

Navigating a Criminal Law Emergency

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Navigating a Criminal Law Emergency

The phone rings in your office on a Tuesday morning. You pick up the receiver to hear your biggest client embarrassed to tell you their 20 year-old son got a call from a detective. They want him to go down to the station to discuss a possible sexual assault.

Does he need legal advice...and if so.... what? What are the police thinking? What are the repercussions? Most importantly – this stuff should be pretty simple, so will my client lose faith in me if I don't know how to answer his questions?

This paper is designed to walk you through the process of what you need to know to ease your mind in criminal law 'legal emergencies' and to give sound, competent, and practical advice until you can move the case along to experienced criminal counsel.

General Thoughts on Criminal Law for Novices

a. I Don't Want to Commit Malpractice

Malpractice should be of very little concern in these types of situations. For a criminal defendant to prevail in a malpractice claim they must prove they are actually innocent of the original charges. *See Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995). The Court of Criminal Appeals in *Peeler* reasoned:

Because of public policy, we side with the majority of courts and hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise. While we agree with the other state courts that public policy prohibits convicts from profiting from their illegal conduct, we also believe that allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict... We therefore hold that, as a matter of law, it is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned. (Emphasis added).

Id. at 498, 499.

Put simply, a criminal defendant would have to be convicted or charged due to the sole negligence of counsel and then have that conviction over-turned to bring a successful case. If you are not involved in the plea negotiation or trial of the case then civil exposure is extremely far-fetched. In fact, in researching this paper every published opinion dealing with malpractice reviewed dealt with the trial attorney or appellate

attorney of the accused. No cases were found dealing with an initial attorney's assisting at the outset of police investigation or assisting someone being released from jail.

b. Putting on Your Criminal Lawyer's Hat

Several rules in criminal procedure and in the Texas Rules of Evidence make practicing criminal defense completely different than civil litigation, transactional work, or administrative law. When dealing with a criminal case a lawyer must 'change hats' and think like a criminal defense attorney.

1. One-Sided Litigation

The State bears the burden of proof beyond all reasonable doubt and the burden never shifts to the defendant to prove his innocence. An accused has the right to remain silent under the 5th Amendment. TEX.CODE.CRIM.P.ART. 39.14 governs discovery in criminal proceedings and that provision is unilateral in nature and does not require the defense to produce a single shred of evidence at any time unless they intend to introduce expert testimony at trial. The State typically only gets their evidence through the pre and post arrest investigation and later trial preparation. The State is not entitled to depositions, interrogatories or production of evidence barring unusual circumstances or expert witness testimony.

Additionally, TEX.R.EVID. 503(b)(2) is entitled the, "Special rule of privilege in criminal cases," and is as follows:

In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship. (Emphasis added)

Id. When compared to the attorney-client relationship as defined by the general rule of privilege as defined by 503(b)(1) which states in relevant part, "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating...legal services," it is clear that the attorney-client privilege in the criminal case is infinitely broader. If taken to its logical extreme, the mere fact an attorney represents someone on a criminal matter can be seen as a privileged fact.

In conjunction, these rules create the unbalanced playing field where information, facts and evidence are extremely valuable commodities to the State and the counsel for defendant's main goal is to starve the State of any facts by which to prosecute. An inexperienced criminal practitioner may create value for a client in an emergency situation by advising his client to invoke their 5th Amendment right to remain silent and by advising his client to deny consent to warrantless searches. It is a mistake for counsel to assume that the State either (1) has present knowledge of all the facts known by your

client of an alleged crime; (2) will inevitably learn of such facts; and/or (3) has a right to ultimately discover these facts.

Common Emergencies

Properly Advising the Criminal Defendant or Suspect

a. Remaining Silent

Your greatest assistance to someone arrested or suspected of a crime can come in the form of very simple but extremely valuable legal advice – telling your client to exercise their right to remain silent. If you are contacted either prior to an arrest, after a client’s detention with an ongoing investigation, or if you are contacted by someone prior to a police interview or interview by another state agency then you are in a position of possibly saving this person a great deal of headaches by properly advising them to remain silent. You can almost never go wrong by advising your client to remain silent or by directly telling the police your client does not wish to speak, but you should leave more complex and detailed discussions and dealings directly with law enforcement for an experienced criminal defense practitioner.

The vast majority of arrests and police investigations happen at the scene of an arrest where defendants typically do not have the right to counsel. During instances where they do have that right, they typically don’t have the presence of mind to demand or request counsel. As a result, the State typically gets all the evidence they need at the scene of the arrest and often won’t conduct a subsequent investigation beyond perhaps an interview within the first hour of your client’s being in custody. This fact should alleviate your fears in dealing with the situation knowing that it is doubtful any mistake you make due to inexperience won’t prejudice your client – because typically and unfortunately – the damage is usually done by the time you (or any lawyer) is involved in the case.

b. Voluntarily Coming to the Police Station for an Interview

Be extremely cautious in dealing with clients who have not been arrested but who contact you because they have been asked to give an interview by police or other state agencies for reasons that aren’t made clear to the client by the police. The police may be investigating a crime they believe someone committed but don’t have enough evidence to seek an arrest warrant and if the person admits to minor details in a voluntary interview the case against them may be complete. Other state agencies such as CPS investigate in the same manner and it is important to realize the accused has rights when dealing with any state actor.

Persons in this situation should always be advised not to participate in these voluntary interviews until they’ve secured experienced counsel (if they participate at all). As a general rule of thumb, if the police have enough evidence for an arrest – they will.

If they're seeking voluntary interviews then they may lack evidence of an element of the crime and are trying to develop it through your client. By advising your client to exercise their right to remain silent, it is very possible you could assist them in avoiding the criminal justice system altogether.

c. Searches

Lawyers may be called from time to time to answer questions about whether a client should acquiesce to a police search or in the event a law enforcement agency is executing a search warrant. Obviously in these situations time is of the essence and decisions must be made by counsel very quickly.

Though this paper is not intended to be an exhaustive review of search and seizure law by any means several key concepts may assist in an emergency situation. There are two types of searches – search with a warrant and a warrantless search.

1. *Search Warrants*

Search warrants are governed by the Fourth Amendment to the U.S. Constitution and Art. 18.02 of the Texas Code of Criminal Procedure. They are commandments by a magistrate to seize certain items and property ranging from drugs, computers, financial records and weapons to biological specimens such as DNA or blood samples. Typically a search warrant is a product of a longer investigatory process for evidence of more substantial crimes such as murder or drug trafficking though local law enforcement agencies have been more aggressive about obtaining search warrants for blood in standard DWI cases.

There is little, if any, useful advice to give a client when a law enforcement agency is executing a warrant on their premises other than merely to be calm and not interfere with the search. If the search warrant is invalid or does not comport with TEX.CODE.CRIM.P. ART. 18.02, the person's remedy is not to halt the search but is through the exclusionary rule which operates to exclude improperly seized evidence under TEX.CODE.CRIM.P. ART. 38.23 at trial or in a motion to suppress evidence.

2. *Warrantless Searches*

The vast majorities of searches are warrantless and occur when police are dealing with persons in common situations such as roadside vehicle investigations, questioning of suspicious persons, or searches incident to a lawful arrest. As a matter of law, warrantless searches are presumed to be unreasonable and their reasonableness must be established by clear and convincing evidence at a pre-trial motion to suppress or beyond all reasonable doubt if properly challenged at trial. Reasonable suspicion and probable cause must be established by clearly articulable facts and not mere conjecture. *Terry v. Ohio*, 392 U.S. 1 (1968).

The judiciary has carved out several exceptions to the general rule prohibiting warrantless searches which generally exist for officer safety and for the preservation of evidence.

1. A search may be consensual. With a consensual search, the State must show that the consent was obtained from an individual with an expectation of privacy in the place searched. That person must understand the circumstances and voluntarily waive his constitutional rights under the fourth amendment and the place searched must be within the contemplation of the consenting individual.
2. An officer can search a person ‘incident to lawful arrest’ where a warrant for arrest is executed on a person because the officer needs to execute a full custodial arrest of the individual. *See Maryland v. Buie*, 494 U.S. 325 (1990); and *New York v. Belton*, 453 U.S. 454 (1981). Because an officer may arrest someone for an offense in their view as well, search incident to lawful arrest is a very common occurrence. In *Arizona v. Gant*, 556 U.S. 332, (2009), The Court blurred the longstanding rule in *Belton* to suggest that in vehicle search situations; only the immediate area within the reach of the defendant is subject to inventory search incident to arrest.
3. The vehicle exception to the requirement for a search warrant allows an officer to search where (a) they have probable cause to believe that contraband is somewhere in the vehicle; and (b) the vehicle must be readily mobile. *See United States v. Ross*, 456 U.S. 798 (1982); *Carroll v. United States*, 267 U.S. 132 (1925). If there is probable cause that contraband is somewhere within the vehicle but its exact location is unknown, the warrantless search of all containers within the vehicles is permitted. *Id.*
4. Officers may search based on exigent circumstances which requires immediate action of an urgent nature by an officer. Officers may search a person when they are in “hot pursuit” which is “immediate and continuous” so they do not have to delay an investigation which by doing so would gravely endanger their lives or the lives of the public. *See Warden v. Hayden*, 387 U.S. 294 (1967).
5. Officers may search incident to arrest pursuant to the community caretaking function which is established when (a) circumstances create a duty for the peace officer to protect the welfare of an individual or the community; (b) potential harm requires immediate action; and (c) the officer has insufficient information to prepare a valid warrant affidavit. *See Cady v. Dombrowski*, 413 U.S. 433 (1973), and *State v. Wright*, 7 S.W.3d 148 (Tex.Crim.App.—1999). Examples of these instances are when officers become involved with circumstances due to their duty to protect citizens such as situations where a

driver may be stranded on the highway, or someone appears ill in public and is eventually arrested for an offense the officer observed to be committed.

Consenting to a search is typically the single biggest mistake a criminal defendant may make in a case involving contraband. Though the four other exceptions to the warrant requirement can and typically do validate a search regardless of the circumstances, consenting to a search almost always guarantees the defendant will be powerless to later set the search aside under the exclusionary rule. Refusing to allow an officer to search is perfectly legal and does not necessarily mean the officer will retaliate by getting a warrant or writing other tickets. **The single best advice you can give to a person who contacts you in a situation where an officer is requesting a search is to advise them to refuse the search if the search is optional.**

d. Advising Someone Arrested for DWI

People being given field sobriety tests and/or being offered breath tests do not have an immediate right to an attorney. As such, it is a highly rare circumstance where you may actually be contacted by a person in the midst of a DWI investigation. In almost every circumstance, once the lawyer and/or family of someone arrested for DWI become involved the State is finished investigating the case.

1. Crash Course in DWI (Yes, a bad pun).

Because attorneys are frequently asked casually about legal advice pertaining to DWI cases, this article shall briefly discuss the topic. A DWI is a two-pronged legal problem. A first offense is a class B misdemeanor pursuant to TEX.PEN.C. 49.04 on one hand and generally carries a civil penalty in the form of a driver's license suspension for the refusal of a breath test or failure of a breath test pursuant to the 'implied consent' law of chapter 724 of the Texas Transportation Code on the other hand. Driver's license suspensions are typically 180 days where a person refuses a breath test and 90 days where a person submits to, but fails, the test on a first offense.

2. DWI Defined

TEX.PEN.C. 49.04(a) is the DWI statute and reads in relevant part, "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." The Penal Code further defines intoxicated one of three ways; not having the normal use of mental faculties due to the introduction of alcohol (or another substance); not having the normal use of physical faculties due to the introduction of alcohol (or another substance), or having a blood alcohol concentration of 0.08 or greater. See TEX.PEN.C. § 49.01(2).

In 2011, the legislature added TEX.PEN.C. 49.04(d), an ‘enhanced’ DWI where the blood alcohol concentration is over 0.15 at the time of the arrest. DWI over 0.15 is a Class A misdemeanor punishable by a year in jail.

DWI arrests become felonies where it is either a person’s third or more DWI, there is a child passenger younger than 15 years of age, or where due to the intoxication of the person causes serious bodily injury or death to another.

3. Field Sobriety Tests and the Breath Test

A person doesn’t have a right to an attorney on the roadside during a DWI investigation so chances are you’ll never be consulted in the middle of an ongoing investigation. An individual does have the right to refuse field sobriety tests and most criminal practitioners advise their clients to refuse the breath test. This is because despite a potential administrative penalty, the state will very likely prosecute for DWI even with a breath specimen below 0.08. This is because the state can elect to try and prove their case through the “normal use” definitions above.

4. “No Refusal” Policies

Police may attempt to apply for a search warrant to draw blood under Chapter 18 of the Texas Code of Criminal Procedure. Certain agencies have arranged to have judges on standby to execute search warrants faxed to them – often on holiday weekends such as the Fourth of July or New Years. The legislature has broadened the ability of municipal judges of courts of record to execute search warrants as well for blood.

The ability of an agency to attempt to get a warrant has no bearing on someone’s right to refuse.

5. Deadlines for DWI Arrestees

After a person is arrested for DWI they should be reminded that they have 15 days from the date they were arrested to file an appeal with the State Office of Administrative Hearings for an administrative law review to contest the police officer’s probable cause for requesting a specimen of breath. As such, an arrested person should retain counsel as soon as practical after an arrest. This appeal may help defeat a potential driver’s license suspension and may allow counsel to essentially depose the police officer prior to trial at an administrative law review hearing.

Getting Out of Jail

a. Bonds and Bail

“Bail” is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond. TEX.CODE.CRIM.P. ART.17.01. The 8th Amendment to the United States Constitution and TEX.CODE.CRIM.P. ART. 17.15 guarantee an accused the right to reasonable bail.

The first basic question you need answered is what type of arrest was conducted which will directly impact when the bond will be set and for how much. Arrests occur one of two ways. Arrests can be warrantless where a police officer views an offense in his presence and makes an arrest or an arrest is made pursuant to a valid arrest warrant.

b. Arrest Warrants

If the arrest was made pursuant to an arrest warrant, then the bond *may* have the amount of bond pre-set on the face of the warrant and the defendant should be eligible for immediate release upon payment of the bond. TEX.CODE.CRIM.P. ART. 15.01. A warrant from any county judge, district judge or magistrate may be executed anywhere in the state. TEX.CODE.CRIM.P. ART. 15.06. Because the amount of bond is not required to be on the face of an arrest warrant, a person arrested via a warrant may have to wait in custody for arraignment before a magistrate to set the bond amount.

c. “Capias” and “Capias Pro Fines”

A “Capias” is a writ issued by a court which has previously rendered a criminal judgment against a defendant. A “Capias Pro Fine” strictly deals with unpaid fines and court costs from a court that has previously rendered judgment. TEX.CODE.CRIM.P. ART. 43.015. Outstanding warrants for traffic tickets are typically Capias Pro Fines which require either the outstanding fine be paid or in the alternative the accused may be incarcerated subject to the provisions of TEX.CODE.CRIM.P. ART 43.

In dealing with jail release of a defendant in custody on a Capias Pro Fine, the attorney or family member will likely have to determine the amounts and locations of the Capias and the court that issued the Capias. If the defendant or family cannot pay the outstanding amounts then some municipal courts or justices of the peace may accept what are commonly known as ‘attorney bonds.’ An attorney bond is different from a bail bond as defined by the Code of Criminal Procedure and is an informal way a smaller court allows an attorney to personally pledge to resolve the case.

Dealing with an arrest stemming from a Capias can be more problematic because those may deal with arrests stemming from probation or parole violations from a judgment for a more serious misdemeanor or felony offense. Depending on the nature of the underlying judgment, the arrestee may not even be eligible for bond.

d. Arrest Without Warrant

Peace officers may make arrests without having warrants for several reasons.

A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

TEX.CODE.CRIM.P. ART 14.01(a). Further, officers may arrest persons where there are ‘suspicious circumstances’ that reasonably show someone has committed a felony which breaches the peace, are about to commit a crime, or have probable cause that someone has committed an assault or violated a protective order. *See* TEX.CODE.CRIM.P. ART. 14.03.

As a practical matter, the person arrested must be booked into jail and is taken before a magistrate “without undue delay.” On misdemeanor offenses, the law requires an arrestee to be taken before a magistrate to set bond within 24 hours of arrest or bond can automatically be set at \$5,000. Once bond has been set by the magistrate, the defendant is eligible for release upon the posting of the bond.

Often if bond hasn’t been set, your client is simply subject to the speed of government. Once the magistrate sets bond, then your client’s family or friends can either post the bond themselves or go through a licensed bail bond agency. A bail bond company can assist with larger bond amounts when the friends or family post a non-refundable premium in exchange for them posting a larger bond.

Quick Reference of Common Crimes and their Severity

Below is a brief list of common state-level offenses and their severity. It should be noted many of these offense levels may vary depending on specific facts of the case, enhancements based on prior convictions and special circumstances such as affirmative findings of family violence, possession of drugs in a drug-free zone, or use or exhibition of a deadly weapon (to name a few):

Class C Misdemeanors: Punishable by fine not to exceed \$500:

- Traffic offenses
- Assault by contact
- Drug paraphernalia
- Disorderly conduct
- Theft under \$100 (unless theft committed by check)
- Insufficient funds

Class B Misdemeanors: Fine not to exceed \$2,000 and not more than 180 days confinement in county jail:

- DWI (72 hours minimum jail; 6 days minimum with open container)
- Possession of Marijuana (less than 2 oz.)
- Theft over \$100 but less than \$750
- Theft by check (over \$20 but less than \$500)
- Criminal mischief over \$100 but less than \$750 (vandalism)
- Violation of a protective order
- Indecent exposure
- Racing on a public road
- Prostitution

Class A Misdemeanors: Fine not to exceed \$4,000 and not more than 180 days confinement in county jail:

- DWI (2nd offense)
- DWI (BAC over 0.15)
- Possession of marijuana (between 2 oz. and 4 oz.)
- Possession of dangerous drugs (usually the possession of legal drugs without a valid prescription)
- Assault causing bodily injury
- Theft between \$750 and \$2,500 (whether by check or otherwise)
- Criminal mischief over \$750 but less than \$2,500

State Jail Felonies: Fine not to exceed \$10,000 and confinement in state jail institution for no less than 180 days and no more than 2 years.

- Possession of controlled substance less than 1 gram (typically methamphetamine, cocaine or heroin)
- Credit card abuse (using another person's credit card without authorization)
- Third theft conviction of any amount
- Theft between \$2,500 and \$30,000
- Forgery
- DWI with a minor under the age of 15 in the vehicle

Third Degree Felonies: Fine not to exceed \$10,000 and confinement in Texas Department of Corrections for no less than 2 years and no more than 10 years.

- Possession of controlled substance between 1 and 4 grams;
- Aggravated assault

- Assault causing bodily injury (enhanced from prior finding of family violence)
- Burglary of a building
- Theft between \$30,000 and \$200,000
- DWI (3rd offense)
- Indecency with a child (by exposure)
- Solicitation of a minor

Second Degree Felonies: Fine not to exceed \$10,000 and confinement in Texas Department of Corrections for no less than 2 years and no more than 20 years:

- Possession of a controlled substance over 4 grams but less than 200 grams
- Burglary of a building
- Aggravated assault with a deadly weapon
- Indecency with a child (by contact)
- Sexual Assault of a Child (under 17 but 14 or over)
- Sexual Assault
- Injury to a child
- Attempted murder
- Intoxication manslaughter

First Degree Felony: Fine not to exceed \$10,000 and confinement in Texas Department of Corrections for no less than 5 years and no more than 99 years.

- Murder
- Possession of a controlled substance over 200 grams
- Possession of a controlled substance between 4 and 200 grams with intent to distribute
- Arson
- Aggravated sexual assault of a child (under 14)
- Aggravated sexual assault of a child (under 6) (25 to life w/out parole)
- Continuous Sexual Abuse of a child (25 to life w/out parole)

It should be understood that though many of these offenses carry mandatory minimum jail sentences, virtually every offense other than Murder has provisions whereby sentence may be probated or suspended for community supervision (probation).

Conclusion

In sum, an attorney has the ability to create immeasurable value for their clients at the onset of a ‘criminal emergency’ by giving swift and prudent advice which limits the state’s investigation and knowledge of a case. By limiting the State’s fact gathering

capacity by assuring your client exercises his or her rights, you may give your client a fighting chance at acquittal at trial or in some instances even prevent an expensive, stressful and life-altering prosecution. Furthermore even where an attorney can not be of much assistance in giving legal advice, they can guide arrestees, their friends and family through what may be the most traumatic hours of their lives by illuminating the legal process and being a calming presence when someone is unexpectedly arrested.