NEWSLETTER

Winter 2017

MESSAGE FROM THE EXECUTIVE DIRECTOR

Happy 2017! The education year is off to a great start for TJCTC. We have already had our first education seminar for the judges, constables, and court personnel and have welcomed 30 new judges. We have also begun our 10 hour workshops and have several scheduled in the coming months. The 85th Legislative Session is underway and we've included the dates and locations of our legislative updates for you to start planning. Our curriculum this year is focused on some of the significant topics we anticipate will be addressed this session, such as the indigent party and mental health.

With a new year comes new changes and we are pleased to tell you about our new staff attorney, Rebecca Glisan. She comes to us with an outstanding background and is already up to speed and firing on all cylinders! Rebecca also has a delightful personality and we hope you enjoy getting to know her as well as learning from her in your courses.

Our office continues to serve your education needs through legal phone calls, board questions, and resources on our website. We are always striving to enhance our offerings, so never hesitate to share your thoughts or ideas with us. Providing you the ability to best serve the people of Texas is what we're here for!

Best Regards

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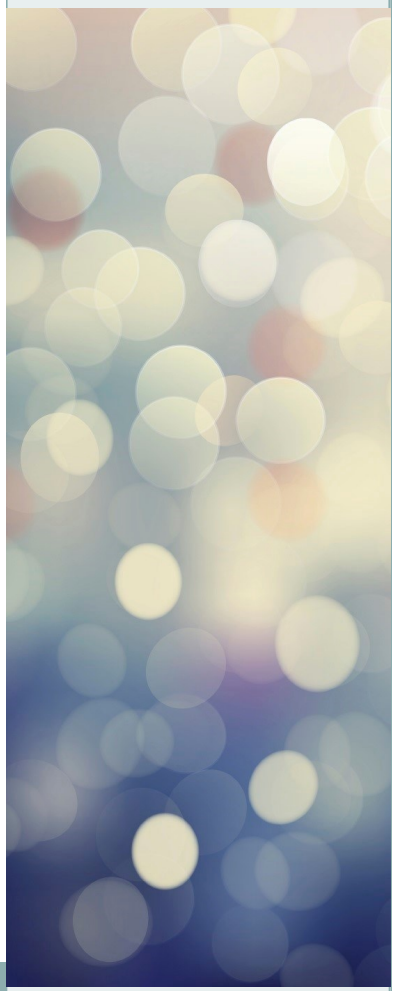

WAIVER OF FINES AND FEES FOR INDIGENT DEFENDANTS

By Randall L. Sarosdy
General Counsel

There have been quite a few stories in the media lately about defendants who have allegedly been placed in jail simply because they were too poor to pay their fines. *See* www.buzzfeed.com/kendall taggart/in-**texas**-its-a-crime-to-be-**poor**; http://www.austinchronicle.com/news/2016-08-05/locked-up-for-being-poor/;http://www.houstonpress.com/news/get-a-ticket-while-being-poor-in-houston-heres-how-you-might-wind-up-in-jail-8424862;http://www.texasmonthly.com/the-daily-post/texas-debtors-prisons-problem/. More attention to these issues is expected in the new legislative session that began this month. We thought it would therefore be a good time to review the procedures for waiving fines and fees for indigent defendants.

A defendant in Texas may find himself facing a variety of fines, costs and fees depending on how he responded (or failed to respond) to the criminal offense with which he was charged. These include: (1) fines and costs imposed upon conviction; (2) collection fees; (3) time payment fees; (4) surcharges; (5) Omni fees; and (6) scofflaw fees. When and how these fines and fees may be waived for an indigent defendant depends on the fine or fee at issue. We will therefore discuss each of them separately. But first let's look at how you determine whether a defendant is indigent.

When is a Defendant Indigent?

Two statutes offer definitions of "indigent" that apply to cases falling within those statutes. Section 133.002(2), Local Government Code, defines "indigent" as "an individual who earns not more than 125 percent of the income standard established by applicable federal poverty guidelines." The federal poverty guidelines are set each year by the Department of Health and Human Services. The 2016 guidelines may be viewed at this link: http://www.ncsl.org/research/health/2014-federal-poverty-level-standards.aspx. For example, it shows household income for a family of four as $24,300. 125% of that amount would be $30,375. This definition applies to any criminal fees owed under Chapter 133 of the Local Government Code.

The second statute that defines "indigent" is Section 708.158, Transportation Code, which deals with surcharges. It states that the following documentation may be used as proof of indigence:

(1) a copy of the person's most recent federal income tax return that shows that the person's income or the person's household income does not exceed 125 percent of the applicable income level established by the federal poverty guidelines;

(2) a copy of the person's most recent statement of wages that shows that the person's income or the person's household income does not exceed 125 percent of the applicable income level established by the federal poverty guidelines; or

(3) documentation from a federal agency, state agency, or school district that indicates that the person or, if the person is a dependent as defined by Section 152, Internal Revenue Code of 1986, the taxpayer claiming the person as a dependent, receives assistance from:

(A) the food stamp program or the financial assistance program established under Chapter 31, Human Resources Code;

(B) the federal special supplemental nutrition program for women, infants, and children authorized by 42 U.S.C. Section 1786;

(C) the medical assistance program under Chapter 32, Human Resources Code;

(D) the child health plan program under Chapter 62, Health and Safety Code; or

(E) the national free or reduced-price lunch program established under 42 U.S.C. Section 1751 et seq.

This standard therefore applies to a defendant who is seeking a waiver of surcharges (discussed below).

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Other statutes (such as Art. 45.046, Code of Criminal Procedure) do not define "indigent." In those cases the court may look to the definitions provided in Local Government Code § 133.002(2) or Transportation Code § 708.158, or the court may use the Federal Poverty Guidelines or an Indigent Defense Plan for the county in which the court is located. Indigent Defense Plans may be viewed at this link: http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx

Generally, the court may consider factors such as the following: (1) The defendant's amount of income; (2) The defendant's source of income (wages, investment, checking/savings, child support, social security, disability, welfare income, assets or non/exempt property to sell, loans and ability to borrow money, if defendant posted cash or surety bail, recent or long-term job loss); (3) The defendant's expenses (number and age of dependents, rent/mortgage payment, debts & obligations (car note, credit card), personal expenses, illness or incapacity of defendant, spouse, or dependent child; (4) Other evidence (ability to work, spouse financial condition; defendant's long-term physical illness or disability (or spouse or dependent child); defendant has a mental disability (or spouse or dependent child); defendant recently incarcerated (or spouse)).

Factors that should not be considered are: (1) the financial resources of the defendant's parents or other relatives; (2) exempt property of the defendant, including homestead and vehicles; and (3) the attitude of the defendant

Fines and Costs Following Conviction

If a defendant has entered a plea of guilty, either in open court or by mailing in payment or a plea, or if a defendant is convicted after trial, the justice court must produce a written judgment. The judgment must include the amount of the fine and costs the defendant must pay to the court. *See* Article 45.041, Code of Criminal Procedure. The judgment must also state whether the defendant must pay:

(A) the entire fine and costs when sentence is pronounced;
(B) the entire fine and costs at some later date; or
(C) a specified portion of the fine and costs at designated intervals.

Id. The justice court must also produce (or be ready to produce) a bill of costs. *See* Article 103.001, Code of Criminal Procedure.

A judge must allow a defendant to pay the fine and costs in designated intervals if the judge determines that the defendant "is unable to immediately pay the fine and costs." Art. 45.041(b-2). This is not a finding of indigency but only a determination that the defendant is not able to pay all of the fine and costs right now.

A judge may also require a defendant to discharge all or part of the fine or costs by performing community service if the defendant is "determined by the judge to have insufficient income or resources to pay the fine or costs." Art. 45.049(a), Code of Criminal Procedure. The judge may also order the defendant to perform community service if a "defendant fails to pay a previously assessed fine or costs." *Id.* A defendant is considered to have discharged "not less than $50 of fines or costs for each eight hours of community service." *See* Art. 45.049(e).

A justice court may also waive the payment of fines or costs if the court determines that (1) the defendant is indigent and (2) discharging the fine and costs by performing community service under Art. 45.049 would impose an undue hardship on the defendant. Art. 45.0491. Although "indigency" is not defined in this Article, the court may use the standards discussed above (at pages 1-2) in determining whether the defendant is indigent.

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If a defendant fails to discharge a fine and costs, the court may issue a capias pro fine under Art. 45.045 for the defendant's arrest. But a court may **not** commit a defendant to jail for failing to discharge the fine and costs UNLESS the court first conducts an indigency hearing under Art. 45.046, Code of Criminal Procedure, and after that hearing makes a **written determination** that either: (1) the defendant is not indigent and has failed to make a good faith effort to discharge the fine and costs; or (2) the defendant is indigent and: (A) has failed to make a good faith effort to discharge the fine and costs by performing community service; and (B) could have discharged the fine and costs by performing community service without experiencing any undue hardship. If the court is unable to make such a finding in writing, then it may not confine the defendant in jail for failing to discharge the fine and costs. What this portion of Article 45.046 says is that we do not jail people simply because they are too poor to pay fines and court costs. This practice, in addition to violating state law, would also violate the defendant's constitutional rights. *Tate v. Short*, 401 U.S. 395 (1971).

If a defendant is ordered to lay out a fine and costs in jail, the court must specify in its order the period of time (not less than eight hours nor more than 24 hours) the defendant must spend in jail for each $50 fine and costs (or such higher amount as the judge may set). *See* Art. 45.048(b). Alternatives to confinement include reporting the defendant to OMNI, civil collection of the fine under Art. 45.047 or waiver of payment of the fine and costs at that point under Art. 45.0491.

Collection Fees

If a defendant fails to appear by the appearance date in response to a citation, and fails to enter a plea or utilize the procedures under Art. 27.14(b), Code of Criminal Procedure, then Art. 103.0031 of the Code of Criminal Procedure allows the case to be referred to civil collections if the commissioners court of the county has entered into a contract for collections under Art. 103.0031(a). That procedure is an effort that seeks to obtain the defendant's voluntary payment of an amount of a fine and costs that is acceptable to the court plus a 30 percent collection fee after the amount is more than 60 days past due. Section 103.0031(b), Code of Criminal Procedure, also applies the 30% collection fee to an "amount ordered to be paid by the court after plea or trial" after the amount is more than 60 days past due.

Section 103.0031(d) states that a defendant is not liable for the 30% collection fee "if the court of original jurisdiction has determined that the defendant is indigent, or has insufficient resources or income, or is otherwise unable to pay all or part of the underlying fine or costs." Again, as the term "indigency" is not defined in this Article, the court may use the standards discussed above in making that determination.

Section 103.0031(b) also states that the 30% collection fee does not apply "to a case that has been dismissed by a court of competent jurisdiction or to any amount that has been satisfied through time-served credit or community service." The collection fee may therefore not be recovered after dismissal of a case or as to any amount that has been discharged by either community service or time served in jail. But the collection fee may be applied to any balance remaining after a partial credit for community service or time served if the balance is more than 60 days past due.

Time Payment Fees

Section 133.103, Local Government Code, imposes a time payment fee of $25 if a person has been convicted of a felony or misdemeanor and "pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution." As the time payment fee does not apply to any amount the defendant pays within 30 days of the judgment, the time payment fee should not be added until 30 days have passed even if the defendant has been placed on a payment plan (since the defendant could pay early and the amount is not due until after 30 days).

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Is the time payment fee waived if the defendant is found to be indigent? Yes. And in this case the statute does define "indigent." As discussed above (at pages 1-2), Section 133.002(2), Local Government Code, defines "indigent" as "an individual who earns not more than 125 percent of the income standard established by applicable federal poverty guidelines." This definition applies to the time payment fee since it is a fee under Chapter 133 of the Local Government Code. Therefore, a time payment fee may not be added to fines or court costs that are not paid within 30 days if the defendant is found to be indigent.

Surcharges

Chapter 708 of the Transportation Code establishes the Driver Responsibility Program. Under that program a person's driver's license accumulates points as of the date the Department of Public Safety records a conviction for certain offenses. Two points are assessed for a moving violation and three points for a moving violation that resulted in an accident. *See* Section 708.052, Transportation Code. Each year DPS will assess a surcharge on the license of a person who has accumulated six or more points during the preceding 36-month period. *See* Section 708.053, Transportation Code. The amount of the surcharge is $100 for the first six points and $25 for each additional point. *See* Section 708.054. Additional surcharges apply if a defendant is convicted of a DWI offense, or an offense for Driving While License Invalid, Driving Without Financial Responsibility or Driving Without Valid License. *See* Sections 708.102 – 708.104, Transportation Code. These surcharges take the form of specific dollar amounts per year for a three year period following a conviction (for example, $1,000 per year for a DWI conviction if no prior DWI convictions, but $2,000 per year if the defendant's BAC was .016 or higher).

Failure to pay the surcharges or enter into an installment plan within sixty days of the date of a second notice from DPS results in automatic license suspension. *See* Section 708.152. DPS may retain a collections attorney to collect unpaid surcharges, resulting in an additional 30% collection fee. *See* Section 708.155, Transportation Code.

DPS must "waive all surcharges assessed under [Chapter 708] for a person who is indigent." *See* Section 708.158 (a), Transportation Code. The "person must provide information to the court in which the person is convicted of the offense that is the basis for the surcharge to establish that the person is indigent." Section 708.158(b). In this case the statute does specifically identify the documentation that "may be used as proof" to determine whether the person is indigent. That documentation is listed above (at pages 1-2). If the court makes a finding of indigency for a person who has been assessed surcharges, the court should notify DPS of its finding with sufficient related information so that DPS can tie the finding of indigency to the conviction in that court.

DPS also allows persons who have been assessed surcharges to apply directly to DPS for a finding of indigency under an Indigency Program. https://www.dps.texas.gov/DriverLicense/ IndigencyProgram. htm. The DPS Indigency Program applies to persons living at or below 125% of the federal poverty level.

Omni Fees

If a person fails to appear in response to a citation or complaint for a traffic offense, or fails to pay or satisfy a judgment ordering the payment of a fine and costs in the manner ordered by the court, then the person may be reported to DPS under Chapter 706, Transportation Code, and DPS may deny renewal of the person's driver's license. *See* Section 706.004, Transportation Code. The court reports the person to DPS through the Omni system.

A person who is placed in Omni for failing to appear in response to a complaint or citation must pay an administrative fee of $30 for each complaint or citation reported to DPS unless the person is acquitted of the charge. See Section 706.006(a), Transportation Code. A person who is placed in Omni for failing to pay or satisfy a judgment ordering the payment of a fine or court costs must also pay the $30 administrative fee in order to be released from Omni. *See* Section 706.006(b), Transportation Code.

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May the $30 administrative fee be waived by the court if the person is indigent? There is nothing in the statute that provides for such a waiver. This administrative fee is not a fee imposed under Section 133.103, Local Government Code, so it is not covered by an indigence finding under that statute. It is also not included in the costs and fees that may be converted to community service under Art. 45.049, Code of Criminal Procedure, or waived under Art. 45.0491, Code of Criminal Procedure, if community service would impose an undue hardship. Section 706.006 of the Transportation Code states that this administrative fee is "in addition to" any other fee required by law. There is simply no provision in Chapter 706 for a waiver of this fee in the case of indigence. Therefore, the Omni administrative fee must be paid before the person can get his or her license renewed.

Scofflaw Fees

Section 502.010, Transportation Code, states that a county assessor-collector or DMV may refuse to register a motor vehicle if they receive information that the owner of the vehicle owes the county money for a fine, fee or tax that is past due or failed to appear in connection with a complaint, citation, information or indictment in a court in the county. Section 502.010(f) states that a county **may** impose "an additional fee of $20" on such a person. This is different from the Omni fees which are mandatory, not discretionary. Can the fee be imposed on a defendant who is indigent? The statute is simply silent on this question. There is no provision for a finding of indigency or waiving the $20 fee for an indigent person.

However, unlike Omni, the statute also does not say that if the defendant fails to pay the $20 fee they do not get their car registered. In fact, it says that if the defendant takes care of the underlying offense, then they must be allowed to register their vehicle even if they have not paid the $20 scofflaw fee. A court may therefore not refuse to give a compliance letter to a defendant just because they fail to pay the $20 fee.

The statute does not say how the scofflaw fee would be enforced; there is no provision for employing a collections attorney (as with surcharges) nor any authority to issue a capias pro fine based solely on an unpaid scofflaw fee.

Conclusion

Upon finding that a defendant is indigent, a court may waive fines and costs imposed upon conviction as well as collection fees, time payment fees and surcharges. There is no provision for waiver of Omni fees or scofflaw fees for an indigent person but in the case of scofflaw fees there is also no provision for enforcement. In making a finding of indigency the court should be guided by the statutory definition in Section 133.002(2), Local Government Code (125% of the Federal Poverty Guidelines), or Section 708.158, Transportation Code (for surcharges), or an Indigent Defense Plan for the county in which the court is located.

Creating, Appealing and Enforcing Eviction Judgments

By Bronson Tucker
Director of Curriculum

A frequent topic of discussion on our legal question board, our legal phone hotline, and at seminars around the state is what should be contained in judgments rendered in eviction cases, and once the judgments are rendered, what is the appeal process. Additionally, if there is no appeal, how are they enforced? The legislature has tinkered with eviction judgments as recently as the 2015 Legislative Session, and we will be monitoring the current session for any additional changes. Information related to these issues can be found in Rule 510 of the Rules of Civil Procedure and Chapter 24 of the Property Code.

What should be in any eviction judgment?

We will first address the issue of what should be in each and every eviction judgment. In general, a judgment needs to clearly resolve all issues pending before the court. So the most critical thing that must be in a judgment is an order either awarding possession of the premises to the plaintiff, or that the defendant may remain in possession of the premises. Additionally, if the plaintiff has joined a suit for back rent, the judgment should contain either an amount awarded to the plaintiff or a finding that the plaintiff take nothing. The prevailing party, whether plaintiff or defendant, should be awarded court costs, and attorney's fees, if allowed by law. *TRCP 510.8.*

Attorney's fees may be awarded if one of the two events listed in Property Code Sec. 24.006 has occurred. First, attorney's fees may be awarded if a written lease entitles the landlord to recover attorney's fees. If a written lease does not authorize attorney's fees, they may only be awarded if the landlord gives the tenant a written demand to vacate stating that if the tenant does not vacate the premises before the 11th day after receipt of the notice, and the landlord files suit, the landlord may recover attorney's fees. This notice must be sent by registered mail or certified mail, return receipt requested, at least 10 days before the suit is filed. Either of these conditions allow the prevailing party to recover attorney's fees, even if the tenant is the prevailing party.

What should be in a judgment for eviction for nonpayment of rent?

In addition to the above, there are more items that must be included if the eviction is for nonpayment of rent.

Keep in mind, an eviction might be for nonpayment of rent even if there is no rent awarded. For example, if I don't pay January and February's rent, get filed on, then give the landlord a check at trial for my back rent, I can still be evicted for breaching the terms of our agreement. Since there is no rent delinquent, there wouldn't be rent awarded. However, the eviction was still for nonpayment of rent, and these provisions would apply. They do not apply to other evictions, including evictions of people who were foreclosed upon (they were making mortgage payments, not paying rent).

In evictions for nonpayment of rent, the judge must determine how much rent is due every rental payment period, and note that amount in the judgment. If any rent is paid by a governmental agency, that fact and how much the governmental agency pays must also be noted in the judgment. *Property Code 24.0053(a).* Also, a judgment of eviction for nonpayment of rent must contain the amount of the appeal bond. That amount is to take into consideration the fact that an appeal of an eviction for nonpayment of rent, whether by appeal bond or by statement of inability to afford court costs, must require the tenant to pay one month's rent into the registry of the court to avoid a writ of possession being issued. *Property Code 24.00511.* Other considerations when setting an appeal bond amount would include damages for withholding or defending possession of the premises during appeal, including but not limited to loss of rentals and attorney's fees in the county court. *TRCP 510.9(b), 510.11.*

What should not be in an eviction judgment?

As important as what should be in an eviction judgment is what should not be in an eviction judgment. Most obviously, no monetary amounts should be in the judgment other than what is discussed above. Money due for late fees, damage to the property, electric or other utility bills, etc., may not be awarded in an eviction judgment. Further, judges have no discretion to issue conditional judgments, such as "The defendant must move from the premises unless they pay delinquent rents to the landlord in the amount of $900 on or before January 23, 2017."

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In addition, the Training Center strongly discourages putting items such as "move-out" dates in the judgment. There are several issues with the move-out date being placed in the judgment. First, possession of the premises has been awarded to the landlord as of the date of the judgment. The five day period is not there so that the tenant can prepare to move, it is there so that the tenant will have the opportunity to appeal. When you tell someone they have five days to move, they will be much more likely to take the full time period, and much more likely to require the landlord to obtain a writ of possession. Next, the information may end up being inaccurate. For example, you render judgment on January 23, 2017 and determine that the appeal will be due on January 30, 2017, and thus the writ of possession may issue on January 31. You place January 31 as the "move-out" date in the judgment. However, unexpectedly, your court must close at 3:00 PM on January 30. This extends the appeal window until January 31, and thus the writ may not issue until February 1. Also, calculating time periods for the parties is considered by OCA to be giving legal advice. So you can say that a party may appeal within 5 days, but should not say "You have until January 30 to appeal." Finally, many courts place "move-out" dates in the judgment that infringe upon the rights of the parties. Usually, it is by giving the tenant more time to move than the law allows. TRCP 510.8(d) says: "If the judgment or verdict is in favor of the plaintiff, the judge must award a writ of possession upon demand of the plaintiff and payment of any required fees." There is no discretion built in for the judge to change the time periods for issuance of writs of possession, which are discussed below.

Instead of placing things in the judgment such as "move-out" dates, our recommended practice, if desired, would instead be to announce in open court something along the lines of "I have rendered judgment in favor of (plaintiff's name). That means they are entitled to possession of the premises. (Defendant's name), you have 5 days in which to file an appeal of that judgment. If, after the expiration of that time, you have not appealed or moved out, the plaintiff will be able to get the constable to come forcibly remove you and your property from the premises." This doesn't calculate deadlines or provide legal advice. Instead it simply outlines the post-judgment procedure applicable in the case. If the landlord wants a "conditional judgment" as described above, that is an issue between the parties that does not involve the court, and the landlord is of course free to not pursue a writ of possession if the tenant satisfies the landlord's demands.

How are eviction judgments appealed and when does rent need to be paid into the registry?

Losing parties in an eviction suit have three methods by which they can appeal: posting an appeal bond, posting a cash deposit in lieu of an appeal bond, or by filing a statement of inability to afford payment of court costs. They have five days from the date of judgment to perfect an appeal by one of these methods, and the time period is extended if the fifth day falls on a Saturday, Sunday or legal holiday. Additionally, if the court closes before 5:00 PM on the date the appeal is due, the appellant has until the next business day to appeal.

As in the rendering of the judgment, the appeal process has special rules if the eviction was for nonpayment of rent. It is mandatory that your court order the tenant to pay one month's rent into the registry of the court if the tenant appeals a judgment of eviction for nonpayment of rent via appeal bond or via statement of inability to afford court costs. The notice must tell the defendant how much money to pay, how to pay it, when and where to pay it, including the time that the court closes on the date that it is due, and a statement that failure to pay may result in a writ of possession being issued against them. *TRCP 510.9, Property Code 24.0053.* A notice with all of the required elements may be downloaded under the Eviction Forms section under Resources at www.tjctc.org.

However, if the tenant fails to pay this rent, they do not lose their right to an appeal! Instead, this simply gives the landlord the right to get a writ of possession from the justice court, and then the appeal will go up to the county court. *Property Code 24.0054(a-2).* The rules and statutes don't give guidance on

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EVICTION JUDGMENTS (CONTINUED FROM PAGE 8)

how long the justice court should wait to send the case to county court after the tenant fails to pay the rent into the registry, in order to give the landlord the opportunity to get a writ of possession from the justice court. The Training Center recommends waiting 24-48 hours. If the landlord misses this window, they can still receive a writ of possession from the county court if the county court sets the matter for a hearing and the tenant still fails to pay the rent into the (county) court registry. *Property Code 24.0054(b).*

When can a writ of possession issue?

A writ of possession may not issue from the justice court if an appeal is perfected (unless, as described above, the tenant fails to pay rent as required into the justice court registry). If there is not an appeal, a writ of possession may not issue until the day after the tenant's appeal is due (TRCP 510.8 says the day after the appeal is due or the 6th day after judgment, whichever is later, but note that the day after the appeal is due will never be earlier than the 6th day after judgment). Your court must ensure that you properly calculate appellate deadlines so that you do not issue writs of possession too soon.

If the tenant fails to pay this rent, they do not lose their right to an appeal!

The only way that a writ of possession may issue before the day after the tenant's appeal is due is if the landlord posts an immediate possession bond pursuant to TRCP 510.5. The tenant must receive notice of the immediate possession bond, served upon them in the same manner as the citation. The citation may contain the required notice, and a citation containing this notice may be downloaded at www.tjctc.org. If the landlord posts an immediate possession bond, this changes the writ of possession timeframe, but only if the tenant does not appear at trial. If the tenant appears, the immediate possession bond has no effect, and we revert to the regular writ of possession timeframe. If the tenant fails to appear, the writ may **issue** immediately after the judgment. However, it may not be **executed** until the tenant has had at least 7 days' notice of the immediate possession bond. So, as long as the tenant got notice of the immediate possession bond at least 7 days before the trial date, if an immediate possession bond was filed and the tenant failed to appear, the writ may be issued and executed immediately upon judgment.

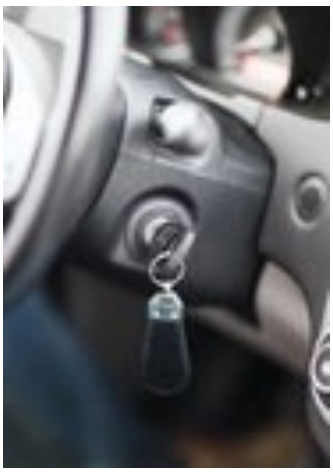
In addition, a writ of possession may not issue more than 60 days after judgment unless good cause is shown. Even with good cause, a writ may not issue more than 90 days after judgment and may never be executed more than 90 days after judgment. If the landlord waits past these deadlines and still wishes to evict the tenant, they must begin the entire process over again.

IMPORTANT NEW STUDIES CONCLUDE THAT MANDATORY IGNITION INTERLOCK SAVES LIVES

By Randall L. Sarosdy
General Counsel

Two major new studies have concluded that requiring all drivers convicted of driving under the influence of alcohol to install ignition interlock devices results in a significant reduction in the rate of alcohol-related crash deaths. The studies are based on an analysis of the impact of ignition interlock laws in all 50 states over the last 32 years. The findings have been reported in articles published in the American Journal of Public Health and the American Journal of Preventive Medicine. *See* Impact of State Ignition Interlock Laws on Alcohol-Involved Crash Deaths in the United States (Kaufman); http://www.ajpmonline.org/article/S0749-3797(16)30587-6/abstract (McGinty).

The articles note that "[alcohol-involved fatal motor vehicle crashes are a major cause of preventable mortality in the U.S. Thirty-one percent . . . of the 33,804 motor vehicle crash fatalities in 2013 involved at least one driver with blood alcohol content (BAC) ≥ .08 g/dL." McGinty at 1. This amount to approximately 11,000 deaths per year. Kaufman at 1. In Texas, 1,089 people died in alcohol-related crashes in 2013 (32.2% of all fatal crashes); 1,041 died in alcohol-related crashes in 2014 (29%); and 960 people died in alcohol-related crashes in 2015 (27%). Despite declining rates of motor vehicle crashes overall and alcohol-related crashes specifically over the last four decades, rates of alcohol-related crashes in the U.S. remain high.



As of 2016, all 50 states prohibit motorists from driving with a BAC greater than .08. But enforcement varies significantly from state to state. Although license suspension or revocation is the primary enforcement mechanism for DWI laws, it is widely recognized that license suspension or revocation is ineffective because more than half the people subject to such restrictions continue to drive anyway. Ignition interlock devices are seen as a more effective means of preventing alcohol-related driving. An ignition interlock is an alcohol-sensing device, connected to the ignition of a vehicle, which detects alcohol in the driver's breath. If alcohol in excess of a preset limit is detected by the sensor, the vehicle will not start. McGinty at 2.

Although all 50 states have some form of ignition interlock laws, the scope of those laws varies. As of March 2016, two states have "permissive" interlock laws which allow judges at their discretion to require a person convicted of DWI to install an interlock; 22 states (including Texas) have "partial" interlock laws requiring the use of interlock devices for certain categories of offenders or in certain situations; and 26 states have "mandatory/all" interlock laws requiring all persons convicted of a DWI offense to use an interlock. McGinty at 2.

The conclusions of the studies are consistent: **requiring interlock devices saves lives**. The first study notes: "In this nationwide study of a major drunk driving-prevention policy initiative, we found that requiring all drivers convicted of driving under the influence of alcohol to install an ignition interlock device was associated with **a 15% reduction in the rate of alcohol-involved crash deaths**. By preventing 0.8 deaths for every 100,000 people each year, this policy was comparable to airbags and the minimum legal drinking age . . . ." Kaufman at 4. The study estimated that 915 lives had been saved so far by the mandatory/all ignition interlock laws.

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The second study was more specific in its analysis by examining the differences between mandatory/all interlock laws and partial interlock laws, which the first study did not examine. McGinty at 2. "This study suggests clear protective effects of mandatory/all interlock laws on alcohol-involved fatal crashes, which were associated with an estimated 7% reduction in BAC ≥ 0.08 and 8% reduction in BAC ≥ 0.15 fatal crashes. This translates into **approximately 1,250 BAC ≥ 0.08 fatal crashes prevented in states that implemented such laws between 1982 and 2013.**" McGinty at 4. The study concluded: "Laws mandating interlock use for all offenders are more effective at reducing alcohol-involved fatal crashes than laws requiring interlocks for segments of high-risk offenders. Enactment of mandatory/all interlock laws in states that currently have partial and permissive laws is a public health priority." McGinty at 6.

Thus, although the methodology of the two studies varied and accordingly they reached different conclusions about the number of lives saved so far (915 v. 1,250), both studies provide strong evidence that mandatory/all ignition interlock laws are an important means in continuing to reduce the number of alcohol-related fatalities on our roads and highways.

Although justice courts do not hear cases resulting in the imposition of interlock devices following a conviction for DWI, justices of the peace do magistrate a very large number of DWI offenses each year and at that stage of the case have a very significant role in protecting the public by requiring ignition interlock devices as a bond condition under Arts. 17.40 and 17.441, Code of Criminal Procedure. For more information on this extremely important function, please see the article entitled DWI Bond Schematic Program or contact me at 512-347-9927, ext. 201.

IMPROVING BOND CONDITIONS IN DWI CASES THROUGH THE TEXAS DWI BOND SCHEMATIC PROGRAM

By Randall L. Sarosdy
General Counsel

The DWI Bond Schematic (or Uniform Bond Condition) Program is part of a statewide plan to reduce the incidence of DWI offenses in Texas by assisting Texas counties in adopting a comprehensive plan for setting bond conditions in DWI cases. The Texas Justice Court Training Center (TJCTC) views this program as an important step in reducing the number of DWI drivers on Texas roads and highways, thereby improving public safety throughout the state.

TJCTC will work with all criminal magistrates (including county judges and justices of the peace), local prosecutors, and potential monitoring agencies in each county that elects to participate in the program in order to create forms specific to that county to be used in administering the program. These forms may be based on TJCTC's Universal DWI Bond Schematic (available at www.tjctc.org) or forms that a county currently uses in setting bond conditions. Forms will be modified to meet the bond conditions that county officials agree are appropriate in DWI cases.

The program: provides county officials with an opportunity to develop a system for setting, monitoring, and enforcing DWI bond conditions to ensure community safety and protect victims; increases consistency in setting bond conditions by a magistrate and a trial court; promotes the use of bond conditions (such as ignition interlock devices) that reduce the incidence of DWI recidivism; and ensures that bond conditions required by law are set, monitored and enforced.

The program is administered by the Texas Justice Court Training Center Traffic Safety Initiative through funding provided by the Texas Department of Transportation. If you would like further information concerning the program, please feel free to contact Randall L. Sarosdy at rs52@txstate.edu.

Save a Life™
TEXAS DEPARTMENT OF TRANSPORTATION

2016-2017 TRAINING SCHEDULE

JUSTICE OF THE PEACE EDUCATIONAL SEMINARS

Corpus Christi
January 29 - February 1, 2017

Austin
February 28 - March 3, 2017

Rockwall
April 23 - 26, 2017

Lubbock
May 30 - June 2, 2017

COURT PERSONNEL EDUCATIONAL SEMINARS

Horseshoe Bay
February 15 - 17, 2017

Galveston
March 8 - 10, 2017

Corpus Christi
April 10 - 12, 2017

San Marcos
May 9 - 11, 2017

Rockwall
July 10 - 12, 2017

CIVIL PROCESS EDUCATIONAL SEMINARS

Austin
February 26-March 1, 2017

McKinney
April 18-21, 2017

Galveston
May 21-24, 2017

10-HOUR EDUCATIONAL WORKSHOPS

Galveston
Evictions and Landlord-Tenant Law
February 6 - 8, 2017

College Station
Criminal Procedure and Traffic
March 19 - 21, 2017

Amarillo
(West Texas JPCA)
Civil Procedure and Other Topics
April 18-19, 2017

San Marcos
Truancy and Juvenile Law
August 23 - 25, 2017

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SETTING BAIL AMOUNTS

By Rebecca Glisan
Staff Attorney

The topic of bail amounts and the release of defendants has been the subject of several news reports recently. Striking the right balance when deciding what bail amount is appropriate can be difficult and there can be consequences to the decisions that are made and how they are perceived. As such, it is worth spending some time discussing how to approach the issue.

Generally, a defendant must always be given the option to be released on bond. There are certain situations, however, where this is not the case. For example, bail may be denied on capital offenses where there is a finding of evident proof of the offense. See Art. 1, Sec. 11, Texas Constitution. Art. 1, Sec. 11a, Texas Constitution, sets out several additional scenarios where only a district judge may deny bond when there has been a specific felony and/or multiple felonies under specific circumstances. In a case where a child is an alleged victim as described in Art. 17.153, Code of Criminal Procedure, the original magistrate may deny bond if the defendant is arrested for the violation of bond conditions, as long as the requirements of the statute are met and the case has not yet been filed with the trial court. Art. 17.152, Code of Criminal Procedure and Art. 1, Sec 11b and 11c, Texas Constitution, also put forth specific provisions for when a magistrate may deny bail when a defendant violates certain court orders or conditions of bond in a family violence case.

When releasing a defendant, there are a few options. You can either release the defendant on their own personal recognizance (no monetary amount paid or promised), set a personal bond (the defendant has to promise to pay a certain amount if they do not appear), or set a bail bond (the defendant has to put up a cash bond or a surety bond through a bail bondsman).

A justice of the peace does not have the option to release a defendant on a personal bond for certain offenses. According to Art. 17.03, Code of Criminal Procedure, only the court before whom the case is pending may do so for the following offenses: capital murder; aggravated kidnapping; aggravated sexual assault; deadly assault on law enforcement/corrections officer/parole board/court participant; injury to a child/elderly individual/disabled individual; aggravated robbery; burglary; engaging in organized criminal activity; continuous sexual abuse of a young child; continuous trafficking of persons; or a felony under Chapter 481, Health and Safety Code, or Sec. 485.033, Health and Safety Code, punishable by a minimum imprisonment/fine that is more than that for a first degree felony. The court before whom the case is pending is also the only one who can order a personal bond in any case where the defendant refuses to submit to testing for a controlled substance as requested by the court or magistrate under Art. 17.03(c), or submits to testing and then tests positive.

There are also some limitations regarding when bail may be set in probation and parole violation cases. On a motion to revoke probation, only the judge who ordered the arrest for the alleged violation may authorize the defendant's release on bail. Any magistrate, however, may perform all other appropriate duties and exercise all other appropriate powers as provided by Art. 15.17, Code of Criminal Procedure, including accepting a bond in the amount set by the judge of the trial court where the motion to revoke is pending. See Art. 42A.751(c), Code of Criminal Procedure. On a parole violation case, a magistrate may release the person on bond pending the parole hearing only if each of the following three requirements are met: 1) the person is arrested or held in custody only on a charge that the person committed an administrative violation of release; 2) the parole division included a notice on the warrant for the person's arrest that the person is eligible for release on bond; and 3) the magistrate determines that the person is not a threat to public safety. See Sec. 508.254, Government Code.

Generally, a defendant must always be given the option to be released on bond.

For the purpose of deciding on a dollar amount for bail, both the Constitution and the Code of Criminal Procedure are relevant. Art. 1, Sec. 13 of the Texas Constitution prohibits setting an excessive bail, and Art. 17.15, Code of Criminal Procedure, sets forth additional rules that must be followed when deciding what amount is appropriate:

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1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be so used as to make it an instrument of oppression.

3. The nature of the offense and the circumstances under which it was committed are to be considered.

4. The ability to make bail is to be regarded, and proof may be taken upon this point.

5. The future safety of a victim of the alleged offense and the community shall be considered.

One pitfall to avoid is setting bail according to a court's or county's bail schedule for certain offenses and not modifying the amount as needed depending on each case. The Attorney General has stated that it is not "proper for bail amounts to be set according to a pre-set schedule. Bail must be determined on a case-by-case basis." Atty. Gen. Op. DM-57 (1991). Perhaps it should be higher due to a safety concern for a victim or a likelihood that the defendant will flee. Maybe it should be lower if the defendant has no possible way to make the bail and it will be excessive for that defendant. Therefore, if a county has a bail schedule, it can only be used as a starting point and each of the five rules stated in Art. 17.15, Code of Criminal Procedure, must be taken into account and followed for each individual defendant.

Another issue that can arise is when a defendant is released on a very low bail or a personal bond and then proceeds to commit another crime shortly after being released. This tends to draw public attention, and so the judge who set the bail needs to be able to support why they made the decision they did. While there is no way to make sure this never happens, paying close attention to the nature and circumstances of the offense will help. With violent crimes, especially those involving stalking and domestic violence, a personal bond or very low bond usually doesn't make much sense. Regardless of the bail amount, bond conditions specific to the type of offense and safety concerns for the victim and community can also be a useful tool and should be used in conjunction with an appropriate bail amount. And for certain offenses, such as alcohol related offenses and offenses with child victims, certain conditions may be mandatory. See Arts. 17.441 and 17.41, Code of Criminal Procedure. A couple of particularly useful conditions that may be appropriate include requiring an ignition interlock device on DWI cases and requiring GPS monitoring on domestic violence and stalking cases. Chapter 17 of the Code of Criminal Procedure contains further details on bond conditions options for a variety of offenses. Bond conditions should not, however, replace the bail. In fact, just recently, the Travis County state district court judges issued a memo warning municipal judges and justices of the peace not to allow potentially dangerous defendants or flight risks to be released from jail without bail.

It is also important not to go too far in the other direction and set bonds that are either generally excessive or too high for the specific offense. A defendant should not be unable to make bail for the sole reason that they are poor. For low-level crimes where there is not a safety concern or flight risk concern, the magistrate should consider whether a personal bond or fairly low bond may be appropriate. When a defendant has been arrested on a Class C misdemeanor, for example, a personal bond will likely be sufficient. And in the case of certain mentally ill defendants charged with non-violent offenses, it is actually mandatory to release the defendant on a personal bond if the requirements of Art. 17.032, Code of Criminal Procedure, are met.

In the end, it is up to the judge's discretion to balance all of the rules that must be followed in each individual case. The best plan of action is to gather as much relevant information as possible, listen to what the defendant has to say, take your time to thoughtfully apply the rules, and be able to explain your decisions.

WAIVER OF THE FIVE DAY WAITING PERIOD IN TRUANCY CASES

By Randall L. Sarosdy
General Counsel

Our Fall 2016 Newsletter included an article concerning service of the summons and pretrial hearings in truancy cases. We described a practical problem that has developed due to the very specific procedures in the Family Code concerning service of a summons and setting of an adjudication hearing. The Family Code requires:

- First, after a truancy petition is filed, "the truancy court shall set a date and time for an adjudication hearing." Section 65.056(a), Family Code.
- Second, after setting the date and time of an adjudication hearing, "the truancy court shall direct the issuance of a summons" to the child and the child's parent or guardian (among others). Section 65.057(a), Family Code.
- Third, the "summons shall be served on the person personally or by registered or certified mail, return receipt requested, **at least five days before the date of the adjudication hearing.**" Section 65.058(a), Family Code.

Because of difficulties in serving a summons in this manner, an adjudication hearing may be set but the child and parent or guardian may not actually be served with the summons at least five days before the hearing.

We described two approaches truancy courts have used to address this problem. Some courts send a letter by first class mail to the child and parents and invite them to come to the court on a specified date for a pretrial hearing. Many recipients respond and appear in court. At that time they are informed of their rights and the child is given the opportunity to answer the allegations of the petition. If the child admits that he or she engaged in truant conduct, the court proceeds to the remedial stage. If a person does not respond to the court's invitation to appear for the pretrial hearing, a summons may be issued and served as provided in Section 65.058 (a).

Other truancy courts (concerned about setting a pretrial hearing) have set the time and date of an adjudication hearing, and then issued a summons while also sending a letter by first class mail to the child and parents notifying them of the adjudication hearing and enclosing a copy of the summons. If the child appears but has not been served with the summons personally or by registered or certified mail, then the child is served personally at the time he or she appears in court. But the adjudication hearing is then postponed for at least five days in order to comply with Section 65.058(a). This requires the child and parent to come back to court a second time for the actual adjudication hearing.

In our Fall 2016 Newsletter article we suggested that the child might be able to waive service of the summons so that the child and parent would not have to come back to court five days later and the court could proceed with the adjudication hearing right then and there. However, Section 65.057(d) creates some confusion as to whether a child may waive service of a summons because it states that a "party, **other than the child**, may waive service of summons by written stipulation or by voluntary appearance at the hearing." Does this mean that a child may not waive service of a summons? We think it does not necessarily mean that (as explained in the previous article) but we think there is a simpler way to address this problem that does not require waiver of the summons.

In a nutshell it is not the summons that the child needs to waive, but **only the five day waiting period** between the service of the summons

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and the adjudication hearing. The summons will still be served on the child if he or she shows up for the adjudication hearing but has not yet been formally served. But the child (and parent) could then be asked if they wish to waive the five day waiting period and proceed with the adjudication hearing at that time or wish to come back for the adjudication hearing at least five days later. A waiver of the five day waiting period does not implicate Section 65.057(d) which only applies to a waiver of the summons.

In order to waive the five day waiting period it is still necessary to follow the procedures in Section 65.008 of the Family Code. That section permits a child to waive rights if: (1) the right is one that may be waived; (2) the child and the child's parent or guardian are informed of the right, understand the right, understand the possible consequences of waiving the right, and understand that waiver of the right is not required; (3) the child signs the waiver; (4) the child's parent or guardian signs the waiver; and (5) the child's attorney, if any, signs the waiver. The five day waiting period is clearly a right that "may be waived" and as long as the procedures described above are followed the waiver will be valid. It seems likely that most children and their parents would prefer to waive the five day waiting period and proceed with the adjudication hearing rather than having to come back to court another day (thereby missing more time from school and, for the parent, work).

Under this procedure the adjudication hearing may be set, the summons may be sent to the child by first class mail (in addition to attempting personal service or service by registered or certified mail) and if the child appears in court in response to the letter sent by first class mail, then the child may be formally served with the summons personally at that time and if the child waives the five day waiting period, then the court may proceed with the adjudication hearing without having to require the child and parent to come back on a future date. Of course, it may be a good practice to make sure a truant conduct prosecutor is available since if the child answers not true to the allegations of truancy, a prosecutor will be necessary to proceed to trial.

We think this approach affords the procedural protections intended by the statute while also addressing the practical problems created by the requirement in the truancy statute that the adjudication hearing be set first, then that the summons be served personally or by registered or certified mail at least five day before the adjudication hearing.

2016-2017 TRAINING SCHEDULE (CONTINUED FROM PAGE 7)

10-HOUR CIVIL PROCESS EDUCATIONAL WORKSHOP
Galveston
Officer Safety & Courtroom Security
February 9-10, 2017

WEBINAR SCHEDULE

DATE	TOPIC	DATE	TOPIC
February 10, 2017	Magistration at the Jail	May 16, 2017	Discovery in Justice Court *(Morning webinar)*
February 22, 2017	Judicial Ethics Update	June 6, 2017	Blood Search Warrants *(One hour webinar)*
March 15, 2017	Enforcement of Criminal Judgments	June 15, 2017	Turnover and Receivership *(One hour webinar)*
March 31, 2017	DWI Bond Conditions *(Morning webinar)*	August 23, 2017	Basic Juvenile Law
April 4, 2017	Post-Judgment Civil Procedure	August 29, 2017	Basic Pre-Trial Civil Procedure
May 3, 2017	Default Judgment Procedure *(One hour webinar)*		

LEGISLATIVE UPDATE SCHEDULE

San Antonio July 17, 2017	San Marcos July 24, 2017	Corpus Christi August 7, 2017	Lubbock August 18, 2017
McAllen July 21, 2017	Tyler August 1, 2017	League City August 11, 2017	North Texas JPCA August 24, 2017

IMPAIRED DRIVING SYMPOSIUM
Austin
July 27-28, 2017

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