

A FORENSIC EVALUATOR'S GUIDE TO THE TEXAS LEGAL SYSTEM

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For mental health professionals, accepting forensic work can feel akin to stepping through the looking glass. The therapeutic work that has been the core of clinical training emphasizes the best interests of the client and encourages the consideration of all data in developing a thorough understanding of the psychodynamics driving any egodystonic behavior. In contrast, a mental health professional serving as a forensic evaluator generally works for the court, not the subject of the evaluation, and must retain a professional distance and objectivity from the subject of the evaluation. Whether a criminal defendant facing homicide charges or a father seeking custody of a child, the subject of the evaluation desires a very specific outcome and is motivated to further that outcome, so that malingering is a significant risk in contrast to therapeutic work (Melton, 1997, at 53-58). The task of the forensic evaluator is defined by a legal standard, which may make parts of a complete case study of the subject irrelevant. The court, in fact, will seek very specific assistance in resolving the legal issue at the heart of the court proceeding.

A forensic specialist thus works within a framework defined by law. In contrast to a therapeutic assessment, which focuses on symptomatology, the focus of a forensic assessment is shaped by legal standards. Subsequent articles in this issue will address the specific legal criteria for various common forensic evaluations. This article first seeks to elaborate the legal framework within which those evaluations are situated. Because the special issue focuses on criminal forensic evaluation, this article will emphasize an understanding of the criminal justice system, although many concepts will apply to civil-side evaluations as well.

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SOURCES OF LAW

Law relevant to forensic evaluation can come from a variety of sources. Although the process of determining the appropriate law to apply in a situation can be complicated, in most cases, the law is well-developed and it will be clear which legal provisions are relevant.

Constitutions: U.S. Constitution and the Texas Constitution

Constitutions serve as the ultimate legal authority, and thus are the primary source of law. They dictate the structure of the government and establish general principles of law. If statute or judicial ruling conflicts with a constitutional provision that applies in a situation, the constitution will preempt, or trump, the other piece of law. State constitutions are free to provide greater protection within the state, but not less protection than the United States Constitution. (California v. Ramos, 1983; Hernandez v. State, 1999, at footnote 2).

Our federal and various state Constitutions are written at a high level of generality and often do not contain the specific detail necessary to address a given question. In the forensic context, the most important federal Constitutional provisions come in the amendments to the original Constitution, commonly referred to as the “Bill of Rights,” which guarantees fundamental civil rights, including rights of criminal defendants. Depending on the type of forensic evaluation, any of the following Constitutional amendments may shape the applicable legal standard:

- Fifth Amendment privilege against self-incrimination
- Sixth Amendment right to effective assistance of counsel
- Eighth Amendment privilege against cruel and unusual punishment
- Fourteenth Amendment right to due process of law

Even when these amendments apply to a given forensic evaluation,

because of their broad language, we must look to additional sources of law to understand the scope and nature of their impact.

Statutes: U.S. Code and Texas Codes

Statutes promulgated by legislative acts of the U.S. Congress and the Texas Legislature provide more detailed provisions relevant to forensic evaluation. Because much of criminal law is governed by state law, the most important sources of statutory law for criminal evaluations in Texas cases are:

- Texas Code of Criminal Procedure
- Texas Penal Code
- Texas Juvenile Justice Code, contained in Title 3 of the Texas Family Code

These statutes codify the definitions of specific criminal offenses and the procedures used to move a case through the system, including procedures for performing forensic evaluations (see, e.g., Texas Code of Criminal Procedure §46B).

Administrative Regulations: Code of Federal Regulations and the Texas Administrative Code

Although statutes provide more detail than constitutions, they may not provide an elaborated framework for addressing a specific issue or process. When a legislature lacks sufficient time or expertise to legislate on a given topic, it can delegate that authority. Most commonly, a legislature will delegate authority by statute to an administrative agency to develop regulations on a topic falling under its mandate and expertise. Most relevant to Texas forensic evaluations might be the Texas Administrative Code Regulations promulgated under the auspices of the Texas State Board of Medical Examiners (Tit. 22, Pt. 9, Chap. 190, § 190.1) and the Texas State Board of Examiners of Psychologists (Tit. 22, Pt. 21, Chap. 465).

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Court Rules: Federal Rules of Evidence, Federal Rules of Civil Procedure, Texas Rules of Evidence, Texas Rules of Civil Procedure

Court rules establish uniform procedures for court proceedings. The most influential rules are promulgated by the highest relevant court under statutorily-delegated authority. The U.S. Supreme Court has promulgated federal rules of evidence and procedure and the Texas Supreme Court and Texas Court of Criminal Appeals have done the same on the state level. In addition, lower courts may have their own local court rules, which will be important for lawyers practicing before these courts. In the context of forensic evaluation, court rules are indirectly relevant, as they will explain the manner in which many elements of the case are developed by the lawyers, including the admissibility of expert testimony. Even though the vast majority of cases will be resolved before reaching trial, the rules governing the trial will affect the attorneys' assessment of the strengths and weaknesses of their cases, and thus the terms of any plea bargain.

Court Decisions

A significant source of law is the many formal written opinions issued by federal and state courts. These opinions are collected in "court reporters," or consecutively numbered volumes containing formal written opinions. The decisions interpret constitutional provisions and statutes in greater detail. Many of these decisions are also available through various online sources.²

The judicial system in the United States (and Great Britain and most former British colonies) follows a common law system of law, a system rooted in reported judgments regarding specific factual situations. In contrast, a civil law system is based on declarations of broad, general principles organized in a highly structured framework of legislative enactments. Common law

²The two primary on-line sources of legal information (cases, statutes, etc.) are Westlaw and Lexis, located at www.westlaw.com and www.lexis.com. For those without access to those costly services, www.findlaw.com contains many statutes and even some cases at no cost to the user.

systems rely on precedent, the controlling authority of previously decided cases in the same jurisdiction with similar legally relevant facts and legal principles. Similar cases from different jurisdictions can be cited to a court as persuasive but not controlling authority. In contrast, cases from appellate courts in the same jurisdiction are binding upon trial courts.

As the reader of subsequent contributions to this issue will note, a number of court decisions provide important information to a forensic evaluator by interpreting constitutional provisions, statutes, and other sources of law as applied to specific assessment contexts.

THE COURT SYSTEM

Federalism and Jurisdiction

To understand our court system, it is necessary to understand the concept of jurisdiction, which refers to the power of a court to decide a matter before it (Black's Law Dictionary, 1999). A court may have jurisdiction over a matter based upon the subject of the lawsuit (the amount in controversy, the type of law, the location of the incident or offense) or the identity of the parties (individual or state entity, residence). Higher courts will generally have authority in a broader geographic area.³

The legal system in the United States operates as a federalist system, with two parallel but different systems. The federal system will apply to some cases and the state system will be the appropriate forum for others. In general, cases brought under state law will be heard in state court and cases based on federal law will be heard in federal court, although some federal laws, especially constitutional provisions, will apply in state cases and under some circumstances in civil cases, federal courts will apply state law to a case (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

³To make things particularly confusing, the geographic region falling under a court's authority colloquially is often called a "jurisdiction."

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Sometimes a matter will be addressed by both a state law and a federal law. If a federal law and a state law conflict, the federal law usually “preempts” the state law and takes precedence. For example, if a state law required all substance abuse treatment providers to notify law enforcement agencies regarding clients’ use of illegal drugs, that law would be preempted by the Department of Health and Human Services’ “Confidentiality of Alcohol and Drug Abuse Patient Records” regulations (42 C.F.R. Part 2 (1987)), which provide a measure of confidentiality for clients of substance abuse evaluation or treatment programs directly or indirectly assisted by the federal government.

A well-trained forensic evaluator should understand the structure of the federal and state court systems. Even though most forensic evaluators will spend the majority of their time working on state court cases, as most crimes are defined by state law and prosecuted in state court, there is an increasing federalism of criminal law in the federal system and a concomitant increase in federal prosecution. (ABA (1998), Report on the Federalization of Criminal Law). Under the Tenth Amendment, states have all powers not delegated to the federal government by the Constitution and not prohibited by the Constitution. Nonetheless, some congressional powers, such as those of interstate commerce and public welfare, have been interpreted broadly, permitting certain categories of federally-defined crimes. Traditional examples of federal crimes include interstate crimes (e.g. mail fraud, interstate or international drug crimes, robbery of a federally insured bank), crimes against federal officials (such as threatening the President), civil rights violations, and crimes committed on federal property. Modern or expansive examples of federal crimes include failure to pay court ordered child support where ex-spouses live in different states and possession of a firearm by a spouse subject to a state protective order. Federal courts also may become involved in state criminal cases on appeal, when the constitutional rights of defendants are at issue. In areas of federal power, federal statutes and regulations trump state judicial decisions, statutes, and regulations.

The Federal Court System

The federal judicial system has three levels of courts. At the lowest level are the trial courts, which examine and decide issues of law and fact. Trial courts hear evidence presented by witnesses and may have juries to decide factual issues. The higher two levels are appellate courts, which do not hold trials, but consider allegations of error in the trial court proceedings and review the trial court's judgment. Appellate courts are paper-intensive, with judges making decisions after hearing short oral arguments by the attorneys and reviewing briefs by the parties and a transcript of the trial court proceedings. They never recall experts to gather more information, but can remand, or send back, a case to the trial court to hear additional evidence. Appellate courts generally give great deference to the trial courts on findings of fact made by those lower courts. The higher courts tend to focus instead on matters of law.

District Courts and Magistrate Courts

In the federal system, there are 94 federal district courts. These trial courts hear cases arising under the U.S. Constitution or other federal laws. In addition, they hear some cases based on state law in which parties are from different states ("diversity" jurisdiction) and a number of other causes of action not related to forensic evaluation. In Texas, there are four Federal District Courts: the Eastern District, the Western District, the Northern District, and the Southern District. Because of the heavy workload for the District Courts, in 1968 Congress instituted a system of federal magistrates, who can hear cases as well as the federal district court judges. Federal United States Magistrate Judges have jurisdiction over federal misdemeanor cases, preside over the initial appearance, determine the issue of pretrial release or detention of the defendant, hear some civil cases, and perform a variety of other tasks by agreement of the parties to a civil lawsuit or at the direction of the District Judges. Except for military courts-martial and military commissions to adjudicate acts of terrorism, the District Courts and U.S. Magistrate Courts are the primary trial courts in the federal system, and thus the usual forum in which a forensic expert might testify.

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Circuit Courts

The first level of appellate court in the federal system is the circuit courts of appeals. There are eleven numbered courts of appeals plus the D.C. Circuit Court of Appeals and the Federal Circuit Court of Appeals. Texas falls under the U.S. Court of Appeals for the Fifth Circuit, along with Louisiana and Mississippi. A decision in one circuit is not binding on the other circuits, although it may be cited as persuasive authority. Generally, a case before a U.S. Court of Appeals will be heard by a panel of three judges, although occasionally the entire court will hear a case together, or “*en banc*.” Because the Circuit Courts are appellate courts, they never hear witnesses, although the attorneys may be invited to make brief oral arguments. To inform their decisions, Circuit Courts rely on the record of the trial and briefs submitted by counsel.

U.S. Supreme Court

The highest level appellate court is the Supreme Court. The nine Justices hear appeals from inferior appellate courts (federal circuit courts and the highest state courts). After receiving an unfavorable decision from an inferior appellate court, a party may petition for a writ of certiorari, requesting the Supreme Court justices to consider hearing the case. In most cases, the justices may accept or reject the request at their discretion, and the Court will hear the case, or “grant cert,” in only a very small proportion of cases. In rare circumstances, for example a dispute between two states, the Supreme Court will have original, exclusive jurisdiction and will have to hear the case. Each year the Supreme Court hears only around one hundred cases of the thousands of cases that have requested certiorari.

The Texas State Court System

Because most criminal cases are based on state law, and because the federal government generally relies on its own forensic examiners in federal cases, forensic evaluators who are not federal employees will most often participate in cases in the state court system. The nature of the offense committed by the defendant will

determine the state trial court in which the case will be filed. To understand where a case stands in the adjudication process, an evaluator must understand the structure of the Texas state court system.⁴

The Texas court system is more complex than the federal system. At the trial level, different levels of courts have different jurisdictional requirements. Some trial courts are courts of record, with a court reporter and formal rules and procedures. Other courts are not courts of record and hear lower-level cases in a more streamlined (and therefore less expensive) manner. The parties may appeal any judgment from a court that is not a court of record by requesting a new trial in a higher court. At the appellate level, cases are heard in different courts depending upon whether the case involves criminal charges or civil claims. In contrast to the federal system, Texas judges are elected, not appointed.

Local Trial Courts: Municipal Courts and Justice of the Peace Courts

Local trial courts hear low-level civil cases and minor criminal cases. Both municipal courts and Justice of the Peace (JP) courts hear class C misdemeanor cases, the lowest level misdemeanors punishable by a fine of no more than \$500 (Tex. Penal Code §12.23). Both courts also have magistrate functions such as issuing search or arrest warrants.

Municipal courts have exclusive jurisdiction over municipal ordinances, violations of some of which are punishable by a fine of up to \$2,000 (Tex. Gov't Code § 29.003(b)). Municipal ordinances often address issues such as land zoning permits and parking tickets. The municipal courts also have concurrent jurisdiction with the JP courts over violations of state law within municipal limits punishable only by a fine (Tex. Code Crim. Pro. § 4.14). Many municipal courts in smaller cities and towns are not courts of record and do not have a court reporter, although a few do (Tex. Gov't Code ch. 30). In larger

⁴ For an overview of the Texas court system, see Helft (2005), Polewski (2003), Texas Courthouse Guide (2004), and Texas Judicial Council (2004).

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metropolitan areas, municipal courts are courts of record. The legislature has created at least one municipal court in each incorporated city in Texas, for a total of approximately 850 municipal courts and more than 1200 judges (Tex. Gov't Code § 29.002).

Justice of the peace courts have jurisdiction over civil matters under \$500 and serve as small claims courts. Along with municipal courts, they handle criminal cases falling under the Alcohol Beverage Code that do not include confinement as a potential disposition (Tex. Code Crim. Pro. § 4.11(a)(2)). They are never courts of record (Tex. Code Crim. Pro. § 44.17). The legislature has created between one and eight JP precincts in each county of the state, depending on the population, for a total of approximately 900 JP courts and judges.

County Trial Courts: Constitutional County Courts, County Courts at Law, and Probate Courts

County trial courts hear appeals from local trial courts and have original jurisdiction in some matters. The appeals from the local trial courts will be *de novo*, or completely anew as if no trial had been held or decision rendered, unless the local court is a court of record. Without a record, or a transcript of the proceedings, the court would have no evidence to review in the appeal and has to hold a new trial.

The Texas Constitution established one Constitutional County Court for each county (Tex. Const. Art. V § 15). These 254 courts hear civil cases up to \$5,000 and have concurrent jurisdiction with JP courts and district courts, leaving attorneys with a choice of courts in which to file their action. The Constitutional County Courts also hear more serious misdemeanor criminal cases (Tex. Const. Art. V § 16). The judge of the Constitutional County Court also acts as the administrative head of county government.

In more than fifteen larger counties, the legislature has created additional county-level courts (Elliston § 1:28). The

jurisdiction of County Courts at Law is determined by the same statute that created the specific court. Generally, these courts will share jurisdiction with the Constitutional County Court and the District Courts in some matters and frequently have jurisdiction of civil matters up to \$100,000. They also generally hear appeals from the local municipal and Justice of the Peace courts. As of 2003, there were roughly 170 County Courts at Law in Texas.

In some counties, there are specialized county criminal courts that do not hear civil cases (Elliston § 1:28; e.g. Tex. Gov't Code § 25.0593 (Dallas County)). In other counties, such as Tarrant and Travis Counties, a County Court at Law may be required to give preference to particular types of criminal cases, such as "family violence" cases (Tex. Gov't Code §§ 25.2223(1), 25.2292(c)).

In the six largest counties in Texas, the legislature has created approximately 19 Statutory Probate Courts to hear cases involving guardianships, mental health commitments, and probate matters such as wills and trusts (Flint, 2002, p. 41). Appeal from any of the county trial courts generally is to the state appellate courts, but contested probate matters can be transferred to the District Court in counties without a Statutory Probate Court.

District Courts

District courts are the highest level trial courts in Texas. There are provisions in the Texas Constitution establishing these courts and describing their jurisdiction (Tex. Const. Art. V §§ 7-8). The legislature determines the geographic reach of each District Court, with more populous counties having more than one district court and rural counties sharing one district court. The District Courts are designed to hear the most serious state cases. They hear felony criminal cases and civil cases including divorces, title to land, contested elections, contested probate matters (in jurisdictions without a Statutory Probate Court), juvenile matters, and civil actions over \$200.

There are almost 400 District Courts in Texas. Most hear a

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broad range of cases, but in more populated areas, District Courts may specialize in civil, criminal, juvenile, or family matters. A forensic evaluator may be asked to do an evaluation for a juvenile court, which can differ significantly from adult criminal court. Juvenile cases are civil matters (the Juvenile Justice Code is part of the Family Code), and originally juvenile court was designed to promote the best interests of the juvenile. While that has changed markedly and serious criminal offenses are frequently prosecuted and adjudicated more like adult criminal cases, juvenile court still has a different tenor than criminal court. (Redding & Frost (2001), p. 355)

Courts of Appeals

Texas has fourteen Courts of Appeals and 80 justices, covering a multi-district area. Each Court of Appeals has more than one justice, and cases are usually reviewed by a panel of three justices and decided by a majority vote. The Courts of Appeals do not conduct trials, but instead hear appeals of civil and criminal cases from the district and county-level courts.

Court of Criminal Appeals and Texas Supreme Court

In reality, the Courts of Appeal are usually the last level of recourse for a party to a lawsuit, as the highest level appellate courts deny the vast majority of requests to review a Court of Appeals decision. The level of appeal beyond the Courts of Appeals is divided between two courts, one of which hears civil appeals and the other which hears criminal appeals (Tex. Const. art. V § 5).

The Court of Criminal Appeals hears all appeals from Court of Appeals decisions in criminal cases. In the unusual instance that the Court of Criminal Appeals grants a discretionary request for review, all nine judges will hear the case and five judges must agree on a decision before a majority opinion will be issued by the Court.

An important exception to the discretionary nature of appeals to the Court of Criminal Appeals occurs in cases in which

a defendant received the death penalty at the trial court level. Such cases will automatically be heard by the Court of Criminal Appeals directly after the District Court proceeding, bypassing the Courts of Appeals and the discretionary decision about appellate review (Tex. Code Crim. Pro. § 4.04(2)).

The Texas Supreme Court hears all appeals from Courts of Appeals in civil cases, including juvenile cases (Tex. Gov't Code § 22.001). The Supreme Court has discretion over whether to accept a request for the Court to hear an appeal (Tex. Gov't Code § 22.007(a)), and it rejects most requests. A party may request to make an oral argument before the court, but cases can be (and usually are) decided based on the pleadings and documents submitted to the Court. At least five of the nine justices must agree on the decision in a case. The Supreme Court has a number of administrative responsibilities and, along with the Court of Criminal Appeals, has promulgated sets of rules including the rules of evidence and procedure.

THE CRIMINAL JUSTICE PROCESS

Forensic evaluations can be useful in a range of court cases, both civil and criminal. On the civil side, it is not uncommon for a clinician to perform an evaluation of parents involved in a disputed custody case. This issue, however, focuses on evaluations of criminal defendants to determine legal issues such as competency, sanity, future risk, or, in a capital case, aggravation, mitigation, and mental retardation issues.⁵ The adversary nature of the criminal trial makes it important for the forensic evaluator interacting with the attorneys in a case to understand the actors and phases in the criminal justice process.⁶

⁵Accounts of the use and misuse of forensic testimony in criminal cases are legion. In Texas, the prosecution has even used psychiatric expert testimony in a capital case in an effort to show a defendant is more likely to be violent in the future because he is Hispanic, as Hispanics have a higher recidivism rate. *Saldano v. State* (2002)(testimony of Clinical Psychologist Dr. Walter Quijano); *see* Hoermann (2002).

⁶For an overview of the criminal justice process in Texas, *see* Baker (2003) and Dawson (2001). To better understand the role of the criminal defense attorney working with defendants with mental illness, *see* Shannon (1999) and Siegfried (2001).

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Players in the System

In a criminal case, a variety of actors will participate in the process. Depending on the nature of the charges and the procedural posture of the case, the roles and even the actors will differ.

The *defense attorney* or defense counsel serves as the lawyer for the defendant (the person charged with an offense). Defense counsel may be retained by the accused or appointed to represent the defendant. Under the Sixth Amendment to the U.S. Constitution, an indigent criminal defendant has a right to be provided a lawyer at state expense. (*Gideon v. Wainwright*, 1963). Depending on the locality, this lawyer may be appointed by the court or provided by a federal or state public defender's office. Confidential communications between the attorney and the defendant are protected by the attorney-client privilege and neither party can be forced to testify in court about the content of the communications. This privilege will extend to some agents of the defense team, for example a forensic evaluator doing a mitigation evaluation in a capital case. The defense attorney's ethical obligation is to be a zealous advocate for the client and to ensure the prosecution proves every element of the offense (ABA, Model Rule of Professional Conduct 3.1).

The *prosecuting attorney* represents the state or federal government in a criminal case and prosecutes the defendant. This is because in a criminal case the offense is considered to be against the federal government and/or state itself, and the victim of the offense is not a party to the case. In the federal courts, United States Attorneys and Department of Justice Trial Attorneys prosecute criminal cases. In any given locality in Texas, depending on the nature of the offense charged, a District Attorney, a County Attorney, or a City Attorney will serve as the prosecuting attorney. A forensic evaluator seeking information essential to the evaluation process may need to work through the prosecuting attorney, in addition to the defense attorney, law enforcement agents, and government agency employees. The

prosecuting district attorney has a special ethical obligation to seek justice and to work within a framework of fairness to the defendant rather than to prosecute to the maximum (ABA, Model Rule of Professional Conduct 3.8). In Texas, the district and county attorneys are elected officials, who appoint or employ Assistant District Attorneys, Assistant County Attorneys, Investigators and other staff to prosecute cases in their jurisdiction.

The *judge* is the official who presides over the trial. The judge will rule on the admissibility of evidence and questions of proper procedure and will serve as the finder of law, deciding the proper legal standards to apply in the case. In a bench trial (where no jury is requested), the judge will serve as the finder of fact as well as the finder of law and decide the verdict in the case. In Texas, state judges are elected; federal judges are appointed for life.

The *jury* is a group of six or twelve individuals (depending on whether the case is heard in federal court, state district court, or a lower state court) that is the “finder of fact,” making determinations about what happened in a case. In a criminal trial, the jury must reach a unanimous verdict. In Texas, a defendant in a criminal case may elect to have the jury determine punishment in the event the jury reaches a guilty verdict. In capital death penalty cases it is always the jury in Texas who must determine whether or not the sentence of death is imposed by answering certain special issues adversely to the defendant.

The *Attorney General* represents and advises state agencies and issues opinions on how ambiguous laws should be interpreted. The Attorney General also represents the state in criminal cases in a very limited number of criminal cases, including death penalty cases appealed to the federal courts on constitutional grounds.

The state *magistrate* issues arrest and search warrants. Some magistrates may also issue temporary detention orders in civil commitment cases. The judges of the various courts including Municipal and Justice of the Peace Courts are all considered

magistrates, as are the mayors of cities and towns (TCCP Art. 2.09). State magistrates are very different from Federal United States Magistrate Judges, who have jurisdiction over some federal civil and criminal cases and perform other duties to lighten the workload for federal District Judges.

The *clerk* controls the court's docket and maintains records. The clerk can be an excellent source of procedural information on a case.

STEPS IN THE CRIMINAL JUSTICE PROCESS

The criminal justice process will look different for more serious offenses.⁷ The less serious offenses are called misdemeanors and have a maximum sentence of one year in jail plus a fine (of no more than \$4,000 in a state offense (TPC § 12.21-23)). Felonies, or more serious offenses, have a maximum sentence of death for capital offenses and a fine up to \$10,000 (TPC § 12.32-35). State district courts hear felony cases, whereas lower trial courts hear misdemeanors. Because the requirements of due process are stronger when the potential penalty is more serious, felony offenses will require more steps in the criminal justice process than misdemeanors.

Arrest

The police have a number of options in fashioning a response to an alleged crime. They might take no official action and issue a warning. They might take an individual into emergency custody for a mental health evaluation, as a diversion from the criminal process. Often they might choose to make an arrest. If a grand jury has already lodged formal charges, the individual must be arrested.

Under most circumstances, a warrant is required in order to make a lawful arrest. Nonetheless, Texas law permits a warrantless arrest for a felony offense or a breach of the peace in a

⁷Because most forensic evaluators will work on state criminal cases, this article will focus on steps in the Texas state criminal justice process.

public place if there is probable cause to believe that an individual committed the offense. Moreover, state law authorizes peace officers to make arrests for offenses committed within their presence (TCCP, Art. 14.01(b)). Otherwise, a warrant for arrest must be issued by a judge or magistrate upon a finding of probable cause.

According to the Supreme Court, a defendant is entitled to receive notice of the constitutional right to remain silent and to consult with counsel (commonly referred to as “*Miranda* warnings”) from law enforcement officers prior to any custodial interrogation (*Miranda v. Arizona*, 1965). Generally, any statements made during custodial interrogation prior to *Miranda* warnings or without a valid waiver of constitutional rights cannot be used against a defendant at trial.⁸ Texas is unique in disfavoring oral waivers of constitutional rights and requiring that a defendant’s statement or confession must be written or recorded to be admissible in state courts (TCCP §38.22).

First Appearance

After arrest, defendants must be taken before a magistrate without undue delay, generally within 24 hours and definitely within 48 hours. The magistrate will inform the defendant of the charges and his or her rights, including the right to an attorney and the right to remain silent. If the arrest was not made pursuant to a warrant or indictment, the magistrate will make a determination of probable cause that the defendant committed the offense. The magistrate will also make an initial pretrial release determination of whether the defendant must stay in custody or can be released on bail. A judge may reconsider this determination at a subsequent pretrial hearing once the defendant has hired an attorney. A defendant who is denied bail by the court (or who cannot afford to

⁸Although a forensic evaluation would usually fit the criteria of a custodial interrogation, under most circumstances an evaluator should not give *Miranda* warnings. For example, in a court-ordered competency evaluation, a defendant has no right to remain silent and instead the evaluator must omit incriminatory details from the report. In a different example, a defendant would have no reason to remain silent in a sanity evaluation in which the evaluation was protected by attorney-client privilege unless disclosed after-the-fact by the defense. *See* Melton et al., 1997 at 4.02(f).

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post bail) will be kept in a jail, a facility run by the local county. In the federal system, criminal defendants are held in the custody of the U.S. Marshals Service, often in state or contract facilities, and may be released after the initial appearance before a U.S. Magistrate Judge on pretrial release conditions supervised by Pretrial Services Officers, or may remain detained prior to trial after a contested hearing if the Magistrate Judge finds that no condition or combination of conditions are sufficient to ensure the defendant's appearance at trial or the safety of the community.

Assignment of Counsel

Prior to an adversarial phase of the proceedings such as the examining trial described below, indigent defendants charged with an offense that could result in jail or prison time have a right to a publicly-funded defense attorney (*Gideon v. Wainwright*, 1963). Defendants may waive their right to counsel and represent themselves if they are competent to make that decision. It is important to note that the defendant need not be competent to put on an effective defense, only competent enough to understand the nature of the charges and proceedings and reasonably communicate with counsel.

Examining Trial

A defendant charged with a felony and not yet indicted by a grand jury has a right to an examining trial (called a preliminary hearing in most jurisdictions) before a magistrate (TCCP Art. § 16.01). The examining trial is an adversarial proceeding in which the district attorney prosecutes and the defendant is represented by counsel. The district attorney must prove a *prima facie* (at first sight) case against the defendant and establish probable cause. If the district attorney fails to make a *prima facie* showing, the court will dismiss the charges. If the district attorney makes the showing, the magistrate will set bail.

Grand Jury Proceeding

A grand jury of at least fourteen citizens (12 grand jurors and two alternates) hears evidence presented by the district attorney in order to inquire into potential violations of the law

(TCCP, Chap. 19). The grand jury differs from the petit jury seated in the trial court to hear a specific case, and the members of the grand jury will serve for up to 90 days (Tex. Code Crim. Pro, Chap. 19). The rules are different from those during the trial phase. A defendant may be called to testify before the grand jury but may invoke the Fifth Amendment right to remain silent. If a defendant elects or requests and is permitted to testify before the grand jury, the defense attorney is not permitted in the room (TCCP § 20). The vast majority of cases are presented to the grand jury in Texas by the prosecuting attorney alone using police reports or by a law enforcement officer as the witness for the state. If at least nine grand jurors find probable cause that the defendant committed the alleged offense, the grand jury will indict the defendant (TCCP, Art. 19.40). If no probable cause is found, the charges will be dismissed.

Pretrial Motions

The prosecution and defense may make pretrial motions requesting some action by the judge. Typical motions might include a discovery motion, a motion to suppress evidence or confessions, a motion for a forensic evaluation, and a motion to continue the trial date of the case.

Discovery

During the pretrial period, the defense may “discover” or access a limited amount of information in the prosecutor’s file, for example the defendant’s statements or confessions. The defense may be denied access to some information, such as police reports and statements of witnesses for the prosecution, although they are entitled to all exculpatory evidence that may be helpful to the defendant’s case. The prosecution may also discover a small amount of information from the defense. Some portions of a forensic evaluator’s work may be privileged, but that privilege may also change depending on the procedural posture of the case. For example, a sanity report may be covered by attorney-client privilege until the defense gives notice that it plans to raise the insanity defense at trial.

Plea Bargaining

Prior to the trial, the defense attorney and the prosecutor may attempt to negotiate a plea bargain. In fact, most cases are resolved through a plea bargain rather than a trial (Melton et al., 1997, p. 33).⁹ In a plea bargain, both sides agree on a disposition for the case and the defendant pleads guilty under the terms of the agreement. For example, in exchange for a guilty plea, the prosecutor may agree to reduce the charge, dismiss other charges, or recommend a particular sentence. The court may refuse to follow the plea bargain and its agreed sentence, but if a Texas court decides not to follow the plea agreement, the defendant must be permitted to withdraw the plea and proceed to trial.

Arraignment

The arraignment is the point in the process, typically just before the trial, at which the defendant enters a formal plea. The defendant can plead guilty, not guilty, or *nolo contendere* (no contest). There is no specific plea of insanity, but a defendant can plead not guilty and present evidence of insanity at trial. Prior to accepting a guilty plea, the judge will inform the defendant of the range of possible punishment, limitations on appeal, and the risk of deportation proceedings for noncitizens. With a plea of *nolo contendere* or no contest, the defendant neither admits nor denies the charges but agrees to the admission of facts (police report, statements, lab report, etc.) sufficient for the court to enter a finding of guilt and proceed to impose a fine or sentence. The no contest plea cannot be used against the defendant in a civil action. In an “Alford plea,” a type of guilty plea, a defendant pleads guilty while denying having committed the offense, thus requiring the Court to find a factual basis for guilt (*North Carolina v. Alford*, 1970). In Texas, the claim to innocence must be explicit in order to trigger the factual basis requirement (*Orman v. Cain*, 2000).

⁹Earlier data shows that in Texas, 95% of felony convictions were obtained through plea bargains (Report of Commission on Sentencing Practices and Procedures, 1985, at 53).

Trial

If no plea bargain is reached, the case will proceed to trial. All criminal defendants have a right to trial by jury. The attorneys will select the jurors through a process called *voir dire* (“to see, to say”) through which they question the prospective jurors and may challenge the inclusion of specific jurors on the panel. District court cases have a panel of twelve jurors and lower court cases have six-member juries.

Due to the differences between the interests at stake in a criminal case, including loss of freedom and social stigma associated with a criminal conviction, and the interests at stake in a civil trial, criminal prosecutors must meet different standards of proof than civil plaintiffs. In a criminal case, the prosecution must prove the elements of the offense beyond a reasonable doubt, a higher standard than the preponderance of the evidence standard used in civil cases. The prosecution puts on its evidence first, and the defense presents its evidence in rebuttal. If insanity is an issue, the defense will present its evidence after the state rests and the state may later rebut with evidence of sanity. After the closing arguments, the jury will be instructed by the judge on the law applicable to the case. After deliberations behind closed doors, the jury must reach a unanimous verdict of guilty, not guilty, or not guilty by reason of insanity.

Disposition

Texas bifurcates all criminal trials, separating the determination of guilt from the sentencing phase. Except in capital cases, the judge will determine the punishment unless the defendant has elected for jury sentencing. If a jury is unable to decide on a punishment, the judge will declare a mistrial, except in a capital case in which the judge must then impose a sentence of life imprisonment. The sentencer (judge or jury) can review any relevant evidence, including the defendant’s criminal history, reputation and character, unadjudicated offenses, and aggravating and mitigating evidence. This range of evidence may include elements that were inadmissible during the guilt phase of the trial. The judge usually considers a presentence report prepared by a

probation officer and, occasionally, a report or testimony of a mental health professional who has done a presentence evaluation.¹⁰ The Texas Penal Code provides punishment ranges for various offenses, but there are no state sentencing guidelines. Until recently, the federal system had mandatory Federal Sentencing Guidelines that judges had to use in determining the length of punishment for a particular offense. The U.S. Supreme Court recently found those Guidelines unconstitutional to the extent that they would require judges to calculate a sentence based on information not reflected in the jury verdict or admitted by the defendant (*United States v. Booker*, 2005).

Appeal and Habeas Corpus

Any defendant who pleads not guilty but is convicted at trial may file a notice of appeal within thirty days after the date the sentence was imposed or the court enters an appealable order. Thereafter, a record of trial is prepared and filed with the Court of Appeals (or directly in the Court of Criminal Appeals in death penalty cases) and the defendant and the prosecution file briefs with the appellate court urging their respective reasons why the case should be reversed or affirmed. The appellate court decides whether to hear oral arguments from the attorneys, and issues its written opinion in its own good time. Generally, the prosecution may not appeal an acquittal because it would violate prohibitions of double jeopardy to retry an acquitted defendant, but it may appeal some pretrial orders such as the suppression of evidence or a confession.

An offender serving a sentence may petition for a writ of habeas corpus (literally, an order to free the body), a collateral type of appeal usually employed after direct appeal. A habeas corpus petition must allege the illegality of the defendant's detention because of some deficiency in the process implicating the defendant's constitutional rights that resulted in the conviction and

¹⁰Because the sentencing phase immediately follows the guilt phase of the trial, presentence evaluations or presentence reports are not used when the defendant elects to have the jury determine the appropriate punishment and the prosecution and defense simply proceed with an evidentiary hearing on the contested issue of the sentence.

sentence. These petitions are common in capital cases.

USES OF FORENSIC EVALUATION IN THE CRIMINAL JUSTICE SYSTEM

Forensic evaluations can play a role at many points in the criminal justice process. In theory, evaluations can be used even in petty misdemeanor cases, although strategically a misdemeanant may prefer to accept the punishment rather than be subject to sometimes lengthy and potentially indeterminate periods of incapacitation in a state psychiatric facility. Attorneys will request forensic evaluations prior to trial and the results of the evaluations often have a significant impact on the plea negotiations that take place in most cases. The court will use risk assessments in determining appropriate punishment for sex offenders, juveniles, and other categories of offenders. Competency evaluations will help the court ensure that a defendant meets the constitutionally-required level of functioning in order to proceed with a trial. Sanity evaluations can help cull out defendants too mentally impaired to have understood the nature of their criminal actions.

Subsequent contributions to this issue will elaborate sound clinical practice in performing quality forensic evaluations, but a solid grounding in the structure and functioning of the legal system will assist the forensic evaluator in understanding the procedural posture and steps in any given case.

REFERENCES

- American Bar Association (1983). Model Rules of Professional Conduct.
 American Bar Association (1998). Report on the Federalization of Criminal Law.
 Baker, Lang (2003). Texas Criminal Procedure Handbook. Stillwater, MN: Freelance Enterprises.
 Black's Law Dictionary, 7th Edition (1999). St. Paul: West Group.
 California v. Ramos, 463 U.S. 992 (1983).
 Dawson, Robert O. & Dix, George E. (2001). Texas Criminal Procedure. New York: Matthew Bender.
 Elliston, D. Mark (2005). Texas Practice Guide: Criminal Practice and Procedure. St. Paul, MN: West Group Publishing.
 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

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- Flint, Richard E. & Scott, L. Wayne (2002). *Texas Civil Procedure: Pretrial*. Dallas: Grail & Tucker Legal Publishing.
- Gideon v. Wainwright, 372 U.S. 335 (1963).
- Helft, Barry P., Ed. (2005). *Texas Criminal Practice Guide*. New York: Matthew Bender.
- Hernandez v. State, 998 S.W.2d 770 (Tex.Crim. App. 1999).
- Hoermann, Diana L. (2002). "Why the Injection of Race in Saldano v. State Constitutes Fundamental Error." In *The Scholar*, St. Mary's Law Review on Minority Issues, Vol. 4, Number 2, Spring 2002.
- Melton, Gary B., Petrila, John, Poythress, Norman G. & Slobogin, Christopher (1997). *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 2nd Edition. New York: Guilford.
- Miranda v. Arizona, 384 U.S. 436 (1965).
- North Carolina v. Alford, 400 U.S. 25 (1970).
- Orman v. Cain, 228 F.3d 616 (5th Cir. 2000).
- Polewski, John (2003). "The Texas Court System: A Primer." *Texas Bar Journal* 66, 365.
- Redding, Richard E. & Frost, Lynda E. (2001). "Adjudicative Competence in the Modern Criminal Court." In *The Virginia Journal of Social Policy & the Law*, Vol. 9, No.2, pp. 353-409.
- Report of Commission on Sentencing Practices and Procedures (1985), 69th Leg., R.S. 32.
- Saldano v. State, 70 S.W. 3d 873 (Tex.Crim. App. 2002).
- Shannon, Brian D. & Benson, Daniel H. (1999). *Texas Criminal Procedure and the Offender with Mental Illness: An Analysis and Guide*. Austin: National Alliance for the Mentally Ill – Texas.
- Siegfried, Chris & Gill, Raman (2001). *Mental Illness, Your Client, and the Criminal Law: A Handbook for Attorneys Who Represent Persons with Mental Illness*. Austin: Texas Appleseed.
- Texas Administrative Code (2005).
- Texas Code of Criminal Procedure (2005).
- Texas Constitution.
- Texas Courthouse Guide (2004). Dallas: Texas Lawyer Press.
- Texas Family Code (2005).
- Texas Government Code (2005)
- Texas Judicial Council, Annual Report of the Texas Judicial System (2004). Austin: Office of Court Administration and Texas Judicial Council.
- Texas Penal Code (2005).
- United States v. Booker, 125 S. Ct. 738 (2005).

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