

CHAPTER 3 PRO SE DEFENDANTS AND DEFENDANTS REPRESENTED BY COUNSEL

Defendants in municipal court have constitutional and statutory rights to the assistance of counsel. However, in municipal court, even indigent defendants do not have the right to a court-appointed attorney, except where the “interests of justice” require, per Art. 1.051(c), C.C.P. (For more information on “interests of justice” appointments, see, “The Oversimplification of the Assistance of Counsel in Class C Misdemeanors in Texas,” *The Recorder* (January 2009)). Most defendants accused of fine-only offenses appear in court pro se (unrepresented by counsel). This fact poses problems in ensuring that defendants are treated fairly. A court should have procedures for communicating with pro se defendants in two settings: (1) outside the courtroom; and (2) in the courtroom during hearings.

1. Communicating with Pro Se Defendants out of Court

Checklist 3-1	Script/Notes
<input type="checkbox"/> 1. Develop procedures and standing orders for the processing of walk-in defendants by support personnel. <input type="checkbox"/> a. Give walk-in defendants information on court proceedings: <input type="checkbox"/> (1) Pay special attention to the right to a jury trial and the right to counsel; and <input type="checkbox"/> (2) Be aware that special procedures apply when dealing with a juvenile.	<p>For a more complete discussion of a criminal defendant’s rights, see <i>Municipal Courts and the Texas Judicial System</i>: Chapter 4.</p> <p>See Chapter 4.</p> <p>See Chapter 13.</p>
<input type="checkbox"/> 2. Instruct support personnel not to give legal advice. They may inform individuals of the procedures, but may not suggest or recommend a particular course of action.	<p>Court support personnel may not engage in the unauthorized practice of law. Sec. 81.101, G.C.</p>
<input type="checkbox"/> 3. When a guilty plea is processed or a fine is paid, the clerk should verify that it is being done by the defendant or person authorized to act for the defendant.	<p>A guilty plea is void when it is not entered by or authorized by the defendant. <i>Ex parte Super</i>, 175 S.W. 697 (Tex. Crim. App. 1915).</p>

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The majority of defendants in municipal courts do not retain counsel, and instead represent themselves in court proceedings. Though pro se defendants maintain the right to litigate their own cases, they often lack a proper understanding of court procedures and decorum. A defendant who elects to represent himself or herself cannot complain of the lack of effective assistance of counsel. The rules of evidence, procedure, and substantive law will be applied the same to all parties in a criminal trial whether that party is represented by counsel or appearing pro se. *Williams v. State*, 549 S.W.2d 183 (Tex. Crim. App. 1977).

While no special treatment is required for pro se defendants, judges and court personnel can efficiently facilitate the court's docket by informing pro se defendants of their rights in court and by clearly explaining the court's expectations for maintaining order and decorum.

2. Communicating with Pro Se Defendants in Court Proceedings

Checklist 3-2	Script/Notes
<input type="checkbox"/> 1. Remind the defendant that conversations with the judge are “court” proceedings.	See Chapter 4 in this book for procedures regarding appearances.
<input type="checkbox"/> 2. Emphasize the right to retain counsel. Reasonable accommodations (by resetting appearance dates and/or granting continuances) should be provided to defendants who appear in court pro se but who after being advised of their right to counsel wish to seek the assistance of counsel.	A warning and waiver of the constitutional right to retain counsel is required. <i>Warr v. State</i> , 591 S.W.2d 832 (Tex. Crim. App. 1979).
<input type="checkbox"/> 3. If the defendant chooses to represent himself or herself, inquire whether the defendant understands the consequences of proceeding without counsel.	
<input type="checkbox"/> a. There is no right to lay representation (except self-representation).	<i>U.S. v. Wilhelm</i> , 570 F.2d 461 (3d Cir. 1978).
<input type="checkbox"/> b. Allowing a lay person to act as an attorney representing anyone other than himself or herself permits unauthorized practice of law. This includes allowing a parent to represent his or her child.	
<input type="checkbox"/> 4. The judge should be aware of the defendant's ignorance of legal procedure and rules of evidence in maintaining order and decorum.	See <i>Municipal Courts and the Texas Judicial System</i> : Chapter 1.
<input type="checkbox"/> 5. In the interests of fairness and order, the court may inform the defendant of:	
<input type="checkbox"/> a. General procedures and steps in the trial;	

- ☐ b. Voir dire and jury selection;
 - ☐ c. Options concerning opening statements;
 - ☐ d. Right to confront and examine prosecution witnesses;
 - ☐ e. Right to present defenses and defense evidence;
 - ☐ f. Right to testify on own behalf;
 - ☐ g. Right to request jury instructions;
 - ☐ h. Options concerning closing argument; and
 - ☐ i. Right to appeal.
- ☐ 6. If the defendant wishes to testify, inform him or her of the privilege against self-incrimination and obtain waiver.
- ☐ 7. The judge must maintain control of proceedings.
- ☐ a. If the defendant is unruly and disruptive, consider warning, restraint, or threat of contempt.

Warning to testifying defendant:
 “You have the constitutional right under the 5th Amendment not to testify and the fact that you do not testify cannot be held against you in any way. The prosecution is required to prove your guilt beyond a reasonable doubt, and you are not obliged to present any evidence. If you do testify, you may be cross-examined, that is, asked questions by the prosecution on any matter relevant to any issue in the case. Do you understand that?”

[If the defendant says “yes”:]
 “Then, understanding that, it is your desire to testify on your own behalf?” See *Municipal Courts and the Texas Judicial System*: Chapter 4 for a more complete discussion of a defendant’s 5th Amendment rights.

Illinois v. Allen, 397 U.S. 337 (1970). See Checklists 14-1 and 16-5.

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3. Defendants Represented by Counsel

While most defendants appear pro se in municipal court, the number of defendants retaining counsel continues to increase. Judges should welcome representation by counsel and foster an environment for conducting the business of the court in accordance with the legal and ethical guidelines applicable to both the bench and the bar. The following are basic guidelines that municipal judges should keep in mind in communicating with attorneys.

Checklist 3-3	Script/Notes
<input type="checkbox"/> 1. In municipal court, a defendant has the right to appear by counsel as in all other cases.	Art. 45.020/45A.160, C.C.P.
<input type="checkbox"/> 2. In order to represent a defendant in any Texas court, an attorney must be licensed to practice law.	Individuals who engage in the unauthorized practice of law may be sued civilly in an effort to prohibit future occurrences. For additional information visit the Texas Unauthorized Practice of Law Committee at www.txuplc.org .
<input type="checkbox"/> a. Upon proof of certain legal requirements and a motion by the Texas Board of Law Examiners, a person may be duly admitted and licensed by the Texas Supreme Court as an attorney and counselor at law and able to practice “in all Courts of the State of Texas.”	To see if an attorney is licensed and active to practice law in Texas (and to determine whether the attorney has a disciplinary history) visit the State Bar of Texas at www.texasbar.com .
<input type="checkbox"/> b. Attorneys licensed to practice law in other states may seek <i>pro hac vice</i> admission to practice in Texas courts. This requires the attorney to complete an application provided by the Texas Board of Law Examiners, pay fees, and file a sworn motion pursuant to Rule XIX of the Rules Governing Admission to the Bar of Texas in the court where the attorney requests permission to participate in representation. The decision to grant or deny such a motion is not made by the court in which the application is filed—rather by the Board of Law Examiners.	For more information on <i>pro hac vice</i> admission, visit the Texas Board of Law Examiners at www.ble.texas.gov .

- ❑ 3. Judges should be just as familiar with the Texas Disciplinary Rules of Professional Conduct (setting ethical guidelines for lawyer) as they are with the Texas Code of Judicial Conduct. Lawyers are obligated to conduct themselves in a manner consistent with the Disciplinary Rules of Professional Conduct in all Texas courts.

- ❑ 4. Attorneys engaged in misconduct cast discredit on the legal profession. Judges have a special duty to maintain the integrity of the legal system. Hence judges also have a duty to prevent attorney misconduct. A judge who receives information clearly establishing that a lawyer has committed a violation of the Rules of Professional Disciplinary Conduct has an ethical obligation to “take appropriate action.” “A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Disciplinary Conduct that raises a substantial question as to a lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.”

- ❑ 5. Courts should consider requiring a letter of representation be on file with the court in every case where the defendant is represented by counsel. Such letters become part of the court’s file. A letter of representation is important for the following reasons:
 - ❑ a. It tells the court the scope of representation;

 - ❑ b. It provides the court with the attorney’s contact information that will be used in all subsequent communications from the court;

 - ❑ c. Prosecutors are not allowed to directly communicate with defendants represented by counsel. Rather, the prosecutor must communicate with the defendant through counsel; and

For more information, visit the Texas Center for Legal Ethics and Professionalism at www.legalethictexas.com.

Canon 3(D)(2), *Code of Judicial Conduct*.

The act of an attorney standing for or acting on behalf of a client is called “representation.” It is customary for defense attorneys to file a letter of representation informing both the court and the prosecution that a particular lawyer or law firm is representing the defendant in a specified matter. *Black’s Law Dictionary*

Rule 4.02, Texas Disciplinary Rules of Professional Conduct.

- ❑ d. It may become important documentary evidence in the event defendant counsel fails to appear in court or commits other violations of the Texas Disciplinary Rules of Professional Conduct.
- ❑ 6. The court may require the attorney to acknowledge the existence of any local rules (rules of decorum or guidelines for practicing before the court).

See, “An Introduction to Model Rules of Court Decorum”
Municipal Court Recorder
(Summer 2002) at 12.