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REMOVAL OF JUDGES FROM TEXAS CASES: DISTINGUISHING DISQUALIFICATION AND RECUSAL

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One of the guiding principles of the American system of jurisprudence is the idea of an independent and neutral judiciary. Americans expect to have their day in court before a judge who will treat their case in an unbiased manner and with objectivity under the law. Similarly, Texas courts have echoed the sentiment that a fair judge is necessary to a fair trial.

Public policy demands that the judge who sits in a case act with absolute impartiality. Beyond the demand that a judge be impartial, however, is the requirement that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or integrity of the court. The judiciary must strive not only to give all parties a fair trial but also to maintain a high level of public trust and confidence. The legitimacy of the judicial process is based on the public's respect and on its confidence that the system settles controversies impartially and fairly. Judicial decisions rendered under circumstances that suggest bias, prejudice, or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence.[1]

The problem of realizing this ideal, of course, is that judges do not live in isolation. Judges have friends, families, and professional and business interests. Inevitably, this means that every judge faces the realistic possibility of having a case filed in his or her court that affects such personal interests. This is because either the judge is directly or indirectly related to a person involved in the case or the judge has a bias affecting his or her role as decision-maker.

Realizing this ideal is even more complicated in Texas municipal courts. Municipal courts come into contact with more people than all other Texas courts combined.[2] Most municipal judges preside in rural communities where defendants are more likely to be acquaintances than if they lived in a bigger city or town. Furthermore, there are no published appellate opinions explaining the interrelationship of specific municipal court statutes that may be applicable when recusal or disqualification is raised in municipal court.

In order to ensure the aims of justice and to protect the integrity of the judicial system, all judges must understand the law governing (1) disqualification and (2) recusal.[3]

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AROUND THE STATE

2010 Great Texas Warrant Round Up

The 2010 Great Texas Warrant Round Up has concluded. The period covered from February 19th through March 15th. This year marked the 4th annual statewide event with 266 entities participating. This is believed to be the largest number of participating agencies and the largest effort nationwide. Figures from the 192 reporting agencies showed continuing success with 191,512 warrants cleared and over $23,649,806.72 gross collected. Special thanks to Rebecca Stark and Don McKinley of the Austin Municipal Court for compiling these figures. A big thank you to all the participating entities. Anyone interested in participating in the 2011 Great Texas Warrant Round Up should contact one of the following people: Rebecca Stark at rebecca.stark@ci.austin.tx.us or Don McKinley at don.mckinley@ci.austin.tx.us.

Register Online!

TMCEC now offers seminar registration online! In fact, for FY 11 participants have the opportunity to register online three weeks prior to when the academic schedule will be available in the paper version and before any "paper" registration forms will be entered into the system. Why? We want to encourage you to register online, as it is more efficient. See the article on page 21 of this publication for details.

Call TMCEC if you cannot remember your user name or password. It was mailed to you earlier this year. Judges and clerks received a second notification in July 2010 in a mailing with the order form for *The Municipal Judges Book*.

TMCEC Disaster and Emergency Preparedness Conference

August 13, 2010
See page 15 of *The Recorder*.

Class C Misdemeanors and the Statute of Limitations: Case Closed?

by Cathy Riedel
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Last year, the Legislature drove the nail into the coffin of ambiguity: Yes, there is a statute of limitations for Class C misdemeanors. Article 12.02 of the Code of Criminal Procedure was amended, effective September 1, 2009, to include Subsection (b), which reads, "A complaint or information for any Class C misdemeanor may be presented within two years from the date of the commission of the offense, and not afterward." Prior to this amendment, the statute simply stated, "An indictment or information for any misdemeanor may be presented within two years from the date of the commission of the offense, and not afterward." The omission in Article 12.02 of the word "complaint," the formal charging instrument in municipal and justice courts, gave rise to the legal argument that there was no statute of limitations in Class C misdemeanor cases. Ascribing to this legal theory, if there was no charging instrument, the liability for committing robbery would expire five years after the offense[1] and two years after the offense of operating an amusement ride while intoxicated,[2] yet the offense of failure to dim headlights[3] would remain in the category of offenses along with capital murder that know no time limitation.

Support for the pre–81st Legislative position that no statute of limitations existed in Class C cases was bolstered by cases such as *Vasquez v. State*, 557 S.W.2d 779 (Tex. Crim. App. 1977). In *Vasquez*, the Court of Criminal Appeals held that because there was no time limitation to prosecute offenses in the common law, in absence of a statute, there is no period of limitation barring prosecution because of a lapse of time. Although the argument that no statute of limitations in Class C cases existed because of the omission of the word "complaint" in the pertinent statute, it was the prevailing view that there had been and is a two-year statute of limitations for the prosecution of Class C misdemeanors.[4] As of September 1, 2009, however, it is clear: there is a two-year limitation in Class C misdemeanors and the complaint–the sworn allegation charging the accused with the commission of an offense[5]–is required to be filed when a defendant pleads "not guilty" or fails to appear in court based on the written notice.[6]

Problem Solved?

Questions concerning the statute of limitations and Class C cases frequently arise in variants of two scenarios. One, a newly–appointed judge finds drawers full of sticky notes attached to old unprocessed citations. Can the judge proceed on these 10-year-old citations? Does the answer change if a warrant has been issued on the citation?

A second common scenario comes up around Warrant Round-Up time. News releases announce that the city is out millions of dollars in fines and costs on outstanding cases that go back as far as the 1980's. Can a complaint be issued on a 20-year-old citation? Can the case be prosecuted if the charging instrument was not filed within the two-year statute of limitations?

Statute of Limitations: Purpose

In order to analyze the impact of the time limitation on the court's authority to hear and process cases, it is necessary to understand the origins and intent of the limitation statutes. The purpose of these statutes is to require the State to exercise due diligence in obtaining and presenting a formal accusation of an offense against a person. *Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004). The U.S. Supreme Court explained the purpose for a statute of limitations in *Toussie v. United States*, 397 U.S. 112 (1970):

> The enactment of statutes of limitations protect the accused from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Statute of Limitations: An Act of Grace

Ultimately, the questions concerning a prosecutor's authority to prosecute and a judge's authority to hear a case for which the statute of limitations has expired depends on whether or not the statute of limitations is jurisdictional.

Statutes of limitation were once considered to be jurisdictional in nature.[7] If the charging instrument showed on its face that the offense was barred by limitations, the trial court did not have jurisdiction. *Ex parte Dickerson*, 549 S.W.2d 202 (Tex. Crim. App. 1977). A prosecution commenced after the

statute of limitations had run, unless facts under the tolling statute were pled and proved, was barred even if the statute of limitations was not pled since it was the duty of the state to show that the offense occurred within the statutory period. *Lemell v. State*, 915 S.W.2d 486 (Tex. Crim. App. 1995); *Cooper v. State of Texas*, 527 S.W.2d 563 (Tex. Crim. App. 1975). Even a defendant's failure to object to a limitations defect on the face of the charging instrument did not relieve the State of its burden of proving at trial that the alleged offense occurred within the limitations period. *State v. Turner*, 898 S.W.2d 303 (Tex. Crim. App. 1995).

However, in 1998, the rules changed. The Texas Court of Criminal Appeals radically altered its view of statutes of limitation in *Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998). In the 1998 version of *Proctor*,[8] the Eleventh Court of Appeals had reversed Proctor's aggravated robbery conviction because the State had not proven beyond a reasonable doubt that the prosecution was not barred by the statute of limitations. The Court of Criminal Appeals granted the State's petition for discretionary review to reconsider its prior holdings that the State, as part of its burden of proof in a criminal prosecution, must prove that the prosecution is not barred by limitations, even if the defendant does not raise the issue.[9]

Reversing a century of precedent, the Court of Criminal Appeals sided with the State's argument that limitations is a defensive issue. The Court found

> [t]he statute of limitations contained in Chapter 12 of the Texas Code of Criminal Procedure insulates individuals from criminal prosecution after the passage of an express period of time following the commission of an offense. Thus, the statute of limitations is an act of grace for the benefit of potential defendants, a voluntary surrendering by the people of their right to prosecute. This act of grace serves several objectives: (1) it protects defendants from having to defend themselves against charges when the basic facts may—or may not—have become obscured by time; (2) it prevents prosecution for those who have been law-abiding for some years; and (3) it lessens the possibility of blackmail. In short, the statute of limitations is a procedural rule, in the nature of a defense, that was enacted basically for the benefit of defendants and not the state.

Since *Proctor*, case law has continued to hold that the burden of proof has shifted and that the issue of time limitations is a defensive issue which must be raised by the defendant in a timely manner before the burden shifts to the State. See *Tita v. State*, 267 S.W.3d 33 (Tex. Crim. App. 2008); *Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004).

Impact on Municipal Courts and Justice Courts

Thankfully, the Legislature has finally answered the long-standing question as to whether or not there is a statute of limitations on Class C misdemeanors. However, in light of the change in direction in the law since *Proctor*, new questions arise. While the *Proctor* case involved a felony indictment, the Court, in explaining the "kinds of rules or 'rights'"[10] applying to criminal cases, couched its holding in terms not of indictments or informations but wholly in terms of the proof required by the State in every criminal prosecution. Accordingly, the debate over the law pertaining to complaints and the statute of limitations in Class C cases is poised to continue.

1. Article 12.01(4), Code of Criminal Procedure.
2. Article 12.02, Code of Criminal Procedure.
3. Section 547.333, Transportation Code.
4. For example, see Resolution of Texas Judicial Council recommending that an explicit two-year statute of limitations be enacted by the Legislature, stating, "Currently, the prevailing view is that despite the statute's failure to mention complaints, Class C misdemeanor cases are subject to a two-year statute of limitations."
5. Article 45.018, Code of Criminal Procedure.
6. Article 27.14, Code of Criminal Procedure.
7. *Texas Criminal Practice Guide*, Vol. 5, Section 120.06.
8. Proctor's appellate history is lengthy. His first conviction was reversed by the Court of Criminal Appeals in *State v. Proctor,* 841 S.W.2d 1 (Tex. Crim. App. 1992).
9. Here, Proctor's first conviction was reversed on appeal and he was re-indicted one year after the statutory five-year limitation for robbery. The issue of the statute of limitations was first raised by the defendant in a motion for instructed verdict at the punishment stage of the trial.
10. *Proctor v. State*, *Supra* at 843.

Note: Change in FY 11

Beginning September 1, 2010, the TMCEC New Clerks program will be reduced from a 32-hour program to a 24-hour program. Rather than span five days and four nights, it will be four days and three nights in the hotel at grant expense. The program will begin on Monday at 1:00 p.m. and conclude on Thursday at 12:00 noon. Consult the TMCEC website for the dates of the three New Clerks programs.

www.tmcec.com

Controlling the Taint of Criminality: Children and Orders of Nondisclosure

by Mark Goodner
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Criminal records generally follow people around. In the past, children convicted in municipal court had those convictions follow them around as well. An otherwise good kid who made a poor decision would have to carry around the stigma of that criminal conviction. This was different than the way juvenile records were handled in juvenile courts. In juvenile courts, records were not available to the public the way that criminal records were. This presented a curious situation. A father who wanted to research his teenage daughter's new boyfriend would be able to find out information about the boy's prior Class C convictions in municipal court. He could find out about a speeding conviction or the theft of a candy bar; however, he would be unable to find out if the boy had been adjudicated in juvenile court for delinquent conduct as a result of actions that would be considered a felony in criminal courts. This disparity was recognized, and in the summer of 2009, in an attempt to more fairly mirror juvenile protections under the Family Code, the 81st Regular Legislature passed S.B. 1056 dealing with nondisclosure orders.

S.B. 1056 added Subsection 411.081(f-1) to the Government Code, which mandates that criminal courts immediately issue a nondisclosure order on the conviction of a child for a misdemeanor offense punishable by fine only. This new law became effective on June 19, 2009[1] and created a new procedure for municipal and justice courts. It should be noted that the unauthorized disclosure of information subject to one of these orders is a criminal offense punishable as a Class B misdemeanor or, in certain instances, a felony of the 2nd degree.[2]

A sample order of nondisclosure can be found in Chapter XI of the 2009 TMCEC *Forms Book* which is available for access at www.tmcec.com.

I. Purpose

Some may wonder why special laws are necessary for juvenile records in municipal courts. After all, Texas has juvenile courts to deal with these types of issues. This is true, but it is interesting to see that in 2009 there were 304,023 juvenile cases filed in municipal courts in Texas. Another 100,000 juvenile cases were filed in justice courts. During the same period of time, there were between 40,000 and 50,000 juvenile cases filed in juvenile courts. So, although juvenile courts are specifically designed to handle juvenile offenders, municipal and justice courts see eight to 10 times the number of juvenile defendants in juvenile courts. Municipal courts should be ready for these juveniles.

A one-size-fits-all approach to handling all of our criminal defendants would have municipal courts treat all defendants in the same manner, but the Legislature has made it clear that courts have additional, different goals for juvenile defendants. In many ways, the Juvenile Justice Code[3] is a mere shadow of what it once was. Many of the statutes relating to juveniles that previously resided in the Family Code have been moved to the Code of Criminal Procedure,[4] but municipal courts still must look to the Family Code from time to time for guidance. Section 51.01 of the Family Code lays out the purposes of the Juvenile Justice Code. Some of the purposes fall in line with what most would think would be the purpose of criminal courts in Texas. For instance, consider these three purposes:

- To provide for the protection of the public and public safety;[5]
- To promote the concept of punishment for criminal acts;[6] and
- To protect the welfare of the community and to control the commission of unlawful acts... .[7]

In general, all three of these sound like goals of criminal courts. In fact, the Code of Criminal Procedure states that it is intended to embrace rules applicable to the prevention and prosecution of offenses against the laws of Texas.[8] However, the Family Code lists some other purposes that reveal other goals that courts should have when dealing with children. Consider the following purposes:

- To provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;[9]
- To provide for the care, the protection, and the wholesome moral, mental, and physical development of children…;[10] and
- To remove, where appropriate, the taint of criminality from children committing certain unlawful acts.[11]

These three purposes show concern for more than just punishment and protection. They reflect a hope that when juveniles are dealt with in the courts that they will become more than just a punished criminal. The first two purposes may not be surprising to those courts that have handled alcohol status offenses. The defendants in those cases are not merely punished with a fine, they are required to complete an alcohol awareness course and to complete alcohol-related community service. These required penalties aim to treat, train, and develop our juveniles. Perhaps the most interesting purpose given (at least as it relates to juvenile records and limits on disclosure) is the final one. Although courts want to promote punishment, courts also have the goal of removing the taint of criminality from children. The State does not want the conviction of a child to be worn as a scarlet letter forever labeling him or her as a criminal. Children already have one method available to help remove the criminal label through expunction. This new nondisclosure law adds another way to deal with the issue. Nondisclosure will not entirely remove that taint of criminality, as an expunction might, but it certainly should control the reach of it.

II. The Law and Procedure

The new nondisclosure law in Section 411.081(f-1) of the Government Code states:

> On conviction of a child for a misdemeanor offense punishable by fine only that does not constitute conduct indicating a need for supervision under Section 51.03, Family Code, the convicting court shall immediately issue an order prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense.

This requirement creates a new procedure that municipal courts must follow. Some aspects of this law merit highlighting to gain a clearer understanding.

A. Conviction

Nondisclosure orders are only to be issued on conviction. This means that the court should not issue a nondisclosure order when a child has been placed on or has successfully completed a form of probation such as deferred disposition, teen court, or a driving safety course. All of these options, if successfully completed, do not result in a conviction, and therefore do not trigger the nondisclosure protection. Keep in mind, however, that placement on deferred disposition does not mean that an order is never to be issued. If a child defendant is placed on deferred disposition, defaults, and is later convicted, that conviction would require a nondisclosure order.

While people desiring an expunction of criminal offenses committed as children must petition for expunction, nondisclosure works differently. A convicted child is automatically entitled to nondisclosure order immediately upon conviction as of June 19, 2009.[12]

B. Child

Nondisclosure orders under this new law are only required on the conviction of a "child."[13] This means that it applies to defendants that are 10 years of age or older and under 17 years of age.[14] This is important to keep in mind because while the term "juvenile" is often used, it is a generic term that encompasses both children and minors. Many of the status offenders that municipal courts see are adults who happen to be minors. For example, nondisclosure orders are not required for conviction of alcohol status offenses committed by 17–20-year-old minors because they are not *children* under the Family Code.

C. Conduct Indicating a Need for Supervision (CINS)

Nondisclosure applies only in fine-only misdemeanor cases when conduct is not Conduct Indicating a Need for Supervision (CINS).[15] Examples of offenses that might be CINS are truancy, running away, inhalation of toxic fumes or vapors, school violations resulting in expulsion, violating a court order for an at-risk child, or conduct (other than traffic offenses) that violates penal laws of the state or penal ordinances. Many of these offenses may sound like ones that would appear in municipal court; however, the conduct described above does not constitute CINS unless the child has been referred to the juvenile court under Section 51.08(b).[16] So, if the child is convicted in municipal court, then they have not been referred to juvenile court, and the offense generally cannot be considered a CINS offense.[17]

D. Issuance of Order

Upon conviction of the child, the court must immediately issue the nondisclosure order.[18] It is the responsibility of the court to specify in the order which agencies might have information regarding the offense and conviction and should be notified of the order.[19] Then, within 15 business days, the clerk of the court shall send all relevant criminal history record information contained in the order or a copy of the order to DPS.[20] DPS has asked that this be transmitted by email or fax, but it may also be transmitted by certified mail.[21] Once the order has been issued and sent to DPS, the court need not send it anywhere else. Dissemination is not the court's responsibility. It is the duty of DPS to transmit the protected information to any other affected agencies as specified in the order. DPS must disseminate nondisclosure orders to all entities that might have information related

to the case within 30 days of the date they receive the order. DPS must also send a copy of the order back to the originating court.

E. Access

Unlike expunction, nondisclosure does not require the clerk to track down and destroy or obliterate every entry regarding a case. The issuance of a nondisclosure order simply means that the information cannot be released or transmitted to anyone other than those agencies specifically provided by the statute. So, once a nondisclosure order is issued, who has access to the information? A criminal justice agency may disclose criminal history record information that is the subject of the order only to other criminal justice agencies[22] for criminal justice purposes,[23] the person who is the subject of the order (i.e., the defendant), or any of the 11 agencies and entities listed in Subsection (j)[24] of 411.081 of the Government Code.[25] No one else has access to the criminal history record information. The defendant cannot authorize the release of information. Notably missing from the list of those with access is mom, dad, and military recruiters.

F. Effect of Nondisclosure

Generally, criminal records are public information available during the normal business hours of the governmental body that keeps them.[26] If a nondisclosure order has been issued with respect to the information, however, the information is excepted from the public access requirements.[27] A person whose conviction is subject to a nondisclosure order may deny the occurrence of the arrest and prosecution unless the information is being used against the person in a subsequent criminal proceeding.[28] While nondisclosure does add a significant layer of protection and confidentiality, there are still many people and agencies that will have access to and knowledge of the criminal records (see section E above). So while someone whose criminal conviction has been ordered not to be disclosed can legally deny the occurrence, it is entirely possible that doing so could catch them in a lie. This is one of the many issues and concerns revolving around the idea of nondisclosure.

III. Issues and Concerns

A. Traffic Convictions

Analysis of this new nondisclosure law has, from the beginning, led to some varying interpretations and debate with respect to traffic offenses.[29] DPS has taken the position that Section 411.081(f-1) does not apply to traffic offenses. A nondisclosure order prohibits criminal justice agencies from disclosing criminal history record information to the public. Criminal history record information means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.[30] The term does not include driving record information maintained by DPS under Subchapter C, Chapter 521, Transportation Code.[31] Because driving record information is excepted from the definition of criminal history record information and traffic convictions lead to the creation of driving record information, DPS posits that nondisclosure requirements do not apply to traffic convictions. While this does make some sense and it would lead to dramatically fewer orders being issued. The plain language of the statute states otherwise. Fine-only misdemeanor convictions include convictions for traffic offenses. It is true that criminal history record information does not include driving record information, but at the municipal court level, all of the information is criminal history record information. The definition even specifies that driving record information *as maintained by the department* (DPS) is not criminal history record information. Municipal courts are not DPS and they do not maintain driving record information. It may be true that once information is reported to the department and it is sorted and classified as driving record information, then a nondisclosure order would not prohibit the disclosure of driving record information. That, however, does not change the requirement of courts to immediately issue a nondisclosure order upon conviction of a child, and this order would still apply to any other criminal justice agency that might have some information related to the offense.

B. Dissemination by DPS

The most pressing concern, however, is the dissemination of the orders. As discussed earlier, disseminating nondisclosure orders is the duty of DPS. In the absence of any reports of courts or any other entity receiving a copy of a nondisclosure order from DPS, one is left to wonder whether the Legislature's plan for dissemination is feasible. No matter the goals of this new law and the efforts of courts to follow it, these nondisclosure orders are not reaching the appropriate entities. Although courts themselves should be aware of their own orders once they are entered, courts are arguably the only ones with knowledge of this new law and are probably the only ones affording children the protection this new law aims to provide. Now the dissemination of all of these orders is an enormous and unenviable task and, hopefully, DPS will begin sending these orders out and will catch up. Perhaps, however, this failure in regard to dissemination reveals a problem with the law. The

Children and Orders of Nondisclosure continued pg 14

To Enhance or Not to Enhance? DWLI Revisited

by Katie Tefft
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In 2007, the Legislature downgraded the punishment for the offense of *driving while license invalid (DWLI)* from a Class B to a Class C misdemeanor in most instances. However, if "it is shown on the trial of [the] offense" that the driver has a previous DWLI conviction or the person's license has previously been suspended as the result of an offense involving the operation of a motor vehicle while intoxicated, the offense remains a Class B misdemeanor.

In 2008, *Dallas Morning News* editor Eric Nelson and two others were seriously injured when an uninsured driver with a suspended license crashed into a group of pedestrians. The media attention was significant enough to prompt legislative action, and in 2009, the Legislature passed *Eric's Law* creating a new enhancement under Section 521.457 of the Transportation Code (the DWLI statute). Effective September 1, 2009, H.B. 2012 provided that a DWLI offense is a Class B misdemeanor "if it is shown on the trial of [the] offense that the person at the time of the offense was operating the motor vehicle in violation of Section 601.191" (*operation of motor vehicle in violation of motor vehicle liability insurance requirement* – or more simply, *FMFR*). Further, the DWLI offense is a Class A misdemeanor if the person was driving without financial responsibility and caused or was at fault in a crash resulting in serious bodily injury to or the death of another. Interestingly, the original version of this bill would have made the latter scenario enhanceable to a third degree felony.

According to the Texas Legislative Council's *Drafting Manual*, "An enhancement is an increase, because of the circumstances of the offense or because of the criminal history of the defendant, to the punishment otherwise applicable to an offense." The *Manual* instructs that upon determining that an enhancement is necessary, a drafter should use the following language: "if it is shown on the trial of [an offense] that the defendant has [*for example*] been convicted… ." This is the same language used in the DWLI statute making offenses committed under certain circumstances Class B or A misdemeanors. Thus, the DWLI offense can be enhanced upon a showing of certain circumstances.

So, the question is: to enhance and file as a Class B DWLI offense in county court –or– not to enhance and file as a Class C DWLI offense and a Class C FMFR offense in municipal or justice court?

Why Enhance?

In theory, enhancements make the punishment imposed proportional to the offense committed. In fact, proponents of H.B. 2012 argued that the increased punishment was necessary to deter the common behavior of driving without insurance on a suspended license.

Prosecutors are primarily responsible for taking the proper steps to enhance an offense. In a perfect world, the prosecutor would notify the court and the defendant of their intent to enhance and would include the prior convictions in the charging instrument. In reality, from small towns that rarely see their prosecutor to a large courts with in–house prosecutors, many towns rely primarily on the citation as a quasi-charging instrument. In these cases, the ability (or should it be the duty?) to enhance falls on the peace officer issuing the citation or filing the complaint.[1]

For prosecutors, enhancements allow for more bargaining power. If the enhancement keeps the offense at a Class C level (think of an FMFR case), the municipal prosecutor has greater leverage in trying the new offense. Is the offense charged as a first offense or a second/subsequent offense? Why does it matter? Look at the fine ranges: a first offense of FMFR has a fine of not less than $175 and not more than $350. But a second or subsequent offense carries a fine of not less than $350 or more than $1,000.[2] Also, think of the fines for child passenger safety seat offenses (maximum $25 for first offense, but maximum $250 for second or subsequent offense)[3] or – yikes – the tiered penalty ranges for privileged parking violations.[4] Think too of the increased hours of community service or period of driver's license suspension for minors under the Alcoholic Beverage Code.[5]

Of course, to enhance an offense to a greater penalty range, the prosecutor will need to know of the previous convictions so that the new offense can be handled appropriately. Attention peace officers: for those hundreds of thousands of cases each year that are pled out to the citation, on the citation – as the

quasi-charging instrument – officers should note that the instant offense is a second or subsequent offense. Otherwise, the court acts on what the "charging instrument" reveals, and without a notation on the citation or an allegation in the complaint that the instant offense is a second or subsequent offense the court would be limited to imposing the fine for a first offense.

If, as under the DWLI statute, an enhancement kicks the offense up to a Class B misdemeanor level or higher, the peace officer, the municipal prosecutor, and the county prosecutor will need to know of the previous convictions so that the new offense can be handled appropriately. The officer writing the citation can file the offense as Class B DWLI in county court. Alternatively, the municipal prosecutor, upon reviewing the citation, can dismiss the charges in municipal court and forward the citation to county court for filing as a Class B misdemeanor.

Problems with Enhancing

Probability of Prosecution. With the proliferation of leap-frog appeals,[6] municipal courts across Texas have expressed concern that county courts rarely aggressively prosecute driver's license offenses. Punishments for these types of offenses are often more favorable in county court, and rarely do county attorneys actively prosecute DWLI or FMFR offenses. County attorneys are often looking for prior convictions. Are they going to prosecute on a first offense because the driver also does not have insurance?

Insurance Verification. Under Texas law, it is only an offense to *operate* a motor vehicle without insurance. It is not an offense to fail to produce evidence of insurance. While TexasSure and insurance databases have attempted to identify drivers without insurance, there is no perfect system for identifying when a driver is insured or has adequate financial resources to be in compliance with the requirement to maintain financial responsibility. All too often, FMFR cases in municipal court are dismissed under Section 601.193 of the Transportation Code because the defendant produces evidence of financial responsibility. Under the new DWLI enhancement, the driver must be operating the vehicle in violation of the requirement to maintain financial responsibility. If even a quarter of FMFR defendants are entitled to a dismissal because they later produce evidence of financial responsibility, that means a quarter of Class B DWLIs (enhanced because of the FMFR) would be kicked down to Class C misdemeanors in county court. Which begs the same question: how aggressively will county court prosecute a fine-only driver's license offense?

Suspended vs. No License. The new enhancement applies only to a DWLI offense, meaning the defendant once had a valid license that is now invalid for some reason. If a driver has no license whatsoever, and no insurance, that behavior can still only be charged as two Class C misdemeanors. So, does this law really get tough on those who illegally drive on Texas roadways without regard for licenses or insurance?

It could be worse…

Despite all of the confusion surrounding driver's license offenses (no driver's license, invalid driver's license, suspended driver's license, people driving on Mexican driver's licenses – not to mention DPS reporting codes), it could be worse. Consider visiting Vietnam…visitors need a temporary Vietnamese driver's license endorsed for the specific vehicle they intend to drive. If caught driving without this Vietnamese license, they face up to three years in prison. And if they cause an accident while driving without this license, they should plan on staying ten.

Cost. Opponents of H.B. 2012, primarily the ACLU, argued that the cost of incarcerating the uninsured and suspended drivers would be an additional financial burden on counties across Texas. Further, uninsured drivers often do not have financial resources to obtain insurance, and thus would not have the money to pay a higher fine.

Unanswered questions. There are dozens of laws in Chapter 601 of the Transportation Code related to the automatic driver's license and vehicle registration suspensions and the impoundment of vehicles upon subsequent convictions for FMFR. If, under the new DWLI enhancement, one of the elements that must be proven is the person's operation of a motor vehicle in violation of the FMFR offense, would that DWLI conviction count as a prior FMFR offense for these suspensions? What about the enhanced penalty/fine for subsequent FMFR offenses? If the DWLI conviction would count, are we shepherding in a new era where the elements of an offense can constitute separate crimes? Along the same lines, would FMFR be considered a lesser-included offense of a Class B DWLI charge?

DWLI: Driving While License Invalid –or– Doing What the Legislature Intended

The Legislature clearly intended to make the punishment for driving on a suspended license without insurance (or failing to maintain some other form of financial responsibility) an offense ultimately punishable by jail time. Despite all the problems of evidentiary proof at the county

level, the law reads that a DWLI offense while failing to maintain financial responsibility is a Class B misdemeanor. It is only after one understands the purpose of an enhancement that one can make the argument that DWLI and FMFR offenses can still be filed as two separate Class C offenses rather than one Class B DWLI offense.

So, to enhance or not to enhance… that is the question for police officers and prosecutors to decide.

For more on enhancements, see "Enhancements in Municipal Courts" by Ross Fischer, *Municipal Court Recorder*, Vol. 11, No. 4 (March 2002) p. 5. For more on DWLI offenses, see "Reconsidering Allen: DWLIs New Impact on Municipal Courts" by Lois Wright, *Municipal Court Recorder*, Vol. 17, No. 4 (August 2008) p. 1.

1. Peace officers can still issue a citation for Class B DWLI thanks to HB 2391 passed by the 80th Regular Legislature (2007).
2. Section 601.191(b)-(d), Transportation Code.
3. Section 545.412(b), Transportation Code.
4. Section 681.011(g)-(k), Transportation Code.
5. Section 106.071, Alcoholic Beverage Code.
6. See "Waiver of Right to Appeal in Local Trial Courts of Limited Jurisdiction" by Ryan Kellus Turner, *The Municipal Court Recorder*, Vol. 12 No. 4 (May 2003).

Enhancements Based on Criminal History

(reprinted from the Texas Legislative Council's *Drafting Manual*)

An enhancement is an increase, because of the circumstances of the offense or because of the criminal history of the defendant, to the punishment otherwise applicable to an offense. Sections 12.42 and 12.43, Penal Code, provide general enhancements for repeat and habitual felony offenders. Those sections generally apply to offenses outside the Penal Code, absent a specific statement in the offense or the law in which the offense is contained that those sections do not apply. Consequently, a drafter requested to create an internal enhancement, that is, one that is specific to a particular offense, should first determine whether the desired increase in punishment is different from that provided by Section 12.42 or 12.43. If the drafter supplies an enhanced punishment that differs from either section, the punishment provided by the drafter will prevail. See Section 12.43(d), Penal Code.

If a drafter determines that an internal enhancement is appropriate, the drafter should use the terminology present in Sections 12.42 and 12.43, Penal Code. Those sections increase punishment "if it is shown on the trial of [an offense] that the defendant has . . . been convicted." Requiring a "showing at trial" of a previous conviction properly requires the prosecution to allege the previous conviction in the information or indictment and to prove the existence of the conviction beyond a reasonable doubt. An example of an internal enhancement is as follows: (b) An offense under this section is a felony of the third degree unless it is shown on the trial of the offense that the defendant has previously been convicted under this section, in which event the offense is a felony of the first degree.

Exceptions and Defenses

(reprinted from the Texas Legislative Council's *Drafting Manual*)

Chapter 2 of the Penal Code, titled "Burden of Proof," distinguishes between exceptions, defenses, and affirmative defenses.[1] Although these three types of defensive provisions all serve to exclude from criminal responsibility conduct that would otherwise be included within the definition of an offense, they differ significantly regarding burden of proof.

An **exception** is, in effect, a negative element of the offense; its nonexistence must be alleged in the indictment or information and proved by the prosecution beyond a reasonable doubt. Exceptions are introduced in the Penal Code (and should be introduced in outside laws) by the phrase "It is an exception to the application of . . . ."

A **defense**, introduced by "It is a defense to prosecution," need not be negated in an indictment or information, and the question of its existence is not submitted to the jury unless evidence of its existence is introduced at the trial. When the issue is submitted, the jury is instructed to acquit the defendant if there is a reasonable doubt on the issue.

An **affirmative defense**, introduced by "It is an affirmative defense to prosecution," differs from a defense only as to the burden of proof; the defendant has the burden of establishing an affirmative defense by a preponderance of the evidence. The full Drafting Manual can be viewed online at www.tlc.state.tx.us.

Disqualification and Recusal continued from pg 1

While the "terms disqualification and recusal are used interchangeably, such use is a grievous error. If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void, without effect, and subject to collateral attack."[4] The failure of a judge to recuse when recusal is appropriate can constitute a violation of the Code of Judicial Conduct.[5] Failure to recuse may rise to the level of disqualification when it impacts a litigant's right to due process.[6]

Figure 1 - Comparison of Disqualification and Recusal[7]

		Disqualification	Recusal
1	Source of Challenge	Constitutions, statutes, & rules	Statutes & rules
2	Discretionary or mandatory	Mandatory	Discretionary
3	Waivable	No	Yes
4	Parties may consent to judge	No	Yes
5	Effect if judge serves after valid challenge	Judgment void	Reversible error
6	Requires written motion	No	Yes
7	Judgment subject to collateral attack	Yes	No

1. Disqualification

Article V, Section 11 of the Texas Constitution provides three grounds for disqualifying a judge from sitting in any case:

1. The judge was counsel in the case;[8]
2. The judge "may be interested" in the outcome of the case; or
3. One of the parties is related to the judge.

Similarly, Article 30.01 of the Code of Criminal Procedure provides instances in which the judge is disqualified regardless of the judge's application of discretion. The defendant cannot waive the judge's disqualification.[9] The judge is statutorily disqualified as a matter of law when he or she:

1. Is the injured party;
2. Has been counsel for the State or the accused; or
3. Is connected to the accused or the party injured by consanguinity or affinity within the third degree as determined under Chapter 573 of the Government Code.[10]

2. Recusal

While disqualification is mandatory, recusal lies in a judge's appraisal of an individual situation.[12] While this determination can only be made in light of the specifics of a situation, Texas Rule of Civil Procedure 18b(2) states that a judge shall recuse when:

- The judge's impartiality might reasonably be questioned;
- The judge has a personal bias or prejudice concerning the subject matter or a party;
- The judge has personal knowledge of disputed evidentiary facts concerning the proceedings;
- The judge or a lawyer with whom the judge previously practiced law is a material witness;
- The judge participated as counsel, adviser, or material witness in the matter in controversy or expressed an opinion concerning the merits of it while acting as an attorney in government service;
- The judge, judge's spouse, or a person within the third degree of relationship to either the judge or judge's spouse is:
    1. a party to the proceeding

Figure 2 - Relatives by Degrees[11]

1st Degree	2nd Degree	3rd Degree
• Judge's spouse • Mother & spouse • Father & spouse • Daughter & spouse • Son & spouse • Mother-in-law • Father-in-law • Stepdaughter • Stepson	• Granddaughter & spouse • Grandson & spouse • Grandmother & spouse • Sister & spouse • Brother & spouse • Sister-in-law • Brother-in-law • Grandmother-in-law • Grandfather-in-law • Step-granddaughter • Step-grandson • Half-sister & spouse • Half-brother & spouse • Stepsister & spouse • Stepbrother & spouse	• Great grandmother & spouse • Great grandfather & spouse • Great granddaughter & spouse • Great grandson & spouse • Niece, nephew & spouses • Aunt, uncle & spouses • Half-aunt, Half-uncle & spouses • Great grandmother-in-law • Great grandfather-in-law • Aunt & uncle-in-law • Niece and nephew-in-law

or an officer, director, or trustee of a party;

2. known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
3. to the judge's knowledge, likely to be material witness in the proceeding; or

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

The Court of Criminal Appeals has not expressly held Rule 18b(2) to be applicable in criminal proceedings.[13] Nonetheless, more than one court of appeals has cited Rule 18b(2) in its consideration of recusal in criminal cases.[14]

3. Motions for Recusal or Disqualification

Though the Texas Rules of Civil Procedure do not generally govern proceedings in criminal cases, in *Arnold v. State*, the Court of Criminal Appeals held that Rule 18a, which contains procedures for the recusal of a judge, applies in criminal cases.[15] Despite Rule 18a being entitled "Recusal or Disqualification of Judges," it is generally believed that the procedures set out in the rule relating to the removal of a judge have no application to disqualification, only recusal.[16] While Rule 18b contains separate and distinct provisions regarding disqualification and recusal, Rule 18a does not. Thus, while the procedure governing recusal is substantive and technical, the motion to disqualify does not need to adhere to the procedure and timeline contained in Rule 18. As disqualification is a matter of law, there is no requirement that a motion be filed, let alone be filed in the manner prescribed by Rule 18a.

It must be emphasized that Rule 18a governs situations when a party (including the defendant or the prosecution in a criminal case) requests that the judge recuse him or herself from a case. Assuming that such a recusal motion is made in a timely manner, and otherwise complies with the rule, a judge has two options: (1) recuse and refer the matter to the presiding judge of the judicial region, or (2) deny the motion and refer the matter to the presiding judge of the judicial region.

While the language of Rule 18a and its application in other Texas criminal trial courts is clear, questions remain about its application in municipal courts.[17] Such long standing questions are compounded by specific provisions governing municipal courts contained in Chapters 29 and 30 of the Government Code.

4. Recusal or Disqualification *Without* a Motion by a Party in Municipal Court

In comparison to other trial courts in Texas, the law governing recusal or disqualification without a motion by a party in a municipal court is complicated by the variance in municipal court organization authorized by state law.[18] Variety may be the spice of life; however, when it comes to recusal or disqualification in municipal court, it may be the root of confusion among judges and attorneys.

Consider this: while most trial courts in Texas have one judge (who is typically elected), a municipal court may have more than one judge (who, depending on the decision of the local government, may be either elected or appointed).[19] Without consulting the specific statute that creates the position of judge, it is a mistake to generalize about the position of presiding judge in a municipal court.[20] The same may also be true in a non-record municipal court located in a home-rule municipality.[21] Collectively, these statutes potentially set the stage for conflicting legal constructions when it comes to recusal and disqualification.

In 1999, the Legislature passed into law Section 29.012 of the Government Code. Titled "Sitting for Disqualified or Recused Judge," it provides that when a municipal judge is disqualified or recused, a judge from another municipal court located in an adjacent municipality may sit for that judge. Under this provision, however, a municipal judge may not sit in a case for another judge if either party objects in writing before the first pre-trial hearing or trial over which the judge is to preside.

Section 29.012 leaves many important questions unanswered. First, does it only relate to instances of recusal or disqualification *without* a motion by a party? While the statute can be read to govern instances where there is a motion by a party, such a construction is inconsistent with the Court of Criminal Appeals opinion in *Arnold*.[22] At least one legal commentator believes that Section 29.012 applies "when the judge is disqualified or has recused himself [without a motion by a party]."[23] Second, what is an "adjacent municipality?" *New Webster's Dictionary* defines "adjacent" as meaning "near, nearby" and "next, bordering." Most Texas cities do not share contiguous borders with another municipality. This interpretation at best gives Article 29.012 limited utility and debatably frustrates the legislative intent.[24] At the same time, a legally operative word in a statute should have a meaning that is definite. (Is Wichita Falls, Texas "nearby" Vernon, Texas? It all depends on who you ask – a person from Vernon is likely to give you a different answer than someone from Woonsocket, Rhode Island.) Third, assuming that there is more than one adjacent municipality, who decides which municipal judge

to call? The law is silent on this point. Fourth, if Section 29.012 is a specific rule that supersedes the holding in *Arnold*, and Rule 18a is inapplicable, what happens if one of the parties objects? Then is Rule 18a applicable?

Until the Legislature or an appellate court clarifies Section 29.012 of the Government Code, prior to self-recusal or disqualification, municipal judges and court administrators should consider whether a provision in either Chapter 29 or 30 governing their particular municipal court authorizes that the case be transferred to another municipal judge or that judges exchange benches.[25] Alternatively, in a non-record municipal court, a judge could declare that he or she is "temporarily unable to act." This, in turn, would trigger the statutory provisions authorizing the appointment of an alternate or temporary judge.[26] In a municipal court of record, Section 30.00008(b) of the Government Code may provide a similar alternative.[27]

Conclusion

Judges and lawyers alike have long struggled with the distinction between "disqualification" and "recusal." However, it is a struggle worth having because all parties deserve access to an impartial arbiter. While there remain unanswered questions about the mechanics of recusal and disqualification in municipal courts, the legislative intent is clear: the requirement of an impartial arbiter applies to all Texas trial courts.

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1. *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 559 (Tex. App.–Beaumont 1993) (footnotes omitted).
2. W. Clay Abbott & Ryan Kellus Turner, *The Municipal Judges Book* (TMCEC 2005) at 1-3.
3. The focus of this article is limited to these two challenges. Though less common, in limited circumstances, objections to a judge can also be raised in the form of (1) an objection to an assigned judge or (2) as a tertiary motion to recuse or disqualify. Section 74.053 of the Government Code contemplates the peremptory challenge to an assigned judge. An assigned judge is a person who is assigned under Chapter 74 of the Government Code by the presiding judge of the administrative judicial region. See http://www.courts.state.tx.us/courts/ajr.asp. The third (or later) motion to recuse or disqualify a judge in the same case by the same party is called a "tertiary motion." Although the substantive law is the same as for motions to recuse, separate rules govern the procedure for tertiary motions.
4. *Supra* note 1 at 559.
5. Judges must recuse themselves if in their discretion they feel they have a conflict of interest that would affect their ability to be fair and impartial. Canon 3(B)(5), Code of Judicial Conduct.
6. *Caperton v. A.T. Massey Co.*, 129 S. Ct. 2252 (2009).
7. *O'Connor's Civil Trials 2006* (Jones McClure Publishing) at 246.
8. To be disqualified, the judge must have served as counsel to one of the parties in an earlier proceeding in which the issues were the same as in the case currently before the judge. If the judge represented one of the parties in the past, but the proceeding before the judge is not the same case, the judge is not disqualified. *Dean v. State*, 938 S.W.2d 764, 767 (Tex. App.–Houston [14th Dist.] 1997) (no writ).
9. *Gamez v. State*, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987).
10. Disqualification is mandatory even if the judge did not know about the relationship. *Ex parte Vivier*, 699 S.W.2d 862, 863 (Tex. Crim. App. 1985).
11. *O'Connor's, Texas Civil Appeals 2004-05* (Jones McClure Publishing) at 107.
12. "The line between disqualification, which is mandatory, and recusal, which is discretionary, is not well defined. The grounds listed in Tex. R. Civ. P. 18b(2) under 'Recusal' may rise to the level of mandatory disqualification when they impact a litigant's right to due process." *O'Connor's Texas Civil Appeals*, *Supra* note 11 at 108.
13. In *Arnold v. State*, 778 S.W.2d 172 (Tex. App.–Austin 1989), the Third Court of Appeals stated that Rule 18a and 18b do not apply in criminal cases. The Court of Criminal Appeals subsequently reversed the Third Court of Appeals opinion but only as it related to Rule 18a. 853 S.W.2d 543 (Tex. Crim. App. 1993).
14. *Ex parte Ellis*, 275 S.W.3d 109, 116 (Tex. App.–Austin 2008); *Kniatt v. State*, 239 S.W.3d 910, 913 (Tex. App.–Waco 2007); *Burkett v. State*, 196 S.W.3d 892, 896 (Tex. App.–Texarkana 2006).
15. 853 S.W.2d 543 (Tex. Crim. App. 1993).
16. William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 601 (1986).
17. *State ex rel. Millsap v. Lozano*, 692 S.W.2d 470, 479, n.13 (Tex. Crim. App. 1985).
18. Consider the following: Section 30.00003(b) of the Government Code states that a municipality by ordinance or charter can have more than one municipal court. In contrast, Section 29.102 of the Government Code states that a municipality with a population between 130,000 to 285,000 can have as many as four non-record municipal courts.
19. Section 29.004, Government Code.
20. For instance, while Section 30.0006(b) of the Government Code provides for the appointment of judges in a municipal court of record, in El Paso, municipal judges are elected. The municipal judges then, in turn, select a presiding judge. Section 30.00128(b)-(e), Government Code.
21. "A home-rule city by charter or by ordinance may divide the municipal court into two or more panels or divisions, one of which shall be presided over by a presiding judge. Each additional panel or division shall be presided over by an associate judge, who is a magistrate with same powers as the presiding judge." Section 29.007(a), Government Code.
22. See, *Supra*, note 13.
23. David B. Brooks, 23 *Municipal Law and Practice*, Section 15.07 (Texas Practice 2d ed. Supp. 2009).
24. Section 311.023(5) of the Government Code provides that in construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the consequences of a particular construction.
25. Sections 29.007(d)(2), 29.102(d)(2) and 30.00007(b)(4), Government Code.
26. Sections 29.006 and 29.007(g), Government Code.
27. "The governing body may appoint one or more qualified persons to be available to serve for a municipal judge who is temporarily absent due to illness, family death, continuing legal or judicial education programs or *any other reason*. The presiding judge, or the municipal judge if there is no presiding judge, shall select one of the qualified persons appointed by the governing body to serve during the absence of a municipal judge." (Emphasis added).

Children and Orders of Nondisclosure continued from pg 7

nondisclosure process may indeed work much more efficiently and effectively if the dissemination was done at the local level. One judge this year asked why these nondisclosure orders could not be handled as some interlocal agreement. This makes sense. If the order is communicated at the local level, then DPS would not have the burden of dissemination for the entire state. Any concerns with DPS disclosing information could be handled with a new statute prohibiting them from disclosing any criminal history record information related to children.

C. Responding to Requests

Courts across the state are facing practical dilemmas daily with respect to nondisclosure. Courts have to be very careful with how they respond to requests for information or records. They must not confirm the existence of records in their response. Can the court really comply with a nondisclosure order by telling a requestor that they cannot give them a copy of any requested documents? This seemingly harmless response implies that there are copies that cannot be given. Perhaps the best response is "we do not have records responsive to your request." This does not deny or confirm the existence of records.

Other Unresolved Issues Concerning Nondisclosure Orders

- Omnibase, Scofflaw, and 3rd party collectors for convictions subject to nondisclosure
- Show Cause Notices regarding the completion of alcohol awareness classes sent to parents
- Payments over the telephone or internet
- Dealing with defense attorneys

D. Access of Parents

Other situations deserve cautious treatment, as well. For instance, parents are not approved entities that have access to criminal history record information. This leaves many people scratching their heads. On the one hand, the law requires parents to make an appearance with their child. The law wants parents to know about these criminal proceedings, but once there is a conviction they no longer have access. This seems contradictory, but this is the law. How is the clerk to handle a parent who wants information? They must tell them that they have no records responsive to their request. This is surely going to lead to some angry parents. What if a parent is attempting to make a payment on a fine for their child? This could also lead to problems. It is very possible that this interaction could lead to the improper disclosure of information. In this situation, the court would need to have a procedure in place that would allow clerks to handle these situations without disclosing information. It might be wise to use a drop box for the payment of fines for children, to mail any receipts to the defendant, or to make sure any receipt given to the parent does not contain criminal history record information like a defendant's name or the title of the offense.

In light of the issues, concerns, and confusion surrounding nondisclosure orders, perhaps a second look by the Legislature is required.

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1. Section 8 of S.B. 1056 specified that the Act would take effect immediately if it received a vote of two-thirds of all the members elected to each house. This occurred on June 19, 2009.
2. Section 411.085, Government Code.
3. Title 3 of the Family Code is commonly referred to as the Juvenile Justice Code; it primarily contains laws and procedure for juvenile courts but also contains procedures for child defendants in municipal courts, including the transfer provisions in Section 51.08(b).
4. S.B. 1432 in the 77th Legislature created Article 45.054 of the Code of Criminal Procedure pertaining to Failure to Attend School Proceedings, which mirrored provisions previously contained in Section 54.021 of the Family Code. S.B. 1432 also created the related Articles 45.055-45.059. Additionally, the same Legislature created Article 45.050(b) pertaining to juvenile contempt, which was amended in the 77th and 78th Legislatures allowing justice and municipal courts to hold children in contempt rather than using the now repealed procedures under Section 52.037 or 54.023 of the Family Code.
5. Section 51.01(1), Family Code.
6. Section 51.01(2)(A), Family Code.
7. Section 51.01(4), Family Code.
8. Article 1.03, Code of Criminal Procedure.
9. Section 51.01(2)(C), Family Code.
10. Section 51.01(3), Family Code.
11. Section 51.01(2)(B), Family Code.
12. Children convicted before the effective date of the new law are not without protection. Section 7 of Senate Bill 1056 states that those children convicted before June 19, 2009 may petition the court for an order of nondisclosure, and the court shall issue the order.
13. Section 411.081(f-1) of the Government Code specifies that "child" has the meaning assigned by Section 51.02 of the Family Code.
14. Section 51.02 of the Family Code also states that a child could also be a person who is 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.
15. Section 51.03, Family Code.
16. Section 51.03(f), Family Code.
17. The only problem with this general rule resides in Section 51.03(g) of the Family Code, which says "in a county with a population of less than 100,000, conduct described by Subsection (b)(1)(A) that violates Section 25.094, Education Code, is conduct indicating a need for supervision." Section 25.094 of the Education Code is Failure to Attend School, which criminal courts have jurisdiction over. The same conduct charged under the Family Code as "truancy" would lead to the charge being dealt with in juvenile court. Originally, this language in Section 51.03(g) was added in the 77th Legislature to give juvenile courts concurrent jurisdiction over Section 25.094 attendance cases in counties with a population of less than 100,000. Is there

any reasonable explanation why children convicted of Failure to Attend School in counties with a smaller population would not receive the same protection of confidentiality as those convicted in larger counties? With respect to orders of nondisclosure, this law appears to lead to an absurd result that circumvents the purposes of the law.

18. Section 411.081(f-1), Government Code.
19. This is an interesting difference from the expunction process where the defendant (the petitioner) must tell the court which agencies have information and should receive a copy of the order to expunge.
20. Section 411.081(g), Government Code.
21. Section 411.081(g), Government Code. The information can be sent via facsimile to 512.424.5760 or by email to Nondisclosures@txdps.state.tx.us.
22. A criminal justice agency is a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice. Section 411.082(3), Government Code.
23. "Criminal justice purposes" means an activity that is included in the administration of justice or screening of applicants for employment with a criminal justice agency. Section 411.082(4), Government Code. Administration of criminal justice means the performance of any of the following activities: detection, apprehension, detention, pre-trial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender. The term includes criminal identification activities and the collection, storage, and dissemination of criminal history record information. Article 60.01, Code of Criminal Procedure.
24. A criminal justice agency may disclose criminal history record information that is the subject of an order of nondisclosure under Subsection (f-1) to the following agencies or entities only: (1) the Texas Youth Commission; (2) the Texas Juvenile Probation Commission; (3) the Department of State Health Services, a local mental health or mental retardation authority, or a community center providing services to persons with mental illness or retardation; (4) the Department of Family and Protective Services; (5) a juvenile probation department; (6) a municipal or county health department; (7) a public or nonprofit hospital or hospital district; (8) a county department that provides services to at-risk youth or their families; (9) a children's advocacy center established under Section 264.402, Family Code; (10) a school district, charter school, private school, regional education service center, commercial transportation company, or education shared service arrangement; and (11) a safe house providing shelter to children in harmful situations.
25. Section 411.081(f-1), Government Code.
26. Section 552.051, Government Code.
27. Section 552.142(a), Government Code.
28. Section 552.142(b), Government Code.
29. An email to TMCEC outlined the position of DPS and can be found here: http://www.tmcec.com/tmcec/public/files/File/Legislative Update/DPS Nondisclosure Email.htm.
30. Section 411.082, Government Code.
31. Section 411.082, Government Code.

Disaster & Emergency Preparedness
One–Day Conference
for municipal judges, court administrators, and bailiffs
August 13, 2010 * Austin

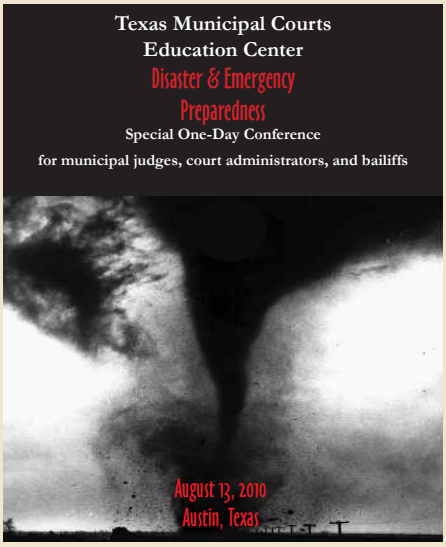
Texas ranks highest of all U.S. states and occupied territories in the number of declared disasters, ranging from severe thunderstorms and tornados to tropical storms and hurricanes, from flooding to fires, even dust storms and earthquakes. There are health pandemics; public utilities are disrupted. And in today's society, we face a new type of threat…those which are manmade. Even the mere threat of an attack can disrupt day to day operations.

According to the U.S. Department of Homeland Security, "how quickly your company can get back to business after a terrorist attack or tornado, a fire or flood, often depends on emergency planning done today." Is your court prepared?

Disaster & Emergency Preparedness
One–Day Conference
Austin Marriott South

6:45 – 8:00 a.m.	**Registration / Breakfast**
8:00 – 12:00 p.m.	**Continuity of Operations Planning for Courts**
	Emergency Preparedness and Response
	Panel Discussion: Dealing with Disaster
12:00 – 1:00 p.m.	**Lunch**
1:00 – 3:00 p.m.	**Court Security: Being Prepared**
3:00 p.m.	**Conference Adjourns**

Registration is $50 and includes one-night hotel accommodations the night before, breakfast and lunch the day of the conference, course materials, and 6 hours of clerk certification or TCLEOSE credit.



Texas Has a New Child Safety Seat Law

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Effective September 1, 2009, Texas has a new child safety seat law. The law states that children under eight years of age, unless taller than 4' 9", will need to be in a child safety seat system (this includes traditional child safety seats with harnesses and booster seats). Many are referring to this new law as the "booster seat law" because it will extend the current law to cover older children who need to ride in booster seats. Until this law was passed, Texas was among only six remaining states that did not have a law to protect booster-age children.

A booster seat "boosts" a child up so the lap/shoulder belt will fit correctly and provide protection in a crash. Vehicle lap/shoulder belts are designed for adults at least 4' 9" tall. Before the law, it was legal for children to be moved to the safety belt system after they reached five years old and 36" tall. The new law makes it mandatory to keep children in booster seats until age 8 unless they are taller than 4'9".

According to the law, a child who is 8 years old, but is not yet 4'9" tall, will be able to legally use the vehicle lap/shoulder belt and not need to be in a booster seat. Best practice, however, is that children not ride in the vehicle lap/shoulder belt until they are at least 4'9" tall. The biggest concern is the improper placement of the lap and shoulder belt. Instead of fitting properly over the lower hips, the lap belt rides over the soft tissues of the abdomen, and the shoulder portion of the belt hits the child's neck or face rather than laying flat across the chest. Many children choose to place the shoulder belt behind their back, leaving them with no upper body protection.

The new law included a warning period for the part of the law that extended coverage past five years of age and 36" in height. The grace period was designed to provide time to educate parents about the new law and the need for booster seats. However, as of June 1, 2010, the grace period ended and citations could be issued for violators.

Getting the word out to parents about the new law, as well as the importance of booster seats, is a daunting task. Media campaigns have been planned, and this year's *Click It or Ticket* campaign included messaging about the changes in the child safety seat law. Law enforcement officers must be educated about the new law and be familiar with the many different types of booster seats and vests that are certified under Federal Motor Vehicle Safety Standard 213, which regulates child safety seats.

A lap/shoulder belt is required in order to use a booster seat, but many parents are still driving older vehicles with lap-only belts in the back seat. Day care providers are using small buses and 15-passenger vans that often do not have lap/shoulder belts in all positions. Safety vests are on the market, as well as higher harness weight seats, that can help in these situations.

Correctly using a booster seat can protect a child from being thrown around the vehicle or being totally ejected in a crash. Booster seats are inexpensive – generally between $15-40. Assistance is available for low-income families through the Texas Department of State Health Services *Safe Riders* Program, as well as through National Safe Kids Coalitions and other state agencies. It is estimated by Safe Kids Worldwide that a $30 booster seat generates $2,000 in benefit to society from reduced health-care expenses. Booster seats offer a low-cost solution to a high-cost problem.

Parents are advised to have a free child safety seat inspection by going to http://buckleup.tamu.edu and finding a nearby certified child passenger safety technician.

Thankfully, Texas now has a law that will help protect its youngest citizens from injuries and deaths in motor vehicle crashes.

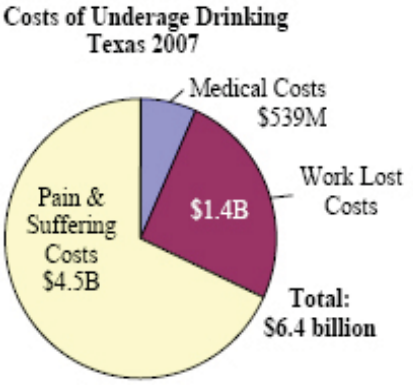
Underage Drinking in Texas

The Facts

Tragic health, social, and economic problems result from the use of alcohol by youth. Underage drinking is a causal factor in a host of serious problems, including homicide, suicide, traumatic injury, drowning, burns, violent and property crime, high risk sex, fetal alcohol syndrome, alcohol poisoning, and need for treatment for alcohol abuse and dependence.

Problems and Costs Associated with Underage Drinking in Texas

Underage drinking costs the citizens of Texas $6.4 billion in 2007. These costs include medical care, work loss, and pain and suffering associated with the multiple problems resulting from the use of alcohol by youth.[1] This translates to a cost of $2,615 per year for each youth in the State. Texas ranks 15th highest among the 50 states for the cost per youth of underage drinking. Excluding pain and suffering from these costs, the direct costs of underage drinking incurred through medical care and loss of work costs Texas $1.9 billion each year.



Costs of Underage Drinking by Problem, Texas 2007

Problem	Total Costs (in millions)
Youth Violence	$4,149.7
Youth Traffic Crashes	$817.7
High-Risk Sex, Ages 14-20	$707.9
Youth Property Crime	$305.8
Youth Injury	$180.3
Poisonings and Psychoses	$39.1
FAS Among Mothers Age 15-20	$149.8
Youth Alcohol Treatment	$27.5
Total	**$6,377.8**

Youth violence and traffic crashes attributable to alcohol use by underage youth in Texas represent the largest costs for the State. However, a host of other problems contribute substantially to the overall cost. Among teen mothers, fetal alcohol syndrome (FAS) alone costs Texas $149.8 million.

Young people who begin drinking before age 15 are four times more likely to develop alcohol dependence and are two and a half times more likely to become abusers of alcohol than those who begin drinking at age 21.[2] In 2007, 786 youth 12- 20 years old were admitted for alcohol treatment in Texas, accounting for 7% of all treatment admissions for alcohol abuse in the State.[3]

Alcohol Consumption by Youth in Texas

Underage drinking is widespread in Texas. Approximately 1,267,000 underage youth in Texas drink each year. In 2007, according to self-reports by Texas students in grades 9-12:[4]

- 78% had at least one drink of alcohol on one or more days during their life.
- 28% had their first drink of alcohol, other than a few sips, before age 13.
- 48% had at least one drink of alcohol on one or more occasion in the past 30 days.
- 29% had five or more drinks of alcohol in a row (i.e., binge drinking) in the past 30 days.
- 5% had at least one drink of alcohol on school property on one or more of the past 30 days.

In 2007, underage drinkers consumed 19.6% of all alcohol sold in Texas, totaling $2 billion in sales. These sales provided profits of $982 million to the alcohol industry.[1]

Harm Associated with Underage Drinking in Texas

Underage drinking in Texas leads to substantial harm due to traffic crashes, violent crime, property crime, unintentional injury, and risky sex.

- During 2007, an estimated 226 traffic fatalities and 5,900 nonfatal traffic injuries involved an underage drinking driver.
- In 2006, an estimated 176 homicides; 86,600 nonfatal violent crimes such as rape, robbery, and assault; and 193,300 property crimes including burglary, larceny, and car theft involved an underage drinking perpetrator.
- In 2006, an estimated 33 alcohol involved fatal burns, drownings, and suicides involved underage drinking.
- In 2006, an estimated 20,600 teen pregnancies and 94,900 risky sexual acts by teens involved alcohol.

Produced by the Pacific Institute for Research and Evaluation (PIRE) with funding from the Office of Juvenile Justice and Delinquency Prevention (OJJDP), November 2009.

1. Miller, TR, Levy, DT, Spicer, RS, & Taylor, DM. (2006) Societal costs of underage drinking *Journal of Studies on Alcohol*, 67(4) 519-528.
2. Grant, B.F., & Dawson, D.A. (1997). Ago at onset of alcohol use and its association with DSM-IV alcohol abuse and dependence: Results from \the Nation Longitudinal Alcohol Epidemiologic Survey. *Journal of Substance Abuse 9*: 103-110.
3. Office of Applied Studies, Substance Abuse and Mental Health Services Administration. Treatment Episode Data Set (TEDS). (2007). *Substance Abuse Treatment by Primary Substance of Abuse, According to Sex, Age, Race, and Ethnicity*.
4. Center for Disease Control (CDC). (2007). Youth Risk Behavior Surveillance System (YRBSS).

Stop and Take Notice

The Texas Municipal Courts Association Public Outreach Committee along with the Texas Municipal Courts Education Center would like to encourage you to go out in your community and address the need for traffic safety.

Please take the time to look at the TMCEC website (www.tmcec.com) and use the materials provided on the Municipal Traffic Safety Initiatives and Driving on the Right Side of the Road webpages to help your community understand the importance of safe driving. The TMCA Public Outreach Committee CHALLENGES all municipal court personnel to speak at schools, senior centers, and civic groups to help promote the court and importance of traffic safety.

We also encourage you to sign up for the speakers' bureau, which will help locate speakers for schools and civic groups requesting this type of outreach. Please fax your information to TMCEC at 512.435.6118 or email *tmcec@tmcec.com*

Name: _____
Court: _____
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TEXAS DEPARTMENT OF TRANSPORTATION

Resources For Your Court

New Law Enforcement Publications from CLEAR

The Council for Law Education and Research (CLEAR) is currently offering three manuals that assist police officers and other legal professionals by simplifying the complex and confusing sets of laws that are so central to their work. These manuals can be purchased at www.clearbooks.com.

Elements of a Crime: A Law Officer's Guide, 2010-11 Edition ($9.95) breaks down the features of and outlines the punishments for each specific crime in the Penal Code, Texas Health and Safety Code, and also some other miscellaneous offenses. With an easy-to-follow index, this manual has been a handy quick-reference resource to numerous legal professionals.

Arrest and Search Without a Warrant, 6th Edition, by Jade Meeker ($14.95) answers the loaded question of when one can search and when one can seize when making a warrantless arrest. As the relevant laws are "confusing" and "difficult to apply," this manual takes an in-depth look at many different doctrines and situations.

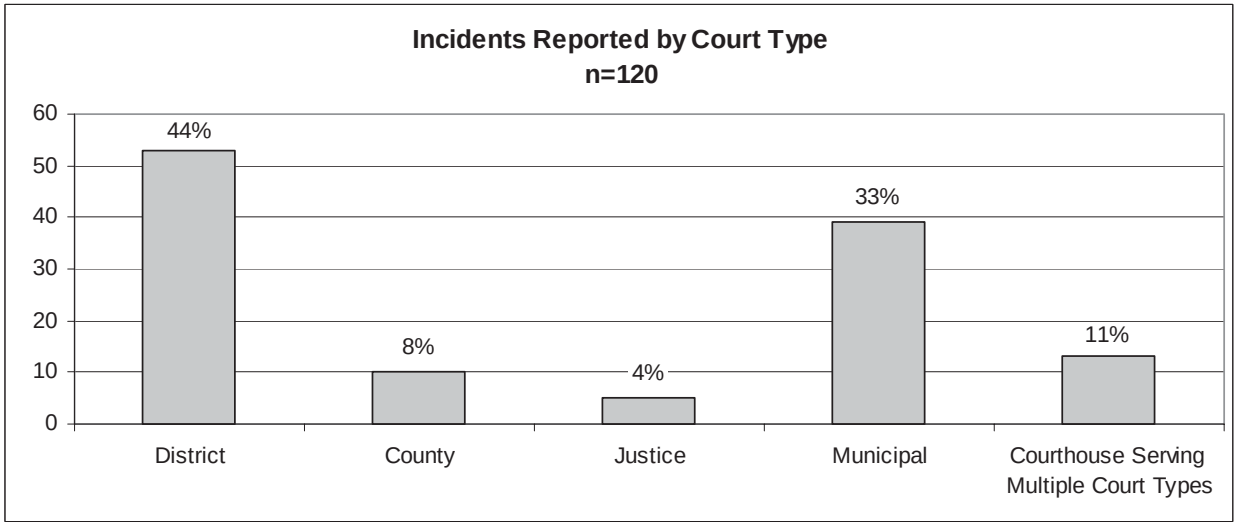
Search Warrant Manual, 9th Edition, by Jade Meeker ($14.95) seeks to help officers in the field understand the complicated search warrant laws in Texas. It does so through listing and defining key terms, highlighting common pitfalls, and examining all of pertinent rules and laws in an easy to understand fashion.

To order, go to www.clearbooks.com.

Texas Court Security Incident Reports FY 2009

The following are some examples of incidents that occurred in the municipal courts during the 2009 fiscal year:

- Male defendant attempted to access the judge's chambers and jury room during pre-trial proceedings without authorization. Defendant was upset over time taken to get to his trial.
- Before business hours, defendant was in secured hallway attempting to enter clerk's office. Access was gained through an unlocked door, which was left unlocked by persons using the courtroom after business hours.
- Juvenile defendant was upset and disorderly during her court hearing. She verbally threatened her parents and the judge. She directly threatened to hit the judge and was arrested. While being transported to detention, she attempted to kick out the windows of the patrol car.
- Defendant became irate when he learned warrants had been issued for his failure to pay. He began yelling at the clerk and bailiff. Bailiff handcuffed him, patted him down, and found a box cutter in his pocket. Defendant was placed in a holding cell and allowed to calm down.



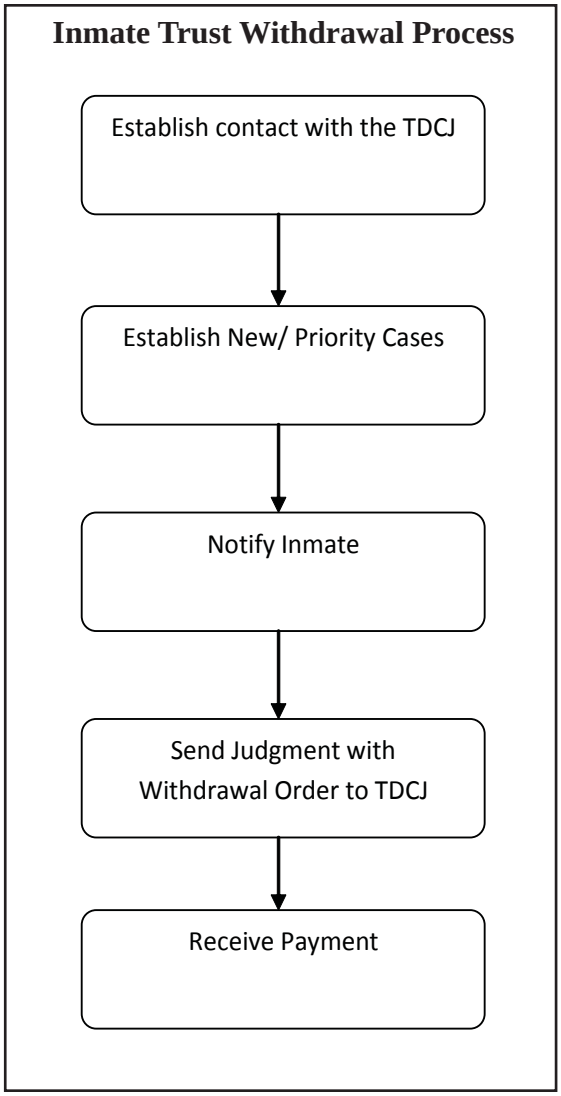
Excerpt from *OCA Texas Court Security Incident Reports FY09*. Available at http://www.courts.state.tx.us/oca/pdf/IncRpt-FY2009.pdf

Collections Corner

Inmate Trust Collections

by Jim Lehman, Collections Program Manager,
Berny Schiff, Collections Program Financial Analyst,
Office of Court Administration

The Inmate Trust Fund, also known as the Inmate Commissary Fund, is authorized by Section 501.014 of the Texas Government Code and provides a place of safekeeping for funds an offender may have access to but not physical control of during their confinement. In 1995 the Legislature enacted Section 501.014(e) of the Government Code essentially to provide a simplified effective way to withdraw funds from an inmate's account to pay for a variety of things. Initially four items were listed as the reasons that withdrawals could be made. They were child support, restitution, fines, and costs – in that order. In 1997 the section was amended to permit withdrawals to pay an inmate's co-payment for medical expenses. In 1999, it was amended to change the order of priorities and add repayment for Medicaid expenses for the child of the inmate and to pay for other judgments and writs. With the creation of the Collection Improvement Program in 2005 authorized by Section 103.0033 of the Code of Criminal Procedure, local governments caught on to this method of collecting delinquent court costs, fees, and fines from offenders. The clerk's offices of Walker and Kerr counties are credited with pioneering the process used to withdraw funds from inmate trust accounts, and that process has been widely adopted.



During 2006 and 2007, much litigation ensued over what is the appropriate process to be used to withdraw funds for the payment of criminal court costs, fees, fines, and restitution. In that time period, the use of orders to withdraw funds to pay court costs, fees, fines, and restitution was stopped by the Texas Department of Criminal Justice (TDCJ) due to the litigation. The matter was finally resolved when the Court of Criminal Appeals determined in *Johnson v. Tenth Court of Appeals at Waco*, 280 S.W.3d 866 (Tex. Crim. App. 2008) that the withdrawal of funds was a civil matter; and the Supreme Court in *Harrell v. State*, 286 S.W.3d 315 (Tex. 2009) issued an opinion affirming the process of withdrawal by direct court order under Section 501.014 of the Government Code, without the necessity of a hearing prior to the withdrawal.

In all, prison officials say there is approximately $33.6 million in the Inmate Trust Account, including $18.6 million in cash. Although most of the accounts contain only a few hundred dollars, which inmates use to buy snacks, hygiene products, and other commissary items, some funds contain much more, including inheritances and other payments received after going to prison. Some of the largest accounts contain amounts

of more than $200,000. The following chart is a 2008 breakdown of inmate account balances: The Office of Court Administration (OCA), working in cooperation with the district clerks of Walker and Kerr counties and the Texas

Frequency of Inmate Account Balances				
	FY 2006		FY 2008	
$ Average Range	Percent	Cumulative Percentage	Percent	Cumulative Percentage
0 - 4.99	49.83	49.83	48.28	48.28
5 - 25	11.57	61.40	10.83	59.11
25.01 - 60	14.52	75.92	14.69	73.80
60.01 - 75	3.31	79.23	3.43	77.23
75.01 - 100	4.13	83.36	4.47	81.70
100.01 - 500	13.53	96.89	14.89	96.59
Over 500	3.11	100.00	3.41	100.00

Department of Criminal Justice, is drafting a “best practices” guideline for withdrawing inmate funds. The flowchart on the previous page is a very basic outline of the withdrawal process.

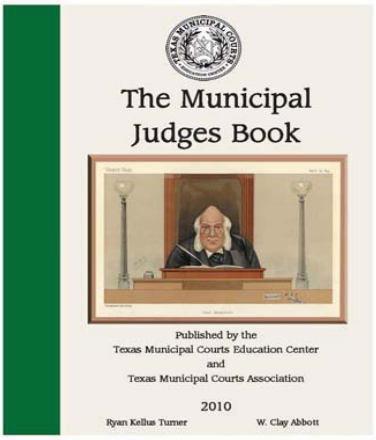
Complete guidelines are available on OCA’s website at www.courts.state.tx.us/oca/collections/list_instr. A thorough review of the process and these guidelines is strongly recommended prior to initiating an inmate trust account withdrawal collection program. For additional details contact Jim Lehman or Berny Schiff at 512.463.1625.

Register Online

Don't forget... you can now register online if you plan to pay the registration fee by credit card or debit card. If you have forgotten your user name or password, contact Crystal Peiser at TMCEC (peiser@tmcec.com) or 800.252.3718. TMCEC plans to have the FY 11 schedule of events up online no later than July 15th. The academic schedule will be mailed to courts in mid-August. So, you can register online early to assure a seat in the school of choice. Registering online is simple, just follow the directions shown below:

1. Visit http://register.tmcec.com
2. Enter your Login and password in the appropriate fields and click the button labeled “sign on”
3. Click “Upcoming Events” in the column to the right of your profile to view available programs
4. Select a program by clicking on its name in the Seminar column
5. Once on the program’s page, select a Housing option
6. Please select an Arrival Date from the drop down menu
7. Choose “Smoking” or “Nonsmoking”
8. Click the checkbox to agree to the terms
9. Review the preselected fees and select any optional sessions you would like attend (if offered)
10. Click the button labeled “check-out”
11. Review the Check-Out Basket and enter your billing information
12. Click the button labeled “check-out” (be sure to only click once)
13. You will receive a confirmation email confirming the details of your registration. Please review everything carefully and contact TMCEC if you have any questions or concerns.

The Municipal Judges Book (2010 Edition)



Featuring both historic and contemporary issues, *The Municipal Judges Book* critically analyzes the nature of municipal courts and the judge's role in the Texas criminal justice system. An ideal textbook for new judges and others interested in procedural and substantive laws impacting Texas municipal courts, the content includes (1) an introduction to municipal courts and the Texas judicial system, (2) judgments, indigence, and enforcement, (3) rights of the accused and victims, (4) contempt, (5) the adjudication of juveniles in municipal court, (6) judicial ethics, and (7) legal research.

Send order to:

Texas Municipal Courts Education Center 1609 Shoal Creek Boulevard, Suite 302 Austin, Texas 78701 Fax: (512) 435-6118

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$250 - $299	$8.25 fee
$300 - $349	$9.50 fee
$350 - $399	$10.75 fee
$400 - $450	$12.00 fee

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Conference Site: _____

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- ☐ New Clerk Program ($200)
- ☐ Non-Attorney Judge ($50)
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- ☐ Traffic Safety Conference - Judges & Clerks ($50)
- ☐ Clerk/Court Administrator ($50)
- ☐ Bailiff/Warrant Officer* ($150)
- ☐ Assessment Clinic ($100)
- ☐ Court Administrator Seminar - June ($100)
- ☐ Prosecutor **not seeking CLE/no room** ($200)
- ☐ Prosecutor **seeking CLE/no room** ($300)
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- ☐ I need a room shared with a seminar participant. Please indicate roommate by entering seminar participant's name: _____ (Room will have 2 double beds)
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- ☐ Justice of the Peace
- ☐ Deputy Court Clerk
- ☐ Mayor (*ex officio* Judge)
- ☐ Other: _____

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

Judge's Signature: _____ Date: _____

Municipal Court of: _____ TCLEOSE PID # : _____

I certify that I am currently serving as a municipal judge, prosecutor, or court support personnel in the State of Texas. I agree that I will be responsible for any costs incurred if I do not cancel 10 business days prior to the conference. I agree that if I do **not** cancel 10 business days prior to the event that I am not eligible for a refund of the registration fee. I will first try to cancel by calling the TMCEC office in Austin. If I must cancel on the day before or day of the seminar due to an emergency, I will call the TMCEC registration desk at the conference site IF I have been unable to reach a staff member at the TMCEC office in Austin. If I do not attend the program, TMCEC reserves the right to invoice me or my city for meal expenses, course materials, and, if applicable, housing ($85 or more plus tax per night). I understand that I will be responsible for the housing expense if I do not cancel or use my room. If I have requested a room, I certify that I work at least 30 miles from the conference site. **Payment is due with the registration form. Registration shall be confirmed only upon receipt of registration form and payment.**

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

Change Service Requested

CHANGE IN OCA REPORTING FORM

Effective September 9, 2011, the Official Municipal Court Monthly Report form will change. Please go to the OCA website at www.courts.state.tx.us to download the form and the instructions. The new form will collect more information on active, inactive and reactivated cases, compliance dismissals, contempt cases, drug paraphernalia cases, orders for nonsecure custody, detention hearings, transfers to juvenile court, and more.

Sections 171.1 and 171.2 of the Texas Administrative Code require submission of court activity reports each month to the Texas Judicial Council by no later than 20 days after the end of the month for which statistics are reported. The monthly report is not designed to report everything that a court does nor everything that requires the attention or time of the judge or court support personnel. Instead, the monthly report is designed to provide information required by law or needed by the judicial, legislative, and executive branches of government to make decisions regarding the jurisdiction, structure, and needs of the court system.

www.courts.state.tx.us

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