NEWSLETTER

Spring 2017

MESSAGE FROM THE EXECUTIVE DIRECTOR

It's that time of year where we at the Texas Justice Court Training Center are completing our education seminars and bracing for the hot Texas summer! Thank you for your participation in making this a successful year and we hope we have kept you updated on the latest news affecting your office or court.

We are also preparing for the results of the 85th Legislative Session. There are still openings at some of our legislative updates: League City, Lubbock, Corpus Christi, and San Antonio. Some locations are already at capacity, so make sure you sign up soon! Significant laws have passed including changes to the criminal process.

As always, we want to know what we can do to enhance your judicial education and serve you better. Your feedback is considered and appreciated. If you have any suggestions for future newsletter topics or course suggestions, please don't hesitate to contact us.

Very Truly Yours,

Thea Whalen

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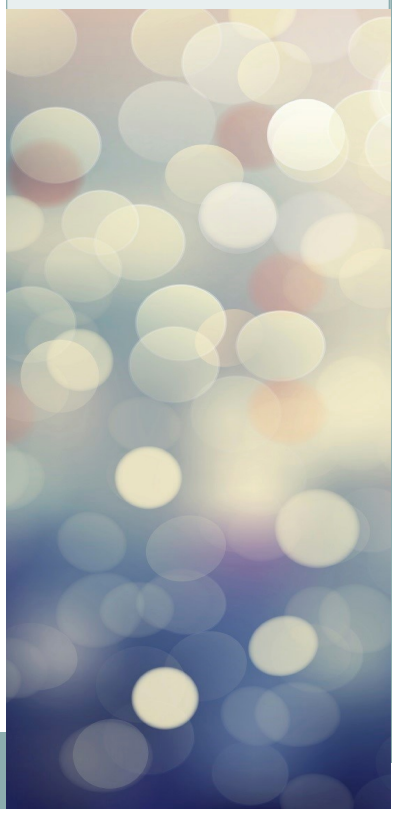

85th LEGISLATIVE SESSION

By Randall L. Sarosdy
General Counsel

Bills to Watch

The 85th Legislative Session of the Texas State Legislature is roaring to its finale with the end of the session (sine die) set on May 29, 2017. We have been tracking bills related to justice courts and constables and any of those bills that are enacted into law will be discussed at our Legislative Updates conferences in July and August. (If you have not already signed up, you may do so by going to this link: http://www.tjctc.org/legeupdate.html) In the meantime you might want to keep an eye on the following bills:

SB 4 (Enforcement of Immigration Laws) (Signed into Law)

This bill requires a law enforcement agency that has custody of a person subject to an immigration detainer request issued by ICE to comply with any request made in the detainer request and to inform the person that they are being held pursuant to an immigration detainer request issued by ICE. A local entity or campus police department may not prohibit or limit enforcement of the immigration laws, either through a policy or by a pattern or practice. Specifically, a local entity or campus police department may not prohibit or limit a peace officer, corrections officer, booking clerk, magistrate, or prosecutor from:

- Inquiring into the immigration status of a person under a lawful detention or arrest;
- Sending, exchanging or maintaining information relating to the immigration status of the person;
- Co-operating with a federal immigration officer; or
- Permitting a federal immigration officer to enter and conduct enforcement activities at a jail.

A local entity that intentionally violates this law is subject to a civil penalty of $1,000 to $1,500 for the first violation and $25,000 to $25,500 for each subsequent violation. A person holding an elective or appointive office of a political subdivision commits an act that causes a forfeiture of the person's office if the person violates this law.

HB 799 (Bench Exchange for Inquests) (Signed into Law)

This bill provides that if a justice of the peace or the county judge is not available to conduct an inquest, then the justice of the peace in the precinct in which the death occurred or the county judge may request a justice of the peace of another county to conduct the inquest. The justice of the peace who conducts the inquest must, not later than the fifth day after the date the inquest is initiated, transfer all information related to the inquest to the justice of the peace of the precinct in which the death occurred for final disposition of the matter.

SB1913 (Indigency)

This bill would: (1) require a judge, before issuing an arrest warrant for a defendant's failure to appear, to provide a notice to the defendant that includes certain information, including information concerning alternatives to the full payment of any fine or costs if the defendant is unable to pay that amount; (2) limit a judge's authority to require a defendant to post a bail bond under Art. 45.016 unless the judge makes certain findings; (3) require a judge, before imposing a fine or court costs following a plea in open court, to make a determination that the defendant has sufficient resources or income to pay all or part of the fine and costs; (4) require a court, before issuing a capias pro fine, to hold a hearing on the defendant's ability to satisfy the judgment; (5) allow a judge to waive all or part of a fine or costs if the court determines that the defendant does not have sufficient resources or income to pay all or part of the fine or costs or that the waiver is in the interest of justice; and (6) make various other changes affecting indigent defendants.

HB 2068 (Driver Responsibility Program

This bill would repeal the Driver Responsibility (surcharge) Program and increase fines for driving with no insurance and for DWI. At this point it appears unlikely that this bill will pass.

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85th LEGISLATIVE SESSION

(CONTINUED FROM PAGE 2)

SB 42 (Court Security) (Passed Both Houses)

This bill, entitled the Judge Julie Kocurek Judicial and Courthouse Security Act of 2017, would enhance court security and the safety of judges and court personnel, including justices of the peace.

SB 920 (Writ of Retrieval) (Passed Both Houses)

This bill would allow issuance of a writ of retrieval for a person who is denied access to a residence because the occupant poses a threat of family violence, would allow the recovery of electronic records of financial or legal documents and would allow a justice of the peace to waive the bond requirement and notice to the occupant.

SB 409 (Jurisdiction in Civil Cases)

This bill would increase the jurisdiction of justice courts in civil cases to $20,000. At this point it appears unlikely that this bill will pass.

HB 1322 (Blood Search Warrants)

This bill would allow any justice of the peace in any county to issue a blood search warrant.

HB 62 (Ban on Texting While Driving) (Passed Both Houses)

This bill would make it a Class C misdemeanor offense for an operator of a motor vehicle to use a portable wireless communication device to read, write or send an electronic message while operating a motor vehicle unless the vehicle is stopped.

Save a Life™

TEXAS DEPARTMENT OF TRANSPORTATION

Improving Bond Conditions in DWI Cases through The Texas DWI Bond Schematic Program

The DWI Bond Schematic Program is part of a statewide plan to reduce the incidence of DWI offenses in Texas by assisting Texas counties in improving procedures for setting, monitoring and enforcing bond conditions in DWI cases. The program is designed to reduce the number of DWI drivers on Texas roads and highways, thereby improving public safety throughout the state.

We will work with all justices of the peace and other criminal magistrates, prosecutors and monitoring agencies (such as the Community Supervision and Corrections Department) to create forms specific to each 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: (1) 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; (2) increases consistency in setting bond conditions by a magistrate and a trial court; (3) promotes the use of bond conditions (such as ignition interlock devices) that reduce the incidence of DWI recidivism; and (4) ensures that bond conditions required by law are set, monitored and enforced.

Currently, Rockwall, Matagorda and Bandera Counties participate in the program, and we have had or are planning meetings with Jim Wells, Duvall, Jim Hogg, Kleberg, Polk and Angelina Counties concerning the program. We would greatly appreciate the opportunity to come in person to your county to discuss the benefits of the program.

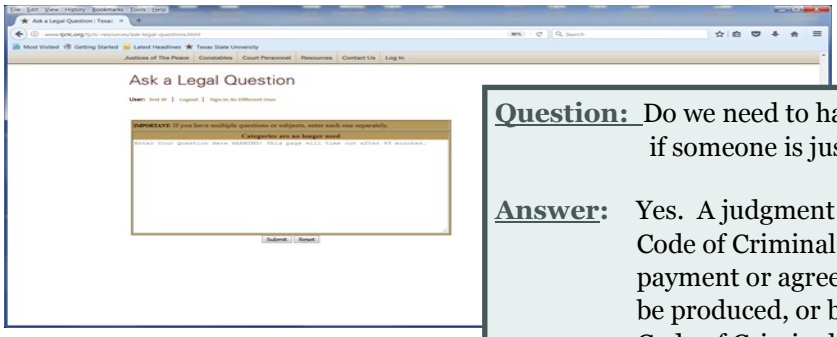
The program is administered by the TJCTC Traffic Safety Initiative through funding provided by the Texas Department of Transportation. If you would like further information concerning the program, please feel free to contact me at rsarosdy@txstate.edu.

-- Randall L. Sarosdy
General Counsel

LEGAL BOARD ROUNDUP

By Bronson Tucker
Director of Curriculum

Below you will find reproduced a sample of legal board questions and answers that address some of the many issues that the Training Center fields inquiries on. We encourage you to set some time aside each week to review the new questions and answers at www.tjctc.org to stay abreast of issues facing justice courts across Texas.



Question: Do we need to have a judgment of conviction signed by the judge if someone is just paying the fine or setting up a payment plan?

Answer: Yes. A judgment must be signed by the judge under Art. 45.041, Code of Criminal Procedure, even if the defendant sends in payment or agrees to an installment plan. A bill of costs must also be produced, or be ready to be produced, under Art. 103.001, Code of Criminal Procedure.

Question: Can someone else come pay a ticket for someone without us having a written plea? Should we be asking for ID when someone comes in to pay or make a plea?

Answer: A court cannot enter a judgment against someone unless they plead guilty, plead nolo or are proven guilty beyond a reasonable doubt by the State of Texas at trial. Someone else paying the ticket doesn't satisfy any of those three requisites. If the DEFENDANT pays in full, that constitutes a plea of nolo under Art. 27.14 of the Code of Criminal Procedure.

Each court needs to decide what protections they wish to have in place to ensure that they aren't allowing another person to enter a plea for somebody in a criminal case.

Question: I have an attorney contacting my office stating that he submitted an appeal bond back in December of 2016. I was not in office at this time. I am unable to find the paperwork indicating that this court received the appeal bond. He has furnished me with an appeal bond dated back December 2016, which is what he stated he submitted back in December. Can I still accept this appeal and process?

Answer: We assume from your question that the case was never transmitted to county court for appeal. If this is correct and you are satisfied that the appeal bond was in fact submitted by the deadline for appeal as the attorney claims, then we would recommend processing the appeal at this time and noting for the county court that the delay was due to a clerical error on the justice court's end.

Question: A citizen has come to my court and filed an eviction suit on a mini-storage warehouse. My clerks accepted the suit. The storage unit is in my precinct. It seems to me that the laws for mini-storage warehouses fall under a special category. Should I hear this case or dismiss for lack of jurisdiction?

Answer: Storage units are commercial property (see Ch. 93 of the Property Code) and follow the same commercial eviction guidelines. There is a separate provision in the law for enforcing a lien for rent against property in the unit, but nothing that would prevent a landlord from filing an eviction and getting a judgment for possession, and subsequently a writ of possession.

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LEGAL BOARD ROUNDUP

(CONTINUED FROM PAGE 4)

Question: My question is on Truant Conduct. We have a student that has been filed on, a remedial order has been issued on him and the school has notified use that the student has missed additional days since the order was issued. So, I am in the understanding that at that time we can set a show cause hearing on the remedial order to possibly be found in contempt. But, since the student has missed additional days shouldn't the school file on the student again? Can the court tell the school not to refile until after we find the outcome of the show cause hearing?

Answer: The decision of whether or not to file additional cases of truant conduct is up to the school. The court cannot tell a school to file or not to file cases.

Remaining 2016-2017 TJCTC Training Schedule

20-HOUR
JUSTICE OF THE PEACE
EDUCATIONAL SEMINARS

May 30-June 2: Lubbock

16-HOUR
COURT PERSONNEL
EDUCATIONAL SEMINARS

July 10-12: Rockwall

10-HOUR WORKSHOPS

August 24-25: San Marcos (Truancy and Juvenile Law)

IMPAIRED DRIVING SYMPOSIUM

July 24-25: Bastrop Lost Pines

LEGISLATIVE UPDATE WORKSHOPS

July 17: San Antonio
July 24: San Marcos
August 1: Tyler
August 7: Corpus Christi
August 11: League City
August 18: Lubbock
August 21: Granbury

EDUCATIONAL WEBINARS

June 6: Blood Search Warrants
June 15: Turnover & Appointment for Receivership
August 23: Basic Juvenile Law
August 29: Basic Pre-Trial Civil Procedure

TEXAS JUSTICE COURT TRAINING CENTER

Funded by a Grant from the COURT OF CRIMINAL APPEALS
In Association with Texas State University and the Justices of the Peace and Constables Association of Texas, Inc.

"The mission of the Texas Justice Court Training Center is to provide quality education opportunities for justices of the peace, constables and court personnel, ensuring the credibility of, and confidence in, the justice courts enabling them to better serve the people of The State of Texas."

WHEN DO YOU INCLUDE IGNITION INTERLOCK IN AN ORDER GRANTING AN ODL?

By Rebecca Glisan
Staff Attorney

An order granting an occupational driver's license must require the person to have an ignition interlock device in two situations: (1) if the person's license has been suspended as a result of a **conviction** of an offense under Sections 49.04-49.08, Penal Code; and (2) if a court order already exists requiring the person to install an ignition interlock device on any vehicle they operate.

A justice of the peace will not have jurisdiction to grant an ODL in the first situation because when a license has been suspended as a result of a conviction of an offense under Sections 49.04-49.08, Penal Code (Driving While Intoxicated, Driving While Intoxicated with Child Passenger, Flying While Intoxicated, Boating While Intoxicated, Assembling or Operating an Amusement Ride While Intoxicated, Intoxication Assault, or Intoxication Manslaughter), the person must apply to the convicting court for an ODL. *See* Section 521.242, Transportation Code.

The second situation could arise in one of two ways:

- If a bond condition has been imposed requiring the installation of an ignition interlock device on any vehicle that the person operates. *See* Section 521.248(4), Transportation Code and Article 17.441, Code of Criminal Procedure. A justice of the peace may enter an order for an ODL here (if the applicant is otherwise eligible) even if the offense resulting in the bond condition is an offense under Sections 49.04-49.08, Penal Code, because there has not yet been a conviction.

- If a condition of community supervision has been imposed after a conviction of an offense under Sections 49.04-49.08, Penal Code, requiring the installation of an ignition interlock device on any vehicle that the person operates. See Article 42A.408, Code of Criminal Procedure. When a person is subject to community supervision, their license will not always be automatically suspended even though they have been convicted of an offense under Sections 49.04-49.08, Penal Code. If a person's license has not been suspended due to a conviction under Sections 49.04-49.08, Penal Code, but for an unrelated reason (for example, due to failure to pay surcharges or as a habitual violator of traffic laws), then a justice of the peace may enter an order for an ODL here if the applicant is otherwise eligible.

So in either of these two situations (and the more common one by far will be where an ignition interlock was required as a bond condition), a justice of the peace should include a requirement that the person have an ignition interlock in an order granting an ODL.

May a justice of the peace order an ignition interlock as a condition of granting an ODL where the person is not subject to an existing order or condition of community service requiring an ignition interlock? No, according to *Deleon v. State*, 284 S.W.3d 894 (Tex. App.—Dallas 2009, no pet.). In that case the Fifth Court of Appeals held that a court could not order an ignition interlock as a condition of an ODL over the applicant's objection unless it fell within one of the situations discussed above.

But what if the applicant says they will voluntarily install an ignition interlock and asks the court to order it as a condition of granting the ODL? As discussed below, there are some benefits to having an ignition interlock (such as no time limits or travel restrictions). Does *Deleon v. State* prohibit the court from ordering an ignition interlock device where the applicant voluntarily installs one and requests this as a condition of the ODL?

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Deleon v. State does not directly address this situation. In that case the court of appeals held that "the trial court did not have authority to impose the requirement of an ignition interlock device, and its requirement that appellant have an ignition interlock device installed on his car was without reference to any guiding rule or principle." 284 S.W.3d at 897. This was because the applicant had not been convicted of a DWI offense.

After the decision in *Deleon v. State* the legislature amended Section 521.248, Transportation Code, to add that an order granting an ODL must specify "that the person is restricted to the operation of a motor vehicle equipped with an ignition interlock device, if applicable." We do not see an explicit grant of authority in this language to permit a court to order an ignition interlock as a condition of an ODL where it is not otherwise required by the statute. However, we understand that some courts do believe they have authority to order an ignition interlock as a condition of an ODL where the applicant voluntarily requests it. Unless and until we receive further guidance from a court of appeals on this issue, the question will remain open.

So when should an ignition interlock device be ordered as a bond condition during magistration?

What if an ignition interlock device should have been required as a bond condition but was not and the applicant does not voluntarily request one? In that case, the magistrate who ordered the bond conditions or the court with jurisdiction of the offense could modify the conditions to add the requirement, but unless and until that happens, there is no statutory authority to require an ignition interlock device in granting an ODL.

So when should an ignition interlock device be ordered as a bond condition during magistration? A magistrate is required to do this when a defendant has been charged with an offense under Sections 49.07 or 49.08, Penal Code, or with a subsequent offense under Sections 49.04-49.06, Penal Code, unless the magistrate finds that to do so would not be in the best interest of justice. See Article 17.441, Code of Criminal Procedure. However, even if it is not required, the magistrate may still choose to add the requirement as a bond condition in a case where it would be a reasonable condition related to the safety of a victim of the alleged offense or to the safety of the community under Article 17.40, Code of Criminal Procedure. For example, if a defendant is arrested for the first time for an offense under Section 49.04, Penal Code (Driving While Intoxicated), the magistrate is not required to impose an ignition interlock device as a bond condition under Article 17.441, but may choose to do so as a reasonable condition related to the safety of the community under Article 17.40.

If, under one of the scenarios above, a court grants an ODL that restricts a person to the operation of a motor vehicle equipped with an ignition interlock, specific laws will then apply. For example:

> The person may not be subject to any time of travel/reason for travel/location of travel restrictions. *See* Section 521.248(d), Transportation Code.
>
> The ODL is effective immediately. *See* Section 521.251(d-1), Transportation Code.
>
> The person may not be ordered to submit to the supervision of the local community supervision and corrections department under Section 521.2462, unless the order is entered by a court of record. *See* Section 521.251(d-1), Transportation Code.

Ignition interlock continues to be one of the most effective means of preventing drunk driving. In the circumstances discussed above it is also an appropriate condition of an order granting an ODL.

RECENT E-BLASTS

By Randall L. Sarosdy
General Counsel

From time to time we send out email notices (or e-blasts) on issues affecting justice courts in order to keep you apprised of developments affecting your court. We thought it might be helpful to include recent e-blasts here so you have them in our newsletter and do not have to try to find them among the thousands of old emails sitting in your inbox.

Time Payment Fees (April 19, 2017)

We have received a number of questions recently concerning the time payment fee under Section 133.103 of the Local Government Code. After carefully reviewing these issues we thought it would be helpful to clarify when the time payment fee applies.

- A time payment fee of $25 should be charged to a defendant only if the defendant **pays** all or part of a fine, a court cost, a special expense fee (in a deferred disposition under Art. 45.051(a) of the Code of Criminal Procedure), or a Driver Safety Course fee (under Art. 45.0511(f)(1) or (f)(2)) on or after the 31st day after the date the judgment or deferral order is entered.

- Even if the court places a defendant on a payment plan that is longer than 30 days, or otherwise anticipates the defendant will not pay within 30 days, a court must wait until the 31st day after the judgment ordering the fine, cost, or fee to assess the time payment fee. This is because if the defendant pays before the payment plan or other agreement requires, and it is within 30 days of the judgment, no time payment fee should be applied.

- Because the time payment fee only applies if the defendant **pays** all or part of one of the fine, court cost or special expense or DSC fee on or after the 31st day after the judgment or deferral order is entered, there is no time payment fee if a defendant discharges the full amount through community service (no matter when the community service is completed). Likewise, if the amount owed is waived, the time payment fee is waived as well.

If you have questions about any of this, please let us know.

OMNI Fee (February 21, 2017)

We have recently been in contact with Omni concerning a statement in the Omni manual indicating that in cases in which a court has found a defendant to be indigent, the $30 administrative fee is not to be collected from the defendant. The President of Omni has now confirmed that that is in fact Omni's policy. Therefore, in the event a defendant is found by the court to be indigent, the defendant may be released from Omni without paying the $30 administrative fee as long as the defendant otherwise satisfies the requirements for release set forth in Section 706.005 of the Transportation Code.

This means that the defendant does not have to pay $30 administrative fee to be released from Omni in the following situations:

1. If a judge makes a finding of indigence and allows the defendant to discharge the fine and court costs by performing community service;

2. If a judge makes a finding of indigence and discharges the fine and court costs as a result of credit for time served in jail;

3. If a judge makes a finding of indigence and waives payment of the fine and court costs because community service would impose an undue hardship on the defendant.

However, **if a judge does not make a finding of indigence**, then the defendant must pay the $30 administrative fee, even if the judge allowed the defendant to pay the fine and court costs in installments as provided in Art. 45.041(b-2), discharge the fine and court costs by community service as provided in Art. 45.049(a), or issued a commitment under Art. 45.046(a)(1) of the Code of Criminal Procedure.

This is a significant development. Please let us know if you have any questions and please bring it to the attention of your fellow judges and court personnel. Thank you.

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Fetal Tissue Burial Rules (January 30, 2017)

A federal district judge has issued a preliminary injunction indefinitely prohibiting the State of Texas from enforcing rules requiring health facilities to ensure that fetal remains are buried or cremated. The rules issued by the Department of State Health Services on November 28, 2016, require the burial or cremation of fetal remains as a result of a miscarriage or abortion regardless of the period of gestation. The rules may be found in 25 TAC §§ 1.132 – 1.137: http://texreg.sos.state.tx.us/public/readtac$ext.TacPagesl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=25&pt=1&ch=181&rl=1

In granting the preliminary injunction last Friday, January 27, 2017, United States District Judge Sam Sparks held that the rules placed burdens on access to abortion that "substantially outweigh the benefits." Judge Sparks said the new standards were vague, inviting interpretations that would allow state health officials "to exercise arbitrary, and potentially discriminatory, enforcement on an issue connected to abortion and therefore sensitive and hotly contested." He noted in his ruling that state officials admitted that the new policy offered no health benefits and replaced tissue-disposal regulations that caused no health problems. Texas Attorney General Ken Paxton has stated that he will appeal the ruling to the Fifth Circuit Court of Appeals.

A bill introduced by Rep. Byron Cook, H.B. 201, would enact the rules into law by requiring health care facilities to bury or cremate fetal remains with a $1,000 fine for each infraction. **[Update: Although HB 201 did not advance, similar provisions have been included in SB 8, which has passed in both the Senate and the House; we will advise you at Legislative Updates if that bill is signed into law.]**

We will continue to monitor and keep you informed of further developments in the Fifth Circuit and the legislature.

INDIGENT MISDEMEANOR DEFENDANTS AND PRETRIAL RELEASE: LESSONS FROM HARRIS COUNTY

By Bronson Tucker
Director of Curriculum

"Liberty is precious to Americans, and any deprivation must be scrutinized."

This quote from a February speech by Texas Supreme Court Chief Justice Nathan Hecht leads off Chief U.S. District Judge Lee H. Rosenthal's April 28 ruling, striking down as unconstitutional the Harris County bail release program. This ruling was a culmination of a national push to not only preserve the rights of indigent criminal defendants, but also to examine the role of monetary bail and its effectiveness in securing the defendant's appearance in court and protecting the safety of the community. In his remarks, Justice Hecht stated that 75% of inmates in Texas jails are currently awaiting trial, at an annual cost to Texas taxpayers of $1 billion. What are the issues contributing to these numbers, and what does Judge Rosenthal's ruling mean for the future of monetary bail in Texas?

BACKGROUND

The lawsuit featuring Judge Rosenthal's ruling was filed in May 2016 on behalf of Maranda Lynn Odonnell, who was in jail for over 48 hours on a charge of driving with an invalid license, unable to afford her $2,500 bond. She was ordered to post this bond even though pretrial services had recommended a personal bond, and even though she had been determined to be indigent for purposes of appointment of counsel. Odonnell's suit was soon joined with two other suits. One was filed by Loetha Shanta McGruder, a mother of two who was pregnant when she was arrested, and remained in jail for four days on a charge of failure to identify herself to a peace officer because she could not pay a $5,000 bail. The other was filed by Robert Ryan Ford, who was ordered to post a $5,000 bond after shoplifting from Wal-Mart, was unable to do so, and pled guilty after five days of detention. In Mr. Ford's case, pretrial services' recommendation was one word: "Detain," claiming there were other "safety issues" with granting Mr. Ford a release on personal bond.

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BAIL REFORM MOVEMENT

Securing release before trial with monetary bail is standard in many jurisdictions throughout the United States. However, an increasing amount of research, along with several civil rights lawsuits, have raised questions, not only about its effectiveness, but also about disparities in how it is applied across racial and socioeconomic categories.

One of the strongest arguments against the efficiency of monetary bond is that it results in detention of defendants before their trials, not based on actual risk factors, but solely on ability to pay. Note that in Mr. Ford's case, the "safety risks" which caused the detention ruling would not have prevented his release if he could come up with the $5,000 bond. This case illustrates what is often called "preventive detention," which is a system ordering someone detained because it is unsafe for them to be released. However, in Texas, preventive detention is not allowed in misdemeanors, except in very limited circumstances in family violence cases. Instead, Judge Rosenthal found that courts are unconstitutionally using bail as preventive detention in misdemeanors by intentionally or indifferently setting bail in an amount that cannot be met by defendants.

Additionally, cases are often based on weak evidence, and ultimately get dismissed. However, the defendant's obligation under the bond doesn't get dismissed with the case, and frequently the defendants will have lost their jobs, been evicted, or faced other consequences, including losing custody of children, based on their inability to escape jail because they cannot afford bonds, for cases that ultimately get dismissed. Many defendants are still on payment plans to their bondsman years after their case has been dismissed. For some examples, and further discussion, see "When Bail Is Out of Defendant's Reach, Other Costs Mount," written by Shaila Dewan, and published in the New York Times on June 10, 2015, found online at https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html.

Due to the issues related to fairness, cost, and effectiveness described above, some jurisdictions, including New Jersey and Colorado, are moving away from monetary bail as the primary basis of their pretrial release system for nonviolent misdemeanor offenses. Washington, D.C. modified its system in the 1990s and is used as a model for jurisdictions looking to move away from monetary bail. New Mexico approved a constitutional amendment in 2016, under which courts cannot order preventive detention for misdemeanor arrestees or accomplish the same effect by setting a secured money bail that an indigent defendant cannot pay.

THE RULING

Judge Rosenthal found that "Harris County's policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention."

More specifically, the court found that:

• Harris County has a consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases.

• These de facto detention orders effectively operate only against the indigent, who would be released if they could pay at least a bondsman's premium, but who cannot. Those who can pay are released, even if they present similar risks of non-appearance or of new arrests.

• These de facto detention orders are not accompanied by the protections federal due process requires for pretrial detention orders.

• Harris County has an inadequate basis to conclude that releasing misdemeanor defendants on secured financial conditions is more effective to assure a defendant's appearance or law-abiding behavior before trial than release on unsecured or nonfinancial conditions, or that secured financial conditions of release are reasonably necessary to assure a defendant's appearance or to deter new criminal activity before trial.

• Harris County's policy and practice violates the Equal Protection and Due Process Clauses of the United States Constitution.

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The court accordingly ordered that:

- Harris County and its policymakers—the County Judges in their legislative and rulemaking capacity and the Harris County Sheriff in his law-enforcement capacity—are enjoined from detaining misdemeanor defendants who are otherwise eligible for release but cannot pay a secured financial condition of release.

- Harris County Pretrial Services must verify a misdemeanor arrestee's inability to pay bail on a secured basis by affidavit.

- The Harris County Sheriff must release on unsecured bail those misdemeanor defendants whose inability to pay is shown by affidavit, who would be released on secured bail if they could pay, and who have not been released after a probable cause hearing held within 24 hours after arrest.

WHAT SHOULD YOUR COUNTY BE DOING?

It is worth noting that Harris County has appealed Judge Rosenthal's decision, and that the original lawsuit is still ongoing. However, counties can take steps now to help ensure that their pretrial release programs are compliant with Texas law and the Constitution.

First, every magistrate should understand that bail is designed to secure the defendant's appearance in court, and protect the community. It is not to be used as a way of keeping a defendant in jail indefinitely until they are tried. Additionally, you must ensure that statutes such as Arts. 17.033 and 17.151 of the Code of Criminal Procedure are followed. These laws mandate that defendants be released on personal bond if they are detained and the state is not ready for trial within a set amount of time, and mandate release in 24 hours on a bond not to exceed $5,000 in any misdemeanor case where a magistrate hasn't determined that probable cause exists for the defendant's arrest. If the defendant can't make that bond, it must be converted to a personal bond. Third, ability to pay must be considered each and every time when determining bail, as required by Art. 17.15 of the Texas Code of Criminal Procedure, as well as the Constitution of the United States. *Tate v. Short, 401 U.S. 395 (1971).* This means that rigidly following pre-set bond schedules is certainly in violation of the law, because those schedules don't consider ability to pay.

Counties should adopt methods of setting bail that take into account how likely an arrestee is to flee or commit a new crime. Personal bonds, including those with specific conditions attached to protect the community, should be used, especially for nonviolent offenses, defendants with clean records, and defendants not posing a flight risk.

Keep in mind also that there are several bills currently in the Texas Legislature which may impact this issue, including SB 1849, which has passed both houses. Any bills which are enacted into law will be covered in depth at our Legislative Update sessions this summer. Information regarding registration for those sessions is at http://www.tjctc.org/legeupdate.html.

CITATIONS vs. COMPLAINTS

By Rebecca Glisan
Staff Attorney

A charging instrument must be filed with a court in order to initiate a criminal case in that court. Generally, the charging instrument is a sworn complaint. A citation, however, may also sometimes serve as a complaint. The procedures and options in a case are different depending on whether a complaint or a citation has been filed as the charging instrument.

When Should a Citation Be Filed and When Should a Complaint Be Filed?

A citation may serve as a complaint in a case if the maximum punishment for the offense is by fine only and if a legible duplicate copy has been given to the defendant. The defendant may plead "guilty," "not guilty," or "nolo contendere" based on the citation. If the defendant pleads "guilty" or "nolo contendere," then a judgment may be entered without a complaint ever needing to be filed. If the defendant pleads "not guilty" or does not appear by their appearance date, a sworn complaint complying with the requirements of Art. 45.019, Code of Criminal Procedure, must be filed before the case may proceed any further. A defendant may, however, waive the filing of a sworn complaint and elect that the prosecution proceed on the citation if the defendant agrees in writing with the prosecution, signs the agreement, and files it with the court. See Art. 27.14, Code of Criminal Procedure.

Even if the law does not require that a complaint be filed, it may still be filed at any time. Once a sworn complaint is filed, the citation ceases to "serve as the complaint" and the complaint replaces the citation as the "original complaint."

If there is any discrepancy between the content of the citation and the content of the complaint, the court should ignore the citation and proceed based on the contents of the complaint.

Can a Complaint Be Included on a Citation?

In some counties, law enforcement officers are filing tickets that include a sworn complaint at the bottom. Under the law, these complaints are sufficient as long as they substantially satisfy the requisites listed under Art. 45.019, Code of Criminal Procedure. So if the complaint complies with all of the requirements, then it (and not the citation) is the charging instrument for the case. We have heard that there are some counties where the county attorney's office does not like complaints being filed in this way. In this situation, the attorney prosecuting the case can always file an amended complaint, which will then replace the original complaint that was on the citation.

Can an Arrest Warrant Be Issued?

An arrest warrant may not be issued on an offense if only a citation has been filed for that offense. So if a defendant has not appeared in a case, a "sworn complaint or affidavit based on probable cause" must be filed before the court may issue an arrest warrant for the defendant on that offense. See Art. 45.014, Code of Criminal Procedure.

Can VPTA or FTA Be Filed?

A complaint may be filed and a warrant subsequently issued for either Violate Promise to Appear (VPTA) or Failure to Appear (FTA) as applicable regardless of whether a complaint or only a citation has been filed on the underlying offense.

A VPTA can be filed on a defendant in the following situation (see Section 543.009, Transportation Code):

- Defendant has been charged with a "Rules of the Road" Transportation Code offense (any offense located in Chapters 541-600).
- Defendant signed a promise to appear on a citation.
- Defendant willfully failed to enter an appearance by the date on the citation.

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Citations vs. Complaints (CONTINUED from page 12)

An FTA can be filed on a defendant in the following situation (see Section 38.10, Penal Code):

- Defendant was in custody (being pulled over by law enforcement counts here).
- Defendant was released from custody on condition that he subsequently appear (this applies if the defendant signed a citation or posted a bond, including a personal bond).
- Defendant intentionally or knowingly failed to appear by the appearance date.

If the defendant commits one of these offenses, the justice court may report the criminal behavior to a peace officer or a prosecutor. If the peace officer or prosecutor files a complaint for VPTA or FTA with the justice court, the court may issue an arrest warrant for that offense pursuant to Article 45.014, Code of Criminal Procedure. If a defendant's conduct meets the elements for both VPTA and FTA, they should be charged with the VPTA and not the FTA offense. See Azeez v. State, 248 SW 3d 182 (Tex. Crim. App. 2008).

Can Defendant Be Reported to OMNI?

Yes—this is an option regardless of whether a complaint or only a citation has been filed. A defendant who fails to appear in the justice court "based on a complaint or citation" may be reported to the Department of Public Safety using the OMNIBASE system pursuant to Chapter 706 of the Transportation Code.

How is the Statute of Limitations Affected?

A citation does not stop the statute of limitations from running out on an offense. A complaint, however, does stop the statute of limitations if it is presented within two years from the date of the commission of the offense. See Art. 12.02, Code of Criminal Procedure. For example, if a citation is filed with a court, the defendant pleads not guilty, and a complaint is not filed within two years of the alleged offense, then a complaint may not be filed at that point and the case may not be prosecuted.

WHEN IS A SQUATTER NOT A SQUATTER?

By Randall L. Sarosdy
General Counsel

We generally think of a "squatter" as someone who settles on land or occupies property of another without title, right or payment of rent. Such a person, who "enters the real property of another without legal authority or by force and refuses to surrender possession on demand" commits a forcible entry and detainer under Section 24.001(a), Property Code. And a notice to vacate to such a person may be given orally and may be to vacate immediately. *See* Section 24.005(d), Property Code.

What rights does a squatter have? Very few, according to a decision of the Texas Court of Civil Appeals dating back to 1906: "There is no law in Texas that protects a squatter on the lands of another. His term of occupancy as a naked squatter, and knowing that he had no right to enter or hold the land, and not claiming to have any such right, would never ripen into title, and possession of this kind was never intended to ripen into title or deprive the owner of any rights of property." *Link v. Bland*, 95 S.W. 1110 (Tex. Civ. App. 1906).

So you may have been surprised if you heard about the antics of one Kenneth Robinson, a 50-year old vitamin salesman, who in the summer of 2011 paid the Denton County Clerk a $16 filing fee to file an affidavit of adverse possession over a $340,000 house in Flower Mound that he had brazenly moved into while it was in foreclosure proceedings. Not shy about sharing his methods, Robinson then posted an online manual called "Ken Robinson's Guide to Adverse Possession" and went on a lecture circuit that included a talk at the SMU School of Law. By November 2011 about 60 affidavits of adverse possession had been filed in Tarrant County by copy cats who moved into homes that were temporarily vacant. These included the home of a woman in Arlington who was in a Houston hospital receiving chemotherapy and a travelling nurse who was gone for several months due to work.

Did Robinson's legal ploy work? No. Robinson was evicted by a justice court in Denton County and the Tarrant County District Attorney filed criminal burglary of a habitation and

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theft charges against David Cooper, who had occupied the $400,000 home of the woman on chemotherapy. Cooper was convicted and sentenced to 90 days in jail, ten years on probation and a $10,000 fine. Following that verdict, the other defendants who had been charged pled guilty and the remaining squatters in Tarrant County "scattered like a covey of quail," according to an Assistant D.A.

Just what legal theory was Robinson trying to exploit during his ten minutes of fame? In other words, when is a squatter not a squatter?

Texas law has long permitted a trespasser to obtain legal ownership of land by occupying the land for a long enough period of time under certain specific circumstances. This legal theory is called adverse possession. It is defined in Section 16.021(1), Civil Practice and Remedies Code as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person."

In *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990), the Texas Supreme Court described the elements of an adverse possession claim:

> More than a century ago, we outlined the various elements to be proved by a claimant seeking prescriptive title through adverse possession in *Satterwhite v. Rosser*, 61 Tex. 166 (1884):
>
> > It is well settled, that where a party relies upon naked possession alone as the foundation for his adverse claim, it must be such an actual occupancy as the law recognizes as sufficient, if persisted in for a long enough period of time, to cut off the true owner's right of recovery.
>
> It has been said that **such possession must not only be actual, but also visible, continuous, notorious, distinct, hostile (i.e. adverse), and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.**

As one would expect, to prevail on an adverse possession claim is no easy matter. As the Tyler Court of Appeals held recently in *Nac Tex Hotel Co. v. Greak*, 481 S.W.3d 327, 331-32 (Tex. App.—Tyler 2015, no pet.):

> To prevail on a claim of adverse possession, a claimant must establish, by a preponderance of the evidence, **(1) the actual and visible possession of the disputed property; (2) that is adverse and hostile to the claim of the owner of record title; (3) that is open and notorious; (4) that is peaceable; (5) that is exclusive; and (6) that involves continuous cultivation, use, or enjoyment throughout the statutory period.**
>
> The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. **Mere occupancy of land without any intention to appropriate it will not support the statute of limitations. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by intent on the part of the occupant to make it so. There must be an intention to claim the property as one's own to the exclusion of all others.**

See also BP Am. Prod. v. Marshall, 342 S.W.3d 59, 70 (Tex. 2011) ("The test for establishing adverse possession, both between strangers and cotenants, is whether the acts unmistakably assert a claim of 'exclusive ownership' by the occupant."); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 756 (Tex. 2003); *Calfee v. Duke*, 544 S.W.2d 640, 642 (Tex. 1976).

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The Texas Supreme Court has noted that the adverse possession "doctrine itself is a harsh one, taking real estate from a record owner without express consent or compensation." *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006). Adverse possession rules are therefore specific and the claimant has the burden of proving each element by a preponderance of the evidence.

The adverse possession statute, Section 16.021, *et seq*., Civil Practice and Remedies Code, requires an affirmative act by the original owner to reclaim the property within certain periods of time, set forth in the statute and referred to as statutes of limitation. If the original owner is prevented from taking the property back by means of peaceable self-help, then he must file a trespass to try title suit to establish legal ownership and regain possession. Of course, a justice court does not have jurisdiction to hear a suit over title to real estate; such a suit must be brought in district court. If the original owner fails to act within the time required, then his claim is barred and the adverse possessor prevails. Adverse possession only applies to privately-held land; the doctrine may not be used with respect to public lands or against a government entity.

The triggering event is notice to the owner and others that the adverse possessor is asserting a claim of right to the property which is actual, open, notorious, exclusive, adverse, hostile, continuous and uninterrupted for the applicable period of time. Once the record owner is put on notice, he must act to defeat the possessor's claim within the period required by the statute or lose title to the land. There are four possible time periods: three years; five years; ten years; or twenty-five years.

The three-year statute of limitations is contained in Section 16.024, Civil Practice and Remedies Code:

> A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues.

Under this section, the possessor must have a title (e.g. a deed) or at least "color of title." So the possessor must be able to produce documentation showing conveyance of title in order for the three-ear statute of limitations to apply. *See Rogers v. Ricane Enters.*, 772 S.W.2d 76, 80 (Tex. 1989); *Johnston v. Bennett*, 176 S.W.3d 41, 46 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Walker v. Geer,* 99 S.W.3d 244, 246 (Tex. App.—Eastland 2003, no pet.); *Oncale v. Veyna*, 798 S.W.2d 802, 805 (Tex. App.—Houston [14th Dist.] 1990, no writ).

The five-year statute of limitations requires the possessor to hold a deed to the property and to pay taxes on it:

> (a) A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who:
>
> (1) cultivates, uses, or enjoys the property;
>
> (2) pays applicable taxes on the property; and
>
> (3) claims the property under a duly registered deed.
>
> (b) This section does not apply to a claim based on a forged deed or a deed executed under a forged power of attorney.

Section 16.025, Civil Practice and Remedies Code. The taxes must be paid before they become delinquent. *Thomas v. Rhodes*, 701 S.W.2d 943, 947 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). *See also McAllister v. Samuels,* 857 S.W.2d 768, 776 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Jones v. Harrison,* 773 S.W.2d 759, 760 (Tex. App.—San Antonio, 1989, writ denied).

The ten-year statute of limitations applies where the possessor does not have a deed or other conveyance of title:

> (a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

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(b) Without a title instrument, peaceable and adverse possession is limited in this section to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed.

(c) Peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument.

Section 16.026, Civil Practice and Remedies Code. *See Natural Gas Pipeline Co. v. Pool*, 124 S.W.3d 188, 198 (Tex. 2003); *Rhodes v. Cahill,* 802 S.W.2d 643, 646 (Tex. 1990) (two kinds of fences: "casual fences" and "fences that designedly enclose an area;" a casual fence does not support an adverse possession claim); *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 438 (Tex. App.—Texarkana 2006, no pet.).

The twenty-five year limitations periods apply to a person "regardless of whether the person is or has been under a legal disability" (e.g. mental incapacity) and where the possessor holds a title instrument even if the instrument is void on its face or in fact. Sections 16.027, 16.028, Civil Practice and Remedies Code. *See Parker v. McGinnes*, 842 S.W.2d 357, 362 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Boyle v. Burk*, 749 S.W.2d 264, 267 (Tex. App.—Fort Worth 1988, writ denied).

The original owner of the property may of course attempt to remove the occupant physically if it may done peaceably or through a forcible entry and detainer suit. If those methods are not successful, then the owner must bring a trespass to try title suit and a request for a declaratory judgment. The adverse possessor may also bring a declaratory judgment suit to establish title.

The occupant may also file an affidavit of adverse possession in the real property records of the county asserting the elements that the person claims entitle him to ownership of the property. The affidavit clearly puts the owner on notice of the adverse possession claim. This was the tactic that Kenneth Robinson employed in his scheme to obtain a $340,000 home by paying a $16 filing fee. So where did Robinson and his followers go wrong?

Their problem was that even if they met all the other requirements for asserting a claim for adverse possession (actual and visible possession of the property; that is adverse and hostile to the claim of the owner of record title; that is open and notorious; that is peaceable; and that is exclusive), they clearly failed to have "continuous cultivation, use, or enjoyment **throughout the statutory period**." *See Nac Tex Hotel Co. v. Greak*, 481 S.W.3d 327, 331-32 (Tex. App.—Tyler 2015, no pet.). Since they did not have a title or color of title, nor did they pay taxes on the property, they would have had to maintain possession – meeting all the requirements noted above – for ten years to be able to assert a claim of adverse possession. *See* Section 16.026, Civil Practice and Remedies Code. Simply moving into vacant, abandoned or foreclosed homes in a naked land grab while filing an affidavit of adverse possession did not give them a claim for adverse possession. Far from being rewarded by a windfall acquisition of expensive homes, their actions subjected them to charges by prosecutors in North Texas of breaking and entering, burglary, filing false instruments, slander of title and fraud. Having no legitimate claim of adverse possession, they remained squatters at best – and potentially convicted felons.

Hopefully, the actions of prosecutors in North Texas will discourage similar attempted scams in the future. But if not, this discussion will hopefully give you some guidance in understanding the legal framework for a legitimate claim of adverse possession and to recognize a squatter when you see one.