not hesitate to contact us. The maps for this lesson are available to you at no cost, thanks to our generous TxDOT grant. Please contact Liz De La Garza at 512.320.8274 or at elizabeth@tmcec.com for more information or materials. We would love to help you reach out to your community!







"OUR TOWN" MAP OF DOS AND DON'TS

Learning Objectives: Students will

1. Develop map reading skills by using the TxDOT "Our Town" map.
2. Identify safe and unsafe practices.
3. Recognize city buildings and services.
4. Create a motto promoting traffic safety.

TEKS: SS 4.6A, 4.22C; Health 4.4F, PE 4.5A-D, 4.6A, 4.6B

Materials Needed: TxDOT "Our Town" map and strips of construction paper for wrist bands

Vocabulary: Practices, map coordinates

Teaching Strategy:

1. Distribute copies of the TxDOT "Our Town" map to each student.

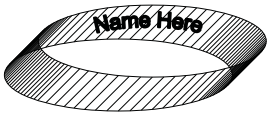
2. Ask students to use the map coordinates to locate examples of both safe and unsafe behavior and actions pictured on the map. Make a class list of these examples, discussing each issue as it is mentioned. In the case of the unsafe behavior practices, students should suggest ways to correct the behavior from unsafe to safe.

3. Ask students to identify the city government buildings on the "Our Town" map.

4. Each student should choose one issue that was identified on the map. Instruct students to create a short traffic safety motto which promotes traffic safety on that specific mode of transportation.

5. Give children a strip of construction paper on which to write their motto, such as "Race for the Cure," "Livestrong," "Turn Around, Don't Drown."

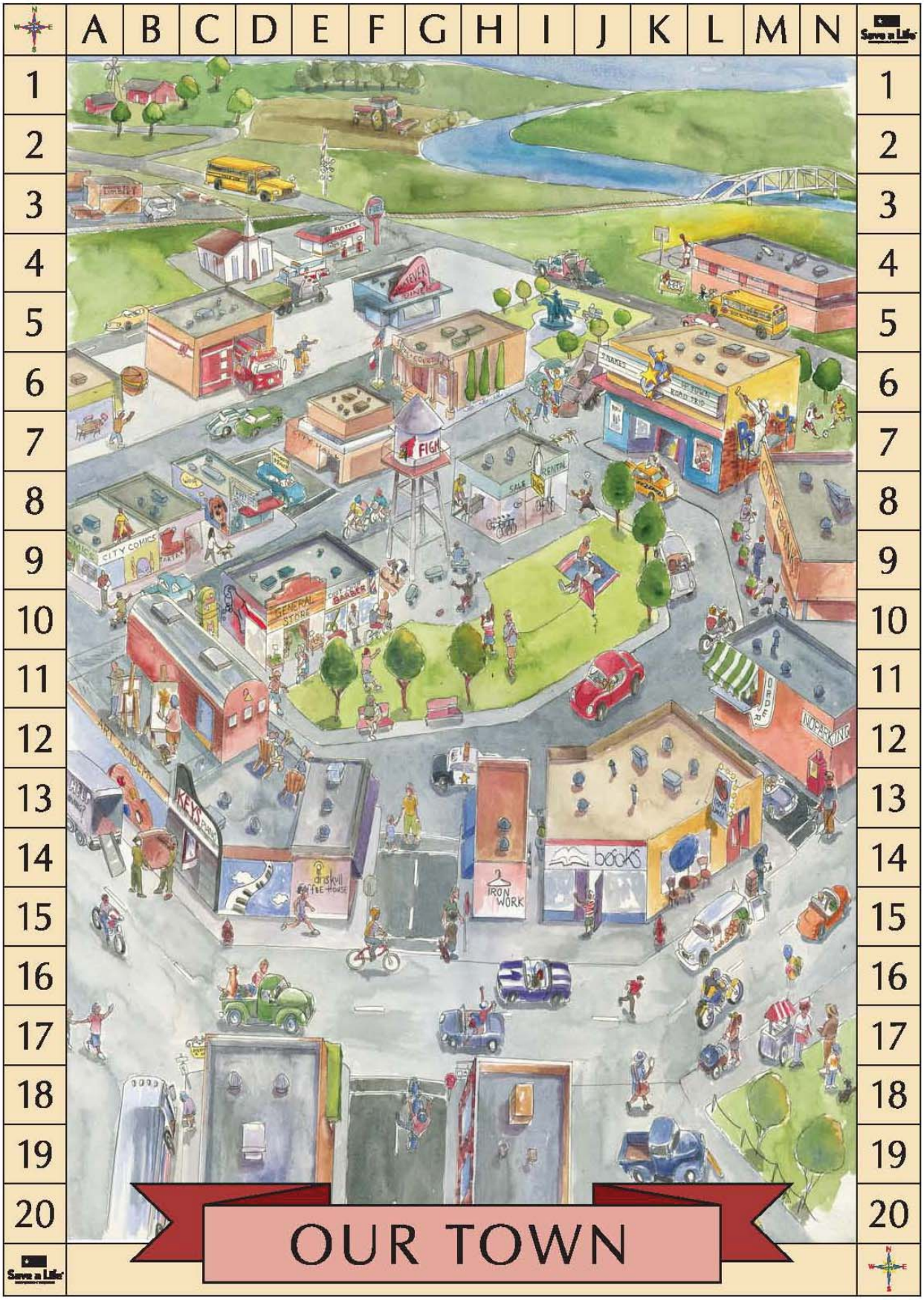
6. Allow students to share their mottos with the class.



7. Using the blank grid provided, have students create a "map" of an imaginary town illustrating safe and unsafe transportation behavior.

Extension for Gifted/Talented:

Students will create an advertising campaign for the distribution of their wristbands, including statistics showing the need for safer conditions.


A B C D E F G H I J K L M N
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20
FIGHT
CITY COMICS
GENERAL STORE
BARBER
ART ACADEMY
KEYS
books
IRON WORK
NO PARKING
OUR TOWN

2015 - 2016 TMCEC Academic Schedule At-A-Glance

Seminar	Date(s)	City	Hotel Information
Mental Health Summit	May 9-11, 2016 (M-T-W)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX 78744
Bailiffs and Warrant Officers Seminar	May 16-18, 2016 (M-T-W)	Dallas	Omni Dallas at Park West 1590 Lyndon B Johnson Fwy, Dallas, TX 75234
New Judges & Clerks Orientation	June 1, 2016 (W)	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Prosecutors & Court Administrators Seminar	June 5-7, 2016 (Su-M-T)	Corpus Christi	Omni Corpus Christi 900 N. Shoreline, Corpus Christi, TX 78401
Regional Judges & Clerks Seminar	June 20-22, 2016 (M-T-W)	El Paso	Wyndham El Paso Airport Hotel 2027 Airway Boulevard, El Paso, TX 79925
Juvenile Case Managers Seminar	June 27-29, 2016 (M-T-W)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX 78744
New Judges & Clerks Seminar	July 11-15, 2016 (M-T-W-Th-F)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX 78744
Impaired Driving Symposium	August 4-5, 2016 (Th-F)	Austin	Austin Sheraton 701 E. 11 St. Austin, Texas 78701

Impaired Driving Symposium:

TMCEC, in partnership with the Texas Association of Counties, Texas Center for the Judiciary, and Texas Justice Court Training Center, will offer an Impaired Driving Symposium for judges with funding from the Texas Court of Criminal Appeals and the Texas Department of Transportation.

This symposium is only for judges and will count for eight hours of judicial education credit as well as CLE credit. This joint program brings together judges of all levels to discuss impaired driving issues. Most importantly, this conference provides an opportunity to discuss these issues with fellow judges in order to better understand roles and responsibilities when dealing with an impaired driving case.

The symposium will be held at the Sheraton Austin Hotel at the Capitol on August 4-5, 2016. The deadline to register is July 1, 2016. Email tmcec@tmcec.com for a registration form. A limited amount of travel funds are available to reimburse participants.

Bailiffs and Warrant Officers Interested in Becoming Certified Court Security Specialists

For the first time ever (and likely the last time so don't miss this!), TMCEC is offering Courses 21006 and 21007 for those officers interested in completing their Court Security Specialist Certification. This opportunity will be offered twice in 2016. The first opportunity to complete this training will be held on May 19-20, 2016, the two days following the Annual Bailiffs and Warrant Officers Conference on May 16-18, 2016. There will be a separate registration form and fee ($100). The hotel is the Omni Park West in Dallas, however, the training for 21006 and 21007 will not be held at the hotel, but is scheduled in multiple sites: Denton, Dallas, and Lewisville. The second opportunity for this training is scheduled on July 14-15, 2016 in San Marcos.

The registration fee will include a hotel stay on the nights of May 18 and May 19 or July 13 and July 14. Meals are not provided as part of this training. Additional equipment and ammunition are required. Interested officers should contact Regan Metteauer at regan@tmcec.com for additional information. Space is limited, so preference will be given to those who have already completed court security courses and those who register for the 2016 Bailiffs and Warrant Officers Conference preceding the training.

Officers who took the court security courses TMCEC offered last year (21001, 21002, 21005), complete the court security courses offered at the 2016 annual conference (21003 and 21004), 21006, and 21007 will have completed the necessary courses for certification (ordering and receiving a certificate from TCOLE is also required for certification). As a result of offering these courses, TMCEC anticipates up to 120 officers becoming eligible for certification this year. Please don't miss this opportunity!

Shared Solutions: Fines, Costs & Fees

TMCEC has setup a new webpage on Fines, Costs & Fees. On this webpage are resources to help courts prepare local forms and handouts that will help defendants understand their rights and responsibilities, as well as the court's procedures. This is a work in progress. We hope that courts will submit copies of their materials on these issues by emailing them to tmcec@tmcec.com. We will then post them on the webpage for other courts to review and adapt for local use. Note: This is in addition to the TMCEC webpage called "Ferguson" which tracks the issues related to fines, fees, and jail practices involving other courts, media coverage, and provides links to webinars and articles of interest.

Check Your Practice:

Do your forms and webpages offer information on the options for persons who are indigent? Below is some exemplary language from a mid-sized court in Texas. This is included in the Rules of Court section on the court's website.

> Indigence. If a defendant is indigent or otherwise too poor to pay either the appeal bond or the transcript, she\he may file an Affidavit of Indigency with the court and a Motion to Waive Costs within the ten (10) day period to file an appeal bond. A hearing on the motion to waive costs shall then be scheduled by the court.
>
> Inability to Pay Fine. If a defendant does not appeal the court's decision, but is unable to pay the fine when due, the defendant must appear at the clerk's office and request their case be set on a show cause docket. If the defendant qualifies, the court may allow the defendant to pay the fine in installments or discharge the fine by performing community service. If community service creates an undue hardship, the judge may enter a finding of indigence and waive fines and fees.

Resources Available:

The TMCEC 2016 *Forms Book* has a number of forms to help judges and court personnel work with indigent persons. Below are the form names and pages in the *Forms Book*.

Chapter 13 INDIGENCE, COMMUNITY SERVICE, JAIL CREDIT & PAYMENT PLANS

- Admonishment as to Financial Changes (p. 170)
- Application for Time Payment, Extension, or Community Service (p. 171)
- Installment Agreement Order (p. 175)
- Schedule of Payments for Installment Agreement (p. 176)
- Community Service Order (p. 177)

Steps Leading up to Commitment on a Capias Pro Fine

Article 45.046 of the Code of Criminal Procedure

*Prior to ordering a defendant confined to jail (commitment order), Article 45.046 of the Code of Criminal Procedure requires a hearing and a written determination that the defendant either (1) is not indigent and has failed to make a good faith effort to discharge the fine and costs; or (2) the defendant is indigent and (a) has failed to make a good faith effort to discharge the fines and costs under Article 45.049 (community service) and (b) could have discharged the fines and costs under Article 45.049 without experiencing any undue hardship.

- Community Service Time Sheet (p. 178)
- Waiver of Payment of Fine and Costs for Indigent Defendants and Children (p. 179)
- Order Waiving Surcharges for Indigent Defendant (p. 180)
- Incarcerated Jail Credit Response Letter (p. 181)
- Defendant's Motion to Lay Out Fine in Jail (p. 182)
- Defendant's Waiver of Option to Discharge Fine or Costs by Performing Community Service (p. 183)

Chapter 14 ENFORCEMENT

- Clerk's Affidavit for Capias Pro Fine (p. 184)
- Capias Pro Fine (p. 185)
- Order of Commitment (Capias Pro Fine) (p. 186)

The TMCEC *Bench Book* also contains a relevant checklist:

- Checklist 8-3 Indigence (p. 199)

The following also contain detailed descriptions of dealing with indigence issues:

- Clerks Certification Study Guides
  - ✓ See Level I, Post-Trial Procedures, A. Default in Payments (page 11) [www.tmcec.com/files/5114/5442/9455/Level_I_Ch_6.pdf]
- The Judges Book, Chapter 5 JUDGMENTS, INDIGENCE, AND ENFORCEMENT
- Course Materials [http://www.tmcec.com/course-m/]
  - ✓ FY 16
    - Indigents & Commitments (Judges Regionals)
    - What Every Judge Needs to Know About Ferguson (Judges Regionals)
    - Lessons Learned from Ferguson, Missouri (Clerks Regionals)
    - Debtor's Prison: Fact or Fiction (Prosecutors)
    - What Every Prosecutor Needs to Know About Ferguson (Prosecutor)
    - Judgment, Indigence & Enforcement (New Judges)
    - Best Practices for Self Represented Defendants (New Judges)
    - Writs: Warrants & Capias Pro Fines (New Clerks)
    - Introduction to Collections (New Clerks)
  - ✓ FY 15
    - Indigency (Judges & Clerks Regionals)

In addition, the following TMCEC webinars address related issues and are recommended. These may be accessed on the TMCEC Online Learning Center (OLC) (http://online.tmcec.com/):

- *Indigency (5/28/15)*
- *Have You Heard the Buzz: Commitment to the Commitment Order (11/19/2015)*
- *Lessons from Ferguson: What Every Municipal Court Needs to Know (4/7/2016)*

The Recorder has also covered related issues in the following articles:

- Court-Ordered Waiver of Surcharges for Indigent Defendants (March 2013)
- Should Cities Embrace or Scoff at the Texas Scofflaw Program (March 2013)
- OmniBase Services of Texas: No Show. No Pay. No Problem? (May 2013)
- Amnesty & Warrant Round Up Programs (May 2011)

The National Center for State Courts also offers reading materials on issues related to indigence on its website: http://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Resource-Guide.aspx.

The Texas Judicial Council and Office of Court Administration (OCA) is in the process of reviewing the rules related to its Collection Improvement Program (CIP). http://www.sos.texas.gov/texreg/pdf/backview/0325/0325prop.pdf. The proposed amendments provide local collections programs greater flexibility in establishing payment plans and codifies the CIP's policy that the CIP's components do not apply to defendants who have been determined to be indigent. If you have other suggestions, please email them to tmcec@tmcec.com and we will forward them to OCA.

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY16 REGISTRATION FORM:
Regional Judges & Clerks Seminar, Court Administrators, Bailiffs & Warrant Officers, and Level III Assessment Clinic

Conference Date: _____ Conference Site: _____

Check one:

☐ Non-Attorney Judge ($50)
☐ Attorney Judge not-seeking CLE credit ($50)
☐ Attorney Judge seeking CLE credit ($150)
☐ Regional Clerks ($50)

☐ Traffic Safety Conference - Judges & Clerks ($50)
☐ Level III Assessment Clinic ($100)
☐ Court Administrators Seminar ($100)
☐ Bailiff/Warrant Officer ($100)

By choosing TMCEC as your MCLE provider, attorney-judges help TMCA pay for expenses not covered by the Court of Criminal Appeals grant. Your voluntary support is appreciated. The CLE fee will be deposited into the grantee's private fund account to cover expenses unallowable under grant guidelines, such as staff compensation, membership services, and building fund.

Name *(please print legibly)*: Last Name: _____ First Name: _____ MI: _____

Names you prefer to be called (if different): _____Female/Male: _____

Position held: _____Date appointed/hired/elected: _____Are you also a mayor?:_____

Emergency contact (Please include name and contact number):_____

HOUSING INFORMATION - Note: $50 a night single room fee

TMCEC will make all hotel reservations from the information you provide on this form. **TMCEC will pay for a double occupancy room at all regional judges and clerks seminars.** To share with a specific seminar participant, you must indicate that person's name on this form.

☐ I request a private room ($50 per night : ____ # of nights x $50 = $_____). TMCEC can only guarantee a private room, type of room (queen, king, or 2 double beds*) is dependent on hotels availability. Special Request: _____

☐ I request a room shared with a seminar participant. Room will have 2 double beds. TMCEC will assign roommate **or** you may request roommate by entering seminar participant's name here:_____

☐ I do not need a room at the seminar.

Hotel Arrival Date (this **must** be filled out in order to reserve a room): _____

*If you bring a companion with you to stay in the hotel, the hotel reserves the right to charge an additional fee.

Municipal Court of: _____ Email Address: _____

Court Mailing Address: _____ City: _____ Zip:_____

Office Telephone #: _____ Court #: _____ Fax: _____

Primary City Served: _____ Other Cities Served:_____

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

Judge's Signature: _____ Date: _____

DOB: _____ TCOLE PID # _____

I have read and accepted the cancelation policy, which is outlined in full on page 10-11 of the Academic Catalog and under the Registration section of the website, www.tmcec.com. **Full payment is due with the registration form. Registration shall be confirmed only upon receipt of the registration form (with all applicable information completed) and full payment of fees.**

_____ _____

Participant Signature (may only be signed by participant) *Date*

PAYMENT INFORMATION:

Registration/CLE Fee: $_____ + Housing Fee: $_____ = Amount Enclosed: $_____

☐ Check Enclosed *(Make checks payable to TMCEC.)*
☐ Credit Card

Credit Card Payment:

Amount to Charge: *Credit Card Number* *Expiration Date*

Credit card type: $_____ _____ _____

☐ *MasterCard*
☐ *Visa*

Name as it appears on card (print clearly): _____

Authorized signature: _____

Please return completed form with payment to TMCEC at 2210 Hancock Drive, Austin, TX 78756, or fax to 512.435.6118.

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TMCEC MISSION STATEMENT

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

Reminders:

Shown below are the webinars planned by TMCEC in the upcoming months. Go to http://online.tmcec.com

May 12: TMCEC Radio: Morning Coffee
May 26: Appeals from Municipal Court
June 16: Court Decorum
June 30: Rule 12 Public Access to Judicial Records

There are still spaces in the following programs:

- Bailiff Warrant Officer Seminar, May 16-18, 2016 (Dallas)
- Court Security Specialist Certification Program (21006 and 21007), May 19-20, 2016 (DFW area)
- Court Security Specialist Certification Program (21006 and 21007), July 14-15, 2016 (San Marcos)
- Prosecutors Annual Conference, June 5-7, 2016 (Corpus)

Please remind your bailiffs, warrant officers, marshals, and prosecutors to register ASAP.

Registering online saves time and money for all of us: https://register.tmcec.com/web/online.

Judges are reminded to complete their mandatory judicial education requirements of 16 hours by midnight to August 31, 2016. To view your transcript, go to https://register.tmcec.com/web/online. Please remember to submit to TMCEC the affirmation of what courses you completed by August 31, 2016.