

**NEW *AND OLD* PERSPECTIVES
FROM THE BENCH**

One Judge's Observations

PRESENTED TO:

**FALL JUDICIAL EDUCATION SESSION
COMMUNICATION AND EDUCATION SERVICES
TEXAS ASSOCIATION OF COUNTIES**

**GEORGE HOTEL
COLLEGE STATION, TEXAS
NOVEMBER 21, 2019**

QUALITIES OF A JUDGE

Good Listener –

(never let them see you sleep!)

Morally Courageous

Fair

Merciful

Patient

Good Communicator

Decisive

Open Minded

Brief

Dignified

Honest

Has Integrity

Innovative

Gracious

COMMANDMENTS FOR THE NEW (OR OLD) JUDGE

- 1. Be Kind
- 2. Be Patient
- 3. Be Dignified
- 4. Don't Take Yourself Too Seriously
- 5. A Lazy Judge Is A Poor Judge
- 6. Don't Fear Reversal
- 7. There Are NO Unimportant Cases
- 8. Don't Impose Long Sentences
- 9. Use Common Sense

**YOU DO NOT HAVE TO EXPLAIN
WHAT YOU DO NOT SAY**

CRIMINAL COURTROOM PRACTICES

DRESS CODE - at the entrance to the courtroom, post signage regarding proper courtroom attire. You can also include this information in the first letter sent to the defendant apprising him of his first court date.

- **No shorts – if they wear shorts, they wait in the lobby and are the last ones to be allowed in the courtroom after all others have left.**

- **No rude, crude, profane writings or drawings on t-shirts or clothing.**
- **Pants pulled up.**
- **No mid-drifts or low-cut blouses.**
- **Children are allowed as long as they are quiet.**
- **Service animals must be allowed – BUT you cannot ask why they have the service animal. You can ask to see permit only.**

- **ATTORNEY ATTIRE:**

- **More relaxed dress standards, especially in rural areas. You can decide where you draw the line.**

DRUG TESTING IN COURT

- **Yes, you can.**
- **If you have a probation officer in your courtroom, he/she should have “pee” test kits available.**
- **Sometimes my bailiffs inform me they believe someone is “drugged up”, high, tweaking, or they smell alcohol.**
- **I call the person up to the bench and ask, “If I tested you right now would you test positive for any illegal substance?” I also tell them if they are honest with me, I will not send them to jail today, but will have them come back to court in about 30 days (time it takes to get marijuana out of their system) and retest. If they are clean at that time, great, if they are not, they go to jail.**

- **If they lie to me, and they test positive that day, they go to jail.**
- **It is generally a condition of their bond that they cannot break any laws of this state or of the United States while on bond. Using illegal drugs or coming to court drunk is a violation of their bond condition.**
- **Sometimes their bond conditions will include no drugs or alcohol while on bond, depending on the charge.**
- **Your prosecutor can provide a Motion and Order Holding Bond Insufficient.**

YOUR STAFF

- **Your staff are an extension of you**
- **They set the tone for how your office will be viewed**
- **You are a public servant – your salary is paid by the citizens in your county**
- **Treat the public with respect**
- **Ensure that your staff treats all equally and with respect**
- **Every case is important to someone – treat it like it is important**
- **Emphasize thoughtfulness and courtesy**

YOUR SAFETY

- **No “Judge” license plates**
- **Beware of your surroundings**
- **Park in different places each day**
- **Have your bailiff walk you to and from your car each day**
- **Take your name off ALL public data – appraisal district, telephone directory, etc.**
- **Limit your use of social media – do not make statements that you don’t want to read about tomorrow**
- **Julie Kocurek – Judge, 390th District Court, Austin, Texas**

ETHICS

**IF YOU DON'T WANT TO READ ABOUT IT ON THE FRONT PAGE
TOMORROW, DON'T DO IT – DON'T SAY IT TODAY!!!!**

People love to file complaints against you.

Know and read your judicial cannons of ethics.

Your bench book is your friend – read it.

If you don't say it – they can't do anything.

Stay OFF Facebook, Twitter, etc.

MANAGING YOUR DOCKET

- **THE BUCK STARTS WITH YOU AND STOPS WITH YOU!**
- **You are ultimately responsible for docket management in your courtroom – NOT your coordinator.**
- **Case Flow:**
 - **begins with the arresting or charging agency – police, sheriff, TABC, Parks and Wildlife, etc. – may take a while to get to your county attorney**
 - **Case report sent to county attorney or district attorney**

- **County attorney reviews for reasonable suspicion, probable cause, – may take a while to review – may be waiting on testing from DPS (6 months to 1 year)**
- **County attorney accepts/rejects case**
- **County attorney “files” case**

- **Sadly, this “flow” process could take up to one year or more before the case is ever set on your docket**
- **What can you do to speed up process?**
 - **Have a meeting with county attorney and law enforcement**
 - **Ask what you can do to assist**
 - **Longer it takes, more likely chances defendant and/or witnesses disappear**

Rule of Thumb: do not allow cases to be set more than three months out on your docket without good reason explained to you by defense attorney/prosecutor. This could mean that you have some crowded dockets to get caught up.

- **“Waiting on Felony”** – we hear this a lot because law enforcement often files several cases, misdemeanor and felony, out of the same incident. Defense attorneys want to wait until the felony is pled before they agree on what to do with the misdemeanor. They are hoping the CA will 12.45 the misdemeanor into the felony conviction.
- **“Waiting for Witness Mr. Green”** – defense attorneys often want to reset a case until they get paid.
- **Most courts set as follows:**
 1. arraignment
 2. status

3. status

4. plea/trial

Not always that easy. I generally do not let a case go past 4-5 settings without a conference with the defense attorney .

YOU should look at the court's calendar of settings yourself at least a couple of times a month. You may have the best coordinator in the world, but sometimes she/he may let things slide. It is your responsibility to know exactly what your docket looks like.

You should receive Office of Court Administration (OCA) reports monthly from your county clerk – YOU need to enlist the assistance of your coordinator in reconciling the report with your docket.

- **Sec. 12.45, Texas Penal Code –**

- (a) A person may, with the consent of the attorney for the state, admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses of which he stands adjudged guilty.**
- (b) Before a court may take into account an admitted offense over which exclusive venue lies in another count or district, the court must obtain permission from the prosecuting attorney with jurisdiction over the offense.**

- **(c) If a court lawfully takes into account an admitted offense, prosecution is barred for that offense.**
- **The prosecutor and the defense attorney usually take care of these steps, and all you do at the plea is ask the defendant if he is admitting guilt to the offenses(s) being 12.45'd, and you sign the 12.45 dismissal at the time of the plea.**

INDIGENCY HEARINGS

COURT APPOINTED ATTORNEY HEARING

You **SHALL** hold a hearing on the record:

If the defendant fills out an **Affidavit of Indigence** requesting a court appointed attorney.

How do you determine indigency?

Federal Minimum Wage Guidelines

MIT Guidelines at <http://livingwage.mit.edu/counties/48053>

See Texas Indigent Defense Commission – Local Plans – your county should be listed and your county’s plan should show up

You are allowed under **Art. 26.05 (g) CCP** to recoup some of the fees paid to an attorney appointed by the Court. We ask for \$250 to be paid before case is final.

HEARING ON ABILITY TO PAY FINES AND COURT COSTS

If, at the time of the plea, which may be months after a hearing for court appointed attorney, you ask the defendant if he/she can afford to pay the fine, court costs and restitution that he has agreed to in the plea bargain agreement, and he says “no” or “he is not sure”, you must hold a hearing on the record to determine his ability to pay (even if you have previously held a hearing for court appointed attorney).

You may: 1) review his original application for attorney to determine if anything has changed; 2) ask questions at the bench on the record regarding his/her ability to pay; 3) have him fill out another Affidavit of Indigence.

- Burnet County Guideline:
- If the defendant's NET household income (including spouse's) does not exceed 150% of poverty guidelines published each year by the US Department of Health and Human Services in the Federal Register, the defendant is entitled to a court appointed lawyer.
- YOUR COUNTY MAY BE DIFFERENT FROM BURNET – CHECK TIDC.

PLEAS

Should be on the record in misdemeanor court.

Guilty

Not Guilty

Nolo Contendere (no contest) – same as plea of guilty, except it cannot be used against the defendant as an admission in any civil suit based upon or growing out of the act he is pleading to.

The defendant must enter one of the above pleas on the record.

- **When the prosecutor and the defense attorney come to you with an agreed plea, you can reject it for any reason per **Art. 26.13 (2), CCP.** The defendant can then withdraw his plea and ask for a trial or the parties can go back to negotiate a different plea.**
- **Generally, you can have an off the record discussion with the attorneys to express your concerns regarding the plea agreement.**
- **The defendant may then decide to go “open” to the court. This means, you can assess the punishment.**

TAKING PLEAS ON THE RECORD

- **No set script for taking a plea**
- **Procedure:**
- **Call the full style and number of the case on the record**
- **Ask the prosecutor to stand at the bench**
- **Ask the defendant if he/she is the person charged with the offense.**
- **Swear in the defendant**
- **Ask if they have reviewed and understand the documents they have signed.**
- **Ask if they have any questions about the documents or the plea.**

- Ask if they are entering the plea “freely and voluntarily”, i.e., they have not been pressured or coerced or offered anything of value to enter into the plea. See **Art. 26.13 (6) (b), CCP**
- Ask what their plea is
- You state the offense and the sentence for the record, “I find you guilty of the offense of ____ and sentencing you to ____”.
- Ask if they understand the sentence and if they have any questions.
- Ask the attorney if he/she wishes to put anything on the record.
- If non-citizen – cover options

NON-CITIZEN PLEAS

- If you have a defendant in front of you ready to plead, and he/she appears to you to be a non-citizen, you may ask if they are a citizen of the United States.
- If the answer is “NO”, you shall admonish them of the ramifications of a guilty plea, and the affect on their status in the US. See **Art. 26.13 (4), CCP**
- I always ask the defense attorney (if they have one) if he has advised his client to consult with an attorney who specializes in immigration law, or if the attorney representing the defendant has admonished his client of the ramifications of a plea, and if the attorney believes the defendant understands he implications.

Video Pleas

- **Art. 27.18** Code of Criminal Procedure
- **May take a plea by videoconference with the jail. Defendant must have signed all plea documents and discussed each with his attorney prior to the plea. The defendant must sign a document giving written consent to the videoconference.**
- **The defendant must be given the opportunity to talk with his attorney privately if needed.**
- **The defense attorney must be present and seen on the video by the defendant.**

TRIALS

- **Jury Trials**

- **Have pre-trial hearing either the day the trial starts or several days before the trial.**
- **Rule on all Motions filed by both sides before the trial starts.**
- **Instruct attorneys to pre-mark exhibits (at least have the exhibit sticker on each exhibit.**
- **Instruct attorneys to have enough copies of the exhibits for the opposing side, the judge and the witness BEFORE the trial begins.**
- **Instruct attorneys to set up electronic equipment and ensure it is working properly BEFORE the trial starts.**
- **I allow witnesses to testify by Facetime or Skype if both sides agree. NO telephone testimony – can't swear in.**

- **All of the above cuts down on time wasted for the jury. They will appreciate it!**
- **All of the above may be in your local rules, if so, your coordinator can provide a copy or direct the attorney to the county website.**
- **Expert witnesses must be designated prior to trial and copies of the documentation and/or names of books, treatises, etc., upon which they will rely must have been provided to the other side.**
- **Prior convictions, if any, must have been provided to the defense prior to the trial.**

OBJECTIONS

- These are just some objections you may hear:
- Answer non-responsive
- Asked and answered
- Hearsay – you need to be very familiar with **Art. VIII. Hearsay, Rule 801 – 803, Texas Rules of Evidence**
- Argumentative
- Assuming facts not in evidence
- Badgering the witness
- Improper impeachment
- Failure to lay proper foundation

- **HEARSAY:** an out of court statement offered to prove the truth of the matter asserted in the statement.
- 24 listed exceptions to the Hearsay Rule

- **Irrelevant**
- **Leading**
- **Calls for legal conclusion**
- **Unfairly prejudicial**
- **Sidebar**

PRO SE DEFENDANTS - TRIAL

Pro se defendants must be given as much leeway as possible.

Appellate courts are especially protective of pro se defendants and their rights.

You CANNOT tell the defendant how to try his case, tell him what the law is, or tell him court procedure. You can only give him the same information and opportunities that you give the State.

Out of an abundance of caution, you may appoint an attorney to sit with the pro se defendant during the trial, at the court's expense. The attorney can be there to answer any questions the defendant may have regarding procedure or the law.

NEW DWI LAW

- Big Change – deferred adjudication community supervision for DWI
- **Sec. 49.04** – Driving While Intoxicated
- **Sec. 49.06** – Boating While Intoxicated
- **Art. 42A.102 (a) (b) (1) (A) (B) (i) (ii) CCP**
- Exceptions: CDL; alcohol .15 or greater

- Different from any other deferred – because this deferred is considered a conviction for purposes of enhancement if he/she gets another DWI charge

Deferred Adjudication

- Art. 42A.101. Placement on Deferred Adjudication Community Supervision
- ...if in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt and place the defendant on deferred adjudication community supervision.

- Art. 42A.106. Record Not Confidential; Right to Petition for Order of Nondisclosure
- (b) Before placing a defendant on deferred adjudication community supervision, the court shall inform the defendant of the defendant's right to receive or petition the court for an order of nondisclosure of criminal history record information ...
- An Order of Nondisclosure prohibits public entities such as courts and law enforcement from giving out information of certain criminal convictions.

PRESENTED BY

LINDA BAYLESS

JUDGE

BURNET COUNTY COURT AT LAW

BURNET COUNTY, TEXAS

220 S. PIERCE

BURNET, TEXAS 78611

512.715.5245

caljudge@burnetcountytexas.org

QUIZ

- 1. Name three qualities of a good judge.
- 2. Name at least three objections attorneys can make.
- 3. What are you required to tell a non citizen defendant?
- 4. What university developed poverty guidelines?
- 5. What is an Order of Nondisclosure.
- 6. What was the change in the DWI laws this legislative session?
- 7. Where can you look for help on indigency issues?
- 8. Name one thing required for a video plea.